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Paste this sheet on the inside of the FRONT cover of vol. 159 Pac.

Official Report Citation of CALIFORNIA Supreme and Appellate Court Cases in the PACIFIC REPORTER, VOL. 159.

The left-hand column shows the page of this volume on which a case begins, against which are shown the volume and page of the State Report where same case is to be found.

Illustration: The case of *Cords v. Goodwin* is in Pac. Rep., vol. 159, p. 138. It can be cited as from the State Report by giving citation opposite "138" (Reporter page column) in this table, i. e., "173 Cal. 61."

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Illustration: The case of *Wood v. Brown*, is in Pac. Rep., vol. 159, p. 396. It can be cited as from the State Report by giving the citation opposite "396" (Reporter page column) in this table *i. e.*, "98 Kan. 597."

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†Opinion withdrawn. For correct opinion, see 162 P. 735.

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NATIONAL REPORTER SYSTEM—STATE SERIES

THE PACIFIC REPORTER

VOLUME 159

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AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

SEPTEMBER 4 — OCTOBER 30, 1916

ST. PAUL
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1916

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(159 PAGES)

234810

**THE HISTORY OF THE
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AMENDMENTS TO RULES

SUPREME COURT OF WASHINGTON¹

Adopted February 18, 1915

Rule XIV. COST BILLS.

It is hereby ordered that section 2 of rule XIV of the rules of the Supreme Court be, and the same is hereby amended to read as follows:

Sec. 2. If no cost bill is filed and served, the clerk will tax as costs only the clerk's

costs, printing of briefs at one dollar per page for the first twenty-four pages, eighty-five cents per page for the second twenty-four pages, and seventy-five cents per page for the remaining pages, the statutory attorney fee, and the cost of the transcript, statement of facts and abstracts at the rate of five cents a folio.

¹ For other rules, see 122 P. ix; 146 P. ix.

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THE
PACIFIC REPORTER
VOLUME 159

MUENZENMAYER et al. v. HAY et al.
(No. 20107.)

(Supreme Court of Kansas. July 8, 1916. Re-
hearing Denied July 29, 1916.)

(*Syllabus by the Court.*)

1. PLEADING \S 369(1)—**MOTION—ELECTION BETWEEN CAUSES OF ACTION.**

Where a party to an action pleads facts which constitute two causes of action, one for rescission of a contract and the other for damages for breach of warranty contained in the contract, it is proper for the court to require the party to elect on which of the two causes of action he will rely for recovery.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1199, 1200; Dec. Dig. \S 369(1).]

2. APPEAL AND ERROR \S 302(3)—**PRESENTING QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL.**

An error in the exclusion of evidence on the trial of a cause cannot be considered by this court, unless it is produced on the hearing of the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1747; Dec. Dig. \S 302(3).]

3. APPEAL AND ERROR \S 302(4)—**PRESENTING QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL.**

A judgment will not be reversed for error in giving or refusing to give instructions to the jury or in refusing to submit special questions, when based on evidence excluded on the trial; and it is necessary to have that evidence to determine the correctness of the instructions given or refused and to determine whether the questions should have been submitted, where that evidence is not produced on the hearing of the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1748; Dec. Dig. \S 302(4).]

4. APPEAL AND ERROR \S 1067 — **REVIEW — PREJUDICIAL EFFECT OF ERROR — INSTRUCTIONS.**

Where parties agree to submit a cause to a jury on special questions and for a general verdict, and agree that the court shall then render such judgment as it might deem proper, it is not reversible error for the court to refuse to give an instruction on a question of fact which does not materially affect those necessary for the court to know in order to render judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4229; Dec. Dig. \S 1067; Trial, Cent. Dig. \S 475.]

5. APPEAL AND ERROR \S 1062(2)—**HARMLESS ERROR—SPECIAL FINDINGS—NECESSITY.**

Under the circumstances disclosed in the last paragraph, a judgment will not be reversed for error in refusing to submit special questions, where the answers to those submitted

give the court sufficient facts on which to render judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4213; Dec. Dig. \S 1062(2).]

Appeal from District Court, Geary County.

Action by J. J. & W. F. Muenzenmayer, partners, against Robert M. Hay and another. Judgment for plaintiffs, and defendants appeal. **Affirmed.**

W. S. Roark, of Junction City, for appellants. J. V. Humphrey, Arthur S. Humphrey, and I. M. Platt, all of Junction City, for appellees.

MARSHALL, J. The defendants appeal from a judgment rendered against them on notes given for the purchase of a gasoline engine and plows. The order for the engine, signed by defendant Robert M. Hay, had printed thereon the following warranty:

"The seller warrants the within-described engine to do good work, to be well made, of good materials, and durable if used with proper care. If upon trial, with proper care, the engine fails to work well, the purchaser shall immediately give written notice to the seller, stating where in the engine fails, shall allow a reasonable time for a competent man to be sent to put it in good order, and render necessary and friendly assistance to operate it. If the engine cannot then be made to work well, the purchaser shall immediately return it to said seller, and the purchase price shall be refunded, which shall constitute a settlement in full of the transaction.

"Use of the engine after three days, or failure to give written notice to said seller, or failure to return the engine as above specified, shall operate as an acceptance of it and a fulfillment of this warranty. No agent has power to change the contract of warranty in any respect.

"This express warranty excludes all implied warranties, and said seller shall in no event be liable for breach of warranty in an amount exceeding the purchase price of the engine. If part proves defective, a new part will be furnished on receipt of part showing defect free."

Five notes were sued on in separate causes of action. The defendants pleaded that oral warranties were fraudulently made by the plaintiffs at the time of the execution of the notes; that the engine was not as warranted; that they offered to return it to the plaintiffs; and by way of set-off and counterclaim pleaded damages in the sum of \$1,500. The defendants further alleged that the note declared on in the third cause of action had been altered without their consent, and that

it was in fact for a smaller amount when executed; that there should be a credit of \$200 on the note declared on in the fourth cause of action; and that it was given for plows purchased to be used with the engine and which were of no value to the defendants because of the failure of the engine to comply with the warranties concerning it. There was no defense as to the note declared on in the fifth cause of action. The defendants further alleged that they tendered the engine back to the plaintiffs in due time and manner after they had made repeated efforts to make it work. They gave mortgages on personal and real property to secure the payment of the notes. They asked judgment against the plaintiffs for such sum as might be found due, and for cancellation and surrender of the notes and mortgages.

When the case was called for trial, the court required the defendants to elect as between their right to recover damages for breach of the warranty and their right to a rescission of the contract of sale. The defendants elected to rely on rescission of the contract. The attorneys agreed that the jury was not to find and include in the general verdict the amount of the notes mentioned in the first and second causes of action in the plaintiffs' petition. Special questions were submitted concerning these causes of action. The engine was purchased in 1912. The return, or the offer to return, was made in 1914. New notes were given for a part of the notes in 1913.

[1] 1. The defendants argue that the court erred in requiring them to elect as to their defenses, and especially as to the time and manner of requiring such election. The defendants set out the facts constituting their defense, and sought to rescind the contract for the purchase of the property and to recover their damages occasioned by the breach of the warranty. They argue that the facts and circumstances surrounding this case made it difficult for their counsel to determine which of these remedies would best protect the rights of the defendants until the evidence had been introduced. They say:

"Of course, there can be no recovery of damages as incidental to both rescission and affirmation in the same case. This would be absurd, and calls of course for an election at some stage of the trial."

In *Hull v. Manufacturing Co.*, 92 Kan. 538, 141 Pac. 592, an election as between damages and rescission was required and was made, and that case seems to recognize the regularity of such a proceeding, but the question now presented was not considered. *Weybrick & Co. v. Harris*, 31 Kan. 92, 1 Pac. 271, recognizes that where personal property sold is not as warranted, the purchaser has two remedies:

"(1) He may return the property and rescind the contract; or (2) he may affirm the contract and sue for damages for the breach of warranty." Syl. par. 1.

In *McCormick v. Roberts*, 32 Kan. 68, 3 Pac. 753, an action on promissory notes given for the purchase of a self-binding harvester, the defendant pleaded a warranty of the harvester; that the warranty failed; that he offered to return the harvester; and set out damages sustained by reason of its failing to work as warranted. A motion was filed by the plaintiffs asking the court to direct the defendant to elect on which of the two defenses stated in the answer he would stand. The court required the defendant to construe his answer. The answer was then construed as containing the defenses of rescission of the contract and such damages as might be recovered thereunder. In the syllabus this language is found:

"In directing the jury, the court charged that no rescission or repudiation of the contract had been shown, but that the defendant was entitled to recover damages from the vendors for a breach of their warranty, if a warranty had been established and a breach thereof had been proved. *Held*, under the circumstances, the charge to the jury was erroneous, misleading, and prejudicial."

The reason given by the court was that:

"The answer, as construed, allowed only proof of rescission of the contract, and the damages therefor; yet the jury were directed upon another and entirely different theory of the case." 32 Kan. 72, 3 Pac. 753.

See *Cookingham v. Dusa*, 41 Kan. 229, 230, 21 Pac. 95; *Cummings v. Sigerson*, 63 Kan. 340, 65 Pac. 639; *Ehrsam v. Brown*, 76 Kan. 206, 211, 91 Pac. 179, 15 L. R. A. (N. S.) 877; *Hay Press Co. v. Ward*, 89 Kan. 218, 223, 131 Pac. 595, 50 L. R. A. (N. S.) 783; *Hull v. Manufacturing Co.*, 92 Kan. 538, 141 Pac. 592; *Lyman v. Wederski*, 95 Kan. 438, 148 Pac. 642.

The defendants cite a dissenting opinion in *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925. The majority opinion follows the rule stated in the headnotes in the Pacific Reporter in these words:

"The purchaser of a machine, on finding that it is not as warranted, may refuse to accept, rescind the sale, and recover what he has paid on the price, or retain the machine and set off against the price such damages as naturally result from the breach of warranty, though he may not pursue both remedies simultaneously." Par. 1.

The rule declared by the Supreme Court of Washington in that case is in harmony with what this court has said. The rule contended for by the defendants would compel this court to overrule a number of its former decisions. There was no error in requiring the election. The conclusion here reached governs other complaints of the defendants that concern instructions, and which will not be further considered.

[2] 2. The defendants next argue that the court committed error in excluding evidence which tended to explain and excuse the delay in returning the machine, and the waiver that might be inferred from making payment and giving renewal notes. This evidence was

not produced at the hearing of the motion for a new trial, and under section 307 of the Code of Civil Procedure (Gen. St. 1909, § 5901), no error that may have been committed in the exclusion of such evidence can now be considered. *Scott v. King*, 96 Kan. 561, 567, 152 Pac. 658; *Stout v. Bowers*, 97 Kan. 83, 154 Pac. 259; *Collins v. Morris*, 97 Kan. 264, 266, 155 Pac. 51.

[3] 3. The defendants complain of several matters which involve the oral warranties that they contend were made by the plaintiffs. These complaints are based on instructions requested by the defendants and which the court refused to give, and on instructions given by the court, and on a special question which the court refused to submit to the jury. They depend on the correctness of the ruling of the court in excluding evidence of these oral warranties. If the court was correct in excluding that evidence, the law on this subject was correctly stated to the jury, and the instructions and special question concerning the same matter were properly refused. To determine the correctness of the ruling of the court in excluding that evidence, it was necessary to produce the evidence on the motion for a new trial. It was not so produced, and cannot now be considered. For that reason, the other acts of the court based on that evidence cannot be considered.

[4] 4. Complaint is made that the court refused to submit an instruction on the question of the plaintiff's waiver of the defendants' delay in returning or offering to return the engine. This may be met by a quotation from the journal entry of judgment, as follows:

"Thereupon the court announced that, with the consent of all parties, general verdicts would be submitted to the jury upon the matters involved in the third, fourth, and fifth causes of action, and that special findings would be submitted to the jury relative to the first and second causes of action, and that the court would then enter thereon such judgment as it might deem proper, to which all parties assented."

In view of this agreement, any error in refusing the instructions requested by the defendants does not justify a reversal of the judgment.

[5] 5. Another complaint, in the language of the defendants, is as follows:

"The court erred in denying appellants' request for certain special findings by the jury. These questions were as follows, and we complain of the refusal to submit Nos. 1, 3, 4, 7, 8, 9, 10, and 11."

Then follow the questions requested by the defendants. They made no argument concerning this complaint. Questions 2, 5, and 6 were submitted and answered. These three questions, together with other questions submitted and answered by the jury, apparently find all the facts necessary for the court to know in order to render judgment under the agreement made on the trial.

Other matters are complained of. They have been examined. There is not sufficient merit in them to warrant a reversal of the judgment.

The judgment is affirmed. All the Justices concurring.

FARRAGHER v. KNIGHTS AND LADIES OF SECURITY. (No. 20282.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. INSURANCE — §819(2)—FRATERNAL BENEFIT INSURANCE—ACTIONS—EVIDENCE.

In an action to recover upon a beneficiary certificate, the defense was that the insured made false and fraudulent representations in his answers to questions asked by defendant's medical examiner, in which deceased stated that he had not consulted or been treated by any physician or surgeon during the previous five years for any illness, disease, or injury, and had never undergone any surgical operation. Within a year previous he had been circumcised by a physician, who on later occasions dressed the wound, and who testified that, in his opinion, the insured was in perfect health at the time, and that the circumcision was performed for sanitary purposes. There was proof that the death of the insured resulted from a disease which had no relation to the circumcision, and physicians and surgeons testified that they did not regard circumcision as an operation. Defendant's medical examiner testified that, if he had been informed of the fact, he might not have considered it serious enough to mention in the application. Upon these facts, and others stated in the opinion, the finding of the trial court that defendant failed to show the intentional suppression of any fact or circumstance which deceased naturally supposed would tend to influence defendant in passing upon his application, and that plaintiff is entitled to recover, will not be disturbed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2007; Dec. Dig. §819(2).]

2. INSURANCE — §723(2)—FORFEITURE — MISREPRESENTATIONS IN APPLICATION.

It will not do to place an absolutely literal interpretation on the provisions in an application and policy of life insurance with respect to untruthful answers. There must not be evasion, fraud, or suppression of facts; there must be absolute good faith in the conduct of the applicant; but where the evidence shows there has been no evasion, no purpose to conceal any fact which the applicant would naturally suppose was contemplated by the questions, and where the company issuing the policy could not have been prejudiced by the answers, and the death of the insured resulted from causes wholly unrelated to the matter about which the alleged untruthful answers were given, a defense based upon their untruth cannot avail.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1859; Dec. Dig. §723(2).]

Appeal from District Court, Labette County.

Action by Margaret Farragher against the Knights and Ladies of Security. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Brown and James W. Reid, both of Parsons, for appellant. John Madden and C. E. Cooper, both of Parsons, for appellee.

PORTER, J. This is an action to recover upon a beneficiary certificate issued December 15, 1913, upon the life of James A. Farragher, plaintiff's son. At the time of his death, March 19, 1914, he was a member of the defendant order in good standing. The plaintiff recovered judgment and defendant appeals.

The defense is that in his application for the insurance, James Farragher made certain representations which were false and fraudulent. To each of the following questions asked of him by the defendant's medical examiner, he answered "No":

"(1) Have you either consulted, or been treated, by any physician or surgeon, within the past five years for any illness, disease, or injury? If so, give name and address of each and full particulars.

"(2) Have you undergone any surgical operation or have you any bodily malformation or weakness?"

The evidence shows that on February 21, 1913, James Farragher was circumcised by Dr. J. C. Cornell for balanitis, that is an inflammation of the foreskin, indicating the presence of bacteria; on later days Dr. Cornell dressed the wound caused by the circumcision; also that on November 1, 1913, Farragher, who conducted a grocery and meat market, cut his finger and had Dr. Cornell treat the wound in order to prevent any danger of blood poisoning, although there was no evidence of blood poisoning. Dr. Cornell testified that the removal of the foreskin does not affect a person's general health, but usually makes it better; that he made an examination of Farragher at the time of the circumcision, and that, aside from this one condition, he regarded Farragher as a perfect specimen of manhood; that there was no evidence of his having then, or previously, any venereal disease. He further testified that he performed the circumcision at his office; that Farragher came there to have it done, and after it was done walked away, and was then in perfect health. In his opinion as a physician and surgeon he did not consider circumcision an operation; that at the time he removed the foreskin there was no diseased condition, that the foreskin was perfectly healthy, and that he performed the operation for sanitary purposes; and that it did not affect Farragher's health. He also made proof of death, and certified that James Farragher died from acute dilation of the heart, which he testified usually arises from secondary conditions, such as rheumatism, which in his opinion was the cause of the heart dilation in this instance, and he said that he found no rheumatic condition at the time of his examination.

Dr. J. C. Creel, one of the witnesses for the defendant, testified that circumcision is a minor operation, and that, if performed where there is no infection, it is beneficial. The chief medical director of the defendant company testified that a simple, uncomplicated circumcision, without disease present

and no disease necessitating the operation, would not in his opinion be a ground for rejecting an applicant for membership in the order. Other physicians testified that circumcision is a very common thing; that it improves the condition of a person from a sanitary standpoint. Dr. Boardman, medical examiner, who examined Farragher at the time the application was made, testified that the answers to the questions were in his handwriting; that if he had known, or had been told, that the applicant had been treated for balanitis or had been circumcised within the past five years, he might not have considered it serious enough to mention in the application. He further testified as follows:

"I quite frequently explain to the applicant that the company doesn't care about every little cold they have had in their head, or cinder in their eye, or anything minor like that; that they don't care for anything like that. I couldn't be positive that I explained that to him, but I quite probably did, as I quite generally do that."

Asked to define his understanding of the words "consultation and treatment" in the written application, he testified:

"Well, the way I understand that question is this: The company don't care about knowing every little thing that a man has spoken to a doctor about in the past five years, or that passes off in a day or two, but that the company don't care about that."

[1] The findings show that the trial court was impressed with the testimony of the examining physician as to his custom and practice to explain to applicants the scope of the inquiry, and was convinced that the defendant had failed to show the intentional suppression of any fact or circumstance which the deceased naturally supposed would tend to influence the defendant in passing upon his application. We think it must be obvious that, if experienced physicians and surgeons do not regard circumcision as a surgical operation in the sense in which that term is employed in the questions submitted, and where it is found necessary for sanitary purposes, and where there is no disease, certainly an ordinary layman would naturally look at the matter in the same light. According to the testimony, James Farragher was a man in perfectly good health at the time of the circumcision. It was apparent that he did not regard it as an operation within the meaning of the question. He had never been sick or lost any time from his work by reason of it. It was a minor operation, requiring the attention of a doctor on one or two occasions after it was performed, for the purpose of dressing the wound. It was of little more consequence or importance than the dressing of his finger when he was injured by the butcher knife.

[2] The authorities generally recognize that it will not do to place an absolutely literal interpretation on the provisions in the policy and application, with respect to untrue answers. See *Insurance Co. v. Brubaker*, 78 Kan. 146, 150, 96 Pac. 62, 18 L. R.

A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267. Of course there must not be evasion, fraud, or suppression of material facts. There must be absolutely good faith in the conduct of the applicant. But where the evidence shows there has been no evasion or fraud, no purpose to conceal any fact which the applicant would naturally, under the circumstances, suppose was contemplated by the question, and where, as in this case, the company issuing the certificate could not have been prejudiced or injured in any manner by the answer, and the cause of death is wholly unrelated to the matter about which the alleged untruthful answer was given, such defense should not be upheld. Upon the findings of the trial court we deem it unnecessary to enter into a discussion of the authorities on the question of untruthful answers in applications for insurance.

The judgment will be affirmed. All the Justices concurring.

STEVENSON et al. v. BOARD OF COM'RS OF SHAWNEE COUNTY. (No. 20732.)

(Supreme Court of Kansas. July 8, 1916. On Rehearing, Aug. 8, 1916.)

(Syllabus by the Court.)

1. COUNTIES §196(4)—TAXES—INJUNCTION.

Property owners and taxpayers affected by any tax levied under the provisions of chapter 201 of the Laws of 1909 may prosecute an action to enjoin the board of county commissioners from constructing and improving a road under that chapter.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. §196(4).]

2. HIGHWAYS §107(1)—CONSTRUCTION AND IMPROVEMENT—ORDER OF COUNTY BOARD—CONCLUSIVENESS.

In the absence of fraud, corruption, or other misconduct, the substantial equivalent of fraud, the finding of the board of county commissioners on the sufficiency of a petition under chapter 201 of the Laws of 1909 is final and conclusive on the property owners and taxpayers affected by any improvement ordered under that section.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-344; Dec. Dig. §107(1).]

3. HIGHWAYS §107(1)—CONSTRUCTION AND IMPROVEMENT—ORDER OF COUNTY BOARD—CONCLUSIVENESS.

This rule applies to the legality and authenticity of the signatures to the petition.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-344; Dec. Dig. §107(1).]

4. HIGHWAYS §107(1)—CONSTRUCTION AND IMPROVEMENT—ORDER OF COUNTY BOARD—CONCLUSIVENESS.

The same rule applies to the determination of the board of county commissioners concerning the boundaries of the district, as set forth in the petition.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-344; Dec. Dig. §107(1).]

5. HIGHWAYS §107(1)—CONSTRUCTION AND IMPROVEMENT—ORDER OF COUNTY BOARD—CONCLUSIVENESS.

The rule likewise applies to the cost of the proposed improvement.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-344; Dec. Dig. §107(1).]

6. HIGHWAYS §107(1)—CONSTRUCTION AND IMPROVEMENT—STATUTORY PROVISIONS—REPEAL.

Chapter 200 of the Laws of 1909 does not repeal chapter 201 of the Laws of 1909, or any part thereof, by implication. The two chapters provide separate and distinct methods of improving roads, and both may be resorted to in any county at the same time for the improvement of different roads.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-344; Dec. Dig. §107(1).]

7. CONSTITUTIONAL LAW §64, 290(3) — HIGHWAYS §107(1), 122—STATUTES §21—ENACTMENT OF STATUTE—LEVY OF TAX—DELEGATION OF LEGISLATIVE POWERS.

Chapter 201 of the Laws of 1909 is not unconstitutional for any of the following reasons:

(a) That the provisions of the Constitution were not observed in the passage of the act.

(b) That the act imposes on the township a tax without giving the township any voice, hearing, or representation with respect to the tax.

(c) That the act requires the township board to levy a tax in which it has no voice in creating.

(d) That the board of county commissioners has no discretion with respect to the improvement to be ordered.

(e) That the act confers legislative powers on the petitioners.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92, 871, 872; Dec. Dig. §64, 290(3); Highways, Cent. Dig. §§ 339-344, 380, 393; Dec. Dig. §107(1), 122; Statutes, Cent. Dig. §§ 18-27; Dec. Dig. §21.]

8. CONSTITUTIONAL LAW §291—CONSTRUCTION AND IMPROVEMENT OF HIGHWAY—NOTICE.

Chapter 201 of the Laws of 1909 is not unconstitutional for the reason that it makes no provision for notice to landowners of the proceedings for the contemplated improvement of a road.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 870-876; Dec. Dig. §291.]

9. COUNTIES §196(7) — IMPROVEMENT OF HIGHWAY—INJUNCTION.

In an action to enjoin a board of county commissioners from improving a road, under chapter 201 of the Laws of 1909, a cause of action is stated in a petition which alleges that the petition to the board of county commissioners did not have the requisite number of signatures, that it was signed by persons not bona fide owners of property in the designated district, and that the commissioners made no investigation of the sufficiency of the petition, but, without evidence of its legality and its sufficiency and in disregard of their official obligation and duty, arbitrarily ordered the improvement of the road.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. §196(7).]

Porter and Dawson, JJ., dissenting in part.

Appeal from District Court, Shawnee County.

Action by James Stevenson and others against the Board of County Commissioners of the County of Shawnee. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. E. Atchison, Jas. P. Coleman, and W. P. Montgomery, all of Topeka, for appellant. James A. Troutman, of Topeka, for appellees.

MARSHALL, J. This is an appeal from an order overruling a demurrer to the following petition:

"Said plaintiffs allege that they are residents, property owners, and taxpayers in Topeka and Mission townships, Shawnee county, Kan.; that this action is one of common and general interest to the taxpayers of said townships, and they bring this suit for themselves and for and on behalf of said taxpayers generally, as well as for those residing within the benefit district referred to in the next paragraph.

"II. That September 22, 1915, a petition to the board of county commissioners of said county was filed with the county clerk, asking for the improvement of the Tenth Street road, commencing at Washburn avenue, and running west to the west line of section 34, township 11, range 16, one mile of said road being within the limits of said Topeka township; that the petition prayed for the improvement of said highway by the use of crushed stone or macadam, with a top surface of Burmudez asphalt, or other asphalt, equally good, 18 feet wide, to be paid for in 10 annual installments; that the prayer of said petition was granted by the defendant September 27, 1915, and the improvement of said road ordered.

"III. That the petition for the improvement of said highway is not in compliance with the law, and is defective and insufficient in several respects, to wit: (a) That it does not contain the requisite number of signatures of landowners, as required by section 1, c. 201, of the Laws of 1909, which is designated in said petition as the law under which it is proposed to make such improvement. (b) That said petition was signed by certain persons who were not at the time bona fide owners within the designated district. (c) That J. E. House, as mayor of the city of Topeka, signed said petition, under purported authority of said city; that said act was unauthorized, illegal, and void. (d) That certain individuals assumed to sign said petition for and on behalf of the owners of a tract of land known as the Catholic Cemetery; that they had no legal authority to sign said petition. (e) That some of the signatures to said petition were obtained by false and fraudulent representations.

"IV. That the limitations of the district, as described in said petition, are irregular, illogical, and unjust, and not of the Laws of 1909; that certain tracts of land whose owners were opposed to the contemplated improvement in compliance with the spirit or the letter of chapter 201 were excluded, and other tracts whose owners were favorable to the improvement were included arbitrarily, for the sole purpose of making it appear that 60 per cent. of the persons who own 50 per cent. of the land within the district were favorable to such improvement and had signed the petition.

"V. That the cost of the proposed improvement is excessive, and out of proportion to any benefit that can accrue to the adjoining lands; that in many cases the annual tax to pay for such improvement will exceed the revenue derived from the land, and would amount to practical confiscation of the property.

"VI. That chapter 201 of the Laws of 1909 is unconstitutional and void for these reasons: (a) That the mandatory provisions of the Constitution of the state of Kansas were not observed in its passage by the Legislature. (b) That it imposes upon the township through which said road is projected a portion of the cost of its construction, without giving the township any voice, hearing, or representation with respect to the same. (c) That it requires the township board to levy taxes in compliance with an order of the board of county commissioners for a debt which it had no voice in creating, thus depriving an independent municipal corporation of its power to levy and collect taxes of its own volition, and to control its own

affairs. (d) That the board of county commissioners has no discretion with respect to such improvement, but must order the construction of the road in accordance with the petition presented. (e) That said chapter confers upon the petitioners legislative power. (f) That said chapter 201 was repealed by chapter 200 of the Laws of 1909.

"VII. That the defendant commissioners made no investigation of the sufficiency of said petition, took no evidence of the ownership of the real property within the designated district, made no examination of the records of real estate titles in the office of the register of deeds of Shawnee county to determine the right of the petitioners to sign such a petition, but, without evidence of the legality and sufficiency of the petition, and in disregard of their official obligation and duty, arbitrarily approved the petition, and ordered the improvement of the road as therein described.

"VIII. That chapter 201 of the Laws of 1909, and the amendments thereto, make no provision for notice of the proceedings for the contemplated improvement of any highway to the landowners within the designated benefit district, or to the taxpayers of the township through which the road runs; and no notice of any kind, actual or constructive, was served upon, or given to, these plaintiffs, to the taxpayers of Topeka and Mission townships, or the owners of land abutting the road described in the petition.

"IX. That the Tenth Street road is only one of some 12 or 15 important highways entering the city of Topeka through said township, the improvement of each of which is equally important; that the improvement will impose upon the taxpayers of said township an unjust, excessive, and oppressive burden for which no compensatory benefit would be derived, and would lead to a demand for the same kind of improvement upon all the important roads entering the city.

"X. That the construction of said road, in accordance with the action already taken by the defendants, would cause irreparable injury to said plaintiffs for which there is no adequate remedy at law; that the defendants threaten, and are, in fact, proceeding to carry out their plans for the improvement of said highway, regardless of the wishes and in derogation of the rights of the residents and taxpayers of said township, and will do so unless restrained by order of this court.

"Wherefore the plaintiffs pray that the said defendant be permanently enjoined from carrying out the order for the construction of said improvement, or from taking any further action, under said petition, and for such other relief as may be just and equitable."

[1] 1. The defendants argue that the plaintiffs cannot sue for the reason that they have not sustained any damage other than that sustained by the public in general. *Com'rs of Barber County v. Smith*, 48 Kan. 331, 29 Pac. 565, and kindred cases are cited in support of this argument. In response to this the plaintiffs cite section 265 of the Code of Civil Procedure (Gen. St. 1909, § 5859), which in part reads:

"An injunction may be granted to enjoin * * * any public officer, board or body from * * * doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge, or assessment; and any number of persons whose property is or may be affected by a tax or assessment so levied * * * may unite in the petition filed to obtain such injunction."

The act of the board of county commissioners will result in the levy of an assessment on the lands of the plaintiffs. If the act of

the board is illegal, it may be enjoined by any number of persons whose property may be affected by the assessment. This section of the Code as it now appears was enacted in 1905. Previous to that it read:

"An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction. * * * Code Civ. Proc. § 253 (Gen. Stat. 1901, § 4700).

Previous to the passage of the act of 1905, parties situated as the plaintiffs are were compelled to wait until the levy or collection of the tax or assessment was attempted, before they could maintain an action. In *Gas Co. v. Railway Co.*, 74 Kan. 661, 87 Pac. 883, this court said:

"The difference between the act amended and the amendment is that the latter gives to the person seeking relief a right of action earlier in the tax proceedings, and also gives to such person a right to have an injunction against any public officer, board, or body to restrain them from entering into contracts which would result in imposing upon his property an illegal tax. The plaintiff might have waited until an attempt was made to sell its property for the nonpayment of the taxes levied to pay this bonded indebtedness, but it was not compelled to do so. The statute gives the right of action at the inception of any attempt to create such illegal burden." 74 Kan. 665, 87 Pac. 883.

Under the law as it now exists, the plaintiffs had legal capacity to sue and prosecute this action at the time it was commenced. *Pollock v. Kansas City*, 87 Kan. 205, 123 Pac. 985, 42 L. R. A. (N. S.) 465; *Hartzler v. City of Goodland*, 97 Kan. 129, 154 Pac. 265; *Arnhold v. Klug*, 97 Kan. 576, 579, 155 Pac. 805.

[2] 2. On the part of the defendants it is contended that the finding of the board of county commissioners on the sufficiency of the petition is conclusive, and State ex rel. v. *Holcomb*, 95 Kan. 660, 149 Pac. 684, is cited. In response to this the plaintiffs point out the difference between the petition in the *Holcomb* Case and the petition in this case. In that case the state, by proceedings in quo warranto, questioned the validity of the incorporation of the city of Zenda. The petition in that case alleged:

"That the petition presented to the board of county commissioners was not signed by a majority of the electors of the unincorporated town and that the number of inhabitants was less than 200." 95 Kan. 662, 149 Pac. 684.

The board of county commissioners acted on the petition presented to them. The court said:

"The act providing for the incorporation of cities of the third class (Gen. Stat. 1909, § 1511) confers authority on the board of county commissioners to determine whether or not a petition for incorporation presented to it is signed by a majority of the electors of the unincorporated town. The authority thus conferred is jurisdiction which attaches when a petition fair on its face and duly published is filed. Proceedings following resulting in an order effecting incorporation are the exercise of jurisdiction. The Legislature having authorized no appeal or

other method of review, the action of the board of county commissioners is final and conclusive, although irregular and erroneous, and cannot be attacked by the state in an action of quo warranto prosecuted against the corporation, except for fraud, collusion or other misconduct the substantial equivalent of fraud." Syl. par. 1.

If the state cannot successfully question the action of the board of county commissioners in the incorporation of a city, it follows that a property owner and taxpayer cannot question the action of the board in ordering an improvement under chapter 201 of the Laws of 1909. In the absence of fraud, corruption, or other misconduct, the substantial equivalent of fraud, the findings of the board of county commissioners are conclusive on the courts. *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811; *Williams v. City of Topeka*, 85 Kan. 857, 118 Pac. 864, 88 L. R. A. (N. S.) 672, Ann. Cas. 1913A, 497; *Spaulding v. Homestead, etc., Ass'n*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249; *Kirchman v. West & South Towns St. Ry. Co.*, 58 Ill. App. 515; *McEnaney et al. v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540; 28 Cyc. 1022.

[3] 3. The plaintiffs maintain that the signing of the petition by J. E. House as mayor of the city of Topeka was unauthorized, illegal, and void, and that the individuals who signed for the Catholic Cemetery had no legal authority. Whether or not the petition was properly signed was one of the questions to be determined by the board of county commissioners. Their conclusion as to this matter is a part of their finding on the sufficiency of the petition, and is binding on all parties. The city of Topeka has power to sue and be sued and to hold real property for the use of the city. Gen. Stat. 1909, § 866. It has power to protect that property by whatever legal means may be necessary. It can do the same things with reference to its real property that any other property owner can do. The petition to the board of county commissioners was drawn under the first section of chapter 201 of the Laws of 1909, which section in part reads:

"Wherever sixty per cent. of the landowners along the lines of any regularly laid out road, who shall own at least fifty per cent. of the land to be taxed, within such distance as shall be stated in the petition * * * shall petition the board of county commissioners of the county in which such road is located for the improvement of such road, or any part thereof, said county commissioners shall cause said road or part of road thereof to be improved as prayed for in said petition," etc.

There is no restriction in this statute as to the legal character of the landowners. The city had authority to petition for this improvement.

What has been said concerning the city of Topeka applies with equal force to the Catholic Cemetery, be that an association of individuals or a corporation.

[4] 4. Another contention of the plaintiffs is that the limitations of the district as set forth in the petition to the board of county

commissioners are irregular, illogical, and unjust. So far as this matter is in the control of any one outside of the petition, it is with the board of county commissioners. When they find that the improvements prayed for will be a public utility and order the improvements made, everything has been done that can be done. The determination of the board is final and conclusive except for fraud.

[5] 5. Another argument of the plaintiffs is that the cost of the proposed improvement is excessive and out of proportion to any benefit that can accrue to the adjoining land. This is a matter for the determination of the board of county commissioners.

[6] 6. The plaintiffs claim that chapter 201 of the Laws of 1909, the act under which this improvement is proposed, was repealed by implication by chapter 200 of the laws of the same session, and argue that this result is brought about by chapter 200, the last act passed, being contradictory to and in conflict with chapter 201. Chapter 201 provides for the improvement of any regularly laid out road when 60 per cent. of the landowners along the line of the road petition for its improvement. Chapter 200 provides for a system of building, improving, and repairing roads and highways, other than dirt roads, throughout the county. The people of a county may or may not desire to proceed under chapter 200. The people living along the lines of a regularly laid out road may desire to improve that road, independent of the desire of the people of the county, and may proceed under chapter 201. The two acts prescribe different systems of building roads. Either one or the other may be adopted. There is room for both to operate. Chapter 200 does not repeal chapter 201.

[7] 7. It is argued by the plaintiffs that chapter 201 of the Laws of 1909 is unconstitutional and void for five reasons, set out as subdivisions (a), (b), (c), (d), and (e) of paragraph VI of their petition. This act was declared constitutional so far as it confers legislative powers on the petitioners, in *Hill v. Johnson County*, 82 Kan. 813, 109 Pac. 163. This court is unable to give any reason for declaring the act unconstitutional on any of the grounds named by the plaintiffs. Under these circumstances, following a well-established rule, this court will presume in favor of the constitutionality of the act until the contrary clearly appears.

[8] 8. The plaintiffs contend that the statute is void because it makes no provision for notice to landowners of the proceedings for the contemplated improvement of the road. In *Hill v. Johnson County*, supra, the unconstitutionality of the act was urged on the ground that it contained no express provision for notice to the property owners before the special assessments became a tax on the property. It was there held that the act was not unconstitutional because it contained no

express provision for such a notice. In 1911 the act was amended by chapter 249 of the Laws of 1911, § 3, so as to provide that the county clerk shall mail a written or printed notice to the owner or owners of any tract of land liable to assessments for improvements 30 days or more before the disposition of the bonds issued for such improvements. This is evidently for the purpose of giving the property owner opportunity to appeal to the courts to redress his grievances. If the act was declared constitutional before this amendment, it cannot be said to be now unconstitutional when it provides for notice.

[9] 9. There remains another question for determination. The seventh subdivision of the plaintiffs' petition alleges—

"that the defendant commissioners made no investigation of the sufficiency of said petition, * * * but, without evidence of the legality and sufficiency of the petition and in disregard of their official obligation and duty arbitrarily approved the petition and ordered the improvement of the road as therein described."

In addition to these allegations the petition alleges that the petition to the board of county commissioners did not have the requisite number of signatures of landowners, and that it was signed by certain persons who were not bona fide owners of property in the designated district. These allegations are attacked by demurrer, and full force and effect must be given them. Under these circumstances, if the commissioners made no investigation of the sufficiency of the petition, but, in disregard of their official obligation and duty, arbitrarily ordered the improvement of the road, their acts were the substantial equivalent of fraud. The county commissioners must make an investigation of the sufficiency of the petition presented to them, and they must act under their official obligation and duty and must act on their best judgment. Because of these allegations the petition states a cause of action, and the demurrer was rightly overruled. But the fact that the defendants filed a demurrer which was overruled and on which they elected to stand should not preclude them from contesting these allegations by answer and proof.

The judgment overruling the demurrer is affirmed, but the cause is remanded, with directions to the district court to permit the defendants to file an answer to these allegations, if they desire to do so.

JOHNSTON, BURCH, MASON, and WEST, JJ., concurring. PORTER and DAWSON, JJ., dissent from the ninth subdivision of the syllabus and the corresponding portion of the opinion.

On Rehearing.

PER CURIAM. The defendants file a petition for rehearing. The fact that judgment was rendered in favor of the plaintiff on evidence was not stated in the former opinion of this court. After the demurrer to the peti-

tion had been overruled, the defendants were given leave to answer. They elected to stand on their demurrer. The journal entry of judgment recites that after hearing evidence on behalf of the plaintiffs, the court rendered judgment in their favor.

This court decided most of the questions raised by the demurrer in favor of the defendants, but held the petition good as to certain facts therein alleged, which facts must be proved by evidence on a trial, where they are put in issue. These allegations of fact are stated in the opinion, and it is on account of these allegations that the petition was held good as against the demurrer. This court considered it neither just nor right that the defendants should be concluded on these questions of fact, although the defendants had been given an opportunity to answer, and had deliberately elected to stand on their demurrer. It is right and just that they be given another opportunity to answer if they desire to do so.

A rehearing is denied. The former opinion of this court is adhered to, and the order therein made is confirmed.

SEDLOCK v. CARR COAL MINING & MFG. CO. (No. 20756.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

MASTER AND SERVANT §375(2)—WORKMEN'S COMPENSATION ACT—"ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

A miner, at the end of his day's work, changed his clothes, and, still carrying a miner's lamp, started towards the bottom of the shaft with the intention of ascending to the top of the mine. About 200 feet from the room where he had been at work and about one-half mile from the bottom of the shaft, his face came in contact with a piece of slate, which was hanging from the roof of the mine, and one of his eyes was destroyed. *Held*, that the injury arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, and that under its provisions he is entitled to compensation for the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §375(2).]

Appeal from District Court, Leavenworth County.

Action by Andrew Sedlock against the Carr Coal Mining & Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. E. Dempsey, of Leavenworth, for appellant. W. W. McCanles, of Kansas City, for appellee.

JOHNSTON, C. J. In an action in the district court Andrew Sedlock recovered a judgment for \$1,456 against the Carr Coal Mining & Manufacturing Company, as compensation for an injury sustained by him while employed in the defendant's mine. There is no controversy between the parties

as to the employment, or the nature and extent of the injury suffered, nor yet as to the amount of the compensation allowed. The question which divides them is whether the accidental injury sustained by the plaintiff arose out of and in the course of his employment with the defendant within the meaning of the Compensation Act. It appears that plaintiff had been at work during the day in one of the rooms in the coal mine. About 4 o'clock he quit work, changed his mining clothes for street clothes in the room, then started to walk along the entry in the mine leading towards the shaft for the purpose of ascending to the top of the mine. He wore his miner's lamp, and it was necessary for him to do so in order to find his way to the bottom of the shaft. While he was walking along one of the straits of the mine leading to the shaft, and about 200 feet from his room and one-half mile from the bottom of the shaft, he struck his face against a piece of slate that was hanging from the roof of the mine, and the result was an injury, including the destruction of one of his eyes. At the time of the injury both parties were within the operation of the workmen's compensation law.

The defendant contends that the plaintiff was not entitled to compensation under the act. To recover, it must appear that the plaintiff's injury arose out of and in the course of his employment. Laws 1911, c. 218, § 1. In an amendment of section 9 of the act it is provided that:

"The words 'arising out of and in the course of employment' as used in this act, shall not be construed to include injuries to the employee occurring while he is on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence." Laws 1913, c. 216, § 4.

While the plaintiff had laid aside his pick and other tools, he was still in the mine and subject to the rules prescribed by the defendant when the accident occurred. The relationship of master and servant continued to exist while he was within the control and subject to the orders of the defendant. While the plaintiff was in the mine he was under obligation to observe the rules prescribed by the defendant, and it was incumbent on the defendant to provide him, not only a safe place to work in the mine, but also a safe passage way out of it, as well as the means to carry him safely to the top of the mine. His duties to his employer had not ended until he left the mine, nor had the duties of the defendant towards him ended until that time. It cannot be said therefore, that he was on his way to assume the duties of his employment, or had left such duties at the time of his injury. The statutory definition of the words, "arising out of and in the course of employment," is substantially the meaning applied to them

by the courts which have had them under consideration.

In *Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327, compensation was allowed to an employé who, after receiving instructions as to where he was to work during the day, proceeded along a street toward the place, and while on the way he fell and injured his knee. It was contended that, as he was not actually at work and had not in fact reached the place of work, the injury could not be said to have been received in the course of employment or to have arisen out of it. The decision was rested largely on the relationship that existed between the parties when the accident occurred, upon the theory that if the relationship of master and servant existed at the time of the injury, he was entitled to the benefits of the act. It was held that if the servant was under the master's control and subject to his direction, the accident is to be regarded as having arisen out of and in the course of the employment. Many American and English cases are cited to show that the relation may extend beyond the hours when the servant is carrying on his regular work, and in some instances, where he goes to places other than the mine, factory, or premises where the actual work was being done.

In *De Constantin v. Public Service Commission*, 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329, a workman employed by a contractor to do work upon a railroad was killed about five minutes before the actual work was to begin and also before his arrival at the place where the work was to be done. The accident was supposed to have occurred while the workman was proceeding on a way chosen by himself, and when he stepped in front of one train to escape another. As he was not upon the premises of the employer, nor upon a road or other way provided by the employer as the only means of access to the place where the work was to be done, compensation was not recoverable. The court held that a recovery may be had in some instances before the arrival at or retirement from the place of actual work. It was said:

"A reasonable time after the termination of actual work is allowed. If a workman is injured on the premises of the employer and while leaving his place of actual work by the usual course of travel, the injury is deemed to have arisen out of the employment. *Kinney v. Baltimore & Ohio Emp. Rel. Ass'n*, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142. Since injury after the termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such a case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way in-

tended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern."

It was held in a Michigan case that the fact that a workman is upon the premises of his employer when the injury occurs is not a conclusive test that he is covered by the act, as he might be so far beyond the place of work at the time of the accident as to be beyond the control or direction of the employer, and therefore outside of the protection of the act. A section hand, instead of eating his dinner with others of the crew near the place of work as was customary, concluded to go to his own home for dinner a considerable distance away. While walking on a railroad track towards his home he was struck by a train and killed. The court followed the rule that accidents which befall an employé while going to and from his work are not to be regarded as happening in the course of or arising out of his employment, and held that as the workman had gone on a mission of his own, not connected with the employer's business nor in accordance with the usage of the crew, but for his own purposes and pleasure, he was not entitled to compensation. In deciding the case the court remarked:

"In applying the general rule that the period of going to and returning from work is not covered by the act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment. *Hills v. Blair*, 182 Mich. 20, 27, 148 N. W. 243.

In *Zabriskie v. Erie R. R. Co.*, 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315, an employer failed to provide toilet facilities for employés in the building where they were at work, and they were obliged to, and did, habitually resort for such facilities to another building of the employer which lay across a public street. One of them, while crossing the street to reach the toilet during working hours, was struck by a vehicle, and the court held that the action arose out of and in the course of employment.

Sugar Co. v. Riley, 50 Kan. 401, 31 Pac. 1090, 34 Am. St. Rep. 123, did not arise under the Compensation Act, but it is somewhat analogous. There an employé at work on the premises of the company asked and obtained permission to go into a certain part of the factory to warm himself, and while attempting to enter the place, fell into an uncovered cistern and was scalded. It was contended that the employé was pursuing his own comfort and pleasure at the time, and was not engaged in the business of his employer; but the court held that he was engaged in the line of his duty at the time of the injury.

In *Brick Co. v. Fisher*, 79 Kan. 576, 100 Pac. 507, four men were employed to work at a certain machine in a brick plant, and under their plan each one took a turn at resting while the others were at work. One

of them, while resting, went into another department of the establishment near his own machine, and was injured because of the failure of his employer to guard machinery near which he went. It was held that he was engaged in the performance of duty at the time, and that a recovery might be had under the provisions of the factory act.

An elaborate annotation of the Workmen's Compensation Act, covering every feature of it, may be found in L. R. A. 1916A, in which the American and English cases are cited, and most of those applicable to the point in contention here are set forth at pages 40, 232, 327, and 329. In the note, authorities are cited in support of the proposition that "the moment that the actual work stops cannot be considered in every case as the time of termination of the employment," and that:

A "recovery may be had for an accident occurring before the place of work has been reached, if, during the antecedent period within which it occurred, the servant was, as a matter of fact under the master's control." L. R. A. 1916A, 332.

Here, as we have seen, the workman was in the mine, under the direction and entitled to the protection of the defendant at the time of the accident. Each owed duties to the other, and the relation of master and servant still existed between them when the injury was sustained, although the workman was not actually using the pick and shovel at that time.

A motion to dismiss the case was filed, but the merits of the controversy were fully presented by both parties when the motion was submitted, and therefore final disposition of the case will be made at this time.

The judgment is affirmed. All the Justices concurring.

WALLACE v. CITY OF WINFIELD. (No. 20543.)

(Supreme Court of Kansas. July 8, 1913.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES §86—WATER RIGHTS—NATURE AND EXTENT.

One who has obtained water power rights in a flowing stream has no ownership in the water itself, but only a right to its use, and if the water is diverted from the stream he may recover damages for any loss or injury actually sustained, but is not entitled to recover the value of the water diverted.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 82; Dec. Dig. § 86.]

2. EMINENT DOMAIN §23, 59 — NATURE OF RIGHT—PURPOSE OF CONDEMNATION.

A city of the second class is authorized to exercise the right of eminent domain in order to supply its inhabitants with water, and the mere fact that it had previously condemned property for that purpose did not exhaust the power, nor preclude it from afterwards condemning property at the same or another location, if the officers to whom the power is intrust-

ed determine in good faith that the public interest requires another exercise of the power.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 75, 143-145; Dec. Dig. § 28, 59.]

Appeal from District Court, Cowley County.

Action by Charles M. Wallace against the City of Winfield. From a judgment for defendant, plaintiff appeals. Affirmed.

Hackney, Lafferty & Moore, of Winfield, for appellant. James A. McDermott, S. C. Bloss, and Jackson & Noble, all of Winfield, for appellee.

JOHNSTON, C. J. In this action Charles M. Wallace, the owner of a mill and mill dam on the Walnut river, seeks to recover the sum of \$49,500 for water pumped and taken from his mill pond by the city of Winfield and sold by it to the inhabitants of the city. He also seeks to enjoin the defendant from going on with certain condemnation proceedings, the building of a dam, and the appropriation of the water for the use of the people of the city.

To supply water to the city and its inhabitants the defendant has erected a plant upon a piece of land, known as the "fair grounds tract," bordering upon the Walnut river. Up the river from this tract are the Baden mill and dam, and below it the Tunnel mill and dam; the latter being the plaintiff's property. The defendant had originally pumped its water from an intake above the Baden dam, where a right had been condemned in 1883 to take all the water necessary to supply the city. After establishing its plant on the fair grounds tract, the defendant abandoned its intake above the Baden dam, and since then has secured its supply from an intake below that dam and within what is called the plaintiff's mill pond. Some time prior to August 5, 1914, the defendant undertook to erect a dam across the river near the lower intake, having secured a right to do so from a landowner adjacent to the river. In an action brought at that time by the plaintiff, the construction of the dam was enjoined by the district court, and its judgment was affirmed by this court. Wallace v. City of Winfield, 96 Kan. 35, 149 Pac. 693. The facts relating to the water rights in the river acquired by the plaintiff and the effect which the proposed dam would have upon his property are set forth in that case, and upon these facts it was determined that the building of the dam by the defendant would materially infringe upon the rights of the plaintiff, and that this could not be done without condemnation of the water privileges and the payment of a compensation to the plaintiff. The defendant then proceeded to condemn a right to erect a dam and take water at the point named, which is near the waterworks plant,

in order to supply water to the municipality and its inhabitants. Condemnation was effected before the board of county commissioners, which made an award of compensation to the plaintiff. He objected to the condemnation, but did not perfect an appeal from the award made by the board. Subsequently he brought this action, and in the first count alleged that he was the owner of the water privileges and of all the water in the river between the Baden dam and the Tunnel dam, that the defendant had taken water there without right from October, 1913, to October, 1915, amounting to 990,000,000 gallons and had sold it at 7 cents per 1,000 gallons, aggregating an amount and value of \$69,300. The plaintiff credited the account to the extent of 2 cents per 1,000 gallons for the expense of pumping and distributing the water, and asked judgment for the remaining sum of \$49,500 as the value of the water appropriated by the defendant.

[1] The defendant moved to strike out of the first count the averments to the effect that the plaintiff was the owner of the water which flowed along the river between the two dams, and which alleged a right to the value of the water taken by the defendant, and also the averments relating to the money received by the defendant from the sale of the water to the people of the city, and this motion the court sustained. The averments stricken proceed on the theory that a recovery may be had for the value of the water taken from the river by the defendant, rather than for the loss or injury which he sustained by being deprived of the use of the water taken by the defendant. It was determined in *Wallace v. City of Winfield*, supra, that the plaintiff had acquired water power rights in the river, and that the taking of water at the lower intake was a material interference with the plaintiff's rights, by not only diminishing the quantity, but depriving him of the use of the water to which he was entitled under rights previously acquired. For this interference and deprivation he is entitled to reasonable damages to the extent of the injury sustained by him. However, he had no title to the water in the river, no right to sell it, nor to recover the sale price of water taken from the river. He had not withdrawn the water from the river and reduced it to possession, nor had he taken any steps which had changed its character and given him a property right in it. In *City of Syracuse v. Stacey*, 169 N. Y. 231, 245, 62 N. E. 354, 355, the court said:

"Water, when reduced to possession, is property, and it may be bought and sold and have a market value; but it must be in actual possession, subject to control and management. Running water in natural streams is not property, and never was."

Since the plaintiff had acquired no ownership in the water, the extent of his recovery is the injury to the use occasioned by the

defendant. Unless he has suffered injury from the interference with his rights and the deprivation of the use to which he was entitled, no compensatory damages can be recovered. He is entitled to nominal damages for the illegal diversion of the water, and also any actual damages proven. *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971; *Price v. High Shoals Mfg. Co.*, 132 Ga. 248, 64 S. E. 87, 22 L. R. A. (N. S.) 684; *Elgin Hydraulic Co. v. City of Elgin*, 194 Ill. 476, 62 N. E. 929; *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18, 68 Am. St. Rep. 645; *Harris v. Railway Company*, 153 N. C. 542, 69 S. E. 623, 31 L. R. A. (N. S.) 543, 138 Am. St. Rep. 686, and note; 40 Cyc. 552; 2 *Farnham's Waters and Water Rights*, § 462; *Gould on Waters* (3d Ed.) § 204. The motion to strike was therefore properly allowed. Whether or not the remaining allegations are sufficient to entitle the plaintiff to recover damages is not raised by the motion. In the judgment it is recited that no request for permission to amend the petition was made, although the defendant offered to submit to a judgment against it for nominal damages.

[2] In the second count of the petition, to which a demurrer was sustained, the principal legal question presented for review is whether, having previously condemned a right to take water from the river above the Baden dam, the defendant had exhausted the power delegated to it to obtain water privileges at the lower point on the river. In the earlier case between these parties the court, after speaking of the former condemnation and the infringement of the plaintiff's right by the attempt to take water at the lower location, said:

"The duty of supplying the inhabitants of the defendant city with water is imperative, and the necessity for obtaining water at this place may be pressing; but the city is vested with the power of eminent domain and may obtain the right to take water from the stream by condemnation and the payment of compensation to those who may be injured or from whom any property rights may be taken." *Wallace v. City of Winfield*, 96 Kan. 35, 38, 149 Pac. 693.

The Legislature has determined the necessity and expediency of condemning a right to take water for a water plant, and delegated to cities of the second class the exercise of that power, in order that they may supply their inhabitants with water. Gen. Stat. 1909, § 1405, as amended by Laws 1911, c. 116. The necessity for the appropriation of the right to take water is to be determined by the municipal authorities and the board of county commissioners before which the proceedings are had. It is conceded that the use is a public one, and the courts have no authority to control the reasonable exercise of the power by the Legislature, directly or by the officers to whom it has been dele-

gated. In *Irrigation Co. v. Klein*, 63 Kan. 484, 488, 65 Pac. 684, 685, it was said:

"Courts may not interfere to limit or control the discretion of the law-making power as to the character, quality, method or extent of the exercise of the power of eminent domain by a private person or corporation engaged in the promotion of a public use, when once it has been determined that such use is a public one." 15 Cyc. 629, 634; note, 22 L. R. A. (N. S.) 71.

Has the defendant exhausted the right to condemn a water privilege because it exercised the power in 1883 at a point more than a mile above the new location? All property is held subject to the right of eminent domain, whenever the public necessity requires it. It is a continuous sovereign right which cannot be extinguished. The fact that the power delegated by the Legislature to the defendant was exercised 33 years ago does not argue that the property deemed necessary for public use at that time meets the requirements of the present time, nor does it exhaust the power where those entrusted with its exercise determine that additional or other property is necessary to the public convenience or welfare. It was expressly decided in *C. B. U. P. Rld. Co. v. A., T. & S. F. Rld. Co.*, 28 Kan. 669, that the right of eminent domain was not exhausted by a single exercise of the power and that a previous condemnation of ground for depots and side tracks did not preclude a second condemnation, where the company determined that more land and enlarged facilities were necessary to the discharge of its duties to the public. In a later case, where land was condemned for shop grounds and terminal facilities, and a second condemnation for a like purpose at the same station was made within a year, it was contended that the second proceeding was invalid. The court, however, held that it was a continuing power, which might be exercised whenever it was deemed to be necessary. *Smith v. Railway Co.*, 90 Kan. 757, 136 Pac. 253. The power to condemn is given to the city in general terms, and nothing in the language of the act indicates a legislative purpose to limit the exercise of the power to a single instance or to one set of proceedings. It is a right which the Legislature, or other agency to which the power is intrusted, cannot bargain away, so as to prevent its use whenever a necessity arises. In *Cooley's Constitutional Limitations* (8th Ed.) 644, it is said:

"When the existence of a particular power in the government is recognized on the ground of necessity, no delegation of the legislative power by the people can be held to vest authority in the department which holds it in trust, to bargain away such power, or to so tie up the hands of the government as to preclude its repeated exercise, as often and under such circumstances as the needs of the government may require. For, if this were otherwise, the authority to make laws for the government and welfare of the state might be so exercised, in strict conformity with its Constitution, as at length to preclude the state performing its ordinary and essential functions, and the agent chosen to gov-

ern the state might put an end to the state itself. It must follow that any legislative bargain in restraint of complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void," etc.

See, also, *C. & E. I. R. R. Co. v. People*, 222 Ill. 396, 78 N. E. 748; *C. & N. W. Ry. Co. v. Mechanics' Inst.*, 239 Ill. 197, 87 N. E. 983; *St. L., E. & K. C. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483; *Kan. & Tex. Coal Ry. v. Northwestern Coal & Mining Co.*, 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717; *Johnson v. Utica Waterworks Company*, 67 Barb. (N. Y.) 415.

The facilities at the old location may be wholly inadequate at the present time, and the conditions that exist there may be such as to demand a change of intake. The city is growing, and it is easy to understand that a plant deemed to be sufficient for the people a third of a century ago would not be sufficient to meet the demands for the greater population or to subserve the present public interest. It devolved upon the officers intrusted with the delegated power and discretion to determine what the public interest required, the expediency of making the change, the suitability of the location for the new intake, and, having decided it in good faith, the court cannot substitute its judgment for theirs. The distance between the two locations shows that the second condemnation is not the mere taking of rights already possessed by the defendant, and under the petition it cannot be held that the necessity for the condemnation did not exist, nor that the power was fraudulently or illegally exercised.

The judgment of the district court is affirmed. All the Justices concurring.

KIRKPATRICK v. ABRAHAMS et al.
NATIONAL COUNCIL OF KNIGHTS AND
LADIES OF SECURITY v. FARRELLY.

(No. 20816.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. INSURANCE §693—FRATERNAL BENEFIT SOCIETIES—ORGANIZATION.

Since the act of 1893, providing for the organization and regulation of fraternal beneficiary societies, took effect, constitutions of societies organized before 1893 and continuing to do business under the act without reincorporation are to be treated in the light of articles of association or charters under the act, so far as they relate to the same subjects, including provisions relating to plan of organization and provisions for amendment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. § 693.]

2. INSURANCE §693—FRATERNAL BENEFIT SOCIETIES—CONSTITUTION—AMENDMENT.

The plan of organization of such a society, set forth in its constitution, cannot be amended by a simple by-law not enacted according to the

provision of the constitution relating to its amendment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. ¶693.]

3. INSURANCE ¶693—FRATERNAL BENEFIT INSURANCE—CONSTITUTION AND BY-LAWS.

Section 56 of the by-laws of the Knights and Ladies of Security, a fraternal beneficiary society of the character described in paragraph 1 above, providing that appointments by the National President to committees the members of which become ex officio members of the supreme legislative body shall not become effective until approved by the National Executive Council, contravenes section 2 of article 4 of the constitution of the order, giving the president unconditional power to make such appointments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. ¶693.]

West, J., dissenting.

Original application by W. B. Kirkpatrick, as National President of the Knights and Ladies of Security, for writ of mandamus to John Abrahams and others, and application by the National Council of the Knights and Ladies of Security, for writ of quo warranto to H. P. Farrelly. The applicant in the mandamus proceeding held entitled to writ of mandamus, but necessity therefor obviated by compliance by defendants with demands of plaintiffs, and costs taxed to the National Council, the plaintiff in the quo warranto proceeding.

Edwin D. McKeever, of Topeka, for plaintiffs. Blair, Magaw & Lillard and A. M. Harvey, all of Topeka, for defendants.

BURCH, J. These actions involve the question whether or not appointments to certain committees by the National President of the Knights and Ladies of Security require the approval of the National Executive Committee.

The Knights and Ladies of Security is a fraternal beneficiary society operating under chapter 23 of the Laws of 1898. The supreme governing body is the National Council. The laws of the order consist of a constitution comprising eight articles and a code of laws comprising numerous sections. Article 4 of the constitution provides for a National Executive Committee and several other committees, including a Law Committee. Section 2 of article 4 reads as follows:

"The National Executive Committee shall be composed of the National President, National Secretary, and three other members to be elected by the National Council. The other committees shall be composed of three members each, to be appointed by the National President, as soon after his election and installation as is practicable, who shall be ex officio members of the National Council."

The National President made the appointments which he is authorized to make, including the appointment of H. P. Farrelly as a member of the Law Committee. Section 56 of the laws of the order reads as follows:

"Any appointment made by the National President to committees shall not become effective

until approved by the National Executive Committee."

The National Executive Committee refused to approve the National President's appointments. In the first case the National President asked for a writ of mandamus to compel the National Executive Committee to approve his appointments. Farrelly intervened, claiming his appointment was valid without the approval of the National Executive Committee. The other proceeding is one of quo warranto, brought against Farrelly to test his authority to act as a member of the Law Committee without approval of his appointment by the National Executive Committee. The decision in each case depends on the effect, if any, to be given section 56 of the laws of the order.

The Knights and Ladies of Security was organized in 1892 as a body corporate without capital stock, under the provisions of section 1 of chapter 89 of the Laws of 1879, relating to the organization of benevolent associations. Under that act it had the same power to make by-laws for the regulation of its affairs as other corporations; that is, as provided in section 19 of chapter 23 of the General Statutes of 1868, which reads as follows:

"The directors or trustees may adopt by-laws for the government of the corporation; but such by-laws may be altered, changed or amended by a vote of the stockholders, at an election to be ordered for that purpose by the directors or trustees, on the written application of a majority of the stockholders or members." Gen. Stat. 1909, § 1737.

Since there were no stockholders the board of directors alone had power to enact by-laws. Steele v. Telephone Association, 95 Kan. 580, 582, 148 Pac. 661. Probably this method was not followed, and whatever laws the society had for its government depended on adoption by acts and conduct of the society and its officers, rather than by express vote or written manifestation of the board of directors.

In June, 1898, the order had a lodge system, with ritualistic form of work and a representative form of government. Members of the order were united in subordinate councils under the jurisdiction and control of the National Council. Subordinate councils were entitled to send representatives to meetings of the National Council. The presiding officer of a subordinate council was called the president. The organization and government of the society was provided for in a constitution comprising 10 articles, and a code of laws comprising 16 articles, divided into numerous sections. The constitution related to fundamental subjects, indicated by the following article headings: Article I, Name, Purpose, System and Territory; article II, National Council—Composition and Powers; article III, Officers of National Council; article IV, Committees and Their Duties; article V, Beneficiary Certificates;

article VI, Reserve Fund; article VII, Membership; article VIII, Who Only may be Beneficiaries; article IX, Officers of Subordinate Councils; article X, Amendments. The National Council was given supreme legislative authority, including power to amend the constitution. Power to amend the constitution was limited by article 10 as follows:

"This constitution may be amended in the following manner, and none other: All proposed amendments shall be made in writing and signed by five past presidents, and sent to the National Secretary not later than ninety days prior to the meeting of the National Council, when it shall be the duty of the National Secretary to have the same printed and to send a copy to each subordinate council and to each representative. All amendments to be in force when adopted and promulgated by the National Council."

This article remained in force until 1906, when it was changed in some particulars, but the requirement of a written proposal, signed by five persons belonging to a designated class, transmitted to the National Secretary before the meeting of the National Council, and service by the National Secretary of a printed copy of the proposed amendment on each duly elected subordinate council representative, has never been departed from.

Article 15 of the laws provided for their amendment as follows:

"These laws may be amended by a majority vote of the National Council at any regular meeting, and all amendments shall take effect and be in force from and after the publication of the same in the Journal of Proceedings of the National Council, or as otherwise ordered."

Section 2 of article 4 of the constitution gave the National President power to appoint members of named committees other than the Executive Committee, including members of the Law Committee, who became ex officio members of the National Council. This section of this article has been changed in some particulars not material here, but it has never been amended in respect to the power of the National President to appoint members of committees of the National Council other than the Executive Committee.

[1] Such was the constitution of the order when the statute of 1898, providing for the organization and regulation of fraternal beneficiary societies, orders, and associations was passed. Laws 1898, c. 23. Section 1 of the act of 1898, as amended by Laws of 1899, c. 147, § 1, reads in part as follows:

"A fraternal beneficiary association is hereby declared to be such a corporation, society or voluntary association of individuals, formed or organized into a lodge system with ritualistic form of work, or composed of members of an order or society having a lodge system with ritualistic form of work, or of such members, their wives, widows, or daughters, as shall make provision for the payment of benefits in case of death, sickness, or temporary or permanent disability, and shall be carried on for the sole benefit of its members and their beneficiaries, and not for profit. Every fraternal beneficiary association as herein defined shall have a representative form of government, with provisions for corporate meetings, and, subject to compliance with its constitution and laws, shall make provision for the payment of benefits in

case of death, and may make provision for payment of benefits in case of sickness, temporary or permanent disability, either as a result of disease, accident, or old age." Gen. Stat. 1909, § 4908.

Section 7 of the act of 1898 provided that the organization of a fraternal beneficiary society might be accomplished by filing with the superintendent of insurance a signed and acknowledged document which, on approval and on compliance with certain formalities and the payment of certain fees, became its charter under the name of Article of Association. It was provided that Articles of Association should state among other things the following:

"The object or purpose for which the incorporation is sought, including the plan of organization and method of conducting the business, including provision for corporate meetings for the adoption or amendment of articles of association and by-laws and the election of officers." Gen. Stat. 1909, § 4809.

Societies, already organized and having the right to do business within the state as provided by the act, were entitled, on compliance with certain conditions, to certificates authorizing them to do business within the state. Gen. Stat. 1909, § 4908. Privilege to reincorporate under the act was granted (section 4908), but all fraternal beneficiary societies, as defined by section 1 of the act, were to be governed by the provisions of the act, and were exempted from the provisions of other insurance laws (section 4903). Societies organized under the act were created bodies corporate, with power to adopt by-laws and with power to amend articles of association in the manner prescribed by by-laws.

The organization and scheme of the Knights and Ladies of Security corresponded so well to the legislative requirements that reincorporation was not necessary. What is now section 56 of the laws of the order, placing a limitation on the constitutional power of the National President to appoint committees, came into the code in the year 1900 as a simple law enacted under the National Council's ordinary legislative power, and not as an amendment to the constitution and without the constitutional provision relating to amendment of that document having been changed.

[2] The legislation of 1898 dealt with conditions as it found them. Many corporations and voluntary associations of the mutual benefit kind were doing business in the state. They had adopted rules for their own government. It was customary to divide these rules into two parts, the constitution and the laws or by-laws. In the constitution the name and purposes of the association were usually specified, and the general frame of the government set forth. The provisions of the constitution were always regarded as fundamental, and special restrictions on the method of changing them were habitually imposed. In the by-laws rules for the conduct of the affairs of the association under the constitution were stated, and because

frequent modification to meet changed and changing conditions might be necessary, little formality in amending them was required. Once adopted, whether by a corporate or by an incorporate society, the constitution was regarded as the fixed and permanent agreement between members, officers, and constituent and governing bodies, and interested persons felt, and had a right to feel, that it would not be abrogated or changed except in strict compliance with the method underwritten in the article relating to amendment. Perhaps in the case of incorporated societies the popular view of the distinction between constitution and by-laws cut across legal theories, but that view persisted and predominated nevertheless. When the notion of the mutual benefit society became clearly conceived, associations multiplied with great rapidity. Promoters and managers often reaped considerable profit and advantage and sometimes some distinction, and there were frequent struggles for the control of organizations. The rights of members and beneficiaries became a subject of great importance, and the integrity of adopted rules of associated life became a matter of serious social concern. When the Legislature approached the subject of regulating fraternal beneficiary associations, it took cognizance of the fact that the thoughts, habits, and practices of the people had refused to conform to the grooves of the law relating to private corporations organized for profit and having capital stock, and recognized in the first section of the act of 1898 that such an association would have "its constitution and laws." Before 1898 corporate charters were not required to contain anything with respect to the adoption and amendment of by-laws and, as already indicated, the enactment of by-laws was left entirely to boards of directors and trustees, subject to modification by stockholders at stockholders' meetings ordered for the purpose. By the act of 1898 corporate charters were required to set forth the plan of organization, including provision for the adoption and amendment of by-laws. Whatever these provisions may be, they are portions of the articles of association, and officers, committees, legislative bodies, subordinate bodies, members, and beneficiaries are all bound by them. They are fundamental in character, and cannot be changed except according to rules lawfully prescribed. Supreme legislative bodies, formerly clothed with power to make and unmake rules, whether stated in the form of constitution or of by-laws, and consequently with power to execute legislative coups, are no longer supreme, but must act according to charter limitations. Indeed, the popular notion of the supremacy of the constitution of a society over its legislative body has triumphed, and has been given expression in the statute book so far as mutual benefit associations are concerned.

After the act of 1898 took effect the

Knights and Ladies of Security could not continue to do business unless its plan of organization and method of doing business corresponded to those of corporations which might be formed under the act. Its plan of organization and method of doing business did conform to the statute, and reincorporation was not necessary. Essential features of articles of association under the statute were embraced in the constitution, which included express provisions fully covering the subject of amendment. Other matters were covered by by-laws which contained a provision relating to their amendment. Without the statute simple good faith on the part of the National Council required that it should not arbitrarily disregard provisions of the constitution, whatever its strict legal power might be, and the court is of the opinion the purpose of the statute was that constitutional provisions of corporations continuing in business without reincorporation should be regarded in the same light as articles of association of corporations formed under the act, so far as they relate to the same subjects, including stated provisions for amendment.

The constitutional provision giving the National President power to make appointments to office was important because it related to the subject of membership in the National Council, a material feature of the plan of organization, and the power granted could not be infringed upon except by an amendment of the constitution adopted after written proposal signed by qualified persons and service of printed copies on elected representatives of subordinate councils.

[3] Conflicts between provisions of the by-laws of a fraternal beneficiary society are to be resolved in the same manner as conflicts between statutes. Supposedly conflicting provisions are to be harmonized and each given effect if possible. It is not easy to give any effect to law 58. While the National Council could not limit the National President's power of appointment without a constitutional amendment it had plenary power over the Executive Committee and, so far as the Executive Committee is concerned, could require it to approve the National President's appointments. Perhaps such approval might serve as a sort of authentication or attestation or witnessing of the National President's act.

It is argued from evidence taken that the right of the Executive Committee to approve or disapprove appointments under law 58 has never been questioned. On the other hand, it is argued that appointments of the National President have always heretofore been accepted and approved without question. The constitution is no longer a matter between friends, and the court prefers to rest the rights of the parties on the written laws of the order.

Because a regular meeting of the National Council was about to be held, decisions

of the two cases were announced as soon as possible after the hearing. The foregoing opinion states the reasons for the decisions. The Executive Committee approved the National President's appointments, and thus obviated all necessity for the issuance of a writ against them. Both proceedings were prosecuted in an official capacity and subserved the same purpose, an interpretation of the laws of the order. They will be treated as having been consolidated, and the costs will be taxed to the National Council, the plaintiff in the quo warranto proceeding.

JOHNSTON, C. J., and MASON, PORTER, MARSHALL and DAWSON, JJ., concurring.

WEST, J. (dissenting). The foregoing opinion correctly decides a case involving a private family quarrel with which we should have nothing whatever to do. The Legislature guarded against going thus afield when it prescribed that a writ of mandamus may be issued to compel the performance of any act which the law specifically enjoins as a duty resulting from an office, trust, or station. Gen. Stat. 1909, § 6310 (Code Civ. Proc. § 714). What office, what trust, or what station, what act specifically enjoined, by what law do we find in the record? None. The case should be dismissed. *Reno Lodge v. Grand Lodge*, 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98; *Supreme Lodge v. Raymond*, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373; *Moore v. National Council*, 65 Kan. 452, 70 Pac. 352; *Stadler v. Bnai Brith*, 5 Ohio Dec. (Reprint) 221, 8 Am. Law Rec. 589; 29 Cyc. 190.

MARSHALL v. FARMERS' & BANKERS' LIFE INS. CO. (No. 20053.)
(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. INSURANCE — §349(3)—FORFEITURE—NON-PAYMENT OF PREMIUM NOTE.

Where a promissory note is taken for a premium on a life insurance policy, and the insurance policy provides that the note is not to be considered as a payment of the premium, but only an extension of time for payment, and that a failure to pay the note at maturity shall forfeit the policy, a default in payment of the note relieves the insurance company from payment of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 897, 898; Dec. Dig. § 349(3).]

2. INSURANCE — §349(3)—FORFEITURE—NON-PAYMENT OF PREMIUM NOTE.

Where a promissory note is taken for a premium on a life insurance policy, payable to the agent of the insurance company and is received by him as agent for the company and delivered by him to the company, the insurance company is the owner of the note from the inception of the transaction, and if the note is not paid to the company at maturity, the forfeiture clause in the policy for nonpayment of the premium note will protect the insurance company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 897, 898; Dec. Dig. § 349(3).]

3. INSURANCE — §349(3)—FORFEITURE—NON-PAYMENT OF PREMIUM NOTE.

Where a premium note is taken by the agent of an insurance company in his capacity as agent and the note is delivered to the company, and by an arrangement between the agent and the company, he is conditionally charged with the company's share of the premium, the charge to be remitted if the note is not paid, the premium note belongs to the insurance company from the inception of the transaction, notwithstanding that it is payable to the agent; and where the policy issued to the maker of the note provides that the obligation of the policy shall be void, unless the note is paid at maturity, a failure of the assured to pay the premium note avoids the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 897, 898; Dec. Dig. § 349(3).]

4. INSURANCE — §349(3)—FORFEITURE—NON-PAYMENT OF PREMIUM NOTE.

A life insurance policy was issued to the husband of the plaintiff beneficiary. The policy provided that it should be void if any premium or premium note was not paid when due. The insured gave his note for the first premium, defaulted in its payment, and soon after died. The note was made payable to the agent of the insurance company, but it was admitted that he merely received it in his capacity as agent, and that he delivered it to the company. It was also admitted that for the convenience of the insurance company and its agent, and agreeable to an understanding between them, when a premium note was taken for an insurance policy, the agent should be conditionally charged with the company's share of the premium, and that the charge should be remitted if the note was not paid, but that in such case the agent should pay the medical fee for examining the applicant for the policy. Held, that the insurance company was interested in the premium note as owner from the inception of the transaction, and that these admissions show that credit was not independently extended to the applicant by the agent on his own responsibility, and that by the plain terms of the policy the default of the insured to pay the premium note when due relieved the insurance company from liability on the death of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 897, 898; Dec. Dig. § 349(3).]

5. LIABILITY ON INSURANCE POLICY—SETTLEMENT SUSTAINED.

The allegations of fact and admissions of facts relating to a settlement of a debatable liability on an insurance policy examined, and the settlement sustained.

Appeal from District Court, Sumner County.

Action by Maud L. Marshall against the Farmers' & Bankers' Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, with instructions.

J. A. Brubacher, of Wichita, and James Lawrence, of Wellington, for appellant. W. W. Schwinn, of Wellington, for appellee.

DAWSON, J. The defendant issued a life insurance policy to Guy G. Marshall, and the plaintiff was named as beneficiary, for the amount of the first premium, \$41.72. Marshall gave his promissory note due in 90 days, payable to C. C. Alexander, the defendant's local agent, who turned it over to the company. Marshall defaulted in the payment of the note and died a few months

later. Some days after his death, an attorney for the insurance company called on Mrs. Marshall, the plaintiff, and informed her that the defendant had never received anything on the policy, and that the policy was void. He showed the plaintiff the note given by Mr. Marshall to Alexander and stated that the note belonged to the defendant and was given in payment of the first premium; but the defendant's attorney also told her that his company desired to do something for her as a matter of good will. The attorney offered to pay the funeral expenses, \$154.50, and surrender the note to plaintiff if she would surrender the policy and receipt it in full. Relying on these statements of defendant's attorney, Mrs. Marshall accepted this proposition and the bargain was carried out accordingly. Some months afterwards the plaintiff filed this action, setting up these facts and alleging that she would not have accepted the \$154.50 and the note and would not have surrendered the policy or have given a receipt except for her belief in the attorney's statements. The petition further alleged that these statements were untrue and known by the insurance company to be untrue when made, and that they were made to induce the plaintiff to surrender the policy and for the purpose of wrongfully avoiding the payment due to her thereunder, and that she was misled and deceived. She prayed judgment for the face of the policy, less the sum paid her in the settlement.

The insurance company answered, setting up the written application of the deceased, in which was the following:

"(10) That if any note or other obligation is taken for any premium or part thereof, such note or obligation shall not be a payment thereof, but only an extension of time of payment of the same, and failure to pay said note or other obligation at maturity shall work a forfeiture of all previous payments, except as provided in the policy."

The answer also pleaded the following clause in the policy:

"Failure to pay any premium or any note or interest thereon given in extension of the time of payment of any premium on this policy, when due, shall, except as herein otherwise provided, void this policy and forfeit all premiums paid hereon to the company, and terminate and forfeit the insured's right to pay any further premiums hereunder. Provided, however, that such voidance shall not operate to relieve the insured of the payment of the earned portion of any such note or interest, if any," etc.

The answer also pleaded the settlement, and alleged that it was made with counsel for plaintiff and with their approval.

Other paragraphs of the answer read:

"That while said Alexander took said note payable to his order, nevertheless he took the same as the agent of defendant, and as such agent turned the same over to the defendant all in conformity with, and subject to the provisions of the application for and the terms of said policy."

"(8) Defendant admits on or about the date when said policy was issued it charged its said agent, the said Alexander, on its books with \$12.52, being the amount of the premium which

it would have received in cash after the payment to the said agent of his commission for obtaining said insurance had said premium been paid in cash or had said note been paid when due; but defendant states that said charge was not considered or regarded by defendant or its said agent as a payment of said premium or any part thereof, but was made with the understanding and agreement that in the event said note was not paid when due by the insured, then said charge against the said agent should, and would be, and was, reduced to the amount of the medical fee for examining the insured, to wit, the sum of \$5. And defendant states that the said Alexander never paid the same or any part thereof, and that said charge aforesaid, with the credit thereon as aforesaid, was made in accordance with certain contractual relations and understandings based upon good and sufficient considerations between said defendant and its said agent, and for their mutual protection, advantage, and benefit, and for the use and benefit of no one else; and in making said charge against the said agent upon its said books, it was not the intention of the defendant or of its said agent to in any manner vary, contradict, alter, or change the written agreement existing between the insured and the defendant, as contained in said application and said policy of insurance."

The court gave plaintiff judgment on the pleadings for the full amount of the policy, less the sum of \$154.50 paid in the settlement, and less, also, the sum due on the unpaid premium note.

[1-4] Since this judgment, at first blush, appears to be erroneous, we will lay aside the usual order of consideration, and endeavor by the aid of appellee's brief to find grounds to sustain it. Her counsel says:

"It was solemnly admitted by counsel he made a false statement on a material matter, affecting the rights of the parties, at the time he obtained the surrender of the policy and the delivery of the receipt; and it must be presumed that he made the false statement for the purpose of obtaining the policy and the receipt."

It was the statement that the note had been given to the company that made all the difference. If that statement had been true, the appellee could not have made any claim under this policy, worded as it was."

We search in vain, however, for the admission of any false statement, material or otherwise. Indeed, the allegations concerning the false statements are general and not specific. Every statement of fact made by the insurance company's attorney to Mrs. Marshall appears to be abundantly corroborated by the admitted pleadings. Alexander took the note as agent for the company. The company owned it from the inception of the transaction; it had not been paid. The plaintiff's motion for judgment admits the truth of defendant's answer. The failure to pay the premium note when due avoided the policy. The methods of the company and its agent in adjusting their business dealings were no concern of the policy holder or of his beneficiary. Those methods and relations of principal and agent were pleaded, and admitted by plaintiff as true. For their own convenience, upon the issue of the policy an item representing the company's division of the premium was conditionally charged against the agent's account, but the charge

was not considered between the company and its agent as a payment of the premium, but was made with the understanding and agreement that if the insured did not pay the note when due, then the charge against the agent would be remitted, less the amount of the medical fee for examining the insured, and that this contractual arrangement between the company and its agent was for their mutual protection and advantage, and not made with the intention of the company or its agent to alter the written agreement between the insurance company and the policy holder.

With such allegations of fact admitted, judgment could not be rendered against the company. If the policy had been issued on Alexander's credit and not on that of the insured, or if the company had made an absolute acceptance of Marshall's note to Alexander in payment of the premium, we would have a different situation to consider. But the motion for judgment admitted everything—admitted the business arrangements of the agent and the company, admitted that Alexander took the note merely as agent for the company, admitted that both the agent and the company had an interest in the note—the company's proportion and the agent's commission, if the note were paid, and the agent's liability to reimburse the company for the fee of the medical examiner if the premium note were not paid. In such a relationship, it was of no controlling consequence that the note was made payable to the agent and not to the company. *Nickelson v. Dial*, 77 Kan. 9, 13, 93 Pac. 606. Nothing is pleaded from which it might be inferred that the agent was to extend credit to the insured on his own account; and the defendant's pleading, admitted to be true by its motion for judgment, is to the contrary.

The decided cases generally hold that liability on an insurance policy cannot be avoided, although the premium note which was made payable to the agent and not to the company was not paid, even though the premium note referred to the policy and provided that the policy would be void, unless the note was paid. *Insurance Co. v. Hardie*, 37 Kan. 674, 16 Pac. 92. In *Perea v. Insurance Co.*, 15 N. M. 399, 405, 110 Pac. 559, 560, the note was payable to the agent and the premium was charged to him by the company.

"Defendant," says the court, "intrusted to its agents the discretion of collecting in advance or in giving such credit as they saw fit, holding them alone responsible for the premium. Under such circumstances, it may well be doubted whether the note in question was a note given for the first year's premium within the meaning of the forfeiture clause of the policy."

Other cases cited are to the same effect, and there ought not to be any serious debate that if the agent extended the credit on his

own responsibility, and if the insurance company was to look to the agent and not to the insured for the payment of its proportion of the premium, the policy would be enforceable against the company whether the premium or premium note were paid or not. 16 A. & E. Encycl. of L. (2d Ed.) 859.

[5] This is not the situation before us, however, and the harsh rules against life insurance companies should not be further extended without positive legislation to support them. As Justice Burnett said in *Cranston v. West Coast Life Ins. Co.*, 72 Or. 116, 139, 142 Pac. 762, 769:

"It is wrong to take something for nothing even from a life insurance company."

Under the petition and answer, the defendant was entitled to judgment; and since there was a compromise and settlement free from fraud or misrepresentation and nothing is left upon which to order a new trial, the cause must be remanded, with instructions to set aside the judgment, and to enter judgment for defendant. All the Justices concurring.

MALANEY v. CAMERON et al.

(No. 20293.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. ADOPTION — 6—SPECIFIC PERFORMANCE — 86—REQUISITES—CONSENT OF PROBATE JUDGE.

Inasmuch as the statutory proceeding for adopting a child includes the consent of the probate judge; no legal adoption can result from the mere contract and conduct of the parties, although under certain circumstances property rights growing out of promises made in that connection may be enforced.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 11; Dec. Dig. 6; Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. 86.]

2. INTERPRETATION OF CONTRACT—ADOPTION OF CHILD.

The question suggested but not determined whether a contract between the father of a 4 year old girl and a married couple, reciting that he relinquishes to them his rights to her "for to have and chaim as their own," is to be interpreted as including a promise of adoption on their part.

3. DEEDS — 194(2)—EXECUTION—PRESUMPTION—DELIVERY.

The presumption of delivery arising from the possession of a deed by a grantee arises even in the absence of evidence that such possession was obtained prior to the death of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 576, 577, 623, 634; Dec. Dig. 194(2).]

4. DEEDS — 194(2)—EXECUTION—DELIVERY—EVIDENCE.

The evidence held not to overcome the presumption of delivery arising from possession of a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 576, 577, 623, 634; Dec. Dig. 194(2).]

Appeal from District Court, Douglas County.

Action by Mrs. Rose L. Malaney against Allen N. Cameron and another. From a judgment for defendants, plaintiff appeals. Affirmed. Rehearing granted.

Ord Clingman, of Lawrence, for appellant. J. B. Larimer, of Topeka, for appellees.

MASON, J. Noah Cameron died intestate on January 18, 1911, holding the record title to several city lots in Lawrence. Five days later a deed was recorded, which had been signed and acknowledged by him on November 12, 1910, purporting to convey the property to his two sons, Allen N. Cameron and Huber L. Cameron. On June 21, 1913, Rose L. Malaney brought an action against Allen N. Cameron and the administrator of Huber L. Cameron, claiming an interest in the property and its rents and profits, as an heir of Noah Cameron, by virtue of being his adopted daughter, and asserting that the deed was inoperative for want of delivery. Judgment was rendered against her, and she appeals.

The trial court found that there had been no legal adoption, and that the deed had been delivered. There is no substantial dispute in the evidence. The plaintiff contends that the established facts show that she was entitled to the rights of an adopted child, and that the grantor died without having delivered the deed. There can be no reversal unless both these contentions are sustained.

[1] 1. When the plaintiff was about four years old, her father, whose wife had left him, entered into a written agreement with Noah Cameron and his wife, in these words:

"Know all men by these presents that I, Loomis J. Beach, party of the first part, and Noah Cameron and Angeline J. Cameron, of the second part, that the party of the first part do by these presents relinquish forever to the parties of the second all his rights and claim as father to his daughter Rose L. Beach (age 4 years, 8 months, and 22 days) for to have and claim as their own."

Thereafter the plaintiff lived with the Camerons, was known by their name, and was treated in every respect as their child. No court proceedings of any kind were had, nor did the probate judge give his approval; at least, no showing to that effect was made. One section of the statute relating to adoption, which has been in effect since 1868, reads as follows:

"Any parent may, with the approval of the probate judge of the county where such parent may reside, first obtained in open court, relinquish all right to his or her minor child or children to any other person or persons desirous of adopting the same, and shall not thereafter exercise any control whatever over such child or children so relinquished; and the person or persons so receiving into his, her, or their charge such child or children shall exercise all the rights over the same that they would be entitled to, were such child or children the legitimate offspring of said person or persons so receiving them." Gen. Stat. 1909, § 5064.

The succeeding section provides a procedure for a formal order of adoption by the probate court, at the instance of the adopting parent. This was amended in 1903, but not in any feature here material. The next section gives the rights of an heir to "minor children adopted as aforesaid." Whether a legal adoption can result from proceedings had only under the section quoted, or whether an order made under the section immediately following it is necessary to produce that effect, need not be determined. The consent of the probate judge was in any event necessary to an adoption under the statute, and as this was lacking the statutory procedure was not complied with. A right of inheritance, based upon an artificial relation, is derived wholly from the statute, and can only be created by a substantial compliance with the method there laid down. *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71. In this all courts agree. 1 C. J. 1373; 2 Enc. L. & P. 218; 1 R. C. L. 595, 596.

But while the plaintiff pleaded an actual adoption the argument made in her behalf amounts to a contention that the written agreement already quoted constituted a valid contract to adopt the child, supported by a sufficient consideration, and that in view of the subsequent conduct of the parties a right to inherit must be deemed to have resulted. By the great weight of authority, supported as we think by sound reason, such a contract is enforceable and may be made the basis of a valid claim against the estate of the obligor. 1 C. J. 1376; 2 Enc. L. & P. 245; 1 R. C. L. 617, 618. In *Horton v. Troll*, 188 Mo. App. 677, 167 S. W. 1081, a judgment was affirmed which declared an oral agreement to adopt a child, when acted upon by the parties, to be an executed deed of adoption, as required by the statute; but that action might have been regarded, as this may, as in effect one for the specific performance of the contract.

[2] 2. If, in the writing relied upon by the plaintiff, Noah Cameron had in so many words agreed that he would make her his heir, or that he would adopt her, the case would probably be brought within the rule stated. Possibly such an agreement may be implied from the recital that her father relinquished to the Camerons his rights to his daughter "for to have and claim as their own." This need not be decided, because of the view taken of the other question presented.

[3] 3. The deed in question, after the certificate of acknowledgment had been attached by the notary public, was left in the possession of the grantor. No direct evidence was given as to how it reached the hands of the register of deeds, but, as it was delivered to Huber L. Cameron after having been recorded, the fair inference is that it had been received from him. He was shown to have been living with his father during his

last illness. The mere unexplained fact that the deed was in the possession of one of the grantees creates a presumption that there had been a delivery (9 A. & E. Encycl. of L. 159; 4 Enc. of Evidence, 158; 8 R. O. L. 999), "which can be overthrown only by clear and convincing evidence" (Rohr v. Alexander, 57 Kan. 381, 46 Pac. 699; 4 Enc. of Evidence, 160). The circumstance that the possession is not affirmatively shown to have originated prior to the death of the grantor does not defeat the presumption, although of course it may weaken it. Blair et al., by Guardian, v. Howell et al., 68 Iowa, 619, 28 N. W. 199; McCarthy v. Colton, 134 Iowa, 658, 108 N. W. 217; Simmons v. Simmons, 78 Ala. 383.

[4] 4. To overcome the prima facie showing of delivery, these considerations are urged:

In a letter written to his son Allen on November 12, 1910, the grantor mentioned that the income of the property was about \$50 a month, and in one written a month later he said:

"The real estate is left to you and Huber jointly, and I think after I am gone you had better not dispose of it but keep it, as it will be a continual revenue. * * * I will have the rents, which will be more than I may need."

A witness testified that three weeks before his death he made inquiries concerning local charitable institutions to which he wished to leave some property, and stated that he had fixed his other property as he wanted it to go. The argument is made that a purpose on the part of the grantor to retain title in himself until his death, by keeping control of the deed, is shown particularly by the expression with reference to the rents, which indicated that he regarded himself as still the owner. To this it is answered that a reliance upon the income of the property during his life is not necessarily inconsistent with a present passing of the title. Ross v. Perkins, 93 Kan. 579, 583, 144 Pac. 1004. An expectation that his use of the rents would not be interfered with, even in the absence of any agreement or understanding on the subject, would not be strongly persuasive of an intention to have the deed take effect at his death, and therefore accomplish what the law requires to be done by will. In the letter written to his son Allen in November, he said, "I have made a deed of all my property in Lawrence to you and Huber jointly." In the December letter he said that he had placed \$1,700 of the proceeds of his personal property in the bank to Allen's credit, indicating a full relinquishment of title to this amount of ready money. He also mentioned having set aside \$100 for the plaintiff. Another witness, to whom he spoke concerning the leaving of something to charity, testified that he said that "he had already disposed of his other property"—an expression, however, which might apply as

well to disposal by will as by deed. A decision that the deed was not delivered would impute to Huber L. Cameron the act of wrongfully taking it from among his father's papers. Upon a consideration of the entire record, we conclude that the evidence tends to support rather than to overthrow the presumption of delivery. This conclusion requires an affirmance of the judgment of the trial court, a result which appears to be in accordance with the established rules of law, and which clearly conforms to natural justice; for while, on the one hand, it would seem harsh to hold that Noah Cameron's manifest purpose to adopt the plaintiff should be defeated by a failure to comply with the prescribed formalities, on the other an equally technical ruling would follow if the non-delivery of the deed had been proved, for then his plain intentions to exercise his undeniable right of vesting title to his real estate at his death in his sons would be frustrated merely because he chose a method of showing his desire which was perfectly intelligible, but not effective for want of the formality the law requires in the making of a will.

The judgment is affirmed. All the Justices concurring.

On Motion for Rehearing.

A rehearing is granted for the purpose of allowing argument upon this question: Assuming that the written agreement signed by Noah Cameron is to be interpreted as a contract on his part to adopt the plaintiff, and that such contract and what took place subsequently gave her a valid claim with respect to all the property owned by him at the time of his death, did the fact that Huber L. Cameron died intestate, leaving no widow, issue, or sister, and no brother excepting Allen N. Cameron, entitle her to recover the interest in the land which had been deeded to him by his father, and which he still owned at the time of his death?

PICKENS et al. v. CAMPBELL et al. (No. 20095.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS \S 509(4) —FINAL ACCOUNT—ACTIONS TO SET ASIDE.

The heirs of an intestate may maintain in the district court an action to set aside an order of the probate court approving an administrator's final account because it was procured by the use of a release obtained from them by intentionally false representations concerning facts which affected the value of the rights they thereby surrendered, and to have an accounting with respect to the administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2199-2206; Dec. Dig. \S 509(4).]

2. LIMITATION OF ACTIONS \Leftrightarrow 100(9)—RUNNING OF STATUTE—FRAUD.

Such an action is based on fraud, and the statute of limitations applicable is that relating to actions for relief on that ground, running from the time of discovery.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 488; Dec. Dig. \Leftrightarrow 100(9).]

3. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 509(5)—ACCOUNTING—CONSTRUCTIVE KNOWLEDGE.

Constructive knowledge of the falsity of a statement that real estate, the record title to which stood in an intestate at the time of his death, had not been sold by him is not as a matter of law to be implied on the theory that it could have been discovered through inquiry from the purchasers.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2215-2218; Dec. Dig. \Leftrightarrow 509(5).]

4. LIMITATION OF ACTIONS \Leftrightarrow 192(3)—RUNNING OF STATUTE—FRAUD—PETITION.

In this state in an action for relief on the ground of fraud, brought more than two years after its alleged perpetration, the petition to be good against a demurrer need not set out the manner of its discovery.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 701; Dec. Dig. \Leftrightarrow 192(3).]

Appeal from District Court, Shawnee County.

Action by Louisa Pickens and another against M. T. Campbell (revived in the name of Donald A. Campbell, administrator, with the will annexed, etc.) and others. From an order overruling a demurrer to the petition, defendants appeal. Affirmed.

J. B. Larimer and Hazen & Gaw, all of Topeka, for appellants. D. R. Hite, of Topeka, for appellees.

MASON, J. Ferdinand Fensky, a resident of California, died intestate and without issue, August 7, 1903. By the laws of that state his heirs were his wife who was entitled to half his property, five sisters, two brothers, and a nephew, who were each entitled to one-sixteenth of it. The widow was appointed administratrix by a California court. M. T. Campbell was appointed administrator in Kansas. He filed an inventory showing something over \$20,000 of personal property in his hands. He paid \$1,000 to each of the collateral heirs named, and received from them writings releasing all claims against the estate in favor of the widow. These releases were filed in the probate court, together with a receipt from the widow for the remaining assets shown by the inventory, and in June, 1905, an order was made closing the estate. On May 15, 1914, two of the intestate's sisters brought an action against the administrator and his bondsmen to have the settlement set aside for fraud, and for an accounting of the assets with which he was chargeable. The administrator has since died, and his representative has been substituted. A demurrer to the pe-

tition was overruled, and the defendants appeal.

In addition to the facts already stated the petition makes these allegations: Fensky had at one time owned various tracts of real estate in Kansas, including what is known as Fensky's Addition to Topeka, the record title to which stood in his name at his death, but which in fact he had sold, taking notes and contracts for the deferred payments, and holding executed deeds for delivery upon their payment. These notes, contracts, and deeds, after the death of Fensky, were sent by the widow to the Kansas administrator, who inventoried none of them, but accounted for them to her. He induced the collateral heirs to execute the releases referred to by falsely representing to them that the Kansas real estate had not been sold and that the entire personal estate left by Fensky amounted to about \$20,000. Other notes than those inventoried came into the hands of Campbell as a part of the estate and were by him collected, the proceeds being paid to the widow. The plaintiffs never knew of the existence of the contracts of sale or the uninventoried notes until after July, 1912.

[1] 1. The defendants maintain that the order of settlement has the force of a judgment and is not open to attack by the method here pursued. The allegation, however, is that the settlement was procured without an actual accounting as to the claims of these plaintiffs, by the use of a release of all demands against the estate (including that in California as well as that in Kansas) which had been obtained by intentionally false statements concerning facts which affected its value, particularly by the representation that the Kansas real estate had not been sold by Fensky, in which case the entire title would of course have vested in his widow upon his death. A fraud so accomplished we regard as extrinsic to the issue determined by the probate court, and, therefore capable of forming a basis for setting aside its order. See *Plaster Co. v. Blue Rapids Township*, 81 Kan. 730, 106 Pac. 1079, 25 L. R. A. (N. S.) 1237; note, 106 Am. St. Rep. 640-642, 645-647. In the United States District Court for the Southern District of California, these plaintiffs brought an action for an accounting founded on the same facts against the successors in interest of Fensky's widow, who had died in the meantime. A motion to dismiss it was sustained. A copy of a memorandum opinion, which appears not to have been published, shows that the court concluded that the fraud complained of was not of such a character as to warrant setting aside the probate court orders, because it was intrinsic with respect to the matter determined, inasmuch as the probate court presumably passed on all the things it would have had to consider if the releases had not been executed, including the extent and value of

the estate, excepting that it was not required to decide the exact proportion to which the plaintiffs were entitled. The allegations in the two cases may not have been precisely the same. Here it would appear that the use of the releases, together with the receipt of the widow and domiciliary administratrix, made it unnecessary to make any decision concerning the disposal of the assets with which the ancillary administrator was chargeable. Various Kansas cases support the view that the order of the probate court is open to attack on the ground of the kind of fraud alleged, and that an equitable action in the district court is an appropriate proceeding for the purpose. *Klemp v. Winter*, 23 Kan. 699; *Gafford, Guardian, v. Dickinson, Adm'r*, 37 Kan. 287, 15 Pac. 175; *Carter v. Christie*, 57 Kan. 492, 46 Pac. 964. The joinder of the bondsmen as defendants is proper. *Fincke v. Bundrick*, 72 Kan. 182, 83 Pac. 403. The defendants urge that this is a collateral attack on the judgment, because other relief is sought than its vacation, and quote in support of the contention this and similar texts:

"If the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, the attack upon the judgment is collateral." 23 Cyc. 1063.

The meaning obviously is that, in order for an action to constitute a direct attack on a judgment, its vacation must be sought as an end in and of itself and not as a mere incident to something else. The circumstance that additional relief is asked cannot affect the matter.

The statute seems to contemplate that the net proceeds of the property of a nonresident intestate administered in this state shall in accordance with the usual practice be paid over to the foreign administrator. Gen. Stat. 1909, § 3610. But while the heirs may have had no absolute right to a distribution at the hands of any one except the domiciliary administratrix, the funds in the hands of the ancillary administrator were subject to the control of the court and might in some circumstances have been ordered paid directly to the final beneficiaries. 13 A. & E. Encycl. of L. 938, 940; 18 Cyc. 1235; 11 R. C. L. 441. A direction to turn over all the assets to the widow, although she was also the domiciliary administratrix, if procured by the use of a release obtained by fraud, cannot be a bar to a further inquiry as to their proper disposition. The petition states grounds sufficient to justify setting aside the order of final settlement by virtue of its allegations of intentional fraud. 23 Cyc. 1022. Ordinarily the right to the purchase price of land, contracted to be sold but not conveyed at the time of the vendor's death, passes to his personal representative and not to his heirs. *Gilmore v. Gilmore*, 60 Kan. 606, 57 Pac. 505; 18 Cyc. 187; 11 R. C. L. 124; note, 57 L. R. A. 646. The petition

contains nothing to suggest a different rule here, but, if the evidence should show that the administrator believed that the notes therein referred to followed the rule of real estate and became the property of the widow, no statements made by him in good faith by reason of that belief, however incorrect from a legal point of view, would warrant a reopening of the administration. The extent of recovery if the allegations of the petition should be proved is not involved in this proceeding.

[2] 2. The defendants assert that the action (as to the sureties at least) is one on the bond of the administrator and has been barred by the 5-year statute of limitation. Civ. Code, § 17, subd. 5 (Gen. St. 1909, § 5610). The plaintiffs contend that it is one for relief on the ground of fraud, properly brought within two years after the discovery. Civ. Code, § 17, subd. 3. To bring it within the latter classification the fraud must be the basis of the action. 25 Cyc. 1178, 1182. The mere fraudulent concealment of facts giving rise to a right of action for damages for the violation of a contract has been held by this court not to suspend the statute. *Railway Co. v. Grain Co.*, 68 Kan. 585, 75 Pac. 1031. Elsewhere there is a difference of judicial opinion as to whether such conduct will postpone the running of the statute against an action at law (25 Cyc. 1214), while there is a general agreement that such is the effect with reference to a suit in equity. 19 A. & E. Encycl. of L. 243; 25 Cyc. 1214. In this state the statute of limitations applies equally to legal and equitable cases. *Chick et al. v. Willets*, 2 Kan. 384. In the present action, however, the requirement that the fraud practiced must be the foundation of the action is fully met. The relief asked is essentially the setting aside of the releases because they were procured by fraud, the vacation of the settlement which was based upon them, and the restoration of the rights thereby denied. If the running of the statute was suspended as to the administrator it was suspended as to the bondsmen as well. 25 Cyc. 1186.

[3] 3. The argument is also advanced that the facts pleaded show that by the exercise of reasonable diligence the plaintiffs could have learned of the matters alleged to have been concealed, and therefore must be deemed to have had constructive knowledge of them. The plaintiffs allege in general terms that they had no means of knowing the facts, and we do not think any of the details stated are in necessary conflict with that allegation. It is suggested that inquiry of the purchasers of lots in the Topeka addition would have disclosed that they had bought them from Fensky and were indebted to him for the purchase price at the time of his death; but, in the absence of anything to excite suspicion on the subject, it cannot be said as a matter of law that the plaintiffs were under

an obligation to make such an investigation. In the federal case referred to, the court reached a different conclusion in this regard, which obviously resulted from a less liberal interpretation of the allegations of a pleading than the practice in this state requires where the attack is by demurrer.

[4] 4. The contention is made that the petition is demurrable because it merely alleges that the plaintiffs did not know of the facts pleaded until July, 1912, and does not state how the discovery came about. The general rule appears to be that such a statement is required. 25 Cyc. 1418; *Hardt v. Heldweyer*, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548. But the contrary practice obtains in some of the states, including Kansas. *K. P. Rly. Co. v. McCormick*, 20 Kan. 107; 25 Cyc. 1419.

The order overruling the demurrer is affirmed. All the Justices concurring.

PUBLIC SERVICE COMMISSION OF MONTANA v. CITY OF HELENA et al.
(No. 3830.)

(Supreme Court of Montana. July 17, 1916.)

1. MUNICIPAL CORPORATIONS §271—PUBLIC UTILITIES—OWNERSHIP—CHARACTER OF ACTS.

The power exercised by the city under Rev. Codes, § 3259, subd. 64, to issue bonds and provide, own, and control a water system, is proprietary in character as distinguished from the governmental capacity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 726; Dec. Dig. § 271.]

2. MUNICIPAL CORPORATIONS §70—PUBLIC WATER SUPPLY—CONTROL BY THE STATE.

Where the city acquires a water supply system without resort to indebtedness or taxation beyond 8 per cent. of the taxable property of the city, it stands on an equal footing with individuals, and is subject to all reasonable regulation and control by the state under the police power.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 170-174; Dec. Dig. § 70.]

3. CONSTITUTIONAL LAW §26—CONSTRUCTION—GRANT OR LIMITATION OF POWER.

Const. art. 13, § 6, limiting municipal indebtedness to 8 per cent. of the value of taxable property, but providing that the Legislature may authorize an increase when necessary to procure a supply of water for the municipality which shall own and control said water and devote the revenues derived therefrom to the payment of the debt, must be construed as to the provision of ownership as a limitation of power rather than a grant; the purpose of the Constitution being to declare the limitations on popular power.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 30; Dec. Dig. § 26.]

4. CONSTITUTIONAL LAW §81—POLICE POWER—POWERS OF LEGISLATURE.

Though no specific provision of the Constitution forbids it, the Legislature is without authority to surrender altogether the police power.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. § 81.]

5. MUNICIPAL CORPORATIONS §64—POLICE POWER—POWERS OF LEGISLATURE.

However positive the terms of the grant of police power to the municipality, the state will be held to have retained its original jurisdiction over the same subject, and to possess the authority to exercise it concurrently with the municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 156, 167; Dec. Dig. § 64.]

6. WATERS AND WATER COURSES §182—PUBLIC WATER SUPPLY—POWERS OF MUNICIPALITY—STATE CONTROL.

The provision of Const. art. 13, § 6, empowering the Legislature to authorize an extended indebtedness of municipalities for public water supply, providing that the city shall own and control the works, does not exempt the city from control and regulation under Laws 1913, c. 52, creating and defining the powers of the Public Service Commission.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 267; Dec. Dig. § 182.]

7. PUBLIC SERVICE COMMISSION §2—STATUTES—VALIDITY—"SPECIAL COMMISSION."

Laws 1913, c. 52, creating and defining the powers of the Public Service Commission, does not infringe Const. art. 5, § 36, prohibiting delegation of powers to special commissions; the Public Service Commission not being a "special commission" within its terms.

[Ed. Note.—For other cases, see *Public Service Commission*, Dec. Dig. § 2.]

For other definitions, see *Words and Phrases*, First and Second Series, *Special Commission*.]

8. WATERS AND WATER COURSES §182—PUBLIC WATER SUPPLY—DELEGATION OF POWERS—STATUTES—VALIDITY—"TAX."

Laws 1913, c. 52, creating and defining the powers of the Public Service Commission over municipal water supplies, does not infringe Const. art. 12, § 4, prohibiting the Legislature from levying taxes for municipal purposes, no tax being actually levied by the commission and the regulation of water rentals not being a levy of taxes, since a water rental is not a tax.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 267; Dec. Dig. § 182.]

For other definitions, see *Words and Phrases*, First and Second Series, *Tax*.]

9. PUBLIC SERVICE COMMISSIONS §8—ORDERS—VALIDITY—REASONABLENESS.

Any regulation made by the Public Service Commission under Laws 1913, c. 52, defining its duties, must be reasonable.

[Ed. Note.—For other cases, see *Public Service Commissions*, Dec. Dig. § 8.]

10. MUNICIPAL CORPORATIONS §986—PUBLIC WATER SUPPLY—INDEBTEDNESS—"REVENUES."

Under Const. art. 13, § 6, authorizing the Legislature to empower municipalities to provide waterworks, providing they be owned and controlled by a city, the revenues therefrom to be devoted to discharge the indebtedness, "revenues" means the gross receipts less necessary operating expenses, against which expenses of regulation, if it is reasonable, are properly chargeable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2014; Dec. Dig. § 986.]

For other definitions, see *Words and Phrases*, First and Second Series, *Revenue*.]

11. CONSTITUTIONAL LAW ~~§~~48—MUNICIPAL CORPORATIONS ~~§~~64—STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY.

Rather than declare a solemn enactment of the Legislature invalid, the court will construe its provisions in harmony with the Constitution if possible to do so, and statutes relating to municipalities will be construed in harmony with municipal self-government and retention of police power by the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ~~§~~48; Statutes, Cent. Dig. § 56; Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. ~~§~~64.]

12. MUNICIPAL CORPORATIONS ~~§~~70—PUBLIC WATER SUPPLY—POWERS OF MUNICIPALITY.

Laws 1913, c. 52, as to powers of the Public Service Commission, does not destroy the municipal power of regulation and control, but merely subjects it to the control of the commission.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 170-174; Dec. Dig. ~~§~~70.]

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

Proceedings by the Public Service Commission of Montana against the City of Helena and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

J. B. Polindexter and J. H. Alvord, both of Helena, for appellant. Edward Horsky, of Helena, for respondents.

HOLLOWAY, J. By chapter 52, Laws of 1913, a public service commission for this state was created and its powers and duties defined. The city of Helena declined to submit to the supervision of the commission over its water system, and this controversy found its way into court where it was decided in favor of the city and its executive officers. The commission has appealed.

[1, 2] 1. Section 6, article 13, of our state Constitution, limits the indebtedness which a city may contract to 3 per cent. of the value of the taxable property therein, but provides that the Legislature may authorize an increase over that limit "when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." By subdivision 64, § 3259, Revised Codes, the Legislature made available this extraordinary privilege, and the city of Helena, already indebted to the full extent of the 3 per cent. limit, issued its bonds to the amount of \$400,000, and from the proceeds purchased its present water system. In the ownership and control of that water system, the city acts in its proprietary character, as distinguished from its governmental capacity. *Helena Con. W. Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412. If the city had acquired this water plant without resort to the extended limit of in-

debtedness, there is not any question that it would then have stood upon an equal footing with an individual or private corporation engaged in furnishing water to a municipality and its inhabitants (*Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276), and would have been subject to all reasonable regulation and control by the state, acting in virtue of its police power. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Spring Valley W. W. v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173.

[3] But the city contends that, having acquired its water supply by extending its indebtedness beyond the 3 per cent. limit as authorized by the Constitution and statutes, it occupies a more favorable position than the prudent and provident city which purchases its water plant and keeps within the 3 per cent. limit, in that it is enjoined by the language of the concluding sentence of section 6, article 13, above, to own and control such water supply; and, since this language of the Constitution is mandatory and prohibitory, it must be held to mean exclusive ownership and exclusive control, and therefore the city could not, if it would, admit of any interference with its water supply by any one else; and, if chapter 52 assumes to clothe the public service commission with authority to supervise or control the management of such water supply thus acquired, it runs counter to the provision of the Constitution above, and must be held to be invalid.

A determination of the proper construction to be given to the language of section 6, article 13, quoted above, will lead to the solution of this controversy. It must be conceded that there is some distinction made in the Constitution between the city-owned water supply purchased by extending the municipal indebtedness beyond the 3 per cent. limit, and the city-owned water supply acquired without exceeding that normal limit. The Constitution concerns itself with the first as it does not with the second. The city able to procure a water plant and keep within the 3 per cent. limit is free to proceed without danger of collision with any provision of the Constitution. It is only when a city already burdened with an indebtedness equal to 3 per cent. of the value of the taxable property therein seeks the privilege of increasing that burden that the Constitution interposes with the declaration that such additional indebtedness may be authorized by the Legislature, and a favorable vote of the taxpayers affected, "when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." Does this reference to ownership, control, and application of revenue constitute a special grant of power to the

city, or is it a limitation upon the authority of the city so unfortunately situated? Was it the purpose of the framers of the Constitution thus to specially favor such city, or was it the purpose to authorize the extension of indebtedness above the normal limit only on condition that ample provision be made for the discharge of such extraordinary burden; in other words, is the reference to ownership, control, and application of revenue to be understood as expressing constitutional restrictions imposed as a condition to the exercise of the privilege implied in the provision for extended indebtedness?

Other things equal, a court should not hesitate to pronounce this concluding sentence of section 6, article 13, a limitation of power rather than a grant; for our state Constitution was intended to express the limitations which the people set upon the various agencies of government—even upon themselves. All political power is vested in and derived from the people, and therefore we should not expect to find in the Constitution any grant of power from the people to themselves, either directly or through any governmental agency. Though some provisions assume the form of grants, in reality they but delimit the power or authority to which they refer. Every reference in the Constitution to public indebtedness is coupled with a limitation upon the power to incur indebtedness. The elaborate provisions for the security of the people of the state, and of every political subdivision, against their own possible improvidence constitute one of the distinguishing features of our fundamental law. Since it is the rule that the Constitution limits, rather than grants, power, any provision open to construction should be held to be within that general rule, unless a contrary conclusion is forced by the circumstances of the particular case.

[4] Another consideration leads to the same end. In the people of this state is lodged its police power, one of the highest attributes of sovereignty. The exercise of this power is deemed essential to the good order and general welfare of organized society, and so jealous are the people in their retention of the power that, though no specific provision of the Constitution forbids it, the Legislature is without the authority to surrender it altogether. *Helena L. & R. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446; *Northern Pac. Ry. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630. We do not say that the people of the state cannot by constitutional provision divest themselves of the right to exercise the power with respect to any particular subject, but we do say that for them to do so would be contrary to the policy pursued in every civilized nation. While the state may employ agencies through which to exercise the power, its absolute abdication to any such agency—the clothing of the agency with the exercise of the power to the exclusion of the

state itself—is all but unheard of in our jurisprudence.

[5] However positive the terms of the grant of police power to the municipality, for instance, the state will be held to have retained its original jurisdiction over the same subject and to possess the authority to exercise it concurrently with the municipality. *Selbold v. People*, 88 Ill. 38; *Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432. Speaking upon one phase of this subject, the Supreme Court of the United States said:

"This power of regulation is a power of government, continuing in its nature, and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the * * * power. In the words of Chief Justice Marshall in *Providence v. Billings*, 4 Pet. 514, at page 561 [7 L. Ed. 939]: 'Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous." *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636.

[6] If the language of the concluding sentence of section 6, article 13, above, should be held to secure to the city of Helena the control of its water system to the exclusion of every one else, the state included, it follows as of course that the state has surrendered to the city all police power with reference to such system, and that, if it should transpire that the water supply became contaminated, spreading contagious disease generally, the state would be helpless and could not interfere. We decline to adopt such a construction, since, as we view it, the language of the constitutional provision does not lead to that conclusion.

When we consider that the privilege of extended indebtedness is open only to the city whose business management has resulted in a burden of debts, it would seem fair to presume that, instead of admitting such city to the extraordinary freedom of action for which respondents contend, it was the intention of the framers of section 6, above, to hedge about such city with restrictions conducive to the security of the additional indebtedness and its ultimate discharge. It certainly cannot be said that the injunction of section 6, above, that the revenues derived from such water system shall be devoted to the payment of the extended indebtedness, secures to the city any special privilege. On the contrary, that language is not susceptible of any meaning other than that the city is prohibited from dissipating the funds derived from the operation of its water system or using them for general municipal purposes, and is commanded to devote them to the single purpose indicated. It is strictly a limitation imposed in the interest of the city and the holders of its securities. But this injunction is employed in the same connection as the direc-

tion to the city to own and control such water system, and in our opinion this reference to ownership and control is likewise but an inhibition upon the city in the interest of its credit, and not a limitation upon the power of the Legislature to direct the exercise of the state's police power. It is not necessary to determine whether a city operating without the disability imposed by this extended indebtedness could sell its water plant or let its operation to an individual or private corporation; but, in its own interest and the interest of its bondholders, the city laboring under such disability is forbidden to part with title to its water plant and thus possibly lessen the security behind the bonds, and is likewise prohibited from parting with control and thus sharing the profits of operation with any one, so long as the disability remains. The entire plant is set apart for and devoted to the ultimate discharge of the extraordinary indebtedness.

To follow the argument advanced in behalf of respondents to its logical conclusion: The city of Helena is in the specially favored class only because it was compelled to resort to the extended indebtedness to procure its water supply. As respects that water supply, it will always remain in that class. There is no provision for removing it, even though it discharges its extraordinary indebtedness and reduces its original obligations well below the 3 per cent. limit, and is otherwise in the same situation as the city that owns its water plant but never exceeded the normal limit. What is to become of the revenue from the plant after the city discharges the indebtedness, if the strict construction of the concluding sentence of section 6 is to be applied as counsel for respondents contend? Our construction of that language seems to us reasonable. It is in harmony with the general character of the Constitution as a whole, and it avoids the all but absurd assumption that the state intended to surrender its police power under circumstances where the necessity for its retention would be augmented rather than lessened.

[7] 2. Chapter 52 above does not infringe the provisions of section 36, article 5, of the Constitution. The Public Service Commission is not a special commission, within the meaning of those terms as employed in section 36 above. In many of the states of this country, the theory of local self-government for municipalities does not prevail, but on the contrary the power of the Legislature to appoint or control municipal officers is asserted. 28 Cyc. 295. For instance, by an act approved March 12, 1861, the Legislature of Minnesota provided for an extension of Fort street, St. Paul, and in section 2 of the act named Nathaniel McLean, J. W. Selby, and Parker Paine commissioners to carry out the requirements of the act. Laws of Minnesota, 1861, p. 256; Daley v. City of St. Paul, 7 Minn. 390 (Gil. 311). By an act approved No-

vember 25, 1885, the Legislature of Oregon amended the act incorporating Portland. By section 142 of the amended act, the city was authorized to procure a water supply for itself and its inhabitants. By section 143, John Gates, F. C. Smith, C. H. Lewis, Henry Failing, W. S. Ladd, Frank Dekum, L. Fleischner, H. W. Corbett, W. K. Smith, J. Lowenberg, S. G. Reed, R. B. Knapp, L. Therkelson, Thomas M. Richardson, and A. H. Johnson were named as a "water committee" with power to purchase or construct the water plant and to that end to issue bonds of the city, etc. Laws of Oregon (Special Session) 1885, p. 97; David v. City of Portland, 14 Or. 98, 12 Pac. 174. Many other examples might be cited, but these suffice to indicate the character of legislation against which the provision in section 36, article 5, above, was directed. People v. Hoge, 55 Cal. 612; In re Pfahler, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911.

[8, 9] 3. Neither does this act conflict with section 4, article 12. It does not levy any tax upon the city of Helena or its inhabitants. Even the regulation of water rentals would not amount to a levy of taxes, for a water rental is not a tax. Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519. Whether a particular regulation of the Public Service Commission may have the effect of imposing a compulsory obligation on the city is another question. Any regulation which the commission makes must be reasonable in order to be valid, and any regulation which imposes upon the city any obligation which is invalid is not reasonable. Whether the regulation sought to be imposed upon the city of Helena, with reference to the character of the accounts to be kept with respect to its water system, is reasonable depends upon considerations not presented by this record. Assuming it to be reasonable, it does not follow that it will impose upon the city of Helena any obligation whatever.

[10] The "revenues" from the water plant referred to in section 6, article 13, above, which are to be held inviolate—dedicated to the discharge of the extraordinary indebtedness—are the net revenues or the gross receipts less necessary operating expenses, and, if this regulation of the commission is a reasonable one, the extra expense incurred in carrying it into effect is a proper and necessary charge against the gross revenues derived from the water system, and not an obligation imposed upon the city at all.

[11] Rather than declare a solemn enactment of the Legislature invalid, we will construe its provisions in harmony with the Constitution if possible to do so. The principle of local self-government as declared by this court in Helena Con. W. Co. v. Steele, above, and in later cases, does not exclude the state from the exercise of police powers within a city of this state. The language of chapter 52 above, conferring authority upon the Pub-

the Service Commission, is to be construed in harmony with the theory of self-government in the city and the retention of police power by the state.

[12] At first blush, the concluding sentence of section 3 of chapter 52, to wit, "And the Public Service Commission is hereby invested with full power of supervision, regulation, and control of such utilities, subject to the provisions of this act and to the exclusion of the jurisdiction, regulation, and control of such utilities by any municipality, town, or village," might seem to contemplate the complete substitution of the Public Service Commission for the city in the management and control of its water system; but a consideration of the entire act leads us to the conclusion that it was the intention of the Legislature to go no further than to provide that, within the limited sphere of its jurisdiction, the Public Service Commission may make reasonable regulations which the city must heed, and to that extent only is the authority of the city superseded, but that it was ever intended to take from the city the active management of its water plant or the authority to appoint the proper officers and employes to operate it, or to interfere with such officers in the proper discharge of their duties, we cannot admit.

From necessity we are compelled to pass upon the general character of the legislation found in chapter 52 above, rather than upon the particular provisions of the act. Whether the Legislature exceeded its authority in attempting to confer upon the Public Service Commission any other particular power can only be determined when the exercise of that power is called in question directly. So far as the objections now urged against it are concerned, chapter 52 appears to be a valid legislative enactment.

The judgment is reversed and the cause is remanded for further proceedings not in conflict with the views herein expressed.

BRANTLY, C. J., and SANNER, J., concur.

STOKES v. LONG. (Nos. 3862, 3882.)

(Supreme Court of Montana. July 3, 1916.)

1. APPEAL AND ERROR §612(4)—RECORD—JUDGMENT ROLL.

On appeal from order denying new trial made on the minutes of the court, the record need not contain a copy of the judgment roll authenticated as such, if it contains certified copies of all the papers which go to make it up, under Rev. Codes, § 6799, providing that the record on appeal from order granting or refusing new trial on the minutes shall contain the judgment roll, or such parts thereof as may be necessary to the consideration of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2698; Dec. Dig. §612(4).]

2. PHYSICIANS AND SURGEONS §18(4)—MALPRACTICE—COMPLAINT.

A complaint that defendant physician, employed to treat plaintiff's broken leg, "failed to exercise ordinary care and skill" and so carelessly and negligently treated the fracture as to displace the bones, causing shortening of the leg and pain and suffering and damages, and alleging in traversable form the acts or omissions of defendant on which recovery is sought, showing they occurred through defendant's negligence, is sufficient, under Rev. Codes, § 6532, requiring complaint to contain "statement of the facts constituting the cause of action, in ordinary and concise language."

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 37; Dec. Dig. §18(4).]

3. TRIAL §419—REVIEW—REFUSAL TO NON-SUIT.

Where defendant introduces evidence after his motion for nonsuit is denied, on appeal the court considers only the question whether the evidence as a whole made a case for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. §419.]

4. PHYSICIANS AND SURGEONS §18(9) —MALPRACTICE—QUESTIONS FOR JURY.

In malpractice action for treatment of broken leg, evidence of the injury, employment of defendant, treatment of leg by attaching an insufficient weight thereto and inclosing it in plaster cast and shortening of the leg two inches, held to make case for submission to the jury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 44; Dec. Dig. §18(9).]

5. PHYSICIANS AND SURGEONS §16—LIABILITY FOR ACTS OF RECOMMENDED PHYSICIANS.

If one physician, upon leaving his home temporarily recommends to his patients the employment, in case of need, of some other physician who is not in any sense in his employment nor associated with him as a copartner, he is not liable for injuries resulting from negligence or want of skill of the latter, in case he is employed.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. §16.]

6. PHYSICIANS AND SURGEONS §16—LIABILITY FOR NEGLIGENCE OF ASSOCIATED PHYSICIAN.

Where two physicians are employed on the same case and by agreement divide the service between them, and one observes and lets go on without objection wrongful acts and omissions by the other or if the circumstances are such that he ought to have observed such wrongful acts or omissions, he is liable.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. §16.]

7. PHYSICIANS AND SURGEONS §14(1)—LIABILITY FOR NEGLIGENCE—ASSOCIATED PHYSICIAN.

In such case, each is bound to bring to the case the ordinary knowledge and skill of the profession, and also to give his best personal attention and care.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21, 24, 25, 28-30; Dec. Dig. §14(1).]

8. PHYSICIANS AND SURGEONS §16—LIABILITY FOR NEGLIGENCE OF ASSOCIATED PHYSICIAN.

Where a physician calls in another to assist him in treating a broken leg and gives the latter exclusive charge of the case only after he leaves temporarily, and before leaving visits

the patient for several days as if in charge of the case, and requests the patient to retain his half of the fee until his return, and the treatment of the leg is vicious from the start, the first physician is liable.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 81; Dec. Dig. ¶ 16.]

9. PHYSICIANS AND SURGEONS ¶18(7)—MALPRACTICE—EVIDENCE.

In malpractice action for treatment of broken leg, evidence of the cost of an operation that would minimize the suffering due to plaintiff's condition at time of trial was admissible.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 40, 41; Dec. Dig. ¶18(7).]

10. DAMAGES ¶62(2)—DUTY TO REDUCE.

A person bodily injured through another's fault is not necessarily bound to submit to a major surgical operation which may or may not result in a betterment of his condition.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 120-123; Dec. Dig. ¶62(2).]

11. DAMAGES ¶208(7)—QUESTION FOR JURY—REDUCTION OF DAMAGES.

It is always a question for the jury on the evidence in any case whether the plaintiff has used ordinary care and diligence to minimize the injurious consequences of his injury through another's fault.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 182, 533, 534; Dec. Dig. ¶208(7).]

12. PHYSICIANS AND SURGEONS ¶18(7)—MALPRACTICE—EVIDENCE—CONTINUATION OF TREATMENT.

Evidence of treatment by associated physician for several weeks after defendant had left town was competent to inform the jury that the course of treatment approved by defendant was continued without change, in order to rebut the notion that any efficient cause intervened by reason of anything such associated physician did upon his own initiative to bring about the condition in which plaintiff found himself at the conclusion of treatment.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 40, 41; Dec. Dig. ¶18(7).]

13. APPEAL AND ERROR ¶1053(5)—HARMLESS ERROR—EVIDENCE—MALPRACTICE.

Admission of such evidence, if error, was not prejudicial, where the jury were instructed to find for plaintiff only if his injury was suffered from defendant's acts or omissions before he left.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180, 4182; Dec. Dig. ¶1053(5); Trial, Cent. Dig. § 977.]

14. APPEAL AND ERROR ¶1033(5)—HARMLESS ERROR—ERRONEOUS INSTRUCTION FAVORABLE TO APPELLANT.

Appellant cannot complain of an instruction, whether correct or not, which was as favorable to him as he could ask.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. ¶1033(5); Trial, Cent. Dig. § 587.]

15. EVIDENCE ¶359(1)—DOCUMENTARY EVIDENCE—PHOTOGRAPHS.

A photograph is competent evidence to prove a condition which can be shown by a representation of that sort, for when shown by a competent witness to be correct, it furnishes evidence of a high order of accuracy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1509; Dec. Dig. ¶359(1).]

16. EVIDENCE ¶359(4)—DOCUMENTARY EVIDENCE—AUTHENTICATION—X-RAY PHOTOGRAPHS.

In malpractice action for treatment of broken leg, X-ray plates of condition of plaintiff's leg at time of trial were competent, they being taken by practicing physicians, who showed that they understood and were accustomed to the use of X-ray process in their practice, and possessed the required skill and knowledge to use it with accurate results.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1509; Dec. Dig. ¶359(4).]

17. TRIAL ¶280(1)—REQUESTS—COVERED BY OTHER INSTRUCTIONS.

Where offered instructions, so far as embodying correct statements of applicable law, are substantially covered by instructions submitted, their refusal is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ¶280(1).]

18. APPEAL AND ERROR ¶302(1)—EXCEPTIONS NOT TAKEN BELOW.

By direct provision of Rev. Codes, § 6746, on appeal from order denying new trial, the Supreme Court cannot consider any error in instructions not specifically pointed out at the time of settlement, as the trial court is precluded from granting a new trial for error not so pointed out to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1746; Dec. Dig. ¶302(1).]

Brantly, O. J., dissenting in part.

Appeal from District Court, Fergus County; Ray E. Ayers, Judge.

Action by Frank H. Stokes against W. A. Long. From a judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

Burton R. Cole, of Lewistown, and Norris & Hurd, of Great Falls, for appellant. John A. Coleman, of Lewistown, and O. W. McConnell, of Helena, for respondent.

BRANTLY, O. J. In this action plaintiff recovered a judgment against defendant, a physician and surgeon, for alleged malpractice in the reduction and treatment of a broken leg. The defendant has appealed from the judgment and an order denying his motion for a new trial. The appeals were taken separately, and appear upon the records of this court under different numbers, but they were argued and submitted, and will be determined as if taken at the same time.

[1] The motion for a new trial was made upon the minutes of the court. After the defendant had filed his brief in this court, counsel for plaintiff filed a motion, asking this court to strike from the files the record on appeal from the order denying the motion for a new trial, and to dismiss the appeal, alleging that the district court was without jurisdiction to settle the statement on appeal because it, together with amendments proposed by counsel for the plaintiff, had not been presented to the trial court within the time and in the manner prescribed by the provision of the statute. The motion included also a demand for a dismissal of the ap-

peal on the ground that the record does not contain a copy of the judgment roll. The motion was denied, with leave to counsel to renew it at the hearing, which they did. The record discloses that during the proceedings leading up to the settlement of the statement, irregularities intervened. We shall not take the time to discuss them in detail. It is sufficient to say that counsel for the plaintiff, by pursuing the course they did, waived these irregularities, and cannot now insist that the court was in error in disregarding them. The record on the appeal from the order denying the new trial does not contain a copy of the judgment roll authenticated as such. It does contain, however, certified copies of all the papers which go to make it up. This sufficiently meets all requirements. Rev. Codes, § 6799; *Doornbos v. Thomas*, 50 Mont. 370, 147 Pac. 277. The motion to dismiss is therefore denied.

[2] On the merits it is argued with much earnestness that the complaint does not state a cause of action, and hence does not support the judgment. It alleges that defendant was a physician and surgeon; that on November 25, 1913, plaintiff had the thigh bone of his left leg broken, and that he employed the defendant, in his professional capacity as such physician and surgeon, to reduce the fractured bone to its proper position and place and to attend to and cure the same. It is then alleged:

"That the defendant accepted and entered upon such employment on the said 25th day of November, 1913, but wholly failed to exercise ordinary care and skill in the performance of his duty, and wholly failed to use reasonable care and diligence in the exercise of his skill as such physician and surgeon, and did then and there treat the fracture of said leg in a grossly careless, negligent, unskillful, and improper manner, so that the bones of said leg were displaced and out of their natural state, position, and condition, thereby causing the plaintiff's leg to be shortened several inches, causing great bodily and mental pain and suffering, which said pain and suffering still continues, whereby the plaintiff has been, and is now, greatly and permanently injured, to his damage in the sum of \$25,000."

The following paragraphs contain allegations charging that because of said negligent conduct of defendant, plaintiff's earning capacity has been entirely destroyed for a long time to come, to his damage in the sum of \$5,000, and that he has suffered damage further in the sum of \$1,500, which he will be compelled to pay for an operation and treatment by competent physicians and surgeons, in order to have the condition of his leg ameliorated and to gain relief from the pain now suffered by him.

It is said that the allegations found in the paragraph quoted are mere bald conclusions of law, and hence that the pleading does not meet the requirements of section 6532 of the Revised Codes, in that it does not contain "a statement of the facts constituting the cause of action in ordinary and concise language." In other words, it does not aver the specific

act or omission of defendant upon which plaintiff bases his right to recover. The pleading is not a model, but we think it states facts sufficient to save it from condemnation. The paragraph made the subject of defendant's attack does not state very fully or specifically the facts constituting the omission of duty by defendant. It does state, however, that defendant so treated plaintiff's injury "that the bones of said leg were displaced, * * * thereby causing plaintiff's leg to be shortened several inches." This, with the qualifying terms employed, we think sufficiently informed defendant upon what plaintiff would rely for a recovery. It means, if anything, that defendant's treatment was such that the fragments of the bone of plaintiff's leg were not retained in apposition, with the result that the leg became shortened, whereas the acceptance of the employment imposed upon defendant the duty to exercise reasonable care and skill to prevent such a result, which the defendant failed to do. It does not matter that the qualifying terms imputing negligence precede or follow the omission of duty charged, or that they are employed at all, if the direct averments of the complaint necessarily raise the presumption of negligence. It is sufficient to meet all requirements if the pleader sets out in traversable form the acts or omissions of the defendant upon which he seeks recovery, and shows that they occurred through the negligence of the defendant. This, we think, the complaint here does. 6 *Thompson on Negligence*, § 7447; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *Geneva v. Burnett*, 65 Neb. 464, 91 N. W. 275, 58 L. R. A. 287, 101 Am. St. Rep. 628; *Consumers' El. L. etc., Co. v. Pryor*, 44 Fla. 354, 32 South. 797; *Hanselman v. Carstens*, 60 Mich. 187, 27 N. W. 18. This statement is in full harmony with the rule announced by this court in *County of Silver Bow v. Davies*, 40 Mont. 418, 107 Pac. 81; *Gauss v. Trump*, 48 Mont. 92, 135 Pac. 910; *Willoburn Branch Co. v. Yegen*, 49 Mont. 101, 140 Pac. 231, and other cases—that, as against an attack for lack of substance, whatever is necessarily implied or reasonably to be inferred from an allegation in a pleading is to be taken as directly averred.

[3] It is contended that there was no substantial evidence introduced by the plaintiff showing negligence by defendant or connecting him with the injury suffered by plaintiff, and hence the court should have sustained defendant's motion for nonsuit and for a directed verdict. Inasmuch as the defendant introduced evidence after the motion for nonsuit was denied, we shall consider only the question whether the evidence as a whole made a case which should have been submitted to the jury. *Van Vranken v. Granite County*, 35 Mont. 427, 90 Pac. 164; *Yergy v. Helena L. & Ry. Co.*, 39 Mont. 213, 102 Pac.

310, 18 Ann. Cas. 1201. The evidence is quite voluminous and cannot be recapitulated in extenso. Nor do we deem it necessary to discuss in detail the portions of it in which the various expert witnesses expressed their personal views as to the merits or demerits of the particular mode of treatment or mechanical appliances which ought to be pursued in such cases. After a careful study of it, we have concluded that it presents a case calling for the judgment of the jury.

[4] In the forenoon of November 25, 1918, the plaintiff was preparing to move a steam threshing machine. While backing the engine in order to couple it with the separator, he inadvertently permitted the former to back too far. In the resulting collision he was caught by the engine and suffered a transverse fracture of the upper third of the femur of his left leg. The skin and muscles of the leg on the inner side were also considerably lacerated. The plaintiff was put into a wagon and taken for treatment to Lewistown, about ten miles away, where defendant resided. Plaintiff's wife, at his direction, went forward to engage defendant's services. He had theretofore been employed by plaintiff. In case she could not find defendant, she was to employ Dr. Wallin. Finding the defendant in his office, she told him of the accident, and that plaintiff desired his services. He agreed to serve plaintiff. He instructed her to engage a room and nurse at a hospital. He also told her that he would need assistance, and suggested that he secure the services of Dr. Wallin. To this she agreed. When plaintiff arrived at the hospital, at about 4 o'clock in the afternoon, defendant and Dr. Wallin were both present. The two proceeded at once to reduce the fracture and to apply such devices as they deemed necessary and proper to secure immobility of the leg and to maintain the parts of the bone in apposition, first cleansing and stitching up the superficial wound. The defendant administered the anesthetic. Dr. Wallin performed the operation and applied the mechanical devices which he deemed necessary. No one other than the two physicians witnessed the operation. When it had been completed, plaintiff was removed from the operating room and put in bed, where he remained for five weeks. At the time of the trial it was not controverted—at least there was evidence tending to show—that the parts of the bone had not been kept in apposition, but had been permitted to slip by each other, the result being a vicious union with a shortening of the leg to the extent of two inches, rendering the use of it painful.

There is much conflict in the evidence as to the course of treatment pursued from the time the fracture was reduced until plaintiff was permitted to leave the hospital, which he did at the end of the sixth week. The plaintiff, his wife, and other lay witnesses testified at length as to the appliances used and the attention given plaintiff. This tes-

timony described the course of treatment as follows: When plaintiff returned to consciousness, his leg was inclosed in a plaster of paris cast without any opening. He was then in bed in a horizontal position, with a weight of 4½ pounds attached to his foot by means of a cord held by strips of surgeon plaster adhering to the leg. The cord passed over a pulley at the foot of the bed, and held the weight suspended. He was kept in this position until he left the hospital. No means were employed such as the elevation of the foot of the bed to prevent his body from slipping down in the bed, as it yielded to the pull of the weight. No examinations were made by means of the X-ray process, nor were the usual necessary superficial measurements made from day to day. No examination could be made by manipulation because the cast prevented. Several physicians, who either heard this testimony or had it submitted to them in the form of hypothetical questions, expressed the opinion that the treatment was vicious, in that it was not such as reasonable knowledge of the surgical art and ordinary care and skill in its practice require. The vice of it, in their opinion, lay in these omissions: To use a much heavier weight—from 12 to 20 pounds or more—to keep the muscles of the leg in a state of relaxation; to elevate the foot of the bed in order to have plaintiff's body serve as a counterweight, and thus keep the muscles relaxed in order to maintain apposition; to measure the limb from day to day, to be assured that apposition was being maintained; and, in view of the fact that the limb was inclosed in a cast, to use the X-ray process for the same purpose. Some of these witnesses expressed the opinion that, considering the inadequacy of the appliances used, and assuming that apposition was secured when reduction had been effected, that condition could not have continued for more than a few hours afterwards. In our view, this evidence made a prima facie case for the jury as to whether ordinary care and skill had been exercised in selecting the means employed to produce a proper union.

[5-7] The defendant and Dr. Wallin both detailed the course of treatment which they claim to have pursued. If their testimony were to be accepted as true, plaintiff had no case; for, as detailed by them, the course pursued was in every particular beyond criticism even in the opinion of plaintiff's expert witnesses. Even so, the evidence as a whole presented a question as to whether, in view of the result, their testimony was true, and this question was exclusively for the jury. But counsel contend that the evidence shows without contradiction that Dr. Wallin reduced the fracture and chose the mechanical appliances which were used, the defendant administering the anesthetic only; that the defendant left Lewistown for Florida on November 30th and spent the winter

there; that during the days intervening between November 25th and the latter date, the defendant took no part in the treatment of the injury, and hence that Dr. Wallin was solely responsible, so that, if plaintiff suffered wrong at the hands of any one, it was by reason of the negligence of Dr. Wallin. In other words, since defendant was authorized by plaintiff to employ Dr. Wallin and he performed the operation of reduction and thereafter treated the plaintiff exclusively, Dr. Wallin's employment constituted an independent contract, under which he became solely responsible to plaintiff. If the evidence were in the condition which counsel assert, their conclusion would undoubtedly be correct. If one physician, upon leaving temporarily the community in which he is engaged in practice, recommends to his patients the employment, in case of need, of some other physician who is not in any sense in his employment nor associated with him as a copartner, he is not liable for injuries resulting from negligence or want of skill in the latter, in case he is employed. In such case the employment of the latter is under an independent contract, and he is solely responsible for the result. *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Myers v. Holborn*, 58 N. J. Law, 193, 33 Atl. 389, 30 L. R. A. 345, 55 Am. St. Rep. 606; *Hitchcock v. Burgett*, 38 Mich. 501; 5 Thompson on Negligence, § 6723; 22 Am. & Eng. Ency. of Law (2d Ed.) 805; 30 Cyc. 1581; 3 Wharton & Stille's Med. Jur. § 502. In the section cited from Thompson on Negligence, *supra*, the rule is stated thus:

"A physician or surgeon is not liable for the negligence of another practitioner whom he recommends or sends in his place when he is unable to attend the patient, and whose services are continued under an independent contract, since no relation of agency or employment exists between the physicians."

It is held also that where two physicians are employed on the same case and by agreement divide the service as their best judgment may dictate, they are considered as independent agents, each being responsible for his own negligence and no more. *Morey v. Thybo*, 199 Fed. 760, 118 C. C. A. 198, 42 L. R. A. (N. S.) 785. If, however, one observes and lets go on without objection wrongful acts and omissions by the other, or if the circumstances are such that he ought to have observed such wrongful acts or omissions, he is liable. Each is bound to bring to the case the ordinary knowledge and skill of the profession, and also to give his best personal attention and care. If one is guilty of want of ordinary professional care and skill in choosing the mode of treatment adopted, and the other expressly or impliedly gives his approval, there is no reason apparent why the latter should not be held guilty also, for by his acquiescence he fails to give the care and attention which his employment requires. *Morey v. Thybo*, *supra*.

[8] The evidence does not justify the position of counsel. Dr. Wallin was employed, in the first place, to assist the defendant. Though the defendant insisted in his testimony that he told plaintiff's wife that he could not take charge of the case because he was about to leave for Florida, and suggested calling Dr. Wallin, the evidence justifies the conclusion that he considered the case as his own, and had Dr. Wallin called merely to assist him in reducing the fracture, with the purpose of having him take exclusive charge of the case only after he had left. This is indicated by the fact that he continued to visit the plaintiff daily from November 25th to November 30th inclusive, making such examinations of the injury and such inquiries touching the plaintiff's general condition as were made, generally accompanied by Dr. Wallin who, however, did nothing other than to lend his presence; and also the fact that some weeks after he had gone he wrote the plaintiff, requesting him to retain his half of the fee. There was testimony to the effect that the treatment was vicious from the start, in that Dr. Wallin had not made use of what is known among physicians and surgeons as "Buck's Extension," or other adequate appliance to preserve apposition of the parts of the bone, and continued so until the plaintiff left the hospital. If this was so—and whether it was, was a question for the jury—the defendant cannot be held blameless for the omissions and wrongful acts of Dr. Wallin in failing to use adequate appliances so long as he was in attendance. Indeed, by his acceptance of the situation as it was at the completion of the operation and permitting it to continue for the five days during which he was in attendance, he approved Dr. Wallin's method and adopted it as his own; and, as the evidence tends to show this, and that no change in treatment was thereafter made, the conclusion seems inevitable that both are to be deemed responsible for the result, the evidence suggesting no other effective cause to which it might be attributed, but, on the contrary, tending to show that the vicious result was due wholly to the inadequacy of the appliance made use of at the time the fracture was reduced and kept in place thereafter.

[9-11] The court admitted evidence showing what would be the cost of an operation which would minimize the suffering due to plaintiff's condition at the time of the trial. Defendant objected to it at the time, and subsequently moved the court to strike it from the record. The court overruled the objection and denied the motion. There was no error. The general rule is that one who has suffered an injury through the fault of another must use ordinary care and diligence to minimize the injurious consequences. *Allen v. Bear Creek C. Co.*, 43 Mont. 269, 115 Pac. 673; *Tiggerman v. City of Butte*, 44 Mont. 138, 119 Pac. 477. When the

injury is bodily he is not necessarily bound to submit to a major surgical operation, which may or may not result in a betterment of his condition. *Freeman v. Chicago, etc., Ry. Co.*, 52 Mont. 1, 154 Pac. 912. But it is always a subject of inquiry by the jury, under the circumstances disclosed by the evidence in the particular case, whether or not the plaintiff has met the requirement of the rule. By offering the evidence in question, plaintiff signified his intention to submit to the operation, and, assuming that it would bring him relief from future pain and suffering, to relieve the defendant pro tanto from the amount of damages for which he would otherwise be liable; or, to make the statement in a different way, assuming it to be his duty to minimize, so far as he might, the damage resulting from his injury, he, in effect, tendered to the defendant a credit of the amount which the operation would cost, upon the amount the jury might award him in the condition in which he was at the time of the trial. This he had a right to do if he chose. By requesting instructions so framed as to inform the jury of the use they should make of the evidence, the defendant would have gained the advantage to which he would have been entitled had he himself introduced the same evidence in connection with other facts and circumstances sufficient to convince the jury that the plaintiff in the exercise of ordinary diligence and care ought to have submitted to the operation. Plaintiff could not, under any view, recover compensation for future pain and suffering and also the amount it would cost to obtain relief from it.

[12-14] Evidence was admitted showing the course of treatment pursued by Dr. Wallin subsequent to November 30th and up to the time plaintiff left the hospital. It is urged that this was error. Counsel say that whatever blame may attach to defendant for his wrongful acts and omissions during his attendance upon plaintiff, he cannot be held liable for any act or omission of Dr. Wallin after his attendance ceased. Let this be conceded. There was no error, for two reasons: In the first place, it was competent to inform the jury that the course of treatment approved by defendant was continued without change by Dr. Wallin, in order to rebut the notion that any efficient cause intervened by reason of anything he did upon his own initiative to bring about the condition in which plaintiff found himself when he left the hospital. In the second place, the court instructed the jury in terms that, before they could find a verdict for the plaintiff, they must find that the injury suffered by him was by the wrongful acts or omissions of the defendant prior to his leaving for Florida, on November 30th. This effectively excluded from the consideration of the jury, as a foundation for a verdict, anything done by Dr. Wallin after that date. Whether the instruction was correct or not,

the defendant cannot complain of it, because it was as favorable to him as he could ask.

[15, 16] During the trial the court submitted to the jury for inspection, over defendant's objection, X-ray plates showing the condition of the bone in plaintiff's leg at the time of the trial. It is now argued that this was error because they were not shown to be correct. There is no merit in the contention. It cannot be questioned that a photograph is competent evidence to prove a condition which can be shown by a representation of that sort. *State v. Jones*, 48 Mont. 505, 139 Pac. 441; *Wigmore on Evidence*, § 790. It stands upon the same footing as a map, plan, or model, and, when shown by a competent witness to be correct (*State v. Jones, supra*), furnishes evidence of a high order of accuracy (*Beardslee v. Columbia Twp.*, 188 Pa. 496, 41 Atl. 617, 68 Am. St. Rep. 883). A plate or photograph taken by the X-ray process must be assigned to the same category. If, for illustration, it appears from the testimony of the person who took the picture that he possesses the knowledge, skill, and experience necessary to enable him to take such pictures accurately, and that the one in question is a fair representation of the situation or condition which is the subject of inquiry, it becomes competent to show that condition. In this case, the witnesses who took the plates were both practicing physicians. Upon being questioned, they showed that they understood, and were accustomed to the use of, the process in their practice and possessed the required skill and knowledge to enable them to use it with accurate results.

[17, 18] Much criticism is made of the action of the court in refusing to submit requested instructions and in overruling objections to some of those submitted. An examination of the refused instructions and of the charge as a whole requires the conclusion that the defendant has no cause for complaint. The offered instructions, so far as they embody correct statements of the law applicable to the case, were covered substantially by those submitted. In some instances the specific objections made by counsel to particular instructions are other than those made in the lower court. That court was precluded from granting a new trial for error in any of the instructions not specifically pointed out at the time of settlement. So this court cannot consider any error not specifically pointed out to the trial court. *Rev. Codes*, § 6746. We think the charge as a whole covered all the issues in the case, and was as fair to the defendant as he could demand.

The foregoing discussion expresses the views of all the members of the court on each point noticed, except that relating to the evidence showing the cost of a surgical operation to relieve the plaintiff. I do not concur in the conclusion stated in this behalf. In my opinion, the purpose of plaintiff in intro-

ducing the evidence was to enable him to recover the cost of the operation as special damages, in addition to the amount claimed as general damages. That this is so is indicated by the allegations in the complaint and the instructions framed upon the same theory, requested by plaintiff and submitted to the jury. Certainly, if the purpose of plaintiff had been to mitigate the damages pro tanto, there could be no question as to the propriety of the court's ruling. Considering, however, the theory of the case as disclosed by the complaint and upon which it seems apparent the evidence was offered, I think the ruling erroneous. I therefore think that the defendant should be awarded a new trial unless the plaintiff should be willing to have the judgment modified by subtracting from the amount of the award by the jury, the greatest amount any witness fixed as the cost of the operation, and that the cause should be remanded to the district court, with directions that plaintiff be permitted to exercise this option.

The judgment and order are affirmed.
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

THOMAS v. PATTERSON, County Treasurer,
et al. (BANCROFT, Intervener).
(No. 8407.)

(Supreme Court of Colorado. July 3, 1916.)

1. WATERS AND WATER COURSES \Leftrightarrow 230(6) —
IRRIGATION BONDS—PAYMENT OF INTEREST—
STATUTE.

An irrigation district, organized under the Irrigation District Act (Laws 1905, p. 246), issued and sold bonds, and thereafter issued and sold a second issue of bonds, the coupons on all of which were payable June 1, 1914, and in December, 1913, the board of county commissioners levied a tax "to raise the amount of money required to pay the interest which may become due during the year 1914 on bonds of the said district," which was the only levy made for that purpose, and on June 1, 1914, the treasurer had received from the levy only \$509, though the total levy would have raised \$26,760 to meet interest on the first issue, amounting to \$5,940, and upon the second issue amounting to \$210,000. Section 15 of the act provides that additional issues of bonds may be made, provided that the lien for taxes for the payment of the interest and principal of any bond issue should be a prior lien to that of any subsequent bond issue; section 17, that bonds and interest shall be paid from an annual assessment upon the real property in the district; section 21 refers to a bond fund account of interest, principal, etc.; section 22 makes the revenue laws of the state for the assessment of taxes on realty for county purposes applicable; section 19 requires the assessments to be of the same value per acre; and section 20 calls for 15 per cent. in addition to cover deficiencies. *Held* that, to recognize a prior lien, there must be authority for a levy to become such a lien, that the holders of coupons clipped from the first issue were not entitled to have all the interest money applied to the payment thereof before those from the second issue, but that the presumption was that the fund was intended to apply equally to all in

the proportion that the total amount of the levy bore to the total amount of the interest coupons coming due during the year, and that the shortage should be apportioned the same to both.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319; Dec. Dig. \Leftrightarrow 230(6).]

2. WATERS AND WATER COURSES \Leftrightarrow 230(6) —
IRRIGATION BONDS—ORDER OF PAYMENT.

In such case no coupon holder had the right to have the fund in the hands of the treasurer of the district applied to the payment of his coupons in preference to others of the same issue due at the same time, when there was insufficient to pay all holders, merely because he succeeded in presenting them for payment before other holders, or was first in line, or was arbitrarily recognized first by the county treasurer, especially where the statute does not require the bonds to be paid in the order of their presentation, but provides that the funds realized from taxes levied to pay interest on any issue of bonds in a specified year shall be for the benefit of all the holders of interest coupons which can be paid out of such fund; and all holders should have a reasonable time in which to present their coupons for payment before losing their rights, and such fund was to be applied on the coupons presented in their ratio to the sum total of all the coupons to which it was applicable, and the act relating to irrigation districts, by Laws 1905, p. 262, § 22, making the revenue laws of the state applicable, did not authorize the presentation of coupons for payment, and, if there were no funds, for registration, etc., the same as county warrants.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319; Dec. Dig. \Leftrightarrow 230(6).]

Gabbert, C. J., and White, J., dissenting.

En Banc. Error to District Court, Weld County; Neil F. Graham, Judge.

Actions by Theodore H. Thomas and by Anna M. De Remer against W. R. Patterson, County Treasurer of Weld County, and ex officio treasurer of the Henrylyn Irrigation District, with intervention in the Thomas suit by Frank N. Bancroft. Judgment for plaintiff De Remer, and Thomas and Bancroft bring error. Reversed and cause remanded.

Thomas & Thomas, of Denver, for plaintiff in error Thomas. Bartels, Blood & Bancroft, of Denver, for plaintiff in error Bancroft. Charles F. Tew, of Greeley, for defendant in error De Remer. Pershing, Titsworth & Fry, of Denver, amici curiæ.

HILL, J. An action was brought by the plaintiff in error Thomas against Patterson, as county treasurer of Weld county and ex officio treasurer of the Henrylyn Irrigation district, the object of which was to compel Patterson, as treasurer of the district, to pay certain interest coupons clipped from a first issue of bonds of the district, held by Thomas. Within a short time thereafter, the defendant in error De Remer commenced a similar action against the treasurer to compel the payment of certain interest coupons of the district, which she held, clipped from a second issue of bonds issued by the district. The plaintiff in error Bancroft intervened in the Thomas suit, to compel the treasurer to pay interest coupons of the first issue held

by him. The cases were consolidated for trial. Judgment was in favor of De Remer, from which Thomas and Bancroft prosecute this writ of error.

[1] The record discloses: That the Henrylyn irrigation district was organized under our irrigation district act of 1905. That on September 1, 1908, the district authorized an issue of bonds. That bonds of the face value of \$99,000 of this issue were sold and the remainder canceled. That on February 1, 1910, a second issue of bonds was authorized by the district, of which a large number were sold. That the coupons held by Thomas and Bancroft were attached to the first issue, and those held by De Remer to the second. That all of these coupons were due and payable June 1, 1914. That in December, 1913, the board of county commissioners of Weld county, by resolution, levied a tax which the resolution states was "to raise the amount of money required to pay the interest which may become due during the year 1914 on bonds of the said district." That this was the only levy made for that purpose for the year 1914. That when the county treasurer opened his office the morning of June 1, 1914, representatives of all three of the owners of the coupons involved were at the door, and, when opened, entered the treasurer's office and presented to the treasurer practically simultaneously these coupons for payment. That the treasurer recognized the representatives of the owners of the coupons in the following order: De Remer first, Thomas second, and Bancroft third. That he refused to pay any, because of a temporary restraining order which had been issued in the Thomas suit. That the coupons presented aggregated as follows: De Remer, \$1,080; Thomas, \$765; and Bancroft, \$1,230. That the total amount in cash in the hands of the treasurer June 1, 1914, received from the tax levy to pay interest maturing on bonds in 1914 was \$509.89. That the total levy to pay interest, if paid in cash, would raise the sum of \$26,760. That the amount of interest which became due during the year 1914 upon the first issue was \$5,940, and upon the second issue about \$210,000.

The plaintiffs in error contend that, being the holders of coupons clipped from the first issue, they are entitled to have all the interest money applied to the payment of their coupons before the holders of coupons clipped from the second issue are entitled to receive any. Their reason for this is the proviso contained in section 15 of the 1905 act, which reads:

"Provided, further, that when the money provided by any previous issue of bonds has become exhausted by expenditures herein authorized therefor, and it becomes necessary to raise additional money for such purposes, additional bonds may be issued submitting the question at special election to the qualified voters of said district, otherwise complying with the provisions of this section in respect to an original issue of such bonds; Provided, also, the lien for taxes, for the payment of the interest and principal

of any bond issue, shall be a prior lien to that of any subsequent bond issue." Laws 1905, p. 258.

In order to ascertain what was intended by this proviso, it is proper to consider its history. Our first irrigation district act was adopted in 1901 (Laws 1901, p. 198); it was taken in part from the so-called Wright law of California and the Nebraska act, but a part of it is different from either. It provides for the formation of irrigation districts for the purpose of acquiring, by purchase, construction, or otherwise, canals and reservoirs, etc., for the irrigation of lands therein. These districts were to be managed by a board of directors to be elected by the people. Under certain conditions, for certain purposes, it authorized the issuance and sale of bonds; but the first act only authorized one issue, and, although insufficient for the purposes intended, there was no authority for any further issue. Section 13 was amended in 1903 (Laws 1903, p. 273) to provide for a second issue by submitting it to a vote at a special election and otherwise complying with the provisions of the act, the same as required for a first issue. The proviso concerning the prior lien of the first issue was for the first time inserted in this amendment. In 1905 the act under consideration was adopted. It repealed both the 1901 and the 1903 acts, but section 15 thereof included a similar provision for a second issue, and likewise contained the same clause that was in section 13 of the 1903 amendment concerning liens. From a careful study of the entire act, in connection with its history, and the proviso which gives a prior lien for taxes to the first issue, we are of opinion that it was intended that there should be separate levies made with which to pay the interest and principal of each issue of bonds; otherwise, the language is not susceptible of enforcement by any practical method that has been pointed out or that we can think of.

It will be observed, which is material, that this proviso reads "the lien for taxes," not "the lien on taxes," as counsel would seek to have it applied. In 37 Cyc. at page 1138, it is said:

"Tax Lien is Statutory.—A tax levied and assessed upon specific property is not a lien on that or any other property of the owner unless expressly made so by statute, and an intention to this effect must be clearly manifested in the statute, as the lien will neither be created by implication nor enlarged by construction."

This appears to be the general rule, with the exception that, when considered as a whole, there are statutes that call for a construction which creates a lien by necessary implication without express language to that effect. Sections 17 and 22 of this act have this effect, but in order to recognize a prior lien there must be authority for a levy to become such a lien. This act recognizes this by, in substance, providing that so far as a second issue of bonds is concerned the same procedure must be gone through as is provided for the first issue. This means everything

concerning them. The context thus indicates, and when the act refers, as it does in section 21, to a bond fund account of interest, principal, etc., it was as originally intended referring to one issue when there was to be only one issue; but when section 15 of the latter act provides for a second issue, and provides further that the same procedure should be followed, etc., in their issuance and all matters pertaining thereto, and then provides that the lien for taxes for the first issue shall be a prior lien, and section 17 having provided that the real property of the district shall be liable to be assessed for such payments, etc., as therein provided for, etc., then the bond fund, principal, and interest language must be construed as referring to each as a separate entity. Such being the case, when the taxes are paid upon any land, the lien proviso concerning it becomes immaterial, for, when the taxes are paid, they must be apportioned to the funds for which they are levied.

In 37 Cyc. at page 1169, it is said:

"Full payment of the taxes due on particular property discharges the tax lien, releases the owner from liability, and invalidates any subsequent proceedings taken for the enforcement of the lien or the tax through the mistake or fault of officers."

This rule applies to all liens upon any particular piece of property; hence, when the holder of a first issue of bonds makes his purchase, he is informed by statute of these provisions made concerning their payment, etc., which, in addition to commanding a levy for the full amount necessary under the provisions of section 20, calls for 15 per cent. in addition to cover deficiencies. It will be observed that section 20 states that "all taxes levied under this act are special taxes," and section 19 provides, upon account of all lands being entitled to receive the same benefit so far as the apportionment of water is concerned, that these assessments or taxes are to be the same value per acre, or upon a flat basis; that is, an equal amount per acre, in contradistinction to the usual practice in taxation matters, viz., upon cash values; and section 22 provides that the revenue laws of the state for the assessment, levying, and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeitures for delinquent taxes.

When the sections above cited are considered together, when applied to a district with one issue of bonds only, they are quite simple in their application. To illustrate: Take a district of 10,000 acres, where the amount required to meet the interest annually is \$10,000; the amount and levy is purely a matter of calculation. There is no uncertainty anywhere. The land is all taxed for interest, \$1.15 per acre; this includes 15 per cent. for delinquencies as the act requires. If all is paid, the full amount of the

coupons is paid, and the district has a surplus of \$1,500; but if only half the land pays, then only a little over one-half of the amount of the interest coupons are, at that time, paid. If the same district has a second issue in amount equal to the first, the levy, for instance, instead of being \$1.15 per acre, is \$2.30 per acre; if all pay, the interest on the second issue is likewise paid, and the district has an additional \$1,500 to its credit. If only one-half of the land pays, then only a little over one-half of the amount of the interest coupons are paid; but the holder of the second issue of coupons, so far as his fund is concerned, is in identically the same condition as the first, with the exception as the lien proviso gives to the first a prior lien upon the lands which have not paid. But so far as this case is concerned it does not call for a construction of this lien proviso; that is, as to how it is to be recognized or enforced. But we cannot agree with the plaintiffs in error that the holders of the coupons of the first issue should get their entire interest paid by taxes from one-half of the land which has paid all levies against it, while the holder of the coupons represented by the second issue would get nothing, but hold a lien upon the other half of the lands in the district, which has failed to pay any of the levies. The result of this position would be that the holder of the first issue of bonds would not only get the benefit of the moneys furnished by the second issue in the completion of the property, and thereby enhance the value of the security, to wit, the lands of the district, but would also be entitled to a prior lien upon all moneys paid in for taxes upon all the lands in the district before the holder of the second issue gets any.

The act says "the lien for taxes," not "the lien on taxes," and in order to be different liens for taxes, as heretofore stated, there must be different levies for these taxes. As stated, just how this lien proviso is to be recognized or enforced is not before us. Somewhat similar conditions pertaining to different liens for taxes have been recognized in different cases, some of which we cite, not as authority upon this question, but as referring to the subject, and as recognizing a distinction between different liens for taxes for different purposes. *City and County of Denver v. Keeler*, 48 Colo. 54, 108 Pac. 998; *White v. Knowlton*, 84 Minn. 141, 86 N. W. 755; *White v. Thomas*, 91 Minn. 395, 98 N. W. 101; *Gould v. City of St. Paul*, 120 Minn. 172, 139 N. W. 293; *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725; *Ballard v. Ross*, 38 Wash. 209, 80 Pac. 439.

The serious question which presents itself is where two issues of bonds are outstanding, with interest coming due on both, and where one levy only is made for the purpose, and is, as the resolution of the board of county commissioners states, "to raise the amount of money required to pay the interest which

may become due during the year 1914 on the bonds of the district." What presumptions of law are to be indulged in concerning this state of facts, where the levy, as here, is over four times too large to pay the interest upon the first issue, but not sufficient to pay both? Should we presume that a sufficient amount of it was intended to pay the interest on the first issue, and the remainder in an insufficient amount was intended for the purpose of paying interest upon the second issue, when the law concerning the amount needed for this purpose applies with equal force to both, and when the board of county commissioners knew the amount required for each? In such case, we are unable to appreciate wherein the presumption should be any different between them, but are of opinion that the shortage should be apportioned the same to both. To assume that the entire levy was made for the first issue would be to assume that the board of county commissioners acted in excess of its authority, for without the existence of the second issue the board was without authority to make a levy in the amount it did, for which reason we must assume that it was intended to have been made for the payment of both. It should be understood that the question of the validity of this levy is not at issue, and we are not passing upon that question, but are limiting our consideration to where the moneys which have been received under this levy should be applied. In such case we are of opinion the presumption is that it was intended to apply equally to all in proportion that the total amount of the levy bears to the total amount of the interest coupons coming due during the year. As the record stands, it discloses that the board of county commissioners was derelict in its duty in not making levies sufficient to pay all of both; but, as stated, in such case we have no right to assume that they intended this neglect of duty to apply any more to one issue than the other, where the law, as here, was equally emphatic as to both, and where the holders of either issue of coupons had a remedy to compel a full levy to be made for their payment as the statute provides. *Perkins v. People*, 59 Colo. 107, 147 Pac. 356.

[2] The third question involved is: Has any coupon holder the right to have the funds in the hands of the treasurer applied in the payment of his coupons in preference to others of the same issue due at the same time, when there is insufficient to pay all, because the one holder may present his for payment before another, or perchance may be first in line, or be recognized first, arbitrarily or otherwise, by the county treasurer? The statute does not require that coupons shall be paid in the order of their presentation for payment; but, to the contrary, it in substance provides that the funds realized from the collection of taxes levied to pay interest maturing on any issue of bonds in a

specified year is for the benefit of all holders of interest coupons which can be legally paid out of such funds. In *Jewell v. City of Superior*, 135 Fed. 19, 67 C. C. A. 623, the collection of local improvement bonds was under consideration, wherein, in considering this subject, the court said:

"The fifth assignment questions the action of the trial court in limiting the amount of his recovery to his pro rata share of the fund to which the holders of all the bonds were entitled. This fund, derivable from the assessments, was a trust fund, pledged to the payment of all of the bonds. The right of the appellant therein was only to such portion of the fund realized as the sum of his bonds bore to the entire amount of the issue of bonds. It is true that equity favors the vigilant, not the slothful; but we think it would be a manifest perversion of equity to require a trustee to commit a breach of trust owing to other cestuis que trustent, by taking from other bondholders and awarding to the appellant so much of this fund as would pay his bonds in full. We know of no principle of equity which would warrant such a decree."

We think this declaration specially applicable to the facts here, as well as based upon sound reasoning, and that it would be a miscarriage of justice where two people, as in this case, like *Thomas and Bancroft*, both holding coupons against a trust fund pledged to the payment of all such coupons, and where both, if not others, were present at the opening of the office at the time they were due, to allow the one who might first be recognized by the county treasurer to receive any priority over the others, who were there also, or who thereafter presented their coupons within a reasonable time. In such case the weight of authority is that there should be no distinction made between them, and that all have a reasonable time within which to present their coupons for payment without losing their rights. *Shelley v. St. Charles County Court* (C. C.) 21 Fed. 699; *Southern Bank v. La. Nat. Bank et al.*, 32 La. Ann. 290; *Sibley v. Mobile*, 22 Fed. Cas. 57.

The contention that, because section 22 of the act makes the revenue laws of the state applicable, except as therein otherwise provided, is authority for the presentation of these coupons for payment, and, if no funds, for registration, etc., the same as county warrants, is not well taken. Were this contention made concerning the warrants of the district, it would present a different question. Counsel have not called to our attention any portion of our revenue laws wherein it is provided what is to be done concerning interest coupons payable by special taxes, as this act provides, when the levy authorized for that purpose, or a lesser one, is made, when either proves insufficient to pay them all. In such case the only logical conclusion, which is supported by the weight of authority, is that when coupons are presented for payment, and there is not sufficient funds in the hands of the treasurer which can be applied to the payment of all the coupons of the bond issue from which they were taken to pay them in full, that such propor-

tion of such funds may be applied on the coupons presented as are payable out of the funds in the hands of the treasurer in the ratio they bear to the sum total of the coupons to which such funds must be applied. *Jewell v. City of Superior*, 135 Fed. 19, 67 C. C. A. 623; 28 Cyc. 1645; *Hodge's Appeal*, 84 Pa. 359; *Roberts v. Denver*, L. & G. R. Co., 8 Colo. App. 504, 46 Pac. 880; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 888; *Bank v. Arthur*, 12 Colo. App. 90, 54 Pac. 1107; 5 *McQuillin on Municipal Corporations*, p. 4921; *Sibley v. Mobile*, 22 Fed. Cas. 57.

For the reasons stated, the judgment will be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed; each party to pay its own costs in this court.

Reversed.

GABBERT, C. J., and WHITE, J., dissent.

GABBERT, C. J. I dissent from the conclusion that any funds in the hands of the county treasurer can be applied upon the De Remer coupons. The act authorizing the organization of an irrigation district, after setting forth the steps necessary to authorize the issuance of bonds, provides in the latter part of section 15 as follows:

"Provided further, that when the money provided by any previous issue of bonds has become exhausted by expenditures herein authorized therefor, and it becomes necessary to raise additional money for such purposes, additional bonds may be issued. * * * Provided, also, the lien for taxes, for the payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue." *Laws 1905*, p. 258.

A construction of this provision determines the relative rights of the holders of the coupons involved. An irrigation district is empowered to issue bonds to construct or purchase reservoir sites, reservoirs, water rights, canals, and ditches, by means of which the lands embraced in the district may be supplied with water for the purpose of irrigation. Anticipating that the first issue of bonds might not be sufficient to complete the work necessary to supply the required volume of water, the General Assembly wisely provided that additional bonds might be issued. In order that the relative rights of the holders of different issues should be definitely fixed, the act provides, as previously quoted, that:

"The lien for taxes, for the payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue."

Evidently the purpose of this provision, when considered in connection with the context, is to give the bonds of the first issue the preference over any subsequent issue in the matter of payment. By section 17 the bonds of a district and the interest thereon shall be paid out of revenue derived from taxes levied on the real property in the dis-

trict subject to taxation for these purposes. By section 20 provision is made for the levy of an annual tax to provide the funds necessary to pay interest as it matures on the bonds of the district. As pointed out, there may be two or more bond issues, and when the statute in express terms gives to the first issue a lien for taxes prior to any subsequent issue, its object was to require that funds thus raised should be applied to the payment of the first issue of bonds in preference to any subsequent issue. It is therefore clear that the purpose of the provision under consideration was to confer upon holders of interest coupons attached to bonds of the first issue the right to have them paid in advance of coupons taken from any subsequent issue out of the funds derived from taxes levied to pay the interest as it matures on the bonded indebtedness of an irrigation district.

The majority opinion appears to recognize that the first issue of bonds is in some way entitled to a priority over a second issue, but indicates that just how this lien is to be recognized or enforced is not presented. In my judgment, that is the vital question for us to determine. It appears to be suggested that there should be a separate levy for each issue. If this course should be followed, then, if any force or effect is given the provision being considered, the lien for taxes levied for the benefit of the first issue must be given priority over a levy for any subsequent issue, and the situation would be precisely the same as though there had been but one levy, as in the case at bar. A lien for taxes for the payment of bonds, or interest thereon, attaches to the property of the district issuing them, upon which taxes may be levied to provide a fund to discharge such bonds, or interest, and when a prior lien for this purpose is given, such lien attaches to taxes levied and collected for that purpose. Consequently, unless the provision under consideration is ignored, it is immaterial whether there be one or two levies, as in either event interest coupons of the first issue would have to be given preference over the second issue.

Confessedly the funds in the hands of the treasurer are insufficient to pay the interest due on the two bond issues. The coupons in the hands of Thomas and Bancroft belong to the first issue. The statute does not require that coupons shall be paid in the order of their presentation for payment. The fund realized from the collection of taxes levied to pay interest maturing on bonds in a specified year is for the benefit of all holders of interest coupons which can be legally paid out of such fund, so that the funds in the hands of the treasurer should be apportioned upon the coupons held by Thomas and Bancroft, in the proportion they bear to the sum total of the coupons of the first issue of bonds maturing June 1, 1914. None of such

funds should be applied upon the De Remer coupons.

This disposition of the case, for the reasons given, would carry out the intent of the General Assembly, give full force and effect to the proviso which confers upon the first bond issue a preference over the second in the matter of payment, simplify the situation by preventing complications which would be the result of attempting to make separate levies for separate issues, and protect the rights of the holders of coupons taken from the first issue conferred by statute, of which they are deprived by the majority opinion.

PRICHARD v. FULMER et al. (No. 1812.)
(Supreme Court of New Mexico. June 30, 1916.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT \Leftrightarrow 182(3)—COMPENSATION OF ATTORNEY—GENERAL LIEN—RETAINING LIEN.

Under the common law an attorney had a right to a "general" or "retaining" lien, which attached to all papers, documents, and money that came into his hands professionally as an attorney, under which he was entitled to retain possession of such papers, documents, and money until the money due him for professional services was paid.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 403; Dec. Dig. \Leftrightarrow 182(3).]

For other definitions, see Words and Phrases, First and Second Series, Attorney's Lien.]

2. ATTORNEY AND CLIENT \Leftrightarrow 182(1), 187, 189—COMPENSATION OF ATTORNEY—"CHARGING LIEN."

The courts also recognize what is generally styled an attorney's "charging lien," which was the right of an attorney or solicitor to recover his fees and money expended on behalf of his client from a fund recovered by his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor, in fraud of his right to the same, and also to prevent or set aside assignments and settlements made in fraud of his rights.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399, 400, 402, 405, 406, 407-417; Dec. Dig. \Leftrightarrow 182(1), 187, 189.]

For other definitions, see Words and Phrases, First and Second Series, Attorney's Lien.]

3. ATTORNEY AND CLIENT \Leftrightarrow 192(2)—COMPENSATION OF ATTORNEY—LIEN—ENFORCEMENT.

The court will not permit an attorney to assert his lien in an independent suit, as by its control of its process in the original suit it can and will afford him an ample remedy.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 427; Dec. Dig. \Leftrightarrow 192(2).]

4. ATTORNEY AND CLIENT \Leftrightarrow 186—COMPENSATION OF ATTORNEY—LIEN—WAIVER.

An attorney's lien, upon a judgment recovered in a foreclosure suit, is waived where he permits his client to purchase the property, ordered sold by the court, in satisfaction of the judgment, and the court without objection on the attorney's part confirms the sale and approves the deeds for the same to his client, and the attorney's lien upon the judgment does not follow the land when the title is perfected in his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 393; Dec. Dig. \Leftrightarrow 186.]

Appeal from District Court, Lincoln County; E. L. Medler, Judge.

Action by George W. Prichard against J. H. Fulmer, Jr., and the Parsons Mining Company. From a judgment sustaining the Mining Company's demurrer and dismissing the complaint, plaintiff appeals. Affirmed.

Renehan & Wright, of Santa Fé, and Geo. B. Barber, of Carrizozo, for appellant. Lorin C. Collins, of Santa Fé, for appellee.

ROBERTS, C. J. Appellant was employed by Jacob H. Fulmer, Jr., as attorney, to foreclose three certain mortgages on described real estate, executed to him by the Eagle Mining & Improvement Company to secure an indebtedness of \$112,000, represented by promissory notes. Suit was filed pursuant to such employment in January, 1909, and on May 9, 1909, final decree was entered. This decree, after finding that the notes representing the indebtedness, secured by the mortgage, were past due and unpaid, and giving judgment for the amount due, further provided:

"And it is further ordered and adjudged that the plaintiff have and recover of and from the said Eagle Mining & Improvement Company the further sum of 7 per centum on said amount as his reasonable attorney's fees herein incurred in and about the bringing and prosecuting of this suit and the foreclosure of said mortgage, as provided for in the said notes, and that he have execution therefor in the sum of \$7,906.10."

After making provision for the sale of the property and the payment first of the taxable costs, the decree provided:

"* * * And out of the remainder pay the plaintiff the sum of \$120,900.50, the amount of his total judgment herein, including attorney's fees, together with the legal interest thereon, from the date of this decree to the date of sale."

The decree further made provisions for a deficiency judgment, in case the property failed to sell for an amount sufficient to satisfy the judgment. A commissioner was appointed by the court to sell the property, and he was by the court ordered to sell the property for cash, unless the mortgagee, Fulmer, should purchase it, in which event Fulmer was only required to pay cash for any amount which he might bid on the property in excess of the amount of the judgment and costs. Fulmer purchased the property at the sale for \$35,000, and the commissioner executed to him a deed, which was approved by the court. No money was paid the commissioner, except the taxable costs and fees of such commissioner. Appellant was not paid his attorney's fee, and thereafter Fulmer conveyed the property so purchased by him to the Parsons Mining Company, of which he was president. The balance of the original judgment, amounting to something over \$85,000, has never been satisfied, and is in the form of a deficiency judgment against the original makers of the notes.

On the 14th day of October, 1913, appellant filed his complaint in the trial court, wherein he set out the above facts, and al-

leged that Fulmer had agreed to pay him, as compensation for services rendered by him in foreclosing the said mortgage, the amount called for and stipulated therein to be paid, which was the amount allowed by the court and carried into the judgment; that he had an attorney's lien upon the judgment rendered in the original action for the sum of \$7,909.10; that Fulmer had failed to pay to him any portion of the fee earned by him as aforesaid, and that there was due and owing to him the said sum, for which he was entitled to and did have a lien upon the property purchased by Fulmer at such sale and by him transferred to the Parsons Mining Company; that said Parsons Mining Company had full knowledge of all the facts, and knew that he had not been paid any portion of the fees earned by him in such foreclosure proceeding. Appellant prayed for judgment against Fulmer for the amount stated, and asked, in the event of nonpayment, that the sale of the real estate to Fulmer and to the Parsons Mining Company be set aside, and for a resale for the purpose of paying and discharging his lien.

The Parsons Mining Company demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, and specifically upon several grounds, only one of which need be stated, for, if well taken, it disposes of this appeal. This was as follows:

"(e) That the said plaintiff, by his failure to assert his alleged lien for attorney's fees at and before the sale was confirmed, and deed executed and delivered to the said defendant Fulmer, waived his said alleged lien on said property, and by operation of law must be held to have elected to look solely to the said Fulmer for his compensation and waive his alleged lien on the property so sold and conveyed."

The trial court sustained the demurrer, and, appellant refusing to plead further, judgment was entered dismissing the complaint as to the Parsons Mining Company, from which judgment this appeal was taken.

The question presented is whether the trial court erred in sustaining the demurrer to the complaint, and this can be disposed of by a consideration of the ground of demurrer above stated, as we consider it decisive against appellant's right to the relief which he seeks. Before entering upon a discussion of the question it is advisable to briefly refer to the law upon the subject of attorney's liens, in order to obtain a clear understanding of the point presented. In this jurisdiction we have no statute which gives or undertakes to give to attorneys a lien upon a judgment procured by their efforts for the value of their services or the agreed compensation. Most of the states do have such a statute, which in many states is very broad, and extends the lien to the proceeds of the judgment "in whosoever hands they may come." The usual code provision reads as follows:

"From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment."

[1] There being no statute here, in order to determine the rights of an attorney in this regard in this state, we are necessarily required to resort to the common law and to the practice prevailing in courts of equity in such cases. The English courts, at an early date, not easy of ascertainment from the reported cases, recognized the right of an attorney to retain papers or other property that might come into his possession, or money that he in the course of his professional employment had collected, until all his costs and charges against his client were paid. This right on the part of the attorney was known as a "general" or "retaining" lien, and was a common-law lien founded upon possession. This lien was enforced by the English courts as early as 1734. Jones on Liens (3d Ed.) § 113. In the case of *Weed Sewing Machine v. Boutelle*, 56 Vt. 571, 48 Am. Rep. 821, the court said:

"The former [referring to the retaining lien] attaches to all papers, documents, and money that come into his hands professionally as an attorney without any special contract in regard to the same. Having the possession, he has the right to retain them against his client, assignments, or attachments, until the general balance due him for legal services is paid. The client cannot discharge him and withdraw such papers or money from his hands without first paying the general balance due him for legal services, whether growing out of the special matters then in his hands or other legal matters. This right is said to have its origin partly in custom and partly to prevent circuity of action. Whart. Ag. §§ 623 to 625, and cases cited in the notes; *Hutchinson v. Howard*, 15 Vt. 544; *Hurlbert v. Brigham & Waterman*, 56 Vt. 368; *Sterling, Ex parte*, 16 Ves. 258; *Dennett v. Cutts*, 11 N. H. 163; *Wright v. Cobleigh*, 21 N. H. 339. Having possession of the thing to which the lien attaches, no notice is required to protect it against assignment by the client or attachment by trustee process by his creditors."

[2] The courts also recognized what is generally styled an attorney's "charging lien," although it has been frequently stated by the courts and law writers that, in a strict sense, there is no such thing as a lien upon a thing not in possession. In *Barker v. St. Quintin*, 12 M. & W. 441, Baron Parke said:

"The lien which an attorney is said to have upon a judgment—which Mr. Jones (*Jones on Liens*, § 155) says perhaps is an incorrect expression—is merely a claim to the equitable interference of the court to have the judgment held as a security for his debt."

Without quibbling over the question as to whether this right on the part of the attorney is, strictly speaking a "right to a lien" or the right to the equitable interference of a court of equity, as stated, we shall in this discussion refer to it as a "charging lien," because, as a practical matter, it is of no

consequence. A very interesting discussion of the question will be found in Jones on Liens (3d Ed.) § 155 et seq. The charging lien, as recognized by the courts, is the right of an attorney or solicitor to recover his fees and money expended on behalf of his client from a fund recovered by his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same, and also to prevent or set aside assignments or settlements made in fraud of his right. It does not usually attach until the recovery of judgment, and then does not prevent an honest settlement, nor a payment to his client until the attorney has notified the debtor of his intention to claim a lien. *Weed Sewing Machine Co. v. Boutelle*, supra. In speaking of this lien, Mr. Jones says:

"The time and manner of the origin of this lien are not shown by any reported case. Probably it has been the practice of judges to aid attorneys in securing their costs out of judgments obtained for their clients before the right to the lien had been formally adjudicated. It was doubtless recognized upon the ground of justice that the attorney had contributed by his labor and skill to the recovery of the judgment, and the court, wishing to protect its own officers, exercised its power to that end, or, as Lord Kenyon puts it: 'The party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained.'" Jones on Liens, vol. 1, § 156.

In some of the American states, without an express statute upon the subject, the courts have refused to recognize the right of an attorney to a charging lien, upon the theory that, as the right in England was limited to the taxable costs, and the compensation of an attorney was taxed as costs in the case, while here the attorneys are not entitled to tax their fees as costs, but recovered them only from their client, upon quantum meruit or by special agreement, the rule can have no application. For list of the states so holding, see note to section 159, Jones on Liens. Other courts hold that the attorney is entitled to the lien, and give as a reason that the taxed costs of the attorney in England had no merit or justice superior to the claim of counsel in this country for a reasonable compensation; and therefore the lien should be here extended so as to secure such compensation. Jones on Liens, § 167, says:

"It is argued that the rule restricting the lien to the amount of the taxed costs arose from the fact that in England these costs are the only charges for which an action might be maintained, the services of barristers being in theory gratuitous, and their charges only an honorary obligation of quidam honorarium; and consequently, where the payment of the fees and charges of an attorney may be legally enforced, as is the case in this country, the reason for the restriction fails, and the lien should cover fees other than the taxed costs, and should include the charges of counsel."

In the case of *Wilkins v. Carmichael*, 1 Dougl. 101, which was a suit before Lord Mansfield, in which it was sought to estab-

lish a lien in favor of the captain against the ship for his wages, the counsel referred to the case of attorneys who cannot be compelled to deliver up their client's papers until their fees are paid. Lord Mansfield, interrupting the argument of counsel, observed:

That "the practice in that respect was not very ancient, but that it was established on general principles of justice, and that courts both of law and equity have now carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him till the bill is paid." Jones on Liens, § 113.

In the case of *Welsh v. Hole*, Doug. 238, Lord Mansfield said:

"An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it in transitu if he can lay hold of it. If he apply to the courts, they will prevent its being paid over till his demand is satisfied. I am inclined to go still further, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice."

If the courts of England, "on general principles of justice," upon application of the attorney, would prevent money being paid over to a client until such attorney's bill of costs, which in truth and in fact was the indirect payment to the attorney of compensation for services rendered, had been paid, and, upon notice to the defendant not to pay the judgment until such bill of costs had been discharged, would compel satisfaction of the attorney's claim, we fail to see why the same principles would not here likewise apply to the fees and expenses of an attorney. In our opinion they should, and this conclusion is supported by many of the adjudicated cases. A very valuable note upon the subject will be found in 31 Am. Dec. 755, appended to the case of *Andrews v. Morse*, reported in the same volume at page 752. See, also, *Ward v. Syme*, 9 How. Prac. (N. Y.) 16, for a very learned discussion of the subject.

Having considered the nature and right of an attorney to a lien upon the judgment which he recovers for his client, we will now turn to a consideration of the particular question presented by this appeal. Here the attorney gave notice to the defendant Eagle Mining & Improvement Company that he intended to assert a lien against the judgment, and as there was no voluntary payment by the judgment debtor of the money called for therein, any question of notice to such judgment debtor is beside the question. The sole question presented is: Does the attorney's lien attach to money or property which the client receives in satisfaction of the judgment? Under the Code provision, quoted herein and in force in many of the states, the question necessarily would be answered in the affirmative. In the case of *Loofbourov v. Hicks*, 24 Utah, 49, 66 Pac.

602, 55 L. R. A. 874, the court held that a lien for attorney's fees allowed by a judgment foreclosing a real estate mortgage attaches to the land, and may be enforced against it after it has been bid in by the mortgagee or his assigns with notice, for an amount less than that due on the mortgage, which has been credited on the judgment.

Appellant cites and relies upon the following cases as sustaining the sufficiency of his complaint herein and his right to the relief which he seeks: *Porter, Taylor & Co. v. Hanson*, 36 Ark. 593; *Wooten v. Denmark et al., Executors*, 85 Ga. 579, 11 S. E. 861; *Stockton S. & L. Society v. Donnelly*, 60 Cal. 481; *Gray v. Denhalter*, 17 Utah, 312, 53 Pac. 976. A review of these cases, however, will show that they do not sustain his right to enforce his lien against real estate purchased by his client in satisfaction of the judgment. The Arkansas case was based upon a statute, which gave the lien therein asserted. It is true the court said:

"The object of the suit had not been to recover land, or establish title; but to recover money by foreclosure; and as the complainant had taken land by foreclosure in place of money, it would have been just and entirely in accordance with *Hanger and Wife v. Fowler*, 20 Ark. 667, to have transferred the lien to the land."

The court further said, however,

"It is useless, however, at this day, to discuss the extent of an attorney's lien, as the whole matter has been settled by the Code of Civil Practice since *Hanger's Case*, and no language could be plainer than that of the Code to give the lien here claimed."

The *Hanger Case*, referred to in the opinion, which was evidently decided before the Code provision was enacted, simply held, however, that an attorney could not assert a lien upon land recovered in a chancery suit for his fee; that to permit him to do so would be introductory of a new principle, and the extension of the doctrine of solicitor's lien beyond adjudged cases. As the later case was decided under a statute expressly giving the right claimed, the casual remark made by the court as to the rule before the statute was enacted certainly would be entitled to but little weight, and especially where no precedent is found supporting the same.

The Georgia case of *Wooten v. Denmark*, supra, was likewise controlled by a statute, which provided:

"Upon all suits for the recovery of real or personal property, and upon all judgments or decrees for the recovery of the same, attorneys at law shall have a lien on the property recovered, for their fees, superior," etc.

The court construed this statute as applying to land purchased by the client upon foreclosure proceedings in satisfaction of the judgment.

The case of *Stockton S. & L. Society v. Donnelly* involved simply the right of the attorney to recover his fee from a defendant in a foreclosure suit, where defendant had paid plaintiff the principal and interest due

on the mortgage after the institution of the suit, at which time he had been informed by the plaintiff that he would be required to pay the attorney's fee. The statute in California provided that:

"In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding."

This case affords no support to appellant's contention.

The Utah case (*Gray v. Denhalter*) is likewise controlled by statute. In that case the court, after quoting the statute in question, said:

"So likewise, as such party, he was liable to have the conditions of the decree and sale enforced against him at any time before the commissioner had made his report as directed in the decree, and the sale had been confirmed, and final disposition of the cause made."

[3, 4] In the case before us, however, the attorney seeks to go much further, and to have his fee declared a lien upon the real estate purchased by his client some four years after the confirmation of the sale and approval of the deed. That he cannot do this becomes apparent when we consider the origin of the lien and its nature and purpose. As heretofore shown, by quotations from the text-writers and cases, the lien originated in the desire on the part of the courts to protect attorneys against dishonest clients, who, utilizing the services of the attorney to establish and enable them to enforce their claims against their debtors, sought to evade payment for the services which enabled them to recover their demand. The court, having control of its own process, would not permit the client to have the benefit thereof without paying the attorney, because in equity and good conscience he should compensate the attorney, as by his exertions and skill he had made it possible for the client to invoke the aid of the court and secure the process of such court to enforce his demand. The court, having control of its own process, saw to it that the client did not utilize it so as to defeat the attorney of his fee. Upon proper application by the attorney it would direct its officers to pay to the attorney the money to which he was entitled, or would withhold its process until he was compensated. In cases similar to the one under consideration, if the property had been sold to a third party, of course, the money would have been paid into the hands of the commissioner, and it could have ordered the amount of the attorney's fee paid direct to such attorney. Where the property was bid in by the creditor in satisfaction of the judgment, as in this instance, upon the attention of the court being called to the fact that the attorney had not been paid, the court would have withheld confirmation of the sale and approval of the deeds until he was paid, and, in the event of the failure to pay it, might, by proper order, have directed

a resale of the property. Thus we see that the courts, by the control which they have over their own process, have ample power to protect the diligent attorney, and this they do, as stated, because the demands of equity and justice require it.

No case has been called to our attention, in the absence of statute, where the courts have permitted the attorney to assert his lien in an independent suit, such as is attempted in this case; and the reason is plain. The courts only give him a lien upon the judgment, or, perhaps more properly speaking, give him the right to invoke the aid of the court, by the control which it exercises over its process and officers in the cause in which the judgment was rendered, in securing for him his just compensation. This willingness on the part of the court, in the cause in which the judgment was tendered, to afford him protection, gives to the diligent attorney an ample remedy by which he can enforce his just demands, thus affording to the diligent ample protection. One who has been dilatory, and has permitted the client to collect the judgment, without objection or protest, or seeking aid from the court, cannot invoke the aid of a court of equity; nor can he ask the court, after he has permitted it to confirm a sale of real estate to his client in satisfaction of the judgment and approved a deed made by its commissioner, to set aside its acts in the premises. It is a well-known equity maxim that "equity aids the vigilant, not those who slumber on their rights." In *Jones on Liens*, § 204a, the author, in speaking of attorney's liens, says:

"The lien does not exist after the client has accepted satisfaction of his judgment, and it does not attach to property received in satisfaction of it."

And at section 231 the same author says:

"The attorney waives his lien by his acquiescence in a satisfaction of the judgment by the payment of money or the transfer of property to his client, and he cannot afterwards enforce his lien upon such money or property, but must look to his client alone for his compensation. An attorney's lien upon a judgment is waived by his procuring the transfer to his client of land attached in the suit in satisfaction of the judgment. His lien upon the judgment does not follow the land when the title is perfected in the client."

In the case of *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707, the plaintiff, an attorney, had rendered services to the defendant, who was plaintiff in a chancery suit, wherein he was successful and recovered the land sought. Afterwards *Flowers* sold the land to a third party, and *Stewart* sought the aid of a court of equity to compel *Cotton*, who had purchased the land from *Stewart*, and had not paid the purchase price, *Stewart* being joined in the suit as a defendant, to pay out of the unpaid purchase price the fees which he had earned. The Supreme Court, after a very exhaustive review of the authorities, both American and English, says:

"In consideration, therefore, of the character of our institutions, and of the somewhat modified relation in this country of attorney and client, we do not think it advisable to extend the doctrine of implied liens, especially as it is not necessary to the profession; attorneys having it in their power to protect themselves by the exercise of ordinary prudence."

The Mississippi court recognized the right of an attorney to a lien upon the judgment and to the interposition of the equitable powers of the court in aid of the attorney, but would not extend the lien to the real estate recovered.

The case of *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649, is very like the present case. In that case *Mrs. Graves*, a daughter of the defendant, *Mrs. McDonald*, employed *Milo Goodrich*, as attorney, to prosecute an action for a money demand against *William T. Porter*. She recovered a judgment for something over \$11,000. When the judgment debtor was ready to pay the judgment, he notified both the plaintiff and her attorney. The attorney consented that the money should be paid direct to his client. *Mrs. Graves* received the money and invested \$8,000 of the proceeds in a bond and mortgage, which she later assigned to her mother, under a prior agreement that her mother was to receive a certain portion of the proceeds of the judgment. *Mrs. Graves* failed to pay her attorney, and he afterwards instituted suit in equity against the daughter and mother to subject the bond and mortgage, which the mother still retained, to the payment of his fee. The court, after an extended discussion of attorney's liens, said:

"The lien, as thus established, is not strictly like any other lien known to the law, because it may exist, although the attorney has not, and cannot in any proper sense have, possession of the judgment recovered. It is a peculiar lien, to be enforced by peculiar methods. It was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained. The lien was never enforced like other liens. If the fund recovered was in possession or under the control of the court, it would not allow the client to obtain it until he had paid his attorney, and in administering the fund it would see that the attorney was protected. If the thing recovered was in a judgment, and notice of the attorney's claim had been given, the court would not allow the judgment to be paid to the prejudice of the attorney. If paid after such notice, in disregard of his rights, the court would, upon motion, set aside a discharge of the judgment and allow the attorney to enforce the judgment by its process, so far as was needful for his protection. But after a very careful search we have been unable to find any case where an attorney has been permitted to enforce his lien upon a judgment for his services by an equitable action, or when he has been permitted to follow the proceeds of a judgment after payment of them to his client. His lien is upon the judgment, and the court will enforce that through the control it has of the judgment and its own records, and by means of its own process, which may be employed to enforce the judgment. But after the money recovered has been paid to his client he has no lien upon that, and much less a lien upon prop-

erty purchased with that money and transferred to another. After such payment, unless he has protected his lien by notice to the judgment debtor, his lien is forever gone, and he must look to his client alone for his compensation. As said by Lord Ellenborough, in *Wilson v. Kymer*, 1 Maule & Sel. 157, and repeated by Senator Verplanck in *McFarland v. Wheeler*, 28 Wend. [N. Y.] 467: 'In a case of a lien we should be anxious to tread cautiously and on sure grounds before we extend it beyond the limits of decided cases.' There are not only no decided cases which sanction the maintenance of this action, but the drift of all the authorities is against the plaintiff's contention."

To the same effect see, also, *Cowen v. Boone*, 48 Iowa, 350, and *Keehn v. Keehn*, 115 Iowa, 467, 88 N. W. 957.

From the argument advanced, and the authorities cited, we are, with some reluctance, forced to the conclusion that the lien which appellant had upon the judgment recovered for his client was waived where he permitted his client to purchase the property, ordered sold by the court in satisfaction of the judgment, and the court without objection on the attorney's part confirms the sale and approves the deeds for the same to his client, and the attorney's lien upon the judgment did not follow the land when the title was perfected in his client. Hence the trial court properly sustained the demurrer to his complaint, and its judgment will be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

STRAW v. TEMPLE et al. (No. 2858.)

(Supreme Court of Utah. July 10, 1916.)

1. CONTRACTS ⇨28(2) — ADMISSIBILITY OF EVIDENCE—OTHER CONTRACTS.

Where defendants, railroad subcontractors, claimed that the terms of certain written contracts were incorporated into an oral agreement under which plaintiff did certain work for them, and there was evidence supporting the claim, *held* that the written contracts were admissible, although plaintiff was not a party to them.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1782; Dec. Dig. ⇨28(2).]

2. CONTRACTS ⇨349(3) — ADMISSIBILITY OF EVIDENCE—OTHER CONTRACTS.

Where plaintiff sued on a contract for constructing a portion of a roadbed which concededly lay between portions covered by other contracts, the defendants could locate the portion involved by showing the boundaries named in the other contracts.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1788-1790, 1798, 1811, 1818; Dec. Dig. ⇨349(3).]

3. CONTRACTS ⇨322(2)—BREACH—ADMISSIBILITY OF EVIDENCE.

Where plaintiff sued defendants, railroad subcontractors, for excavating work done under a contract between them it is immaterial that the railroad company allowed pay for a less amount of excavation than plaintiff claimed to have done.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1781; Dec. Dig. ⇨322(2).]

4. CONTRACTS ⇨237(2) — CONSIDERATION — PERFORMANCE OF CONTRACTUAL OBLIGATION.

Where conditions arise not contemplated under an excavation contract, a promise of extra pay is supported by promise to continue the work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1120-1122; Dec. Dig. ⇨237(2).]

5. CONTRACTS ⇨237(2) — CONSIDERATION — PERFORMANCE OF CONTRACTUAL OBLIGATION—WHAT CONSTITUTES.

Where a railroad excavation contract provided that the sides of a cut be left vertical, but caving of the banks required the removal of additional dirt, *held* that the additional work was not contemplated in the original contract, and therefore furnished consideration for a promise of extra pay.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1120-1122; Dec. Dig. ⇨237(2).]

6. CONTRACTS ⇨333(6) — PLEADING — ALLEGATION OF NEW PROMISE.

The extra pay agreement constituted a separate cause of action which should have been pleaded in the complaint.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1650, 1654; Dec. Dig. ⇨333(6).]

7. PLEADING ⇨180(2)—REPLY—ADDITIONAL CAUSE OF ACTION.

Plaintiffs could not enlarge the complaint by alleging the extra pay agreement in their reply.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 366, 368-376, 378, 379, 381; Dec. Dig. ⇨180(2).]

8. PLEADING ⇨237(1)—LEAVE OF COURT—CONFORMITY TO PROOF.

If evidence is received without objection upon a claim which should have been pleaded, the complaint may thereafter, by leave of the court, be amended to conform to the proof.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 603; Dec. Dig. ⇨237(1).]

Appeal from District Court, Utah County;

A. B. Morgan, Judge.

Action by G. W. Straw against Sarah Temple, T. P. Vosburg, and L. Carlson, copartners doing business under the firm name of Temple, Vosburg & Co. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Cheney, Jensen & Holman, of Salt Lake City, for appellants. S. A. King, of Salt Lake City, for respondent.

FRICK, J. The plaintiff commenced this action to recover an alleged balance due him from the defendants upon an oral subcontract, wherein plaintiff agreed to and did perform certain work for the defendants. The plaintiff, as a first cause of action, alleged that on the 26th day of October, 1913, he and the defendants entered into an oral contract—

"whereby this plaintiff agreed to construct that portion of the roadbed of said Salt Lake & Utah Railroad Company lying between stations 277 and 282 in mile 26, according to the engineer's survey of the Salt Lake and Utah Railroad Company, and to complete and make ready the said grade or roadbed for the laying of track thereon; and said Vosburg and Carlson, in consideration of the work so to be performed and completed by said plaintiff, agreed to pay

to plaintiff at the time of the completion of said work, the sum of forty cents (\$.40) per cubic yard, for all loose dry material removed in the execution of said work, and, if in the prosecution of said work the plaintiff should encounter wet material, then and in that event he was to prosecute said work to completion upon what is known as a force account, that is to say, the said plaintiff was to be paid at the rate of five dollars (\$5) per day for each man and team, plus ten per cent for wear and tear on the tools and equipment and \$2.50 for each laborer doing common labor; in other words, the plaintiff was to be paid at the rate of \$5.50 per day for each man and team and \$2.50 as aforesaid, for each laborer doing common labor, the plaintiff to furnish, while doing work under the force account, supplies and food for his horses and men at his own cost and expense."

Plaintiff further alleged that he commenced work on the date aforesaid and completed the work on the 10th day of December, 1918; that in completing said work he removed 10,518.5 cubic yards of dry material, and that, in addition thereto, he removed a certain quantity of wet material; that for the removal of dry material he, under the terms of the contract, was entitled to the sum of \$1,206.60, and for the removal of the wet material the further sum of \$1,914.00 "plus ten per cent."; that there was a balance due him at the commencement of the action, upon the contract aforesaid, amounting to the sum of \$1,698.20. As a second cause of action plaintiff alleged the defendants owed him a balance of \$141.30 for the use of his teams, etc. The defendants answered the complaint, and, in answer to the first cause of action, after admitting that they had entered into a contract with the plaintiff to do certain excavation work, they set forth the terms and conditions of that contract in the following words:

"That the terms, conditions and stipulations of the contracts between the Inter-Urban Construction Company and the Reynolds-Ely Construction Company, and the Reynolds-Ely Construction Company and these defendants covering the said work (the said two contracts being identical as to terms except as to price per cubic yard and amount), all of which terms, conditions and stipulations plaintiff knew and understood, were adopted and made a part of the said agreement entered into between these defendants and plaintiff herein, except that these defendants were to pay plaintiff the sum of 40 cents per cubic yard for material removed in the course of said work, and that said work so undertaken by plaintiff was to be completed by November 15, 1913."

Defendants denied that plaintiff had removed the amount of dry material claimed by him, and averred that he had removed only 5,140.1 cubic yards of dry material, and further averred that he had removed no wet material at all as defined by the terms and specifications of the contract. Defendants admitted that there was a balance due upon the first cause of action amounting to \$208.80 and no more. They also admitted that there was a balance due on the second cause of action amounting to \$17.80 and no more. The defendants also set up a counterclaim against the plaintiff for damages, but that is not material here.

The defendants were subcontractors under the contractors named in their answer and they in turn sublet the work in question here to the plaintiff. A trial to a jury resulted in a verdict for the plaintiff in the sum of \$1,135.78 on the first cause of action, and nothing on the second cause of action. Judgment was entered in accordance with the verdict, and the defendants appeal.

While defendants' counsel have assigned a large number of errors, yet in their brief they have grouped them all under a few heads. We shall consider only those assignments which are deemed material.

[1] The assignments we shall consider first relate to alleged errors in the admission of evidence. In considering these alleged errors we shall not refer to the many questions, rulings, and exceptions, since the several rulings must all be controlled by one general principle. It will be observed that the plaintiff declared upon an oral contract, wherein he alleged that he had agreed to construct a certain portion of a certain railroad "grade or roadbed," and that in doing that work he was to receive 40 cents for every cubic yard of "loose dry material" removed by him and a fixed per diem for removing wet material, etc. No specific terms or conditions of the contract are pleaded. The defendants in their answer, however, specifically set forth that "the terms, conditions, and stipulations" of the oral contract were to be the same as those mentioned in certain contracts to which special reference was made. In other words, "the terms conditions, and stipulations" that were contained in the contracts referred to, the defendants claimed, were in fact adopted by the plaintiff and the defendants as part of the oral contract sued on. At the trial plaintiff testified in general terms what, according to his version of the oral contract, was due him from the defendants thereunder, both for removing dry material and what he contended constituted wet material. It is, however, insisted that, under the terms and stipulations of the contracts referred to in their answer, plaintiff did not remove any material which fell within what is denominated "wet material" under those contracts, and hence was not entitled to the amount claimed by him upon that score, or to any amount. For the purpose of proving their claim in that regard counsel for defendants, in various ways, attempted to introduce the contracts and specifications pleaded in their answer. Plaintiff's counsel, however, objected to the proffered evidence upon the ground that the contracts referred to were between other parties, and hence were "immaterial and irrelevant." The court, it seems, adopted the view of plaintiff's counsel and excluded the proffered evidence in whatever form it was offered. Some idea of the theory upon which the district judge excluded the proffered evi-

dence can best be gleaned from what is said in ruling upon the question. He said:

"Now, this offer which is now made of certain matters in the document marked for identification as 'Defendants' Exhibit 16,' in the first place, could not bind the plaintiff in this case, because it could not be considered as an admission. There is an entirely different privity between the parties to this document and the parties in this action, and then the record further discloses that this witness did not read this contract and does not know what it contains. The objection is sustained."

From what he did say it is quite clear that the ruling is erroneous according to the most elementary principles of law. Quite true plaintiff could not be bound by the terms and conditions of contracts made between others with whom he was not in privity, but the defendants by their offer did not seek to so bind him. All they attempted to do was to establish the terms of plaintiff's own contract as the defendants claimed them to be, and thus bind him by those terms if the jury should find them to be as contended by the defendants. In order to so bind the plaintiff, the defendants were required to prove at least two things: (1) What the terms, conditions, and stipulations of the contract they referred to in their answer were; and (2) that the plaintiff and the defendants had adopted such terms, conditions, and stipulations as part of the parol contract sued on. To show the first was as necessary as it was to prove the second, and it would be utterly useless to prove one unless the other was also proved. The evidence shows that the plaintiff had said, when the contract in question was entered into:

"You needn't explain to me those conditions. I bid on this work and I understand what they are."

That evidence was, however, without effect as long as the defendants were not permitted to show what the terms and conditions of the contracts were to which they had referred in their answer and which, they contended, were adopted by the plaintiff and the defendants. The court, therefore, committed manifest error in excluding the defendants' proffered evidence by which they sought to prove the terms, conditions, and stipulations of the contracts referred to in the answer.

[2] It is next contended that the court erred in sustaining plaintiff's objections to the defendants' attempts, by various questions propounded to their witnesses, to prove the precise limits of plaintiff's contract. The plaintiff had testified that nothing was said, either by the defendants or by himself, concerning the limits of his contract, but that he was to remove the earth between certain stations as fixed by the railroad engineer. It appeared at the trial that the firm of Sumpston & Straw, a copartnership of which the plaintiff was the junior member, had contracts for excavating the earth on both ends of the portion of the excavating to be done by the plaintiff under the contract in question. That is, plaintiff's work, under his con-

tract, was between the work done under two of the contracts of the firm aforesaid. The south end of plaintiff's contract thus was coterminous with the north end of said firm's contract lying to the south, and the north end was coterminous with the south end of said firm's contract lying to the north of plaintiff's contract. The plaintiff also testified that he had excavated longitudinally for a distance of 218.6 feet, and also removed some material beyond those limits; that he had removed 10,516.5 cubic yards of dry material, and in addition thereto a large amount of wet material. The defendants denied all that, and attempted to show that plaintiff's contract did not extend a distance of 218.6 feet as claimed by him, but that his contract extended only over a space of 176 feet, and that he was entitled to pay for the removal of only 5,140.1 cubic yards instead of 10,516.5, as claimed by him. As before pointed out, the firm of Sumpston & Straw had the adjoining contracts to the north and south of plaintiff's contract. Defendants' counsel, therefore, attempted to prove just where the north and south end lines of those two contracts were. Plaintiff's counsel objected, however, that such fact was "immaterial and irrelevant," since plaintiff was neither bound by those contracts, nor concerned in what they contained. Under different circumstances counsel's objection might have been proper, but such would not be the case under all possible circumstances. For example, if A. and B. have a controversy concerning A's boundary line, it ordinarily would not be either material or relevant to prove where the boundary lines of C. and D. were located, although such lines might be adjacent to those of A. If, however, either A. or B. should contend that A's boundary lines were coterminous with C's and D's lines, then it might be very material to show just where the latter boundary lines were located, for the very good reason that if the boundary lines between A., C., and D. were coterminous, then to establish C's and D's lines would also establish A's line. If A's boundary line were marked on the ground, then such marked line would control. The evidence of all parties, including the plaintiff however, is to the effect that the boundary lines of plaintiff's contract were not marked on the ground, and nothing was said with respect to where they were located, except to name the stations within which he was to operate. As we have seen, it was also conceded on all sides that plaintiff's contract extended to the two contracts lying on either end of his contract. It is manifest, therefore, that it was both material and relevant for the defendants to prove just where the limits of plaintiff's contract were. One way to do that was to prove where the boundary lines of the original contracts referred to in defendants' answer were. That is just what defendants sought

to prove by the proffered evidence. The court, however, in effect ruled that although they might establish, if they could, where the boundary lines of plaintiff's contract were, yet they could not do that by proving where the boundary lines of the adjoining contracts were. Moreover, the defendants contended that the plaintiff was claiming pay for material which had been removed on the two adjoining partnership contracts, and that if he were only allowed for the 176 feet, which was the length of his contract, he had only removed the number of cubic yards claimed by them. Of course, the jury were not bound to believe defendants' evidence upon that subject, but defendants had a clear legal right to present to the jury what they claimed were the facts in that regard. Counsel for plaintiff, in answer to defendants' contention upon this question, say:

"The exclusion of this evidence did not prevent defendants, however, from proving their theory of the contract and of the yardage involved."

That is quite true, but defendants had the right to establish those facts by any competent and material evidence at their command. That right was denied them. We cannot say what conclusion the jury might have reached if the excluded evidence had been admitted. We think, therefore, that the trial court was clearly in error in excluding defendants' proffered evidence, and that the error was prejudicial to the substantial rights of the defendants.

[3] We remark that in that connection defendants' counsel offered some evidence to the effect that the railroad company had only allowed pay for certain amounts of material that had been removed. The court's rulings upon those questions were correct. It was not material nor relevant what the railroad company had allowed. Plaintiff, as between him and the defendants, would not be bound by that, but he would be limited to what he had a right to remove under his contract, and by the amount he in fact did remove under it, and not by what the company had allowed.

It is next insisted that the court erred in permitting the plaintiff to recover for removing wet material which it is contended, under the terms and stipulations of the contracts referred to in defendants' answer and which we have already discussed, did not constitute wet material for which plaintiff was entitled to recover the special rates claimed by him. Of course, in that regard the terms of the contracts which we have ruled the court erred in excluding would control in the event the jury found that those terms were adopted and made a part of the contract sued on by the plaintiff. That the defendants had the right to show what those conditions were we have already determined, and therefore we need not pursue this subject further.

The next assignment arises as follows: At

the trial the plaintiff claimed that he was entitled to a large sum, to wit, \$1,500, for having removed material not contemplated under his original contract entered into with the defendants. In the original contracts made by the railroad company the sides or banks of the cut plaintiff was to excavate under his contract were to be made or left vertical. He, however, insisted that in doing the work the banks "sloughed" to such an extent that it was necessary for him to remove a large amount of material not originally contemplated; that he saw the defendants about it, and that it was agreed between him and the defendants that he should receive pay as though he had in fact constructed the sides of the cut to a "one to one slope," which would be at an angle of 45 degrees; that while he did not in fact make such a slope, yet the cut should be measured as though he had constructed the sides in that way. The defendants denied plaintiff's contention, and insisted that he was to receive pay only for vertical sides. Ordinarily the question whether plaintiff's contention should prevail or not would, as a matter of course, be one for the jury. Defendants' counsel, however, insist that the court erred in submitting that question to the jury for the reasons: (1) That there was no consideration for the alleged agreement to pay for a one to one slope; and (2) that no such an agreement was pleaded; and hence no issue of that character was presented.

[4, 5] The first proposition raised by counsel, under the authorities is not free from either difficulty or doubt. Of course if the making of a one to one slope, either directly or by implication, was a part of the original contract with the railroad company and the terms of that contract were adopted and made a part of plaintiff's subcontract as contended by the defendants, then the plaintiff was already bound to make such a slope, and it is elementary that a promise to pay a person for what he by the terms of his contract is already bound to do is without consideration, and therefore unenforceable either in law or equity. See 1 Page on Contracts, § 312; 9 Cyc. 349, 350, where the doctrine is clearly stated and the cases are collated. There are, however, exceptions to the general rule just stated. While the decisions are quite harmonious with regard to the general rule, they are in conflict with regard to when the exceptions apply or modify the general rule. See 1 Page on Contracts, supra, and 9 Cyc. 352, 353, where the cases upon the exceptions are referred to. Upon the other hand, while refusing to follow the cases which have adopted the rule respecting the exceptions, some of the courts have nevertheless assumed a middle ground. The rule adopted by the latter courts is well illustrated by the Supreme Court of Minnesota in the case of King v. Duluth, M. & N. Ry. Co., 61 Minn. 482, 63 N. W. 1105, and cases there

cited. In the course of the opinion the doctrine is well stated by Mr. Chief Justice Start in the following words:

"But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. 1 Whart. Cont. § 500."

It is also pointed out in the course of the opinion that in applying the doctrine each case must be considered in the light of all the surrounding facts and circumstances and the objects and purposes the parties had in view in entering into the contract, and if it appears that the party claiming additional compensation is already bound by the contract, or that the matter by implication of law must be held to have been within the contemplation of the parties, then the general rule should be enforced. In the original contract in this case it seems clear that the parties contemplated the sides of the excavation should be vertical and not sloping. Such, it seems, was also the contract between plaintiff and the defendants. The making of the sloping sides was therefore entirely outside of the terms of the contract, and it seems could not have been within the contemplation of the parties, either express or implied. This case, therefore, is not one where a party to a contract promises to pay the other party thereto an additional compensation for doing something which the promisee was already bound to do by the terms of the contract. That fact, therefore, takes this case out of the general rule.

[6-8] With regard to the second proposition it will be remembered that the plaintiff claims, and we have held, that the removing of the material constituting the slopes was not included within his original contract. He also claimed at the trial that the agreement for extra compensation for making the slopes was entered into as a distinct agreement and at some time after the original contract was entered into. Moreover, it appears that it was not a modification of the original contract merely, but that it was a new and independent agreement. As we have

seen, Plaintiff testified that he was entitled to \$1,500 for removing the material in making the slopes. Plaintiff, however, said nothing about such an agreement or liability in his complaint. Nor did the defendants, either in their answer or counterclaim, refer to the matter in any way. But the plaintiff, in his reply, for the first time, referred to the one to one slope, but what was said in that connection, as a matter of pleading, constituted mere surplusage which the defendants had a right to disregard. Defendants' counsel, therefore, contend that the court erred in submitting to the jury the question of plaintiff's right to recover for that claim. It seems to us the contention is well founded. The claim being based upon an independent promise or agreement, as it is, was just as much a separate and distinct cause of action as was the first cause of action under the contract declared on by the plaintiff or the second one for the use of the horses, wagons, etc. Neither could the plaintiff add anything to either of his causes of action in his reply. That is not the province of a reply. In this jurisdiction a reply can only be filed under the conditions pointed out by the statute, and in no event can a cause of action be either stated or enlarged in the reply. When, however, evidence is produced in support of a claim which ought to have been pleaded, and is received without objection, the party producing it may nevertheless obtain leave of court to amend his pleading to conform to the evidence and recover judgment accordingly. Where that is the case, the pleadings, after they are amended, support a judgment based upon the evidence and that is all that is necessary. Such a course was, however, not pursued in this case, and, in view of the pleadings as they stand, we think the court erred in submitting to the jury the question of whether plaintiff should recover for removing the material and making the slopes.

What we have said sufficiently covers all other assignments, including those relating to the instructions. All those assignments are covered by the same general principles we have discussed, and of course will not occur again. Moreover, the instructions were erroneous only because they were in harmony with the trial court's rulings upon the evidence which we have already passed on. All such errors will therefore necessarily be avoided upon a retrial of the case.

For the reasons stated herein, the judgment is reversed, and the case is remanded to the district court of Utah county, with directions to grant a new trial. It is further ordered that the court may make such orders with regard to amendments of the pleadings by either party as he may deem just and proper. Costs to appellants.

STRAUP, C. J., and McCARTY, JJ., concur.

LANGTON LIME & CEMENT CO. v. PEERY

et al.

SAME v. SMITH et al.

(Nos. 2806, 2807.)

(Supreme Court of Utah. June 29, 1916.)

1. APPEAL AND ERROR \S 327(2)—PROCEEDINGS FOR TRANSFER—NOTICE—PARTIES ENTITLED TO NOTICE.

All parties who may be adversely affected by reversal or modification of the judgment must be made parties to the appeal, although they defaulted in the court below.¹

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814, 1831, 1834; Dec. Dig. \S 327(2).]

2. APPEAL AND ERROR \S 327(11)—PARTIES—PERSONS NOT AFFECTED BY REVERSAL.

A contractor who defaulted in a mechanic's lien case need not be joined in an appeal taken by the owner, since the reversal or modification of the judgment would not adversely affect him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814; Dec. Dig. \S 327(11).]

3. EXCEPTIONS, BILL OF \S 58(3)—SETTLEMENT—SERVICE—PARTIES TO BE SERVED.

A defaulting contractor need not be served with the bill of exceptions in a mechanic's lien case since a reversal or modification of the judgment would not adversely affect him.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 103; Dec. Dig. \S 58(3).]

4. MECHANICS' LIENS \S 132(10)—PROCEEDINGS TO PERFECT—TIME FOR FILING CLAIM—CONTINUING CONTRACT.

Where an owner exercised his contract right to change contractors, a mechanic's lien notice is in time when filed over 40 days after the first contractor quit, but within 40 days after delivering material to the second contractor, for the contract is continuing.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 202; Dec. Dig. \S 132(10).]

5. MECHANICS' LIENS \S 99, 132(14)—PROCEEDINGS TO PERFECT—TIME FOR FILING CLAIM—STATUTE.

A subcontractor is entitled to a mechanic's lien upon complying either with Comp. Laws 1907, § 1388, by filing a claim for work, etc., to be thereafter performed, or with section 1386 by filing a notice within 40 days after the work, etc., is performed.²

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 131, 132, 206; Dec. Dig. \S 99, 132(14).]

6. MECHANICS' LIENS \S 103—RIGHT TO LIEN—MATERIALMEN—STIPULATIONS IN PRINCIPAL CONTRACT AS TO LIEN.

A contract provision that the contractor should keep the building free from liens, etc., does not affect a materialman's right to a lien upon complying with Mechanic's Lien Law (Comp. Laws 1907, §§ 1372-1376, 1378, 1386, 1388).

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 135; Dec. Dig. \S 103.]

7. MECHANICS' LIENS \S 290(2)—ENFORCEMENT—FINDINGS—SUFFICIENCY—NONPAYMENT.

A finding that a mechanic's lien claimant had not been paid, sufficiently meets a conten-

tion that the claimant had been paid by work done for it by the contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 592, 593; Dec. Dig. \S 290(2).]

8. APPEAL AND ERROR \S 931(6)—REVIEW—PRESUMPTIONS—FINDINGS—EVIDENCE CONSIDERED.

Where there is ample, competent, and material evidence in a mechanic's lien case, it will be presumed that the court considered only proper evidence in making its findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3766; Dec. Dig. \S 931(6).]

9. MECHANICS' LIENS \S 164(1)—OPERATION—AMOUNT OF LIEN—LIMITATION TO AMOUNT PAYABLE UNDER CONTRACT.

Under Mechanic's Lien Law (Comp. Laws 1907, § 1373), providing that the lien shall extend to the entire contract price, or the amount remaining due thereunder when the claimant commences work, a subcontractor's lien cannot be enforced beyond those amounts.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 235; Dec. Dig. \S 164(1).]

10. MECHANICS' LIENS \S 281(4)—ENFORCEMENT—EVIDENCE—SUFFICIENCY—AMOUNT OF DEFENDANT'S INDEBTEDNESS.

Evidence held to sustain a finding that a mechanic's lien claim could be satisfied without exhausting the sum specified in the contract between the owner and the principal contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 571; Dec. Dig. \S 281(4).]

11. MECHANICS' LIENS \S 57(2)—INTEREST SUBJECT TO—WIFE'S INTEREST.

Under Comp. Laws 1907, § 2826, a wife's interest in her husband's property other than homestead is subject to a mechanic's lien claim.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 65; Dec. Dig. \S 57(2).]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Two actions to foreclose mechanic's liens were commenced by the Langton Lime & Cement Company, one against Joseph S. Peery and his wife, and the other against Elias Wesley Smith, in both of which the Walker Stone Company became a party defendant and asserted mechanic's lien claims against the property. From a judgment sustaining the Walker Stone Company's lien, the owners appeal. Affirmed.

Snyder & Snyder, of Salt Lake City, for appellants. James Ingebreten, of Salt Lake City, for respondent.

FRICK, J. The Langton Lime & Cement Company, a corporation, commenced two actions to foreclose mechanics' liens. The first action was commenced against one O. M. Engdahl, contractor, and said Peery as owner of a certain building and the real estate upon which the same is situated, and against a number of other lien claimants whom it is not necessary to enumerate here; and the second one was commenced against said Engdahl as contractor and said Smith as the owner of a certain other building and the real estate on which the same is situated, and against other lien claimants whom it is not necessary to enumerate. The Walker

¹ Allen v. Garnet, 45 Utah, 39, 143 Pac. 228.

² Morrison v. Carey-Lombard Co., 9 Utah, 70, 33 Pac. 238; Lumber Co. v. Partridge, 10 Utah, 322, 37 Pac. 572.

Stone Company, hereinafter called company, was made a defendant in both actions as a lien claimant and it set up its liens and asked that the same be established against both properties and foreclosed. Engdahl, the contractor, made default in both actions. Either some time before or at the trial of the cases all the other lien claimants were settled with or their claims were taken care of, except the first mortgage lien, and that was not in question in the lower court nor is it in question here. The only real parties to the first action, therefore, were Peery (who is appellant here) as the owner of one of the buildings and the real estate on which it is situated, and said company (which is respondent in this court); and to the second action said Smith as appellant and said company as respondent. The cases were tried together below and were heard as one case by this court, and we shall dispose of them on that basis.

The court entered a default judgment against Engdahl and declared the mortgage a first lien on both premises, and also declared the company's liens as second liens on both said properties, and, in case of default in payment of the company's liens, ordered said properties sold subject to said mortgage. Both Mr. Peery and Mr. Smith appeal.

[1-3] The first question requiring consideration is presented by counsel for said company. In settling the bill of exceptions and in taking the appeal neither said Peery nor said Smith served the bill of exceptions or the notice upon any of the defendants or parties other than said company. Counsel therefore contends that, under the rulings of this court in *Allen v. Garner*, 45 Utah, 39, 143 Pac. 228, and preceding cases, the appeal should be dismissed, or, at least, the bill of exceptions should be stricken, for the reason that neither said Engdahl nor any of the other defendants were served with notice of appeal. This court, by an unbroken line of decisions, has held that all the parties to an action who may be adversely affected by a modification or reversal of the judgment are adverse parties under our statute and must be made parties to the appeal either as appellants or respondents. We have, however, further held that such is the case even though a party makes default in the court below. *Allen v. Garner*, supra. It will be observed, however, that the test whether a party below is a necessary party to an appeal, as laid down in that case, as in all other cases emanating from this court, is that the omitted party must be affected by a modification or reversal of the judgment appealed from. If a party would not be affected he is not a necessary party, and hence to omit to serve him with notice of appeal or to serve him with a bill of exceptions is not fatal to the appeal, nor is it ground for striking the bill of exceptions. In this case, both under the contract entered into by Mr. Eng-

dahl and under our statute, Engdahl's status or liability is not in the least affected, regardless of what conclusion we shall reach respecting the judgment appealed from. This precise question has been before the Supreme Court of California several times in recent years, and that court has squarely held that a contractor, in the position of Engdahl, is not affected by the modification or reversal on appeal of a judgment foreclosing a mechanic's lien against the property of the owner, although a personal judgment was also entered against the contractor. *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983; *Quist v. Sandman*, 154 Cal. 748, 99 Pac. 204, and cases cited in those two cases. Although there are some provisions in the California statute somewhat different from ours, yet the decisions and the reasoning of the California Supreme Court apply to our statute. The Supreme Court of Idaho has arrived at the same conclusion in the case of *Nelson Bennett Co. v. Twin Falls, etc., Co.*, 13 Idaho, 767, 92 Pac. 980, 13 Ann. Cas. 172. We do not deem it necessary to quote from those cases nor to cite other cases. The reasoning in all of them is not only sound but convincing. In view, therefore, that all of the other lien claimants were out of the case at the time of judgment, and that the only defendant who in fact remained in the case apart from the two appellants cannot be affected by whatever judgment we may enter or direct, it was not necessary to serve notice of appeal upon any of the others; neither was it necessary to serve the proposed bill of exceptions upon any of them, or their attorneys.

Counsel for appellants, however, insists that our former decision, wherein we held that the requirement to serve notice upon an adverse party applies to one who made default in the court below, should be overruled. We think otherwise. A party in making default certainly concedes no more than that judgment as prayed for may be entered against him. By making default he indicates that he is satisfied with such a judgment. In case, therefore, the judgment is appealed to another court in which his liability may be materially affected or changed, and where additional costs may be adjudged against him, we think it is but fair and just that in case he can be served with notice of the appeal he should be. A party does not become an outlaw simply because he makes default in a court of original jurisdiction. While there are cases which are contrary to our holding in *Allen v. Garner*, supra, we can see no reason for changing the ruling there made that in case a party may be adversely affected by a modification or reversal of the judgment on appeal he should be served with notice when that can be done. To serve such a notice when the party's residence is known, and when he does not conceal himself, can work no hardship upon

any one. Upon the other hand, it affords every party to an action an opportunity to advise this court why the judgment should be sustained. Every one is thus given his day in the court to which an appeal is taken and in which the rights of all parties may be finally determined. Of course, where service of notice cannot be made and the appellant would be deprived of his constitutional right of prosecuting an appeal, and when timely application is made to this court setting forth the facts, some way will no doubt be found to allow the appeal and to dispose of it.

For the reasons stated, therefore, the motion to dismiss the appeal and the motion to strike the bill of exceptions must be denied.

Proceeding now to the merits. Appellants' counsel has grouped his numerous assignments of error as follows: (1) That "the findings are contrary to the evidence and insufficient to support the judgment"; (2) that the court erred in its "construction of the lien law as a whole"; (3) that "respondent has no lien because not filed in time and because waived, and because it elected to and did take pay in another manner"; (4) "that findings are not upon all the issues"; (5) "errors in the admission and rejection of evidence"; and (6) "Mrs. Peery's objections." It will be more convenient for us to consider the foregoing propositions in a different order from that in which counsel has stated them. We shall proceed to a consideration of the second proposition, namely, that the court erred in construing our mechanics' lien law, and especially as the same applies to subcontractors.

In order to present the questions involved intelligently we shall be required to state somewhat at length the different sections of the mechanic's lien law. The different sections of the law are found in Comp. Laws 1907, and those which are material here are as follows:

Section 1372 reads as follows:

"Mechanics, materialmen, contractors, subcontractors, builders, and all persons of every class performing labor upon or furnishing materials to be used in the construction * * * of any building * * * shall have a lien upon the property upon which they have * * * furnished materials, for the value of such * * * materials furnished, * * * whether at the instance of the owner or of any other person acting by his authority or under him as agent, contractor, or otherwise."

Section 1373 reads as follows:

"In case of a contract between an owner and a contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole of the contract price: * * * Provided, that if at the time of the commencement to do work or furnish materials, the owner has paid upon the contract, and in accordance with the terms thereof, any portion of the contract price, the liens hereby created shall extend only to the unpaid balance of such contract price and of which such laborers and materialmen shall have had notice."

Section 1374 reads:

"No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person except the contractor; but as to such liens payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract or be or become indebted to the owner, in any amount for damages or otherwise, for non-performance of his contract or otherwise."

Section 1375, so far as material, provides:

"As to all liens except that of the contractor, the whole contract price shall be payable in money * * * and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the owner and against the contractor."

Sections 1376 and 1378 are as follows:

"No alteration of any contract shall affect any lien acquired under the provisions of this chapter."

"When any person entitled to a lien under the provisions of this chapter, other than the original contractor, shall have actually commenced to perform labor upon or to furnish materials for any building, improvement, or structure herein mentioned, the property shall be charged with the liens in this chapter provided, and no payment made to the original contractor shall in anywise defeat or impair the claims for such liens."

Section 1386 reads:

"Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, must, within forty days after furnishing the last material or performing the last labor for any building, improvement, or structure, or for any alteration, addition to, or repair thereof, or performance of any labor in or furnishing any materials for any mining claim, file for record with the county recorder of the county in which the property or some part thereof is situated, a claim in writing containing a notice of intention to hold and claim a lien, and a statement of his demand, after deducting all just credits and offsets, with the name of the owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last materials furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or some other person."

Section 1388 reads as follows:

"Any subcontractor before commencing to furnish materials or to perform work, or at any time thereafter and before the completion of his contract, may file a statement of claim with the recorder as hereinbefore provided, containing a notice of intention to hold and claim a lien, a description of the property to be charged, and the probable value of the work to be done, or the probable value of the materials to be furnished, as near as may be. From the time such statement shall have been filed, he shall have a lien for the work thereafter done, or materials furnished by him, not exceeding the sum stated as the probable value thereof; and in the event of such subcontractor claiming to have done work or furnished materials before the filing of such statement, he may include therein a statement of the value of the work already done or material furnished, as near as may be, for which, to the extent of the sums mentioned, his lien shall likewise attach."

The first thing that divides the parties is the construction that should be placed on section 1388, which is the last section set forth above. In order to fully understand the position of appellants' counsel it now becomes necessary to refer to a few of the material facts.

On the 11th day of April, 1910, the appellants entered into a general contract with the defendant O. M. Engdahl to construct two apartment houses, one for the appellant Smith and the other for the appellant Peery. The contract price to be paid to Engdahl to complete the two buildings was \$22,280 for each building, or \$44,560 for both. The whole amount paid upon said contract will hereafter be given in this opinion. On June 15, 1910, respondent entered into a contract with Engdahl, the contractor, to furnish the cut stone for the two buildings for the sum of \$2,084.30, one-half of that sum to be applied to each one of the buildings. Respondent made the first delivery of stone on July 23, 1910, and the last on December 6, 1910, but performed some work on the building connected with the stone work as late as the 23d day of December, 1910. Respondent's notice of intention to claim a lien, and the claim of lien itself, were filed on the 11th day of January, 1911, as provided by our statute. Some time in the preceding October Engdahl abandoned his contract with appellants and they, on November 4th following, entered into a contract with one Thomas Homer to complete Engdahl's contract, agreeing to pay said Homer the sum of \$16,500 to complete both buildings. When the respondent commenced to deliver the stone perhaps not more than \$10,000 or \$12,000 had been paid on Engdahl's contract. The evidence on that point is not very clear, but in view that the amount paid was much less than one-half of the contract price the exact amount is not controlling or even material for the purposes of this decision. The respondent, within the time required by section 1386, *supra*, and in accordance with its provisions, filed separate claims and notices of intention to claim a lien against each one of the buildings, and the ground upon which they stand, for the amount remaining unpaid upon its contract with Engdahl. After Engdahl had abandoned his contract respondent continued to furnish stone under the contract with him and the same was all accepted and it is conceded was all used in the buildings and is a part thereof. Respondent, however, did not proceed under the provisions of section 1388, *supra*, by filing the statement in that section provided for. Counsel for appellants contended in the court below, and insists in this court: (1) That in view that respondent did not file the statement mentioned in section 1388 it acquired no valid lien against the buildings, or either of them; (2) that inasmuch as it did not file its claim and notice of intention to claim a lien within 40 days

from the time it furnished the last item under the Engdahl contract—that is, within 40 days from the time Engdahl abandoned the contract—it, for that reason, failed to acquire a lien on either of the buildings; and (3) that inasmuch as it was provided in the contract entered into between Engdahl and appellants that the former should keep the buildings free from liens, and in view that all subcontractors were bound by the provisions of that contract, neither of them could acquire a lien against the buildings but were required to look to Engdahl for their pay. In view that the trial court did not agree with counsel's contentions he insists that the court has failed to correctly construe and apply the mechanic's lien law of this state.

[4] The real situation must be kept in mind. In article V of the Engdahl contract it was expressly provided that in the event that he should, "fail in any respect to prosecute the work with promptness and diligence" or should fail in other respects, the owners had the right to proceed to complete the contract and to deduct the cost of doing so from the contract price, and if it developed that the unpaid portion of the contract price was insufficient they might recover damages against Engdahl for such difference. The contract also provided that the owners, for the purpose of completing the contract, should take possession "of all materials, tools and appliances" on the premises "and to employ any other person or persons to finish the work and to provide the materials therefor." The contract with Homer, in express terms, specified that it was entered into under the foregoing provisions of Engdahl's contract and to complete the same. Now, for the purpose of considering the contract with Engdahl and the one with Homer as one contract, so far as the contract price and the payments for the buildings were concerned, counsel for appellants, at the trial, stated his position as follows:

"Our position is, that the money paid to Homer was paid on the Engdahl account under the terms of article V of the contract."

That is, he contended it was paid pursuant to the article of the contract, a portion of which we have just quoted. We think counsel's position is the correct one, but, if it is, then it must also follow that the material that was furnished by any subcontractor for, and which was used in, the building under any contract entered into by any subcontractor with Engdahl must be deemed as furnished to complete the original contract entered into between Engdahl and the appellants. In other words, under the circumstances of this case it is wholly immaterial, for the purpose of acquiring a right to a lien, whether the materials were furnished under the contract with Engdahl or under the contract entered into with Homer. The owners of the buildings were bound under either in so far as the right to a lien was concerned, provided the subcontractor com-

piled with the statutory provisions in filing his claim for a lien in other respects. The question thus narrows itself down to the proposition of whether the respondent has, by what it did in the way of filing and recording its claim and notice of intention to claim a lien, acquired a lien under our statute.

[5] That the claim was filed within the 40 days required in section 1386, in view of what we have said, there can be no doubt. Nor can the contention prevail that the respondent has failed to obtain a lien because it did not file the statement mentioned in section 1388. That section, in substantially the same form that it is now, was adopted in 1890. Laws Utah 1890, p. 26, § 12. That section was considered and passed on twice by the territorial Supreme Court. The first time it was before that court was in 1893 in the case of Morrison v. Carey-Lombard Co., 9 Utah, 70, 33 Pac. 238. In that case the question now raised by counsel was carefully and extensively considered and the court arrived at the conclusion that while a subcontractor may, if he chooses, follow the provisions of section 1388, yet, in order to acquire a lien, it is sufficient if he complies with the provisions of section 1386. The same result was reached in the case of Lumber Co. v. Partridge, 10 Utah, 322, 37 Pac. 572, where the preceding case was approved and followed. The results reached in those cases have been followed in this jurisdiction ever since. Section 1388 in its present form has been in force ever since 1898. R. S. 1898, § 1388. Even though we were inclined to arrive at a different conclusion from that reached by the territorial Supreme Court, yet, in view that there is no substantial difference between the present phraseology of section 1388 and when it was passed on by the territorial Supreme Court, and in view that the law as declared in the two cases referred to has been enforced and followed for more than 20 years, we should be very slow to disturb the rule there laid down; and we do not feel inclined to do so.

[6] The third proposition raised by counsel that because it was provided in the contract that Engdahl should keep the buildings free from liens for that reason those who furnished him labor or material were prevented from acquiring liens, to our minds, is in the very teeth of the statute. We have set forth the different sections for the purpose of permitting the reader to judge for himself, and to prevent us from repeating in the opinion what their effect should be. If counsel's last contention were adopted our lien statute could, in effect, be repealed by the owner and the principal contractor so far as the subcontractors' rights are concerned. The provisions of the statute are, however, so clear upon the proposition that the rights of the subcontractors cannot be affected by the owner and the principal contractor that no

comment upon that phase of the statute is necessary. If the subcontractor follows the provisions of the statute enacted for his benefit he acquires a lien, regardless of the acts of the contractor or the owner of the building. It follows, therefore, that respondent filed its claim and notice of intention to claim a lien within proper time and that it acquired a lien against both buildings and the ground upon which they stand, although it did not file the statement mentioned in section 1388 and notwithstanding the provisions of Engdahl's contract.

[7] Neither can the contention prevail that the respondent waived its right to a lien, nor that it received payment for the material furnished by it "in another form." While it is true that counsel produced some evidence to the effect that respondent's manager had taken up the question of pay for the stone with Mr. Engdahl by having the latter build a dwelling house for the manager, yet the great preponderance of the evidence is against counsel's contention that any arrangement for payment except in the usual manner was entered into between Engdahl and the manager. Indeed, the evidence against counsel's contention is all but conclusive. In that connection complaint is also made by counsel that the court failed to find whether counsel's contention was correct or whether the manager's version of the transaction was true. While the court made no specific finding upon that question, it, however, did find that respondent had not been paid for the stone as contended for by appellant's counsel. The court's finding is therefore responsive to appellants' pleas of payment and is against those pleas. In view of the circumstances of this case the failure to make a specific finding upon the question suggested by counsel cannot affect the result. In view that this is an equity case we could make or direct a finding if one were necessary. As we read the record, and we have read the whole evidence as it is preserved in the bill of exceptions, but one finding is reasonably permissible under the evidence upon that question, and that is that the respondent neither agreed to receive, nor did receive, payment for the stone by it furnished for the buildings or either of them from any source, except in the regular way.

[8] There is no merit to the contention that the court committed error "in the admission and rejection of evidence." This is an equity case and the court, not only once but on frequent occasions during the trial, announced to counsel that he would admit the evidence proffered and would hear counsel with regard to its relevancy and materiality later and would ultimately pass upon the competency, materiality, and relevancy of those parts of the evidence which were objected to by both sides. In view, therefore, that there is ample competent, material, and relevant evidence in the record to support the findings

we must assume that the court considered proper evidence only. Nor did the court reject any material evidence offered by appellants.

[9,18] Under the proposition that "the findings are contrary to the evidence and insufficient to support the judgment" various arguments are presented. One argument, as we understand counsel, is, that money in excess of the contract price of Engdahl's contract had been paid by the owners of the buildings to the subcontractors for the erection of the same. Under the provisions of section 1373, *supra*, subcontractors are entitled to claim a lien for the full amount specified in the contract between the owner of the building and the contractor. They, therefore, cannot enforce liens for any sum in excess of that amount, and if any part of the contract price has been paid in accordance with the provisions of the contract, if those provisions are not repugnant to our statute, before a subcontractor furnished material, his lien is limited to the amount remaining unpaid on the contract. The amount agreed to be paid the contractor, if the statute is complied with, is therefore the source and limit of the subcontractor's rights to claim a lien against the owners of the buildings. As we have seen, Engdahl agreed to erect the two buildings, excepting the heating plant and the plumbing, for \$44,560. According to the evidence there had been charged against the Engdahl contract the sum of \$29,693.90. In addition to that sum Mr. Homer was paid \$16,500 to complete the two buildings. The whole amount of \$46,193.90, which was charged against the Engdahl contract, was, however, not legally chargeable against it since some of the money was paid out for other purposes and hence must be deducted therefrom. There are at least two items, one for \$1,225 for plumbing and heating, and the other for \$1,000 paid to the architect, that cannot legally be charged against the Engdahl contract to the prejudice of respondent as a subcontractor. These two items alone amount to \$2,225, which, when deducted from the \$46,193.90, leaves a total apparently paid on the contract of \$43,968.90, or \$591.90 less than the contract price. But in addition to the foregoing there were other numerous items that were improper charges against the Engdahl contract which will reduce the amount legitimately chargeable against the contract so that there was enough remaining unpaid on the contract to satisfy respondent's claim in full. There is, therefore, ample evidence to justify the court's finding that the amount agreed to be paid on Engdahl's contract was not exhausted, and that the respondent was entitled to a lien for the full amount claimed. Indeed, the great weight of the evidence is to that effect. The court, therefore, did not err in making the finding complained of.

[11] Finally, it is contended that no lien could be obtained against Mrs. Peery's interest in the property without her consent, and that she did not consent. There is no evidence either way in the record upon that question. The contention is, however, not sound. The very statute which is relied on, to wit, Comp. Laws 1907, § 2826, which gives the wife an inchoate interest in her husband's property which he owned or acquired during marriage makes her right in all property except the homestead subject to claims "secured by mechanics' or laborers' liens for work or labor done or material furnished exclusively for the improvement of the same." A different question would arise if the premises constituted Mr. Peery's homestead. The case would then be controlled by the decision of this court in the case of *Lumber Co. v. Vance*, 32 Utah, 74, 88 Pac. 896, 125 Am. St. Rep. 828. In view of the character of the property involved, therefore, there is nothing in counsel's contention.

For the reasons stated the judgment should be, and it accordingly is, affirmed, with costs.

STRAUP, C. J., concurs in the result. McCARTY, J., concurs.

JENSEN et al. v. PRADERE, (No. 2113.)

(Supreme Court of Nevada. July 5, 1916.)

1. ANIMALS §100(8)—TRESPASS—MEASURE OF DAMAGES.

In a trespass action for grazing sheep upon plaintiffs' land, the damages may be calculated upon the reasonable value of pasturage, where the land was used only for such purposes.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 361, 384, 413; Dec. Dig. § 100(8).]

2. APPEAL AND ERROR §1001(1)—REVIEW—FINDINGS—CONCLUSIVENESS.

A judgment, based upon substantial evidence, will not be reversed because not supported by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3928-3933; Dec. Dig. § 1001(1).]

3. ANIMALS §100(9)—TRESPASS—ACTIONS—ATTORNEY'S FEE—STATUTE.

Under Rev. Laws, § 2336, providing that live stock grazing on another's land shall be liable for damages, costs, and an attorney's fee, held that a personal judgment for the attorney's fee cannot be rendered against the owner of the stock.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 100(9).]

McCarran, J., dissenting.

Appeal from District Court, Washoe County; L. N. French, Judge.

Action by Peter Stampe Jensen and others against Martin Praderé. Judgment for plaintiffs, and defendant appeals. Affirmed as modified.

James T. Boyd, of Reno, for appellant. Summerfield & Richards, of Reno, for respondents.

COLEMAN, J. This is an action to recover damages in the sum of \$5,000 for trespass upon certain lands by the sheep of appellant, and for costs and attorney's fees. Judgment was rendered in favor of the plaintiffs in the sum of \$540, together with costs of suit and \$350 as a reasonable attorney's fee.

While appellant assigned several errors as grounds for reversal, only three of them were argued; hence we will treat those not argued as waived.

[1] The first assignment which we will consider is the one to the effect that the action was brought for a tort, but that the judgment rendered was based upon an implied contract. The theory upon which this assignment is urged is that the court, in determining the amount of damage sustained by plaintiffs, fixed it at a sum equal to what it was reasonably worth to pasture the sheep. No case has been called to our attention where the method of arriving at the amount of damage sustained under similar circumstances was discussed, and the only ones that we have found are those of *Tex. & Pac. Ry. Co. v. Ervay*, 3 Willson, Civ. Cas. Ct. App. § 48 (p. 73), and *Tex. & Pac. Ry. Co. v. Land*, 3 Willson, Civ. Cas. Ct. App. § 51 (p. 75). In those cases it was held that, the land having been used for pasturage only, evidence of its reasonable value for such purpose would be proper. Since the land which was trespassed upon by defendant's sheep was used for pasturage only, we are of the opinion that the finding of the court sustained the pleadings and the judgment. While this question was not before the court in the case of *Pyramid L. & S. Co. v. Pierce*, 30 Nev. 237, 95 Pac. 210, the method of establishing the amount of damage was the same as in the case at bar.

[2] It is also urged that the evidence does not support the judgment. This court has time and again held, as have the courts generally, that a judgment will not be reversed on that ground where there is substantial evidence to support it. From a consideration of the entire evidence, we are unable to say that there is not substantial evidence to support the judgment. In view of the character of the evidence in this case, it is impossible to quote from it with any degree of satisfaction, and to quote it at length is out of the question.

[3] It is also asserted that that portion of the judgment awarding plaintiffs \$350 as an attorney's fee is erroneous. The court allowed an attorney's fee pursuant to section 2336 of the Revised Laws of Nevada, which reads:

"The live stock which is herded or grazed upon the lands of another, contrary to the provisions of the first section of this act, shall be liable for all damages done by said live stock while being unlawfully herded or grazed on the lands of another, as aforesaid, together with costs of suit and reasonable counsel fees, to be fixed by the court trying an action therefor, and said live stock may be seized and held by writ of at-

tachment issued in the same manner provided by the general laws of the state of Nevada, as security for the payment of any judgment which may be recovered by the owner or owners of said lands for damages incurred by reason of a violation of any of the provisions of this act, and the claim and lien of a judgment or attachment in such an action shall be superior to any claim or demand which arose subsequent to the commencement of said action."

It is the contention of appellant that the Legislature intended that an attorney's fee might be awarded and collected only in a case where the live stock is "seized and held by a writ of attachment," and that no personal judgment for attorney's fees should be rendered in any suit brought under this act. Counsel for respondents maintain that the case of *Dangberg v. Ruhenstroth*, 26 Nev. 457-460, 70 Pac. 320, 321, is decisive of the question, quoting:

"There is a broad distinction between the two statutes. Ours does not sanction the restraining of animals by the owner of land, and provide for a lien in his favor for their care before suit. It contemplates only an action at law for damages for the trespass, with counsel fees and costs of suit."

The exact question under consideration in the case at bar was not before the court in that case; the court simply meant to distinguish between the California statute, which provided that the landowner might take possession of the trespassing live stock and commence an action in rem, whereas our statute provides that a party may commence an action at law, sue out and levy an attachment, and, if successful, recover judgment for damages, costs, and attorney's fees, which might be satisfied by recourse to the live stock attached. In this connection the language of Lord Halsbury, in *Quinn v. Leathern* (1 Br. Rul. Cas. 209), is most appropriate. He says:

"Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority of what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

The same idea is expressed by Lord Manners, in *Revell v. Hussey* (2 Ball & B. 280), from which we quote:

"It is always unsatisfactory to abstract altogether the reasoning of the court in any reported case from the facts to which this reasoning is meant to apply. It has a tendency only to misrepresent one judge and to mislead another."

See, also, *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Ex parte Young Ah Gow*, 73 Cal. 438, 15 Pac. 81; *Lelsy v. Hardin*, 135 U. S. 135, 10 Sup. Ct. 681, 34 L. Ed. 128; *Mayer v. Erhardt*, 88 Ill. 457; *In re Johnson*, 98 Cal. 541, 542, 33 Pac. 460, 21 L. R. A. 380.

Costs and attorney's fees were not allowed at common law, and can be awarded only when the person claiming them brings himself within the express terms of the statute.

The statute quoted does not provide for a personal judgment against a defendant for attorney's fees, but simply makes the live stock liable for such fees, under certain conditions. There was no seizure and attachment of the live stock in this case; consequently there could be no personal judgment for attorney's fees against the defendant.

It may be possible that the Legislature had in mind that a personal judgment should be rendered in suits brought under the act in question when the plaintiff prevails, but there is nothing in the language used to convey this idea; and, while the court may, and should, construe statutes so as to give effect to the intention of the Legislature, yet if the words of the statute convey a definite meaning, there is no room for construction. *Goldfield Con. M. Co. v. State*, 35 Nev. 183, 127 Pac. 77.

"It is the duty of the courts (in construing a statute) to confine themselves to the words of the Legislature, nothing adding thereto, nothing diminishing." *Eddy v. Morgan*, 216 Ill. 437, 75 N. E. 174; 36 Cyc. 1106.

"In construing a Constitution the thing to be sought is the thought expressed." *Lewis v. Dorton*, 5 Nev. 399.

The judgment appealed from is modified by striking out so much thereof as awards plaintiffs an attorney's fee in the sum of \$350, and as so modified, it is affirmed.

NORCROSS, C. J., concurs.

MCCARRAN, J. (dissenting). I dissent. In this case there were issues presented other than those determined in the prevailing opinion. These issues, to my mind, deserved consideration, and I shall deal with them in a dissenting opinion which will be filed later.

TURNER v. FOGG, County Clerk, et al.
(No. 2243.)

(Supreme Court of Nevada. July 24, 1916.)

1. STATUTES §125(5)—SUBJECTS AND TITLES.

Act March 29, 1915 (St. 1915, c. 283), entitled "An act regulating the nomination of candidates by political parties providing for the holding of primaries and conventions and regulating the manner of nominating candidates by petition," does not contravene Const. art. 4, § 17, providing that each law shall embrace but one subject and matters properly connected therewith, which subject shall be embraced in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 187, 188; Dec. Dig. §125(5).]

2. STATUTES §64(1)—PARTIAL INVALIDITY.

The unconstitutionality of one section of a law does not destroy the validity of other provisions which can stand independent of such section.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58, 195; Dec. Dig. §64(1).]

3. CONSTITUTIONAL LAW §42—VALIDITY OF STATUTES—APPORTIONMENT.

Where a petition fails to show that authorized representatives of the Progressive party

sought to preserve the rights of their party under section 8, St. 1915, c. 283, for the apportionment of convention delegates, held that petitioners for writ of prohibition cannot question the validity of section 3, providing for apportionment on the basis of vote for Congressmen at the last election.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. §42.]

4. CONSTITUTIONAL LAW §48—STATUTES—NOMINATIONS—VALIDITY—ENFORCEMENT.

On an application for prohibition on the eve of election to annul St. 1915, c. 283, providing for the nomination of candidates by political parties, and the holding of primaries and conventions, the court will not speculate on the effect of possible contingencies on the validity of the act, nor annul it because contingencies may arise under section 11 of such act which would make the act impossible of enforcement.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. §48; Statutes, Cent. Dig. § 56.]

5. ELECTIONS §95—REGISTRATION OF PARTY AFFILIATION—VALIDITY OF STATUTE.

Acts 1915, c. 283, §§ 12 and 14, requiring electors to register their party affiliation as a prerequisite to the right to vote at primary election, is a reasonable regulation and valid exercise of the legislative power.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 95, 96; Dec. Dig. §95.]

6. ELECTIONS §126(4)—PRIMARY ELECTIONS—REGISTRATION.

Under St. 1915, c. 283, §§ 12 and 14, which was not repealed by St. 1915, c. 285, § 8, the names of electors which appear upon the certified registration list as copied from the register of the last general election, together with the names that appear on the supplemental list, constitute the list of electors qualified to vote at the primary election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. §126(4).]

7. ELECTIONS §10—STATUTES—CONSTRUCTION.

Election laws are to be liberally construed to enable the largest participation of qualified electors in all elections.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 7; Dec. Dig. §10.]

Application for a writ of prohibition by Dewitt C. Turner against W. A. Fogg, County Clerk of Washoe County, and another, to contest the constitutionality of St. 1915, c. 283. Application denied, and proceedings dismissed.

W. W. Griffin, of Carson City, for petitioner. Geo. B. Thatcher, of Carson City, and E. F. Lunsford, Dist. Atty., of Reno, for respondent Fogg. Eli Cann, Dist. Atty., of Fallon, for respondent Wilson. H. V. Morehouse, George Springmeyer, S. S. Downer, Thos. E. Kepner, James Glynn, and J. M. Frame, all of Reno, Anthony Jurich, of Ely, and N. J. Barry, of Reno, amici curiae.

COLEMAN, J. This is an original proceeding in prohibition, designed to test the constitutionality of that certain act of the Legislature approved March 29, 1915, entitled, "An act regulating the nomination of candidates by political parties, providing for the holding of primaries and conventions, and regulating the manner of nominating

candidates by petition." Stats. 1915, p. 453.

The petition in this case was filed July 17, 1916, and an alternative writ issued returnable July 22d. The importance of the case and the shortness of the time allowed for its consideration caused the court to request a number of prominent attorneys of the state to appear as friends of the court, for the purpose of giving the court the benefit of their several opinions, in order that a correct conclusion might be reached. In view of the fact that petitioner delayed his objections to the act until so short a time before the election provided for in the act sought to be annulled, and in view of the fact that the petition does not show that petitioner sought to secure any rights alleged to be guaranteed to him and infringed by the act in question, through the medium of authorized representatives of his party or by application in any way to other legally constituted authorities, this court might well be justified in refusing to consider any questions presented under the extraordinary writ prayed for, which writ rests in the sound discretion of the court.

For the purpose of avoiding possible future litigation, the court will determine certain of the contentions made by petitioner which bear upon his rights as a member of the Progressive party. Certain other questions in which petitioner's rights are only in common with those of all electors generally will not be determined in this proceeding.

We may premise what we will say in discussing the questions deemed important to be determined or referred to by referring to the well-settled proposition of law that all presumptions are in favor of the constitutionality of acts passed by the Legislature, and that all reasonable doubts are determined in favor of legislative enactments, and that courts have nothing to do with questions which go to mere policy or expediency of acts of the Legislature. It is proper here to state that the arguments presented showed a wide difference of opinion relative to the constitutionality of the act in question, both by counsel appearing for the parties to the proceeding, and those appearing as friends of the court.

[1] It was contended: First, that the whole act was void because the title contains more than one subject, in violation of section 17, of article 4 of our Constitution. We think the objections to the title of the act are fully answered by former decisions of this court, particularly the case of *State v. State Bank & Trust Co.*, 31 Nev. 456, 103 Pac. 407, 105 Pac. 567. It is also contended that section 3 of the act in question deprives petitioner of his rights as an elector and member of the Progressive party because that section apportions delegates to the state and county conventions on the basis of the vote for representative in Congress at the last preceding election, and that the party of which he is a member, having had no candidate for representative in Congress

at such election, is therefore deprived of participating in the primary election. It is conceded that under the provisions of section 2 of the act in question the Progressive party is within the classification of parties entitled to the privileges of the act in question. It is not alleged in the petition that the representatives of the party of which petitioner alleges himself to be a member made any attempt to avail themselves of the privileges of the act by complying with the provisions of section 8, or that petitioner made any request of the state and county central committees of his party to apportion delegates to the state and county conventions as prescribed in such section prior to the time fixed in such section, or at all, for such action by such state or county central committees.

Assuming, however, for the purposes of this decision, that the rights of a party elector may not be cut off by reason of the failure or neglect of the duly constituted state or county party central committees, we shall consider whether the provisions of section 3 actually have the effect of depriving a political party otherwise entitled to the privileges of the act from participating in the primary election. It is provided in section 29 of the act that:

"This act shall be liberally construed, to the end that the real intent of the electors shall prevail."

As before pointed out, section 2 of the act gives the Progressive party the positive right to proceed "to elect delegates to party conventions as hereinafter provided."

[2] If we were to assume that section 3 is unconstitutional, and so hold, such holding would not destroy the validity of other provisions of the act, which could stand independent of said provisions. It is the contention of counsel for respondents that the provision in question is directory merely, and not binding upon a party otherwise entitled to the benefits of the act, but which cannot comply with this basis of apportionment. Authorities have been cited which seem to sustain this view. *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1126.

[3] As the duly authorized representatives of petitioner's party, so far as appears from the petition, did not, within the time prescribed by the provisions of section 8, seek to preserve the rights of their party by any other reasonable method of apportionment, we cannot see where petitioner is entitled, particularly in this character of proceeding, to question the validity of this particular provision of the act.

[4] It is contended by petitioner that section 11 of the act renders the entire act void because, under contingencies which may arise under the provisions of that section, the act would be impossible of enforcement. Our attention has not been directed to any specific provision of the Constitution which this section violates. If the officers and

party representatives named in the section perform the duties prescribed, no manifest difficulty would arise in carrying out the provisions of the section. We think it not within the proper province of the court, in a proceeding of this extraordinary character, instituted virtually on the eve of the election provided for in the act, to speculate upon what the effect would be should certain possible contingencies arise under the provisions of this section.

[6] It has been contended that the act is void because the provisions of sections 12 and 14 together limit the right to vote at the primary election to electors only who have duly entered upon the register the designation of their party affiliation. It is well settled that requirement for registration of party affiliation as a prerequisite to the right to vote at a primary election is a reasonable regulation and a valid exercise of legislative power. 9 R. C. L. p. 1075, § 89. In this connection the question was suggested in the arguments of respective counsel as to what registration controls for use at the primary election. The question is one of great importance and doubtless will result in future litigation unless now determined. We think it clear that the specific provisions of sections 12 and 14 relating to primary elections are controlling as to what electors are entitled to vote at the primary election. Section 12 of the act in question, in prescribing the qualifications and regulation of voters at the primary election, among other things provides that the same officers who prepare and furnish registers for general elections shall prepare and furnish them for use at primary elections, and it is made the duty of these officers to furnish and certify lists of the voters entitled to vote at such primary election. In providing as to how the register for such primary election shall be made the statute sets forth:

"Said register shall be made by taking the names of all voters on the register used at the last general election in the city, precinct, or county, together with supplemental registers or additions showing all additional registrations, changes, and corrections made since the last general registration. The supplemental registers to be made as follows: All persons entitled to register or vote at any primary election in any precinct, city, or county whose names are not upon the register, or who may be entitled to transfer their registration, shall be entitled to be registered or transferred so as to enable them to vote at such primary election, and for that purpose it shall be the duty of the officer charged with the registration of voters of such precinct, city, or county, to keep his office open for at least fifty days prior to ten days immediately preceding such primary election, and to register all voters entitled to vote at such primary election." Stats. 1915, p. 457, § 12.

It is clear to our mind that under the provisions of the section quoted all voters whose names appeared on the register used at the last general election in any city, precinct, or county are, by the terms of the act, regarded as duly registered electors for the

primary election contemplated by the law, and their names are to be certified by the proper officers as having been duly copied from the registration lists of the last general election.

[8] In addition to this register of voters, a supplemental register is provided for by the section, and this supplemental register makes provision for the registration of any voter entitled to register or vote at the primary election in any precinct, city, or county whose name is not upon the register of the last general election in such city, precinct, or county. The registered voters whose names appear upon the certified lists as copied from the register of the last general election, together with the names that appear on the supplemental register, constitute the list of electors qualified to vote at the primary election.

The general election law (St. 1915, c. 285), entitled "An act relating to election," approved on the same day as the act in question, is, in the main, a mere compilation of prior existing election laws. Section 8 of the general election law provides, "A new registration of the electors of this state shall be made in the year of 1916, within the dates hereinafter specified, and every two years thereafter," and is precisely the same provision which was contained in the act of 1913, except that the figures 1916 were substituted in lieu of those of 1914. The general law regulating registration which has been in force in this state for many years contemplated a new registration for the general election every two years. By no reasonable construction could it be said that the provisions of section 8 of the general election law repeals or modifies the provisions of section 12 of the primary election law. Section 12 of the primary election law of 1915 is, except as to immaterial modifications, precisely the same as section 17 of chapter 3, Acts 1913, p. 520, and the same as section 17 in the primary election law of 1909 (Rev. Laws, § 1751). It is therefore clear that the Legislature of 1915 did not make any change in the prior existing law in so far as registration for primary elections is concerned.

[7] It is well settled that election laws are to be liberally construed to enable the largest participation in all elections by qualified electors. Undoubtedly all electors whose names do not appear upon the register "used at the last general election in the city, precinct, or county," and who register for the general election of 1916 prior to the time at which registration closes for the primary election, are entitled to have their names placed upon the register for such primary election.

As said by the Supreme Court of Pennsylvania in a similar case recently decided:

"If it were our duty to make the law, no doubt some of its provisions would be written differently, but we cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may

be difference of opinion as to its wisdom upon grounds of public policy. Questions of this character are for the Legislature, and not for the courts. If the restrictions complained of in this proceeding are found to be onerous or burdensome, the Legislature may be appealed to for such relief, or for such amendments, as the people may think proper to demand." Winston v. Moore, 244 Pa. 447, 91 Atl. 520, L. R. A. 1915A, 1190, Ann. Cas. 1915C, 498.

Application for the peremptory writ is denied, and the proceedings are dismissed. It is so ordered.

NORCROSS, C. J., and McCARRAN, J., concur.

TALLEY v. STATE. (No. 863.)

(Supreme Court of Arizona. July 1, 1916.)

1. JURY §118—CHALLENGE TO PANEL.

Under Pen. Code 1918, § 1018, requiring a challenge to a panel to specify, plainly and distinctly, the facts constituting the grounds of challenge, and section 1017, providing that a challenge to a panel can only be founded on a material departure from the forms prescribed for drawing and return of the jury, the challenge must set forth facts showing such departure.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 545; Dec. Dig. §118.]

2. CRIMINAL LAW §1105(1)—APPEAL—TRANSCRIPT—CERTIFICATION.

Though the reporter's transcript of the testimony is not approved by the trial judge, yet, there being no suggestion that it is not correct, it may, and in a capital case ordinarily will, though it need not, be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2887; Dec. Dig. §1105(1).]

3. CRIMINAL LAW §1036(2)—REVIEW—ADMISSION OF EVIDENCE—OBJECTIONS NOT MADE BELOW.

Objection to introduction of garments worn by deceased when he was shot, that they were not in the same condition as when taken from his body, is too late when made for the first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2640; Dec. Dig. §1036(2).]

4. HOMICIDE §166(3)—EVIDENCE—MOTIVE.

Evidence that deceased objected to defendant keeping company with his daughter, though two years before, is admissible to show motive, especially where defendant on learning, just before the homicide, of the daughter's marriage, was sensibly affected; remoteness of the evidence going only to its weight.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 323; Dec. Dig. §166(3).]

5. HOMICIDE §166(3)—EVIDENCE—MOTIVE.

As tending to show feeling, motive, or malice, a letter written by defendant to deceased's daughter, shortly before the homicide, reflecting on deceased's lack of parental care and affection for other daughters, and on their chastity and virtue, is admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 323; Dec. Dig. §166(3).]

6. CRIMINAL LAW §695(5)—INTRODUCTION OF EVIDENCE—OBJECTIONS.

Objection that no time was fixed as to when the examination took place is not included in the objection of incompetency, irrelevancy, and immateriality, to testimony of examination for weapons on the ground where the killing had taken place.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1683; Dec. Dig. §695(5).]

7. HOMICIDE §166(3)—EVIDENCE—LETTERS SHOWING MOTIVE—RIGHT TO SHOW TRUTH.

Defendant, who had written a letter to deceased's daughter, complaining of deceased letting other daughters work and stay in disreputable places, was not entitled to testify to the character of such places or the conduct of such daughters, as, whatever they were, they could not mitigate or justify defendant in seeking out deceased and provoking the quarrel resulting in his death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 323; Dec. Dig. §166(3).]

8. CRIMINAL LAW §1153(4)—WITNESSES §240(2)—LEADING QUESTIONS—DISCRETION.

Permitting leading questions is ordinarily in the sound discretion of the trial court, reviewable only for clear abuse of such discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. §1153(4); Witnesses, Cent. Dig. § 795; Dec. Dig. §240(2).]

9. CRIMINAL LAW §696(3)—RECEPTION OF EVIDENCE—STRIKING OUT—DISCRETION.

Where two witnesses testified to defendant having said he would get even with deceased, and one of them, in answer to a leading question, before objection was made, testified that he also said he would get revenge on deceased, there was no abuse of discretion in refusing to strike out the latter answer; defendant's meaning, in view of his subsequent conduct, being the same whichever expression he used.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1639; Dec. Dig. §696(3).]

10. CRIMINAL LAW §823(17)—MISLEADING INSTRUCTIONS.

In view of other instructions stating that included in the information was the charge of murder in the first and second degrees and of manslaughter, and that the verdict might be either of said degrees, or not guilty, as the evidence convinced the jury, the conclusion of an instruction defining murder in the first degree, "You will thus see that, included in the charge contained in the information, is that the defendant is guilty of murder in the first degree," could not have been understood as a statement that defendant was guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158; Dec. Dig. §823(17).]

11. CRIMINAL LAW §944—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CREDIBILITY.

Defendant not having claimed at the trial that deceased had a pistol, and all the witnesses having testified that defendant alone had a pistol, it was not error to refuse a new trial on affidavits of persons, who told no one of the occurrences till after the trial, one that she saw deceased throw up his hand with a pistol in it, and all that they heard deceased's wife say to deceased, "Don't kill him."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2335; Dec. Dig. §944.]

12. CRIMINAL LAW §942(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PERJURY.

The only thing that a witness testified to being that she was present when defendant made a threat against deceased, which was corroborated, affidavit of a person that after the conviction witness cried and said, "If you had sworn to a bunch of falsehoods against T. (Defendant) as I did you would cry too," did not entitle defendant to a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2331; Dec. Dig. §942(1).]

13. CRIMINAL LAW **§989(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

It was defendant's duty to disprove, at the trial by his intimates, the statement of a physician that the wound on his finger was an old one on the day after he claimed it was inflicted by deceased; so that he was not entitled to a new trial for alleged newly discovered evidence thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318, 2321-2323; Dec. Dig. **§989(1).**]

14. CRIMINAL LAW **§938(1), 1156(3) — NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.**

Granting of a new trial for newly discovered evidence is largely in the trial court's discretion, so that denial will be disturbed only for abuse clearly disclosed in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306, 2312, 2313, 2315, 2317, 8069; Dec. Dig. **§938(1), 1156(3).**]

15. CRIMINAL LAW **§939(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

New trial should not be granted for newly discovered evidence, where diligence to discover and produce it at the trial is not shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318, 2321-2323; Dec. Dig. **§939(1).**]

16. CRIMINAL LAW **§941(1), 942(1) — NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.**

New trial should not be granted for newly discovered evidence where it is purely cumulative or contradictory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2330, 2331; Dec. Dig. **§941(1), 942(1).**]

17. CRIMINAL LAW **§945(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY.**

New trial should not be granted for new evidence unless it is such as to render a different result probable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. **§945(1).**]

18. HOMICIDE **§253(1)—DEGREE OF MURDER—SUFFICIENCY OF EVIDENCE.**

Evidence held sufficient to support a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523, 531; Dec. Dig. **§253(1).**]

Cunningham, J., dissenting.

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

Robert Dayton Talley was convicted, and appeals. Affirmed.

Thomas E. Flannigan, of Globe, H. M. Foster, of Miami, and F. C. Jacobs, of Globe, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

ROSS, C. J. The appellant appeals from a sentence of death, having been convicted upon the charge of murdering Jesse G. Danner on the 18th day of November, 1913, in Gila county, Ariz. He asks that the judgment be reversed upon numerous grounds. He interposed a challenge to the panel of the trial jury, which was overruled by the court. His

reasons for challenging the panel were as follows:

"(1) That the jury has no legal authority to act.

"(2) That said jury was not drawn according to law.

"(3) That there is no law authorizing the drawing of said jury in the manner that such jury is drawn.

"(4) That any verdict rendered by said jury would be null and void."

[1] Paragraph 1018, Penal Code 1913, provides that:

"A challenge to a panel must be in writing and be taken before a juror is sworn, and must specify, plainly and distinctly, the facts constituting the grounds of challenge."

Paragraph 1017, Penal Code 1913, provides that:

"A challenge to a panel can only be founded on a material departure from the forms prescribed in respect to the drawing and return of the jury, in civil actions, or an intentional omission of the sheriff to summon one or more of the jurors drawn."

If it was intended to make the challenge in this case as indefinite and uncertain as possible, that purpose could not have been more effectively accomplished than by the language used. No "facts constituting the ground of challenge" are set forth. It is not shown that "a material departure from the forms prescribed in respect to the drawing and return of the jury" was had. If the jury "was not drawn according to law," the challenge could and should have shown wherein. The record shows that in obtaining the jury the court followed the provisions of paragraph 8542, Civil Code 1913, by entering an order on its minutes directing the sheriff of the county forthwith to summon 50 good and lawful men of his county to serve as trial jurors; this order being based on the fact that there was no jury in attendance upon the court to try the case.

Paragraph 3542 has been the law of Arizona since 1901, it appearing in the Revised Statutes as paragraph 2807. The challenge failing to set forth any reason why the court was not authorized under said paragraph 8542 to order a special venire, we must presume that the court regularly pursued its authority and that the facts, justifying the course taken by the court, existed.

A challenge was interposed to Juror Willis Miller upon the ground that he had "served as a juror on the regular list within the previous twelve months in the same court." This challenge is based upon chapter 24, § 2, Session Laws of 1905. At the time of the trial, said section 2 had been amended by the elimination of the ground of exemption or disqualification interposed. See paragraph 3543, Civil Code 1913.

The other errors assigned are directed toward alleged errors committed in the course of the trial, and in order to consider them it will be necessary to look into the evidence. They are that the court erred in admitting

evidence over the objections of appellant and in rejecting evidence offered by the appellant; in the giving of instructions and in refusing appellant a new trial upon newly discovered evidence.

[2] The Attorney General has called our attention to the fact that the reporter's transcript of the testimony has not been approved by the judge who tried the case. He insists that under the rule heretofore made by this court in *Chavez v. Territory*, 14 Ariz. 107, 125 Pac. 483, *Perez v. Territory*, 14 Ariz. 163, 125 Pac. 483, and *Shaffer v. Territory*, 14 Ariz. 329, 127 Pac. 746, we are without authority to review the evidence for any purpose. However, we are not disposed to pursue that course in this case. Under strict law we might refuse to examine the evidence and confine our attention to the record for fundamental errors; but, in view of the fact that appellant has received the death sentence, we will treat the evidence as though it were regularly and legally before us. Besides, in the *Chavez Case* this court said:

"This being a criminal case where the death penalty was awarded, we have most carefully scrutinized the record as it is presented to us. The indictment is sufficient, and the evidence in the case is ample to support the conviction."

In the *Perez Case* it was said:

"We have carefully examined the entire record presented. We think the instructions of the court fairly placed the law of the case before the jury, and we think the substantial evidence supports the verdict."

In all capital cases this court has uniformly examined the evidence, whether approved by the trial judge or not, to see that the accused was protected in his rights and not unlawfully condemned. There has been no suggestion by the Attorney General nor any one else concerned that the transcript of the evidence on file in this court is not correct, and should it disclose that the appellant was not awarded all of the rights guaranteed to him under the Constitution and the law, in view of the fact that appellant's life is involved, we ought not to hesitate to reverse the case. On the other hand, if his rights were secured to him the duty is equally obligatory to let the law take its course.

Out of the mass of testimony introduced the salient facts leading to the homicide and descriptive thereof are as follows:

The deceased, Jesse G. Danner, was the stepfather to Ethel Spencer, Ruby Johnson, and Pearl Johnson, being the husband of their mother, Lily May Danner. The Danners and the appellant before coming to Arizona had lived at Anthony, N. M. While there the appellant paid attention to Ethel Spencer and kept her company for about two years. The deceased disapproved of his visits and companionship with his stepdaughter and requested appellant to cease visiting the Danner home. The Danner family, including Ruby and Pearl Johnson, moved to Miami, Ariz.; Ethel Spencer remaining in New Mexico. Appellant also moved to Miami and at

the time of the tragedy was working at one of the mines there.

About September 6, 1913, appellant wrote a letter to Ethel Spencer, in which he advised her, if she could, to take her sisters away from Miami because the Danners did not care as to the way they carried on; that one of the sisters was working in a shooting gallery and the other was working in a restaurant; that these places were not places that decent girls should work; that there was a roadhouse between Miami and Globe; and that this roadhouse had been indicted because of letting Pearl and Ruby Johnson stay there all night. On the receipt of this letter, Ethel Spencer wrote her mother and stepfather of its contents, but did not tell them its author.

On the evening of the 18th of November, 1913, about 8 o'clock, Mr. and Mrs. Danner and the appellant were at the home of Mrs. J. O. Lipps in Miami. The deceased only remained for a few moments. After he had gone, some one remarked that Ethel Spencer was married. Mrs. Lipps further testified, when these remarks were made, appellant got up and left without saying a word. It could not have been very long thereafter when appellant appeared at the sleeping apartments of Harry Hovey and asked him if he wanted to go downtown. After they got started, Hovey said:

"Where are you going, to the dance?" And he said, 'Yes, I might dance some.' We went in and sat in the dance hall awhile, and finally he said, 'Let's go and get the mail,' and I said, 'All right.'"

While at the dance appellant asked Price Lipps if Mr. and Mrs. Danner came by, and was informed that they did. Reaching the post office, Hovey went in the building for the mail, and appellant remained on the outside at the door. Just at this moment the deceased and Mrs. Danner entered the post office, passing appellant at the door and meeting Hovey as he was going out. Hovey says he told Talley that there was no mail and suggested that they go, whereupon Talley said, "Let's stick around." As the Danners passed out of the post office, Talley said, using his own language, "Mr. Danner, I would like to speak to you a minute." Danner said, "All right," and walked up to him. "I said, 'Mr. Danner, I understand you suspicion that I wrote a letter to Ethel about the way you are treating Pearl and Ruby?' and he said, 'Yes.' Then I asked him did he know who wrote the letter for sure, and he said, 'No,' and then I told him that I wrote it, and what I wrote was the truth, and he replied, 'You are a damn dirty liar,' and struck me almost at the same time."

Mrs. Danner's testimony was practically the same as appellant's as to what was said by appellant and her husband, but she says appellant struck her husband first, knocking him down. A rough and tumble fight ensued, with the deceased first underneath, then appellant. In the meantime, several people

had gathered around, and Mrs. Danner was begging them to separate the combatants. While the deceased had appellant down and was severely punishing him, the bystanders pulled them apart, and in doing so they both raised to their feet. It was then that appellant drew a gun. The deceased said to him, "Put up that gun and fight like a man," at the same time grabbing hold of the gun, or the hand in which it was held. The bystanders becoming frightened ran away, and as they left the fighting men they heard a number of shots. Danner was assisted into the post office, where it was discovered that he was mortally wounded. The appellant stood in the middle of the street in front of the post office working with his pistol, some of the witnesses saying that he reloaded it, and others that he was working with the pistol and remarked that it would not work; that it was out of order. Danner died in a very few minutes after he was shot.

The appellant testified that at the time he shot deceased the latter moved his right hand down toward his hip, and that he thought he was going after a gun; thus he would justify his act in taking the life of the deceased upon the ground of self-defense.

[3] The state introduced as part of its evidence some of the garments worn by the deceased at the time that he was shot, and this is assigned as error. It is contended by appellant that there was no evidence to show that the garments were in the same condition as when taken from the body of the deceased. No such objection to this evidence was interposed at the trial, the objection there being that such evidence was incompetent, irrelevant, immaterial, and no part of the res gestæ, and on the further ground that it had not been properly identified. The identification was absolute, the witnesses testifying that the garments were the identical garments worn by the deceased at the time he was shot. Appellant not having raised the point at the time that the clothing were not in the same condition as when taken from the body of the deceased, we think his objection now comes too late.

[4] The prosecution was permitted over the objections of the appellant to introduce evidence of appellant's attachment to Ethel Spencer, showing that he kept company with her against the will and protest of the deceased. It is contended that this testimony should not have been admitted, because it was too remote and did not tend in any way to establish a motive or intent. With this contention we cannot agree. The evidence showed that appellant and Ethel Spencer kept company for about two years, and that after he left New Mexico and came to Arizona he kept up a correspondence with her, and that when he learned on the night of the 18th of November, 1913, at Mrs. Lipps' home, that Ethel Spencer had married, he was sensibly affected. The remoteness of the evi-

dence might affect its weight, but not its competency. It can readily be seen that Danner's objection to his keeping company with Ethel Spencer would naturally be taken as an aspersion upon his character and social standing and a charge of social inequality with his stepdaughter. The most natural result of these reflections would be to arouse animosity and ill feeling.

In *Lenord v. State*, 15 Ariz. 137, 137 Pac. 412, and 151 Pac. 947, we said:

"It is always permissible to show previous troubles, when in search of the real cause or motive actuating a party to the commission of crime, especially if the trouble is of recent occurrence, or even somewhat remote in time, if it tends to elucidate and throw light on the act constituting the crime or explain the reason of its commission."

[5] It is also objected that the court erred in permitting the prosecution to show the contents of appellant's letter, dated September 6, 1913, to Ethel Spencer, wherein he reflected upon the lack of parental care and affection on the part of deceased and Mrs. Danner for their daughters, Pearl and Ruby, and also upon the chastity and virtue of these two girls. We think the letter was proper evidence to show the feeling appellant entertained toward the deceased. If what he wrote was false, it was a malicious lie originating from the wicked and vindictive heart; if the contents of the letter were true and written in the interest and for the protection of the two girls, still it indicated a feeling of resentment and condemnation toward the deceased. In either event, it would tend to show feeling, motive or malice.

[6] Jim Swearingen, deputy sheriff, testified, over the objections of appellant, that he and Alf Edwards examined the ground for weapons, where the killing had taken place, and this was excepted to for the reason that no time was fixed as to when the examination took place. The witness stated that he was in the post office immediately after the shooting. The question propounded was, "What else, if anything, did yourself and Mr. Alf Edwards do with respect to the place where the killing had been had?" This was objected to on the ground of its incompetency, irrelevancy, and immateriality, whereupon the court asked, "I understand this is all within a period of a few minutes?" The county attorney replied, "All within a few minutes." The witness then said that he and Edwards took a light and searched the ground to see what they could find. We think the objections interposed did not go to the grounds as now urged against the evidence. Besides, that no weapons were on the ground is supported by the evidence of all the other witnesses, and that the only weapon seen was the one in appellant's hands. Appellant himself says that he did not see any weapon in the hands or on the person of the deceased, nor did any other witness.

[7] The appellant complains because the

court sustained the prosecution's objection to the introduction in evidence of a letter written by Ethel Spencer to appellant in answer to his letter of September 6, 1913. We have examined the letter offered and fail to find therein anything bearing upon the issues in the case. The appellant also complains that the court erred in not permitting him, while on the stand, to go into and explain the conduct of the two girls, Pearl and Ruby, and the character of the places where they were employed. We think the court properly rejected such offer, for it seems to us that it was immaterial as to what their conduct was or the character of the places in which they worked, as none of these things could possibly mitigate or justify the act of appellant in seeking out the deceased and provoking the quarrel that resulted in his death.

[8, 9] Pearl Johnson was a witness for the prosecution, and, on being questioned concerning a conversation had with appellant some two or three weeks before the 18th day of November, 1913, concerning her stepfather and the letter that appellant had written to Ethel Spencer, in answer to a question, she testified that appellant "said my stepfather was the cause of him and my older sister not agreeing, and he said he would get even. * * * He said he would get even with him. * * * He said two or three times those words, two or three times during the conversation. Q. What words? A. That he would get even with him. Q. Did he say he would get revenge on him? A. Yes, sir; he said that once."

After the last question had been answered, appellant objected and asked that the answer be stricken as leading and suggestive. This ruling of the court refusing to strike is assigned as error. The matter of permitting leading questions is ordinarily left to the sound discretion of the trial court, and this discretion will not be disturbed unless clearly abused.

Another witness, Kate Rose, testified that in that conversation she heard appellant say, "I will get even with Mr. Danner." In the connection and under the circumstances under which appellant made the threat, the question could not have made very much difference in the meaning of the two statements. Appellant's subsequent conduct toward Danner satisfies us that whether he said, "I will get even with Mr. Danner," or, "I will get revenge," he meant the same thing. Neither is it improbable that he did not use both terms. Besides, the question was answered before any objection was interposed. We do not think that the court abused its discretion in refusing to strike the answer. Jones on Evidence, vol. 5, § 819.

[10] The instructions of the court were very full, covering every phase of the case, and, when considered as a whole, we think they correctly state the law. Appellant has

taken from them excerpts which he claims were prejudicial and erroneous. When considered alone, they might be so. One of the instructions of which complaint is made is as follows:

"You are instructed, gentlemen of the jury, that every murder which is perpetrated by means of poison or lying in wait, or by any other kind of willful, deliberate, or premeditated killing, or which is committed in the perpetration of or attempt to perpetrate arson, rape, burglary, or mayhem, is murder in the first degree. *You will thus see that included in the charge contained in the information is that the defendant is guilty of murder in the first degree.*"

It is said that the court by this instruction practically told the jury that the appellant was guilty. The italicized sentence is somewhat confused and involved, but we think the reasonable construction of it is that in the information was included the charge of murder in the first degree. Further on in the instructions the court told the jury that included within the information was the charge of murder in the first degree, murder in the second degree, and manslaughter. These different degrees of homicide were fully explained and defined by the court, and the jury were advised that the verdict might be according as the evidence convinced them—for murder in the first degree, or murder in the second degree, or manslaughter, or not guilty. It seems impossible that the jury could have been misled by the language objected to.

We have examined the other exceptions to the instructions and do not think that they misstate the law.

[11] Finally, it is contended that the trial court should have granted appellant's motion for a new trial upon the affidavits of newly discovered evidence. The principal affidavit relied upon was that of Mrs. W. B. Harris. She states in her affidavit: That she was at the post office and saw two men and a woman who seemed to be scrambling, the men appearing to be lifting the woman up. The woman seemed to be trying to keep the men apart with her hands; that thereupon she saw the smaller man of the two throw his hand up with a gun in it, and the woman immediately said to him: "For God's sake, don't kill him, Jesse; think of me and the children." That the woman repeated these words many times. The larger man appeared to be endeavoring to take the gun out of the hand of the smaller man. That she was within 10 feet of the parties who were fighting. She states that she informed her husband what she had seen and heard, and that he forbade her telling any person, and that she had not told any one except her husband until after the trial. W. B. Harris, her husband, made affidavit to the effect that he was in his house about 60 or 70 yards from the post office, having retired to bed, when he heard the same language; that when his wife told him what she had seen and heard he enjoined upon

her not to repeat it; that he had told no one these things until after appellant was tried and convicted.

J. D. Kenney also made affidavit that he was about 150 feet from the post office when he heard the same language and also pistol shots; that in about 10 minutes thereafter, seeing a large crowd congregate near the post office, he went to the post office and viewed the dead body of Jesse Danner; that he did not tell what he saw and heard to any person until after the trial and verdict, as he did not care to be a witness.

There were a number of eyewitnesses immediately present who testified as to what occurred after the fight began. They all state that the gun that they saw was in the possession of the appellant; that he and he only did any shooting. The appellant himself, while a witness, did not claim that deceased had a gun, or that he ever got possession of appellant's gun. The affidavits are so widely at variance with the actual facts as they were told on the trial that we think they may be wholly discredited. Those witnesses that testified did say that Mrs. Danner was pleading not only with the appellant, but with her husband, to desist from further trouble. The language that she used in addressing each of the combatants was variously stated by the witnesses, but none of them testified that she asked her husband not to shoot.

The learned judge who heard all of the evidence was well qualified to pass upon the weight and sufficiency of the affidavits, and we are satisfied that his disposition of them was correct.

[12] Beurette De Berry made an affidavit upon the motion for a new trial to the effect that Kate Rose, a witness for the prosecution, after hearing of the verdict of the jury threw herself upon a bed and cried and sobbed; that he spoke to her, saying that there was no use crying, that neither she nor himself nor any one else could help it now; whereupon she said, "If you had sworn to a bunch of falsehoods against Talley as I did, you would cry too." The only thing that Kate Rose testified to was that she was present when appellant said to Pearl Johnson, "I will get even with Mr. Danner." That statement was made to the jury under the solemnity of an oath. It does not stand alone; it is supported by corroboration. If she said to De Berry what is charged, it was not under the sanctity of an oath, nor does any one corroborate De Berry that she ever said it.

[13] Appellant, while a witness in his own behalf, testified that the deceased bit the index finger of his right hand. The prosecution in rebuttal of this statement by appellant, as to his finger being bitten by deceased, placed Dr. C. B. Wiley upon the stand. He testified that on the following day after the trouble he was called professionally to the aid of appellant. The doctor testified

that appellant told him that he had had an infected finger in the neighborhood of a month; said that he examined the finger and found "a cut which appeared to be from an old infection. * * * It had granulated tissues in it, which would go to show it had not been very recent. * * * In order for a wound to be granulated, it would be necessary to be sore for at least a week."

The affidavits of H. S. Hovey and Mrs. J. H. Medlin filed upon the motion for a new trial stated in effect that they personally knew that the index finger of the right hand of appellant had thoroughly healed prior to the trouble, and that it had no sore or bruises upon it whatsoever prior to the 18th day of November, 1913. Hovey states, in addition: "I saw the said Jesse Danner biting the said index finger of the right hand of Robert Dayton Talley." This witness was on the stand and testified; he says he did not tell what he saw to any person or persons prior to the verdict in the case.

What the appellant now seeks to show about the condition of his finger by Hovey and Mrs. Medlin, it would seem, could have been amply sustained at the trial. He then certainly knew, and his intimate friends and associates must also have known, whether his finger was sore and bruised just before the trouble or not. The opportunity was then open to disprove statements of Dr. Wiley, and it was his duty to make his proof at that time.

[14-17] As to all of these affidavits filed in support of the motion for a new trial and as to the disposition of the motion, we add, with approval, to what we have said, a quotation from *State v. Fleming*, 17 Idaho, 471, 106 Pac. 317:

"The granting of a new trial upon the ground of newly discovered evidence is largely a matter of discretion, in the exercise of which this court will not disturb the order of the trial court except in case of abuse clearly disclosed by the record. A new trial should not be granted in a case where the party has not shown due diligence in discovering and producing the evidence, nor where the evidence is purely cumulative or contradictory, nor unless the newly discovered evidence is such as to render a different result upon a retrial probable. To entitle the defendant to a new trial upon the ground of newly discovered evidence, it must appear from the affidavits presented that the new evidence is not cumulative merely, that it is such as to render a different verdict reasonably probable upon a retrial, and that the evidence could not with reasonable diligence have been discovered and produced at the trial."

[18] One of the grounds upon which the new trial was requested was that the evidence did not support the verdict. That was a question for the jury. It was resolved against the appellant. There was ample evidence to sustain the verdict. The jury saw all the witnesses who testified, heard their statements of things they saw, and knew as they fell freshly from their lips. They must have concluded that the prosecution's theory that appellant was harboring a feeling of hate and revenge against Danner for interfering with

him and Ethel Spencer was true; that it was to carry out a preconceived plan that he went forth that fatal night armed and at his first opportunity grossly insulted the deceased for no other purpose than to induce the fight and take his life under the claim and pretext of self-defense.

During the time that this case has been pending here on appeal, it was discovered that the minutes of the trial court showed that the appellant was tried by only eleven jurors. This fact was called to the attention of the Attorney General, who in turn brought the matter to the attention of the county attorney of Gila county, who thereupon, after notifying the attorney of record for appellant, moved the trial court to amend its minutes in conformity with the actual facts. The minutes as amended have been certified to this court, showing that in truth and in fact the jury that tried appellant was composed of twelve men. The error in the original minutes was purely a clerical one and consisted of the clerk in writing down the names of the jurors omitting the name of one who actually served in the case. Appellant has not suggested or contended that he was not tried with twelve jurors, nor has he at any time since the misprision of the clerk was discovered by the court urged upon us that this clerical mistake has in any manner prejudiced his rights. We mention these facts as a part of the history of the case since pending in this court and as an admonition to the clerks of trial courts of the necessity of carefully and accurately keeping their minutes, and not because we think it has any bearing upon the merits of the case.

Judgment is affirmed.

FRANKLIN, J., concurs.

CUNNINGHAM, J. (dissenting). The court instructed the jury as to the law (paragraph 172, Penal Code of Arizona 1913) defining the degree of murder, by reading the statutory words, and added thereto the following:

"You will thus see that included in the charge contained in the information is that the defendant is guilty of murder in the first degree."

This statement is assigned as error. The court may have, and probably did have, the intention of saying to the jury that:

"You will thus see that included in the charge contained in the information is that the defendant is thereby charged of having committed the crime of murder of the first degree."

He could have so instructed the jury and thereby correctly instructed them.

Did they so understand the instruction given, from the language used by the court? The answer must be formed from the results of speculation, unless the court, in the instructions given, stated the law otherwise.

The language used, certainly, informs the jury as a fact "that included in the charge contained in the information is that the defendant is guilty of murder in the first degree." Not that the defendant is charged by

the information of the crime of murder of the first degree, but that he is guilty of murder in the first degree according to the charge as set forth in the information.

The connection in which this instruction stands with regard to the entire instruction given is therefore important. I will briefly refer to such portions of the instruction as bear upon the matters affected by this alleged erroneous statement. The only matter affected is the matter of the degrees of murder.

The court commenced the instructions by reminding the jury that the information had been read in their hearing, and stated the contents of the allegations of the information in substantially the language of the information, and stated, "The defendant is thus charged with the crime of murder." The court then informed the jury of their duty:

"Before you proceed upon an investigation of the truth or falsity of the charge contained in the information, it is necessary that you be instructed upon some of the preliminary steps which you must observe in arriving at a final conclusion under the evidence, which you have been listening to, and the information, which you have heard read."

The court instructed of the necessary existence of act and intent, or act and criminal negligence to constitute a crime; of the power of the jury in weighing the evidence and arriving at its truth, and the rules to be followed in so arriving at the truth; of the presumption of defendant's innocence until the contrary is established, and in case of a reasonable doubt whether his guilt be satisfactorily shown he must be acquitted; "and it is incumbent upon the state in this case to satisfy you beyond a reasonable doubt of the truth of every material allegation in the information which you have heard read;" of the meaning of reasonable doubt:

"You must understand, however, gentlemen of the jury, the law does not require that every doubt of guilt should be excluded; that would require an impossibility of the state. Crimes are not usually committed under circumstances which permit of demonstrative proof. In the determination of criminal cases it is seldom possible to be absolutely certain. You are required to decide the question of the defendant's guilt or innocence upon the evidence, under the law, using those reasoning faculties with which you have been endowed, and determine whether the state has proven the defendant guilty, not beyond all doubt or possibility of error, but beyond a reasonable doubt."

"You are instructed * * * that it is the law in this state that, if you find from the evidence that Robert Dayton Talley fired the fatal shot which killed Jesse C. Danner, then the burden of proving circumstances of mitigation, or that justify or excuse the homicide, devolves upon Robert Dayton Talley, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable. Where it is shown from the evidence that a homicide has been committed with a deadly weapon, and no circumstances of mitigation, justification, or excuse appear, the law implies malice. The malice thus implied is that malice aforethought which is necessary to sustain an indictment for murder."

"Having thus been instructed upon what are the preliminary steps in arriving at a just con-

clusion in criminal cases, you may proceed to an investigation, gentlemen, and in so doing it is well to observe certain rules. You should first consider * * * whether or not Jesse C. Danner is dead. Second, if you so find from the evidence beyond a reasonable doubt, did he die within a year and a day of the time of the infliction of the wounds upon him, and that the wounds were inflicted by the defendant, Robert Dayton Talley, in Gila county, Ariz., as you will be hereafter more fully instructed.

"As I have heretofore instructed you, the defendant in this case is charged with having on or about the 18th day of November, 1913, murdered one Jesse C. Danner, a human being."

The statutory definition of murder is then given. This is followed by the instruction stating the statutory definitions dividing murder into the first and second degrees, followed by the instruction complained of, viz.:

"You will thus see that included in the charge contained in the information is that the defendant is guilty of murder in the first degree."

Immediately following, the court instructed as follows:

"Before you will be justified in finding that the defendant is guilty of murder in the first degree, you must find, beyond a reasonable doubt, that the killing was done with malice aforethought; that such killing was willful, deliberate, and premeditated, as there is no evidence in this case which would justify your consideration of any other of the elements which constitute murder in the first degree."

The court defines malice, and malice aforethought, and states that "deliberation and premeditation need not exist for any fixed period of time; it is enough that they were formed before the act"—clearly making proof of the existence of malice aforethought, as defined, include deliberation and premeditation.

The court defines willfulness, and states that the meaning excludes accident, but:

"It must be deliberate and premeditated. By this is not meant that the killing must have been conceived or intended for any particular length of time. Deliberate and premeditated do not necessarily mean brooded over, considered, or reflected upon for a week, a day, an hour, or any particular length of time. It is sufficient that it should be done with reflection and conceived beforehand, and in this view the deliberate purpose to kill and the killing may follow each other as rapidly as successive impulses or thoughts of the mind. It is enough that the party deliberate beforehand, premeditate the purpose to kill before he gave the fatal blow; but, while the purpose to kill and its execution may follow thus rapidly upon each other, it is proper for you to take into consideration the shortness of such interval in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation, upon which you will be hereafter more fully instructed. Thus, should you be satisfied beyond a reasonable doubt that Robert Dayton Talley willfully, unlawfully, feloniously, and of his premeditated malice aforethought did kill Jesse C. Danner, as you are herein instructed, in such case you should find the defendant guilty of murder in the first degree.

"From what has been said you will see the distinction between first and second degree murder is that murder in the first degree, unless committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, which elements do not enter into this case, is the killing must be willful, deliberate, and premeditated; while in murder of the sec-

ond degree the killing is not deliberate and premeditated. In the one case, there is a deliberate, premeditated, and preconceived design, though it may have been formed in the mind immediately before the mortal wound was given, to take life. In the other case, there is no deliberation, premeditation, or preconceived design to kill. In both, however, murder in the first degree and murder in the second degree, the killing must have been unlawful and accompanied with malice.

"If you have a reasonable doubt * * * of the guilt of the defendant of the crime, either of murder in the first or second degree, there is still included within this charge the lesser offense of manslaughter."

Whereupon the court instructed upon the law of manslaughter and on the law of justifiable and excusable homicide, and the forms of verdict to be adopted. As a final instruction as to the degrees of murder, the court said:

"In considering the degree of the crime, * * * it is your duty to resolve any reasonable doubt as to whether or not the defendant is guilty of the higher offense, in favor of the defendant and in favor of the lesser degree of the crime, and, upon the whole case, resolve every reasonable doubt that may exist in your minds in favor of the defendant."

The cause was submitted, and the jury retired to consider of a verdict. At a later time the jury returned into court and requested a "definition between first and second degree murder; explanation of what constitutes malice aforethought and premeditation; also, the difference between malice and malice aforethought." The foreman stated the jury wanted the "difference between first and second degree murder." The court said:

"Sometimes, gentlemen of the jury, it is almost utterly impossible to be able to so give a definition that embraces law terms that a layman can understand; that is, it is hard, of course, even for lawyers and for judges who have spent probably years of their lives to get the distinction between the different elements constituting certain offenses so that it is absolutely clear even to their own minds. But in this state it may be well for you to understand that 'murder,' as I have heretofore defined that to be, is the unlawful killing of a human being with malice aforethought. That general definition embraces all classes of murder, as you have been instructed in the instructions that I have heretofore read to you—that is, first and second degree murder. In this state murder is divided into two degrees, first degree and second degree. Under the statute and under the law of this state, every murder which is perpetrated by means of poison or lying in wait, or by any other kind of willful, deliberate, or premeditated killing, or which is committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree; all other kinds of murder are murder of the second degree. From the evidence that has been introduced in this case, gentlemen of the jury, you are instructed that as a matter of law that that part of the definition which relates to murder in the first degree as that which is committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, has no part in your deliberations at all, and may be excluded from your deliberations entirely. Consequently, the only thing that you are concerned with in this definition of murder in the first degree is as to whether or not you are convinced beyond a reasonable doubt that this killing was willful, deliberate, and premeditated to constitute murder in the first degree.

"I will again read you the definition that I gave you in the instructions I first read to you, as this instruction has been thought out carefully and worded in order to give expression to the meaning as near as possible."

The instruction theretofore given was read, including the instructions indicated and the instructions explaining the meaning of malice aforethought, and the distinction between malice and malice aforethought, and the following:

"Where it is shown from the evidence that a homicide has been committed with a deadly weapon, and no circumstances of mitigation, justification, or excuse appear, the law implies malice. The malice thus implied is that malice aforethought which is necessary to sustain an indictment for murder."

Whereupon the jury retired and later returned a verdict of guilty of murder of the first degree and fixed the punishment at death.

The sum and substance of the whole instruction given the jury, as they relate to the first degree of murder, is: That under the evidence in this case the jury is not concerned with murder committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, but they are only concerned with the homicides committed by any other kind of willful, deliberate, and premeditated killing. That the state is required to prove every material allegation of the information to the satisfaction of the jury before a conviction can be had. "Where it is shown from the evidence that a homicide has been committed with a deadly weapon, and no circumstances of mitigation, justification, or excuse appear, the law implies malice. The malice thus implied is that malice aforethought which is necessary to sustain an indictment for murder." That murder is divided into first and second degrees, but it is extremely difficult to express a clear distinction existing between the two degrees of murder. That under the law of this state, "that, if you find from the evidence that Robert Dayton Talley fired the fatal shot which killed Jesse C. Danner, then the burden of proving circumstances of mitigation, or that justify or excuse the homicide, devolves upon Robert Dayton Talley, unless" the proof of such mitigation, justification, or excuse is furnished from the evidence produced by the state.

A fair construction of the instructions defining deliberation and premeditation is that such words are included in the definition of "malice aforethought," viz:

"You are instructed * * * that the term malice denoted a wicked intention of the mind; an act done with a depraved mind attendant with circumstances which indicate willful disregard of the life or safety of others indicates malice, and that malice aforethought is such wicked intention of the mind previously entertained. Deliberation and premeditation need not exist for any fixed period of time; it is enough that they were formed before the act."

The law of this state is that an act done with a depraved mind attendant with circum-

stances which indicate disregard of the life or safety of others indicates malice, and, before a homicide may be considered murder, the act resulting in the homicide must have been accompanied by malice so understood manifest from the facts and circumstances of the killing.

The facts that establish malice aforethought, in order to constitute a homicide murder, do not also establish the further elements of willfulness, deliberation, and premeditation, and thereby establish the higher degree of murder. In order to establish willfulness, deliberation, and premeditation in the commission of a homicide (in order to establish murder of the first degree), the state must satisfy the jury from further evidence, beyond a reasonable doubt, that the fatal wound was inflicted in such circumstances as exemplify not only the offspring of a depraved mind bent on mischief, but also such further state of mind acquired from a previous deliberation and premeditation of the act, and a fixed purpose and intention of bringing about the exact result (the death of the human being wounded). To establish these elements of deliberation and premeditation, the prosecution must produce evidence of a greater degree of depravity of mind than is required to establish an unlawful killing with malice aforethought. In other words, the evidence must satisfy the jury beyond a reasonable doubt that the accused not only killed the deceased of his malice aforethought, but, also, that the act of killing was willfully, deliberately, and premeditatedly done. Hence a greater degree of punishment is deserved, because a greater depravity of mind is shown to have accompanied the act of killing.

The instructions given nowhere required the jury to become satisfied from the evidence, beyond a reasonable doubt, that the accused willfully, deliberately, and premeditatedly shot and killed the deceased. The instructions did require the jury to become satisfied of the existence of such elements, beyond a reasonable doubt, but instructed the jury that, from a definition of the degrees of murder as given by the court, "you will thus see that included in the charge contained in the information is that the defendant is guilty of murder in the first degree."

Who can say at this stage of this cause that the jury was or was not influenced by such instruction?

The evidence shows no reasonable motive prompting defendant to a willful, deliberate, and premeditated act of shooting deceased. That the accused did shoot deceased is not denied. The circumstances surrounding the fatal transaction tend to show that the parties were engaged in a fight, and continued fighting with about equal success for some minutes; that the accused was prostrate on the ground in a muddy street, and the deceased was on "top" of him, and both were fighting; that bystanders took hold of the

deceased and pulled him back but did not break the hold each had on the other. They were partially disengaged, so that both men recovered a standing position, but holding to each other's arms. At about the time they arose to their feet, defendant pulled a revolver from under his left arm, where he usually carried it, and the deceased made a jump towards defendant, at the same time saying to defendant, "Put up that gun, fight like a man," or words to that effect. As deceased made the jumping motion, as if to disarm accused, the accused passed his right hand, with the revolver, over the deceased's left shoulder and pressed the muzzle against the back of the deceased and fired. Then he fired two more shots into the deceased's left side, whereupon the deceased retired towards the sidewalk, showing a great weakness. Defendant fired a fourth shot in his direction, but did not again strike the deceased.

There is no evidence as to which of the three shots was fatal. The three combined proved fatal, and the jury is fully justified in finding that the shots caused the death. No witness testified directly of the cause of death. The wound in the back and the two wounds in the side were powder burned.

This evidence would justify an inference that the defendant fired the shots intending thereby to kill the deceased, and in so doing he was prompted by and did fire the shots of his malice aforethought. He thereby unlawfully killed Jesse C. Danner, a human being, with malice aforethought. Of this conclusion the facts and circumstances surrounding the killing furnish sufficient proof, if the jury did not believe that the shots were fired by accused in his necessary self-defense. Whether or not the facts and circumstances surrounding the killing tend to prove that the accused willfully, deliberately, and premeditatedly fired the shots, I will not now stop to inquire. Certainly the above-mentioned facts do not justify the fair inference of deliberation and premeditation necessary in law to raise the crime to murder of the first degree. The jury had doubts of the degree of murder established by the proof; but as the court had instructed them that, "you will thus see that included in the charge contained in the information is that the defendant is guilty of murder in the first degree," and treated deliberation and premeditation as included in malice aforethought, and nowhere required the jury to become satisfied beyond a reasonable doubt from the evidence in the case that the accused willfully, deliberately, and premeditatedly fired the shots that killed Danner, they may have thought the court had intended by the instruction to inform them of their duty to convict of murder of the first degree if they were satisfied beyond a reasonable doubt, from any source, that the defendant deliberately and premeditatedly fired the shots

that proved fatal. They were expressly told, if accused fired the fatal shots, he had the burden of proving that he fired them in such circumstances as relieved him from the extreme penalty of the law. What could a jury do in case they did not believe the defendant's statements claiming he fired, but fired in self-defense, under these many instructions, other than convict of murder of the first degree, and particularly when the court had intimated the absence in law of the existence of a certain line marking a distinction between the first and second degrees of murder?

We may as fairly speculate and determine, from the whole of the instructions given, that the defendant was or was not injured by the instruction in question. Certainly the instruction has nothing to recommend its presence in this trial. This considered, and the imperfect condition of the record presented to us for review of this appeal, convinces me that justice, administered with mercy, requires another trial.

The entire record presented to us for review is prepared and presented with such absence of care and attention to plain statutory requirements that only charity toward the appellant in his extremity prompts us in giving any consideration whatever to the record other than to order the appeal dismissed. Yet, the defects in the record are, and have been, such for which the appellant and his counsel are not to be censured. The censure falls upon those over whom appellant has no control. Such record as we have had for consideration, and particularly the evidence contained in the reporter's transcript of his notes, has been considered as an authentic, correct transcript, and treated as correctly containing all of the evidence in the case and the entire instruction of the court, not because it has been authenticated as such by the officers designated by statute in the exact manner and with the formalities specified by statute to so establish it as a part of the record, but because the appellant in right and justice ought not be penalized for another's failure of duty; appellant being without fault. In taking this course, I feel that the broad spirit of our statute has been met, and by meeting the statute in this way its beneficial purposes have been promoted, not violated. I am of opinion that by this course we have not thereby nullified our previous decisions in similar cases, but entered a field not covering those previously decided cases—the facts maturing the record are so very different.

Upon the whole case, I am convinced that the appellant has been deprived of that fair and impartial trial guaranteed to him by law, because the court erred in its instructions to the jury, under the evidence.

For this general reason, I dissent from the decision affirming the conviction.

SABIN v. KYNISTON et al.

(Supreme Court of Oregon. Ang. 1, 1916.)

1. FRAUDULENT CONVEYANCES \Leftrightarrow 295(2)—EVIDENCE—SUFFICIENCY—FRAUD—CIRCUMSTANTIAL EVIDENCE.

In action to set aside a conveyance as fraudulent, it is not essentially requisite that there be direct proof of fraud, but the necessary deceit may be proven by circumstantial evidence.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 870; Dec. Dig. \Leftrightarrow 295(2).]

2. FRAUDULENT CONVEYANCES \Leftrightarrow 271(2)—EVIDENCE—BURDEN OF PROOF—FRAUD.

In such action, one alleging fraud or any other material matter must prove it.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 797; Dec. Dig. \Leftrightarrow 271(2).]

3. FRAUDULENT CONVEYANCES \Leftrightarrow 168—TRANSACTION INVALID—KNOWLEDGE OF GRANTEE.

The title of a purchaser is protected from attack as based on fraudulent conveyance where, without knowledge or notice of vendor's intent or of fraud, he has paid a valuable consideration, under L. O. L. §§ 7397, 7400, 7401, providing that every conveyance of any estate or interest in land made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits or demands as against the person so hindered, delayed, or defrauded shall be void; that the question of fraudulent intent shall be deemed one of fact, not of law; and that the statute shall not affect the title of purchaser for valuable consideration unless it appears he had previous notice of the fraudulent intent of his immediate grantor of the fraud, rendering such grantor's title void.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 494, 520; Dec. Dig. \Leftrightarrow 168.]

4. FRAUDULENT CONVEYANCES \Leftrightarrow 282—BURDEN OF PROOF—KNOWLEDGE BY PURCHASER OF FRAUDULENT INTENT OF GRANTOR.

Under L. O. L. § 7401, providing that the statute as to fraudulent conveyances shall not impair title of purchaser for valuable consideration unless it shall appear that he had previous notice of the fraudulent intent of his immediate grantor, one of the essentials which the plaintiff, in suit to set aside a conveyance as fraudulent, must establish is that the purchaser had previous notice of the fraudulent intent of his grantor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 817, 818; Dec. Dig. \Leftrightarrow 282.]

5. JUDGMENT \Leftrightarrow 766—LIEN—DOCKETING JUDGMENT OF FEDERAL COURT—CONSTRUCTIVE NOTICE.

Where judgment of the United States court was not docketed in the county where land was situated until long after conveyance from judgment debtor to purchaser, there was no imputed notice to the purchaser of the determination of the cause in the United States court, under L. O. L. §§ 210-212, providing that United States court judgments shall be a lien from the time of docketing a transcript in any county, etc.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1823-1827; Dec. Dig. \Leftrightarrow 766.]

6. FRAUDULENT CONVEYANCES \Leftrightarrow 301(1)—EVIDENCE—SUFFICIENCY—NOTICE TO GRANTEE.

In suit to set aside a conveyance as fraudulent, evidence that there was a rumor current among farmers, in the neighborhood where land

was situated, that grantor had been sued, the grantee living several miles distant, and no knowledge of this rumor being imputed to him, was not sufficient to show grantee's knowledge of fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 904; Dec. Dig. \Leftrightarrow 301(1).]

7. FRAUDULENT CONVEYANCES \Leftrightarrow 156(1)—BONA FIDE PURCHASER—ACTUAL NOTICE.

Actual notice of fraudulent intent by vendor must be shown to avoid a sale to a purchaser paying a valuable consideration.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 495; Dec. Dig. \Leftrightarrow 156(1).]

8. FRAUDULENT CONVEYANCES \Leftrightarrow 301(1)—EVIDENCE—KNOWLEDGE OF GRANTEE—CIRCUMSTANTIAL EVIDENCE.

Actual notice to grantee of fraudulent intent by vendor may be proven by circumstantial evidence.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 904; Dec. Dig. \Leftrightarrow 301(1).]

9. EVIDENCE \Leftrightarrow 591—CONCLUSIVENESS ON PARTY INTRODUCING WITNESS.

Where a party calls a witness, he thereby represents him to be worthy of credit, or at least not so infamous as to be wholly unworthy of it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2440-2443; Dec. Dig. \Leftrightarrow 591.]

10. FRAUDULENT CONVEYANCES \Leftrightarrow 300(1)—EVIDENCE—SUFFICIENCY—PAYMENT OF VALUABLE CONSIDERATION.

In action to avoid a conveyance as fraudulent, testimony of grantee, called as plaintiff's witness, of payment of valuable consideration, and testimony of his son as to remittances to such grantee for use in buying the land, held sufficient to show payment by grantee of valuable consideration.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 896; Dec. Dig. \Leftrightarrow 300(1).]

In Banc. Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Suit by R. L. Sabin, trustee in bankruptcy, against T. E. Kyniston and another. From a decree for defendants, plaintiff appeals. Affirmed.

In substance, the complaint in this suit is that on May 12, 1914, in the United States District Court for the District of Oregon, the plaintiff recovered a judgment against the defendant Kyniston for \$1,760, with interest and costs upon which on the 22d of that month an execution was issued and returned unsatisfied before the commencement of this suit; that on May 18, 1914, Kyniston, for the purpose of defrauding the plaintiff and preventing him from collecting the judgment, conveyed to Patton a tract of land in Wasco county not then nor ever exempt from execution; that the latter knew of the judgment and received the conveyance with the same intent and purpose imputed to his grantor; that there was no consideration for the transfer, the \$1 mentioned in the deed referred to being merely nominal; and, finally, that after making the conveyance Kyniston had no property which the plaintiff could find or out

of which he could satisfy his adjudicated claim. Except the allegation of the actual transfer of the land, all the averments of the complaint are traversed by the answers, which pleadings state in substance that Patton bought the realty in question in good faith paying \$1,000 therefor, assuming a mortgage of \$1,000 then on the property with accrued interest, and promising to pay the balance of taxes then due, all without any knowledge or notice or reason to believe that Kyniston owed anything to the plaintiff or desired to dispose of his property to defraud any creditor. The separate answers of both defendants were substantially the same. The replies controverted the pleadings of the defendants in material particulars. From a decree dismissing the suit, the plaintiff appealed.

Sidney Teiser, of Portland, for appellant. Frank G. Dick, of The Dalles, for respondents.

BURNETT, J. (after stating the facts as above). [1-3] It is well settled that it is not essentially requisite that there be direct proof of fraud. Indeed, this is generally impracticable, and the deceit necessary to impeach a conveyance may be proven by circumstantial evidence. *Elfelt v. Hinch*, 5 Or. 255; *Williamson v. North Pac. Lbr. Co.*, 42 Or. 153, 70 Pac. 387, 532; *Kabat v. Moore*, 48 Or. 191, 85 Pac. 506; *Phipps v. Willis*, 53 Or. 190, 96 Pac. 866, 99 Pac. 935, 18 Ann. Cas. 119. On the other hand, it is a legal platitude to say that he who alleges fraud or any other material matter which is denied must prove the same according to his averment. It has been established by precedents in this state that three things concurring will protect the title of the purchaser: (1) He must buy without knowledge of the bad intent on the part of the vendor; (2) he must be a purchaser for a valuable consideration; and (3) he must have paid the purchase money before he had notice of the fraud. It is provided by section 7397, L. O. L., that every conveyance of any estate or interest in lands made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits or demands as against the person so hindered, delayed, or defrauded shall be void. The effect of this is limited by two sections reading thus:

Section 7400: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law."

Section 7401: "The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

[4-8] Under the latter, one of the essentials which the plaintiff must establish is that the purchaser had previous notice of the fraudulent intent of his grantor. On this

point, it is conceded that the judgment of the United States court was not docketed in Wasco county, where the land was situated, until long after the conveyance from Kyniston to Patton. Sections 210, 211, and 212, L. O. L., cover this subject permitting such docketing, and prescribing that from the date thereof the judgment shall be a lien upon the real property of the defendant within the county where the same is docketed. For want of compliance with this section there was no imputed notice to Patton of the determination of the cause in the United States court. There is utterly no evidence to show that he had any knowledge that Kyniston was indebted or obligated in any manner whatever to the plaintiff. There is some slight testimony that there was a rumor current among the farmers in the neighborhood where the property was situated to the effect that Kyniston had been sued, but at the time Patton resided in The Dalles several miles distant, and no knowledge even of this rumor is imputed to him by any witness. In *Coolidge v. Heneky*, 11 Or. 327, 8 Pac. 281, it was decided that notice of the fraudulent intent of a grantor in cases of this sort must be actual. It is true enough that this may be proven by circumstantial evidence, but there are no circumstances disclosed by the witnesses tending to charge Patton with the necessary knowledge of the deceit, if any, practiced by his codefendant.

[9, 10] We pass to the inquiry of whether Patton paid a valuable consideration for the land. To establish his case the plaintiff called as his first witness the defendant Patton himself, thus representing him to be worthy of credit, or at least not so infamous as to be wholly unworthy of it. *State v. Steeves*, 29 Or. 85, 103, 43 Pac. 947. *Greenleaf* states it thus:

"When a party offers a witness in proof of his cause, he thereby in general represents him as worthy of belief." 1 *Greenl. Ev.* (16th Ed.) § 442.

The testimony of Patton is to the effect that on Sunday, May 17, Kyniston visited him and offered the land for sale subject to a mortgage for \$1,000 in favor of the state land board with accrued interest, pricing it at the sum of \$1,000 additional, and the balance of unpaid taxes amounting to \$26.31; and that he accepted the offer. He said he had in his possession \$600 belonging to his son which the latter had earned from time to time and left in his keeping, together with \$90 of his own, all of which he kept in a can buried sometimes in a cellar and sometimes in a woodshed at the various places where he had lived in Wasco county; that he paid this amount to Kyniston on the Sunday mentioned, taking his receipt for the same which, at the time he testified, had been lost and could not be produced; that the following morning he went to the office of an attorney where the deed was prepared

and signed by Kyniston; that he then paid him \$210. The remainder of the consideration was \$100 which he had previously loaned to Kyniston, making a total of \$1,000.

An attempt was made to discredit his testimony by showing that when he was working for a farmer, plowing a 92-acre tract for \$1.50 an acre, he drew his money substantially as fast as he earned it; that once he owed his landlord \$6 for a month's house rent and paid it by cutting wood; that in another instance he was compelled to ask credit for \$16.81 to buy feed for his team while he was cultivating rented land; and, finally, that shortly prior to the transaction in question he borrowed \$100 and gave a chattel mortgage on his team to secure its payment. These matters are satisfactorily explained by Patton's statement to the effect that at the time he was plowing he did not have ready cash and was compelled to use the money from time to time; that he did not have available funds when he owed the house rent, and, not having any work on hand, made the turn by cutting wood; and, lastly, that his wife was afflicted with cancer and he had borrowed \$100 for the purpose of sending her to California for treatment, which plan she abandoned. The son testified that for practically four years he had been earning money which, from time to time, he gave to his father for safe-keeping, and that it was with his consent that his parent used the money to make the initial payment to Kyniston. The latter testified to receiving the money as stated by Patton; and, finally, the scrivener, who prepared the deed and took the acknowledgment, declared that at that time he saw quite a sum of money in gold, estimated by him to be \$200 or \$300, pass from Patton to Kyniston as part of the transaction.

Some unimportant discrepancies between the testimony of Patton and of Kyniston are pointed out as discrediting their statements. For instance, the former said that the subject of the transfer of the land had not been broached between them until the stated Sunday, while the latter declared that he had several times before then interviewed Patton on the subject. This circumstance, together with the fact that the greater part of the purchase money was paid before the execution of the deed, that no abstract was required or examination of the title made, and that for a long period of time the money was kept buried in a can about the house instead of being deposited in a bank, gives an apocryphal flavor to the stories of the witnesses. On the other hand, there is nothing whatever to dispute them. The plaintiff has vouched for the credibility of Patton and, while the transaction may not have been carried on by a farm laborer, as Patton was disclosed to be, with the same precaution that would characterize a similar affair conducted by

well-trained business men, the testimony clearly preponderates in favor of the defendants. The case is governed by such precedents as *Phipps v. Willis*, supra; *Ball v. Danton*, 64 Or. 184, 129 Pac. 1032; *Coffey v. Scott*, 66 Or. 465, 135 Pac. 88; *Coolidge v. Oberlin*, 66 Or. 563, 135 Pac. 167; *Lane v. Myers*, 70 Or. 376, 141 Pac. 1022, Ann. Cas. 1915D, 649.

In brief, there is nothing to show that Patton had any notice whatever that Kyniston intended to defraud any one. It is established at least by the greater weight of testimony that he paid a valuable consideration for the land and that, too, before he had any notice either actual or imputed of any possible fraud on the part of his codefendant. The criticisms of the statements of the witnesses are not sufficient entirely to discredit them, especially where the veracity of the defendant Patton was indorsed by the plaintiff when he called him as a witness. We deem it unnecessary to consider the question urged by the defendants to the effect that without an allegation in the body of the complaint stating his appointment as trustee, words of that kind in the title are mere descriptive personae, so that the plaintiff is suing in his private capacity while the proof shows he is entitled to recover, if at all, only in the character of a representative.

The decree of the circuit court was right and must be affirmed.

EAKIN, J., took no part in the consideration of this case.

WICKS v. SANBORN.

(Supreme Court of Oregon. Aug. 1, 1916.)

1. APPEAL AND ERROR \S 1099(8)—LAW OF CASE—MOTION FOR DIRECTED VERDICT.

Where the evidence contained in the record on a second appeal is not materially different from that produced on the first trial, the decision on the first appeal, on motion for directed verdict, that the plaintiff was entitled to have the jury pass on the evidence, is the law of the case on the second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4370; Dec. Dig. \S 1099(8).]

2. TRIAL \S 252(16)—ACTION ON CONTRACT—INSTRUCTION—APPLICATION TO EVIDENCE.

In an action by an architect for the price of house plans, an instruction that, if the jury should find that the contract between plaintiff and defendant was that if defendant did not build he was not required to pay for the plans, verdict must be for him, even though he agreed or promised to build, and yet did not do so, and that such promise, if made, did not change the contract, was properly modified by adding, "unless you should find from the evidence that it was the intention of the parties to so change the contract," where there was evidence that a change had been agreed upon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 606; Dec. Dig. \S 252(16).]

3. TRIAL. ~~199~~—INSTRUCTIONS—PROVINCE OF JURY—LAW QUESTION.

In an action by an architect for the price of house plans ordered by a contractor acting for the owner, where the court instructed that, if the contractor was used as the medium through whom the contract was made, then both parties to the action would be bound by the terms of the contract, provided the contractor correctly represented them to the respective parties, the quoted language of the instruction, that if the jury should find from the preponderance of the evidence that the contractor was not the agent of the owner "to the extent of having power to bind him," unless he should have fully and honestly represented to the owner the full terms of the contract and then have the owner ratify them, was not improper, as permitting the jury to decide what the agent might do by virtue of his authority, a question of law for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 467-470; Dec. Dig. ~~199~~.]

Department 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by John E. Wicks against Frank H. Sanborn. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

This is the second appeal of a dispute involving \$90. The plaintiff alleges that he is an architect, that at the request of defendant he drew a set of plans reasonably worth \$90 for a dwelling house, and that the defendant has refused to pay for the plans. The answer avers that the defendant contemplated the erection of a dwelling house, that the plaintiff agreed that he would prepare a set of plans with the understanding that the defendant would pay \$90 if he approved the plans and if he built the house, but no charge was to be made for drawing the plans if the defendant did not approve them or if he did not build. The reply traverses the averments of the answer. The verdict of the jury was for the plaintiff, and the defendant appealed from the consequent judgment.

G. C. Fulton, of Astoria, for appellant. Frank C. Hesse, of Astoria (A. W. Norblad, of Astoria, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). The assignments of error question the refusal of the court to direct a verdict for the defendant, and also complain of the giving and refusal to give other instructions. The negotiations for the plans were for the most part conducted by plaintiff and C. L. Houston, a contractor. The controversy between the litigants largely results from their variant claims concerning the authority of Houston. Wicks argues that Houston had sufficient authority to make the agreement relied upon by the plaintiff, while Sanborn contends that Houston lacked the requisite authority. A brief reference to the evidence is necessary.

The plaintiff testified that Houston "told me that Mr. Frank Sanborn had asked him to inquire from me what the cost would be for making a plan for a house that Mr.

Frank Sanborn intended to build. He had with him a piece of paper, * * * and that paper was laid down, * * * representing the floor plan of the house. * * * I told him the price would be about \$90 or \$95; so he said he was going to take it up with Mr. Sanborn and let me know a few days afterward." The plaintiff also testified that Houston returned in a few days, and said that \$90 was satisfactory to the defendant, and "to go ahead and make up preliminary drawings to be submitted to Mr. Frank H. Sanborn for his approval." Preliminary drawings were then made and turned over to Houston, who "said he was going to take it up with Mr. Sanborn." A few days afterward, at the request of the defendant's wife, Wicks went to Sanborn's home, and there discussed with the defendant and his wife the preliminary drawings, which had been turned over to Houston and by him delivered to Sanborn. According to the testimony of the plaintiff, Sanborn was satisfied with the plans, after some changes pursuant to "suggestions made back and forth," and then "Mr. Sanborn told me that he was going to take the matter under consideration, when he had gone over the preliminary drawings, and would let me know through Mr. Houston in a few days," and "in a few days afterwards Mr. Houston came into my office with the same preliminary drawings that we had discussed at Mr. Sanborn's house, and said that the arrangement was satisfactory, to go ahead with the plans." The plaintiff then completed the plans and "turned them over to Mr. Houston when finished," as "Sanborn said that Mr. Houston was to build the house by day's work and that he procured these plans for him."

C. L. Houston, when a witness for the defendant told the jury that after the preliminary plans had been submitted to Sanborn "he said 'go ahead, I am going to build the house,'" and "to have the plans completed then"; and the witness then told Wicks that Sanborn had said "that he was going to complete the house." Wicks subsequently finished the plans and delivered them to Houston.

[1] On the first appeal it was held that the plaintiff was entitled to have the jury pass upon the evidence and that the trial court erred in directing a verdict for the defendant. *Wicks v. Sanborn*, 72 Or. 321, 324, 143 Pac. 1007. And since the evidence contained in the record now presented to us is almost identical with and is not materially different from the evidence produced at the first trial, the decision in *Wicks v. Sanborn*, supra, on the motion for a directed verdict, becomes the law of the case on this appeal. *Baines v. Coos Bay Navigation Co.*, 49 Or. 192, 195, 89 Pac. 371. The motion for a directed verdict was properly denied.

[2] At the request of the defendant the court instructed the jury:

"If you should find from a preponderance of the evidence that the contract between plaintiff and defendant was that if the defendant did not build the house in question, that defendant was not required to pay for the plans in question, your verdict must be for the defendant, even though you should further find that defendant agreed to or promised to build a house, yet did not do so. Such promise, if made, would not change the contract."

And Sanborn now complains because the court modified the instruction by adding:

"Unless you should find from the evidence that it was the intention of the parties to so change the contract."

The contention is that there was no evidence to justify the modification. We cannot agree with the defendant in his claim that the testimony of Houston that Sanborn told him he intended to build was the only evidence that could be considered in determining whether a change had been agreed upon. The discussion of the preliminary plans at the Sanborn home, and the statement by Sanborn that he would "take the matter under consideration," and then let Wicks "know through Mr. Houston in a few days," are by no means negligible in the consideration of the controversy, and cannot be ignored, especially when taken in connection with what Houston says Sanborn told him and what he in turn repeated to Wicks.

[3] Objection is made by the defendant because the court used the words "to the extent of having power to bind him," on the theory that the quoted words had the effect of permitting the jury to decide what an agent may do by virtue of his authority, which is a question of law for the court. The language complained of was used when the court said:

"But I instruct you that if you find, from the preponderance of the evidence, that the said C. L. Houston was not the agent of the defendant in this case to the extent of having power to bind him, unless he should have fully and honestly represented to the defendant the full terms thereof, and then have defendant ratify them, then I instruct you"

—in substance that the defendant would not be liable on an assumed state of facts. The court had previously told the jury that, if Houston was used as—

"the medium through whom the contract was made, then both parties to this action would be bound by these terms, whatever you may find them to be, provided you find that he correctly represented them to the respective parties."

The language excepted to may appear awkward, but it did not have the effect urged by defendant, when read in the light of the whole charge, and particularly when viewed in connection with what immediately preceded it and with what followed it.

Instruction No. 6 does not attempt to leave to the jury the decision of a question of law. The court presented the theory of each litigant to the jury in a charge which on the whole has the merit of being concise and

complete, and at the same time understandable, and it was not error to refuse to give the instructions numbered 3 and 4 requested by the defendant.

The jury found for plaintiff after a fair trial, and the judgment is therefore affirmed.

MOORE, C. J., and BEAN and BURNETT, JJ., concur.

RONEY v. LANE COUNTY et al.

(Supreme Court of Oregon. Aug. 1, 1918.)

1. COUNTIES \Leftarrow 195—TAXATION—DISPOSITION OF GENERAL TAXES—STATUTE.

Under L. O. L. §§ 937, 6278, giving county courts authority over county roads and power to tax for general county purposes, the money so raised may be used upon county roads, for sections 6320, 6321, authorizing special tax levies for "building and improving" county roads is not an exclusive, but merely a supplementary, method of raising road funds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 307; Dec. Dig. \Leftarrow 195.]

2. MUNICIPAL CORPORATIONS \Leftarrow 958—TAXATION—CHARTER PROVISIONS—CONSTRUCTION.

Eugene City Charter, §§ 114, 115, exempting the city from road taxes levied by the county court, refers only to road taxes levied under L. O. L. §§ 6320, 6321, and is inapplicable to general taxes raised under sections 937, 6278, although they are used for road purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2023-2087; Dec. Dig. \Leftarrow 958.]

3. COUNTIES \Leftarrow 191—TAXATION—DISPOSITION OF GENERAL TAXES—STATUTE.

Budget Law (Laws 1913, p. 458), requiring the county court to publish an estimate of the amount required for each department of the county government, merely requires an estimate of how much of the general tax fund, as distinguished from the special road tax fund, will be used for road purposes.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300, 305; Dec. Dig. \Leftarrow 191.]

Department No. 2. Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Taxpayer's suit by L. N. Roney against the County of Lane and others. From a decree sustaining a general demurrer to the complaint and dismissing the suit, plaintiff appeals. Affirmed.

The plaintiff is a taxpayer owning taxable real and personal property located in the city of Eugene in Lane county, Or. He brings this suit in his own behalf and that of all other taxpayers similarly circumstanced. That city is a municipal corporation chartered by an act of the legislative assembly of the state of Oregon entitled "An act to reincorporate the city of Eugene and to repeal all acts and parts of acts in conflict therewith," filed in the office of the secretary of state February 18, 1905. Sections 114 and 115 of that charter are here set down:

"The corporate limits of the city of Eugene shall embrace and the same is hereby constituted an independent road district; and the power and authority given by the general laws of the

state of Oregon to the county court of Lane county, to divide said county into road districts, to appoint road supervisors, to lay out and work highways, and to levy a tax upon all taxable property of said county to be used in building and improving the county roads shall not apply or extend to the territory within the limits of the city of Eugene, but the said territory and the inhabitants thereof are hereby excepted out of the jurisdiction of said court upon said subjects; and the authority given to the county court by general law to manage, control, and levy road poll taxes, in cash, shall be exercised within the city of Eugene by the common council thereof; and all road taxes, including road poll taxes levied upon or against the property and persons of the city of Eugene, shall be expended by the street commissioner thereof under the direction of the common council of said city, and authority is hereby given to the common council to expend such portion of the road taxes outside of the limits of the city upon the roads leading to the city as a majority of the common council shall deem expedient and advisable." Sec. 114.

"Authority is hereby given to the common council to levy such tax, not exceeding two mills in any one year, as it shall deem necessary, upon all taxable property in the city, to be collected at the same time and in the same manner as the other taxes of the city: Provided, that such part thereof as the council or street commissioner shall direct may be paid in labor on the streets and roads, under the direction of the street commissioner, who shall have all the power and authority of a road supervisor under the general laws of the state." Sec. 115.

The plaintiff avers that in the budget framed by the Lane county court on December 2, 1915, under the head of "roads," there was inserted the sum of \$110,620 to be levied upon all the taxable property in that county including that within the city of Eugene. This was incorporated with the larger amount of \$320,683.50, which is denominated in the budget "general fund"; the rate levied to raise which was 8.676 mills. He avers that the part apportioned for roads amounts to 2.79 mills. He charges that this tax was extended on the assessment rolls and that the sheriff of the county will collect the same from the plaintiff. He prays for a cancellation of the extension, that the levy of 2.79 mills be set aside and held for naught, and that the sheriff be enjoined and restrained from collecting the same. A general demurrer to this complaint was sustained, and the suit dismissed. The plaintiff appealed.

O. H. Foster and S. P. Ness, both of Eugene (Foster & Hamilton, of Eugene, on the brief), for appellant. J. M. Devers, Dist. Atty., and H. W. Thompson, both of Eugene (Thompson & Hardy, of Eugene, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). Section 6320, L. O. L., as amended by the act of February 23, 1915, reads thus:

"The county court or commissioners' court of each county in the state may levy a tax of not to exceed ten mills on the dollar on all taxable property of said county, at the time of making the annual tax levy upon the previous year's assessment, which shall be set apart as a general road fund, to be used in the building and improving the public or county roads or bridges

on county roads of the county in which the property is located. Said tax shall be paid in money, and collected in the same manner as other county taxes are collected, and when so collected shall be used for road purposes only, as provided in this act, and seventy per cent. thereof shall be apportioned to the several road districts including districts composed of incorporated cities and towns, in such proportion as the amount of taxable property in each district shall bear to the whole amount of taxable property in the county, and the remaining thirty per cent. shall be applied to roads in such locality in the county as the court may direct." Laws 1915, p. 135.

Section 6321, L. O. L., provides for an additional tax to be voted by the taxpayers of a road district for the improvement of roads therein. Section 6278 here follows:

"All county roads shall be under the supervision of the county court of the county wherein the said road is located; and no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in the state, except by the authority of the county court of the proper county; and each county court within this state shall have the authority, and it shall be its duty, to supervise, control, and direct the working, laying out, opening, and keeping in repair of all county roads within its county, and to prescribe the methods and manner of working the same; to supervise the construction and repair of all bridges on the county roads, and to remove any supervisors for incompetency or disobedience to the orders of said court. The powers herein given may be exercised directly by the court, or through some one of its members designated for that purpose."

In addition to the authority conferred by section 6278, L. O. L., we find in section 937 that the county court has powers pertaining to county commissioners to transact county business, among other things:

"(3) To establish, vacate, or alter county roads or highways within the county, or any other necessary act relating thereto, in the manner provided by law; (4) to provide for the erection and repairing, within the county, of public bridges upon any road or highway established by public authority; * * * (7) to estimate and determine the amount of revenue to be raised for county purposes, and to levy the rate necessary therefor, together with the rate required by law for any other purpose, and cause the same to be placed in the hands of the proper officer for collection; * * * (9) to have the general care and management of the county property, funds, and business, where the law does not otherwise expressly provide. * * *

[1, 2] The principal question to be determined is whether the county court in the exercise of its authority defined in these sections is restricted for necessary funds to the special tax provided for in section 6320 revised in 1915. It will be observed that the money to be raised under that section is to be used exclusively for "building and improving" the public or county roads or bridges on such roads. In *Kime v. Thompson*, 60 Or. 183, 118 Pac. 174, we held that it was not mandatory upon the county court to exercise the authority conferred by this section; that it was merely cumulative in the matter of taxation; and that the county court was not confined to the levy of this special tax in the furtherance of its effort to improve the highway, nor deprived of the

power of applying other means to such a purpose. The general authority conferred upon the county court by sections 937 and 6278, and the objects of its control, include many things besides the mere building and improving of thoroughfares. In section 6320 nothing is said about the expense of surveying or laying out roads, paying damages for property taken, or for salaries of road officers, and many other things which would naturally suggest themselves upon detailed examination of legitimate expenses connected with the general road system of a county.

The statutory grant of authority by the legislative department of the state as above described is ample sanction for the county court to apply to the operation of its road system money drawn from the general resources of the county independent of or in addition to the restricted levy provided for in sections 6320 and 6321. As held in *Kime v. Thompson*, supra, the fund authorized in these latter sections is cumulative and permissive. Specific and exclusive road taxes were those from which the charter of Eugene originally exempted that municipality. They are the only funds to which the restricted designation of "road taxes" used in the city's incorporating act is applicable. All others are referable to the ordinary dominion of the county over its municipal affairs, as a branch of the government vested with the taxing power. It would cripple the general authority of the county court if it were required to depend exclusively upon a special fund applicable alone to the mere building and improving of public roads. The special tax described in section 6320 must perforce be apportioned among all the districts throughout the county including cities and towns in the classification therein described. The districts get 70 per cent. whether needed or not. The county has only 30 per cent. and is restricted in its disbursement to mere building and improvement. None of that money is applicable to any other of the numerous expenses necessarily incident to road matters. The thickly populated centers would have money to waste while the outlying highways would become impassable for want of means to repair them and new roads would be out of the question. It is not reasonable to construe section 6320 so as to make it a hobble instead of a help to the county in its progress towards good roads. It was evidently intended to supplement the general resources of the county and was not designed to contract them. The conclusion that the county may finance its road system with money raised by general taxation and is not compelled to resort to the additional scheme authorized by sections 6320 and 6321 renders it unnecessary to determine whether the charter provisions already quoted are superseded by the general law embodied in the latest form of section 6320 contemplating dis-

tribution of money among cities and towns which happen to be separate road districts as well as among rural districts.

[3] The question is not affected by chapter 234 of the Laws of 1913, known as the "Budget Law," which requires the county court to publish beforehand an estimate fully itemized showing under separate heads the amount required for each department of the county government, among other things, for the improvement and maintenance of public highways, roads, streets, bridges, the construction, operation, and maintenance of each public utility, etc. Having reached the conclusion in *Kime v. Thompson*, supra, that the county court has the right to use the general fund for road purposes it is plain that the budget law merely requires an estimate of how much of that general fund, as distinguished from the special fund named in section 6320, will be expended for that purpose. In short, the general fund is derivable from taxation upon all taxable property within the county wherever situated. It may be applied to the operation of the road system of the county. The portion thus used is not technically a road tax, which term may be applied in strictness only to the levy authorized by sections 6320 and 6321.

The demurrer to the bill was properly sustained, and the decree is affirmed.

MOORE, C. J., and BEAN and BENSON, JJ., concur. HARRIS and EAKIN, JJ., took no part in the consideration of this case.

KREINBRING v. MATHEWS 'et ux.
(Supreme Court of Oregon. July 18, 1916.)

1. MORTGAGES \S 454(3) — ACTION TO FORECLOSE — EQUITABLE DEFENSE.

In a suit to foreclose a purchase-money mortgage, an answer, admitting the making of the mortgage, but alleging that the mortgagee falsely represented that he was the owner of the land described in the mortgage, and that it was free from all incumbrances, and that there was valuable timber on it which he owned, and that the mortgagor relying upon such false representations purchased and received a general warranty against incumbrances, that the purchase money, except the mortgage note in suit, had been paid, and that the outstanding and unexpired right to cut and remove the timber amounted to more than the note so that there was a total failure of consideration to the mortgagor's damage, if insufficient as a counterclaim, contained all the elements of a valid defensive answer, good in equity.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1323; Dec. Dig. \S 454(3).]

2. MORTGAGES \S 415(2) — FORECLOSURE — COVENANTS.

Such outstanding and unexpired right to cut and remove timber was a breach of the covenant against incumbrances which would have to be disposed of before equity would foreclose the purchase-money mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1219-1222; Dec. Dig. \S 415(2).]

3. COVENANTS — 94 — SEISIN — BREACH.

An outstanding title does not breach a covenant of seisin going to a paramount right to the fee and possession until there is an eviction or something equivalent thereto.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 104-109; Dec. Dig. — 94.]

4. COVENANTS — 96(4) — INCUMBRANCES — BREACH.

An outstanding mortgage breaches a covenant against incumbrances when the deed is delivered.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 115; Dec. Dig. — 96(4).]

5. COVENANTS — 94, 96(2) — SEISIN — BREACH — DOWER.

An outstanding right of dower is not technically an incumbrance, but an interest in the fee covered by a covenant of seisin, instead of by covenants against incumbrances.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 104-109, 112; Dec. Dig. — 94, 96(2).]

6. LOGS AND LOGGING — 3(10) — CONVEYANCES — CONSTRUCTION.

A conveyance of all the timber on designated land, coupled with a condition that it should be removed within ten years from the date thereof, amounted only to a sale of all the timber the grantee could cut and remove before that date.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. — 3(10).]

7. APPEAL AND ERROR — 1121 — REMAND — LEAVE TO APPLY FOR FURTHER RELIEF.

In a suit to foreclose a purchase-money mortgage in which the mortgagor set up the equitable defense of the mortgagee's incumbrance created by a conveyance of the timber with the right to remove it, but where, in view of the grantee's failure to cut and remove any timber, the mortgagor's damage was but small, and it reverted within six months, the cause will be remanded and continued to the expiration of the time for removal, so that damages might then be ascertained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4418, 4419; Dec. Dig. — 1121.]

Department 1. Appeal from Circuit Court, Columbia County; J. A. Eakin, Judge.

Suit by Frank H. Kreinbring against L. P. Mathews and wife. Decree for defendants, and plaintiff appeals. Cause remanded, with directions.

This is a suit to foreclose a purchase-money mortgage upon the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section 25, township 6 north, range 5 west, W. M., in Columbia county. The answer admitted the making of the mortgage, but set up as an affirmative defense that on July 14, 1910, plaintiff falsely represented to defendants that he was the owner of the land described in the mortgage and that it was free from all incumbrances; that there was valuable timber upon the southwest quarter described in said mortgage, and plaintiff falsely and fraudulently represented that he owned said timber; that plaintiff, relying upon these false representations, purchased the tract described in said mortgage for the sum of \$3,500, and received from plaintiff and his wife

a general warranty therefor containing a covenant against incumbrances of all kinds; that defendant paid all the purchase price except \$625, to secure which he gave the mortgage and note sued upon; that at the time said contract was entered into there was a valid and outstanding right in one M. J. Kinney to cut and remove the timber upon said southwest quarter for the term of ten years, which right does not expire until December 5, 1916; that such interest in said timber was conveyed by Kinney to the Appledale Land Company, which corporation now holds the same; that the existence of such interest was known to plaintiff, but was not known to defendants when the contract was entered into; that the value of said timber and the right to remove the same is the sum of \$750; that there has been a total failure of the consideration for which said note and mortgage was given; and that plaintiff has been damaged in the sum of \$750. Plaintiff replied denying the new matter in the answer, and alleged that at the time of said transfer defendants had full knowledge regarding the title to said timber. There were findings and a decree for defendants canceling the mortgage and for costs, from which plaintiff appeals.

Sam M. Johnson, of Portland (J. J. Fitzgerald, of Portland, on the brief), for appellant. Jerry E. Bronaugh, of Portland (Bronaugh & Bronaugh, of Portland, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1] It is argued by plaintiff that the defendants' answer presents a counterclaim for unliquidated damages and nothing more, and that, such being the case, it cannot be successfully urged in this proceeding; but it is more than a mere counterclaim. It is pleaded not only as such, but also as an equitable defense. By it defendants say:

"It is true we gave this mortgage, but the consideration of the mortgage was falsely represented to be a tract of unincumbered land. We now find that there is upon it an incumbrance which diminishes its represented value to the extent of more than the amount of the mortgage. We are willing to discharge the mortgage so soon as the plaintiff shall have extinguished the incumbrance. If plaintiff declines to do this, we are entitled to have the value of the incumbrance deducted from the amount of the mortgage."

This is not like the case of an outstanding claim of title. Here is an incumbrance of record plain and incontestable which its owner declines to extinguish without compensation. In such a case, it would be extremely inequitable to require the defendant to pay for what it is probable he will never get and relegate him to a remedy upon a covenant against incumbrances which covenant was broken when his deed was delivered. Conceding for the purposes of this case that the answer is insufficient as a counterclaim, it contains all the elements of a valid de-

fensive answer, and was evidently so treated by the court below. We are of the opinion that the evidence sustains the findings of the court below as to the facts, and this conclusion leaves for our consideration the question of the sufficiency of these facts to justify the decree rendered.

[2] Under most circumstances, a vendee of land will not be permitted to set up an outstanding title as a defense to a suit brought against him to foreclose a mortgage for the purchase money. *Edgar v. Golden*, 36 Or. 448, 48 Pac. 1118, 60 Pac. 2; *Farmers' Nat. Bank v. Gates*, 33 Or. 388, 54 Pac. 205, 72 Am. St. Rep. 724; *Gennes v. Peterson*, 54 Or. 378, 103 Pac. 515; *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554. A distinction seems to be made in some of the cases between an outstanding title which affects the seisin and goes to a paramount right in the fee and possession, and a mere incumbrance such as an outstanding mortgage. In the latter case, it has been held that the outstanding incumbrance must be disposed of before equity will foreclose the purchase money mortgage. *Van Riper v. Williams*, 2 N. J. Eq. 407. In *Abbott v. Allen*, supra, Chancellor Kent, after stating that as a general rule a failure or defeat of title cannot be set up by the vendee to defeat a suit to foreclose a purchase money mortgage, uses this language:

"Perhaps an outstanding incumbrance, either admitted by the party or shown by the record, may form an exception, in cases of covenant against incumbrances. Some dicta in the books (see *Sergeant Maynard's case*, 2 Freeman 1, and 1 Ves. 88) seem to look to that point, but I have formed no opinion respecting it."

The distinction between a defense of an outstanding title and an outstanding incumbrance is shown by contrasting two cases decided by the same court and reported in the same volume, namely, *Van Riper v. Williams*, supra, and *Van Waggoner v. McEwen*, 2 N. J. Eq. 412. In the former case the defense to the foreclosure of a purchase-money mortgage was that there was an unpaid mortgage outstanding when the vendee purchased, and it was held that the plaintiff could not have a decree of foreclosure until the outstanding mortgage was disposed of. In the latter case, the defense was that there was an outstanding title to a part of the land, and that no decree of foreclosure should be made until the plaintiff should have procured such title for defendant, or that, failing in that, the value of the tract owned by other parties should be deducted from the mortgage given for the purchase price. The court held that defendant must rely on the covenants in his deed, there having been no eviction. The reason for this distinction seems sound.

[3-5] A covenant for title is not broken until there is an eviction or something equivalent thereto, while a covenant against incumbrances is broken when the deed is delivered if such incumbrance actually exists.

In the case of *Glenn v. Whipple*, 12 N. J. Eq. 50, this distinction seems to be ignored, but an examination of that case shows that the defense set up was an outstanding right of dower, which according to most authorities is not technically an incumbrance, but an interest in the fee and covered by covenants of seisin instead of those against incumbrances. *Johnson v. Elmen*, 94 Tex. 168, 59 S. W. 253, 52 L. R. A. 162, 86 Am. St. Rep. 845; *Shell v. Duncan*, 81 S. O. 547, 10 S. E. 330, 5 L. R. A. 821; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385. In *Kuhnen v. Parker*, 56 N. J. Eq. 286, 38 Atl. 641, this case is noted as among those where an outstanding title is attempted to be set up as a defense to the foreclosure of a purchase-money mortgage. This case (*Kuhnen v. Parker*) fully supports the contention of defendant in the case at bar.

[6] The conveyance from Wells to Kinney purports to sell and convey all the timber upon the southwest quarter designated in the deed coupled with a condition that it shall be removed within ten years from the date thereof, which limitation would expire on December 5, 1916. Such a conveyance amounts only to a sale of all the timber that the grantee can cut and remove before that date. *Anderson v. Miami Lumber Co.*, 59 Or. 159, 116 Pac. 1058. And the right created by it is an incumbrance. *Adams v. Reed*, 11 Utah, 480, 40 Pac. 720; *Stambaugh v. Smith*, 23 Ohio St. 534; *Cathcart v. Bowman*, 5 Pa. 317. We are satisfied that plaintiff deliberately misled defendants into believing that the timber upon the southwest quarter described was unsold, and that the purchase would not have been made or the mortgage given but for this fraudulent misrepresentation.

[7] But having arrived at this conclusion, we are confronted with another difficulty. The damage which defendants are likely to suffer is largely prospective. What little testimony defendants have introduced on that subject indicates that the value of the timber is about \$700, and that the grantees of Kinney assert the right, which they undoubtedly have, to remove it; but the fact remains that up to December 7, 1914, they had not removed a stick of it, and it is possible and even probable that they have not done so yet and may never do so. If they remove the timber, defendants should have credit upon the mortgage for its value. If they do not remove it by December 6, 1916, defendants' damage by reason of the incumbrance will be comparatively small, and it would be manifestly unfair to allow him credit for the value of the timber with the possibility that it may within less than six months revert to him. The rule adopted in *Van Riper v. Williams*, supra, seems to be the fair one, namely, to hold up the foreclosure until the incumbrance is extinguished. The same rule is stated, though its application

was not deemed necessary, in *Kuhnen v. Parker*, supra. It is one of the attributes of equity, and its chief excellency, that it will reach out and administer specific relief according to the exigencies of the particular case, and in this instance we think that absolute justice will be promoted by remanding this cause to the circuit court and directing its continuance there until after December 5, 1916, and then permitting the parties to frame issues by way of supplemental complaint or answer in which the actual damage done by reason of the incumbrance can be stated, litigated, and ascertained. Meanwhile the costs of this appeal will abide the final determination of the suit.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

PATTON v. WITHYCOMBE, Governor.

(Supreme Court of Oregon. July 14, 1916.)

1. STATUTES \S 130, 150, New, vol. 2 Key-No. Series—INITIATIVE STATUTES—LEGISLATIVE REPEAL.

The Constitution does not deny to the Legislature the right to amend or repeal a statute enacted by the people in the exercise of the initiative.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. \S 198; Dec. Dig. \S 130.]

2. STATUTES \S 150, New, vol. 2 Key-No. Series—REPEAL—CONSTITUTIONAL REQUIREMENTS.

Even though an independent act, complete within itself, works a repeal by implication, the repealing statute is not pregnable for failure to observe Const. art. 4, \S 22, declaring that no act shall be revised or amended by mere reference to its title, but the act amended shall be set forth at full length.

3. ELECTIONS \S 120—PRIMARIES—FILING FOR NOMINATION—STATUTES—VALIDITY.

Although Laws 1913, p. 183, forbids nomination of candidates for public office by political parties except as provided by L. O. L. \S 3349-3391, inclusive, as to direct primaries the Legislature, by Laws 1915, p. 124, provided an additional method of nomination by filing and payment of fees which is valid in view of the facts that the Legislature may amend an initiated statute, and that there is no conflict.

[Ed. Note.—For other cases, see *Elections*, Dec. Dig. \S 120.]

4. CONSTITUTIONAL LAW \S 205(2)—ELECTIONS \S 21—NOMINATIONS—FREE AND EQUAL ELECTIONS—PRIVILEGES AND IMMUNITIES.

Laws 1915, p. 124, providing for nominations for primary elections by payment of fee, as a method additional to that of Laws 1913, p. 183, providing for nominations without fee on petition, is not invalid as violating Const. art. 2, \S 1, requiring all elections to be free and equal, or article 1, \S 20, prohibiting privilege or immunity legislation, since no distinction is made on the ballot, and the candidate may elect the method he will follow.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. \S 596-606, 615, 618-621; Dec. Dig. \S 205(2); *Elections*, Cent. Dig. \S 15; Dec. Dig. \S 21.]

In Banc. Original proceeding in mandamus by H. M. Patton against James Withycombe,

Governor, wherein defendant filed demurrer. Demurrer sustained.

Upon the petition of H. M. Patton an alternative writ of mandamus was issued by this court, directing James Withycombe, as Governor of Oregon, to refrain from issuing a proclamation, declaring that Gus C. Moser, A. W. Orton, Conrad P. Olson, S. B. Huston, and Robert S. Farrell were nominated at the primary election as the Republican candidates for the five offices of state senator for the Thirteenth senatorial district, and to refrain from issuing certificates of nomination to any of those persons, and that the Governor proclaim that the petitioner was nominated, and issue him a certificate of nomination, or show cause for not doing so. The defendant filed a demurrer, and consequently the questions for discussion arise out of the allegations found in the writ. A general primary nominating election was held throughout the state on May 19, 1916, for the nomination of candidates for different offices, including five senatorships for the Thirteenth senatorial district, which comprises Multnomah county only. Complying with the direct primary nominating elections law, H. M. Patton filed a petition with the secretary of state as a candidate for the Republican nomination for the office of state senator in the Thirteenth senatorial district. Gus C. Moser, A. W. Orton, Conrad P. Olson, S. B. Huston, and Robert S. Farrell each filed a declaration of candidacy for the Republican nomination for the office of state senator for the Thirteenth senatorial district with the secretary of state, and paid the fees prescribed by chapter 124, Laws of 1915. The name of the petitioner, as well as the names of the other five persons, were printed as candidates for the Republican senatorial nominations on all of the official primary nominating ballots which were submitted to and used by the voters of the Republican party in Multnomah county. A canvass of the votes cast at the primary election showed that Moser, Orton, Olson, Huston, and Farrell each received more votes than Patton. It is alleged, however, that the five persons mentioned were not lawful candidates, for the reason that the act of 1915 is void, that Patton received more votes than any other lawful candidate, and that therefore he is entitled to a certificate of nomination.

W. T. Humé, of Portland, for petitioner. George M. Brown, Atty. Gen., for defendant. F. W. Mulkey, of Portland, amicus curiæ.

HARRIS, J. (after stating the facts as above). The argument of the petitioner proceeds upon the theory that the legislative act of 1915 is unconstitutional because it requires the payment of a fee, that all persons who followed that statute were unlawful candidates; and that therefore all votes cast for

those persons were deposited for unlawful candidates and should not be counted. The petitioner announced his candidacy in compliance with the provisions of the direct primary nominating elections law, which was adopted by the people in the exercise of the sovereign right of initiative at the general election held on June 6, 1904 (chapter 1, Laws 1905; 2 L. O. L., §§ 3349 to 3391, inclusive), but the other five persons filed their declarations of candidacy in the manner prescribed by the legislative act found in chapter 124, Laws 1915. The direct primary nominating elections law permits a person to become a candidate for a party nomination by filing a petition signed by a specified number of voters belonging to that party, but no fee is required to be paid by the candidate. If the petition is signed by the required number of voters, it must be filed without the payment of any fee, and the name of the candidate must be printed on the official ballot. The legislative act of 1915 provides that:

"Any registered elector may become a candidate for his or her party's nomination for any office to which he or she is constitutionally eligible * * * in addition to the method now provided by law, by filing declaration of his or her candidacy, as herein provided and accompanying said declaration with the required filing fee."

The fees are fixed at \$150 for United States senator; \$100 for offices to be voted for in the state at large, except national committeemen, delegates to national party conventions and presidential electors; \$100 for representatives in Congress; \$50 for certain district offices; \$20 for county offices, except district offices within the county; \$10 for senator and representative in the Legislature; \$15 for national committeemen, delegates to national party conventions and presidential electors; and \$5 for district offices within the county. Upon the filing of the declaration and the payment of the required fee, "said candidacy shall be deemed complete," and the name of such candidate is then "printed upon the official ballot at the ensuing primary election, and no additional signatures or fees shall be required to make said candidacy complete and effective."

[1-3] While the Constitution does not deny to the Legislature the right to amend or repeal a statute enacted by the people in the exercise of the initiative (*Straw v. Harris*, 54 Or. 424, 431, 103 Pac. 777), yet it is plain that the legislative act of 1915 was not designed to amend, revise, or repeal the initiative statute of 1904, and consequently the second act was not passed in violation of section 22, art. 4, of the state Constitution, which declares that:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." *Sheridan v. City of Salem*, 14 Or. 328, 337, 12 Pac. 925; *State v. Rogers*, 22 Or. 848, 365, 30 Pac. 74.

Even though an independent act, complete within itself, works a repeal by implication,

the repealing statute is not pregnable on account of a failure to observe section 22, art. 4. *Warren v. Crosby*, 24 Or. 558, 563, 34 Pac. 661; *Northern Counties Trust v. Sears*, 30 Or. 388, 399, 41 Pac. 931, 35 L. R. A. 188. The second statute employs the most positive language in expressing its purpose. The title introduces the act by declaring that it is "an additional method, whereby electors may become candidates for party nominations." Section 1 provides that an elector may become a candidate for a party nomination "in addition to the method now provided by law * * * as herein provided." The final section directs that:

"In case any candidate for office shall elect to become a candidate under the provisions of section 3361 of Lord's Oregon Laws, he shall be required to file the following declaration."

Section 3361 relates to the form of the petition to be circulated and filed when following the provisions of the statute of 1904. It is true that the title of the initiative act asserts that one of its purposes is to forbid "the nomination of candidates for public office by such political parties in any other manner," and section 11, being section 3359, L. O. L., amended by chapter 108, Laws 1913, affirms that every political party embraced by the primary law "shall nominate all its candidates for public office, under the provisions of this law and not in any other manner"; but since there is no constitutional obstacle to prevent the Legislature from providing for another method, the language last quoted from the 1904 statute offers no impediment to subsequent legislation, whether by the people or the Legislative Assembly; and consequently the force of the words found in the 1904 legislation, declaring that there shall be no other method of nominating candidates, is reduced and weakened to the extent that an additional method is provided by a subsequent statute. The act of 1915 is a complete and independent statute, which declares that its purpose is to afford another method, in addition to the one already provided, for becoming a candidate for a party nomination. The elector is not obliged to follow both methods, but he has the option of choosing either one or the other. He has the privilege of filing a petition, signed by a certain number of voters, without the payment of any money, or, if he chooses, he may become a candidate by merely filing a declaration and paying the specified fee. The petitioner exercised his option by filing a petition, and no fee was required from him, while the other candidates merely filed declarations and paid the fees required by the act of 1915.

[4] The petitioner contends that the legislative act of 1915 is void because it violates section 1, art. 2, which commands that "all elections shall be free and equal," and for the reason that it infringes upon section 20, art. 1, of the state Constitution, guaranteeing that:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The adjudications dealing with statutes which exact the payment of fees by candidates for party nominations may be divided into three classes. The language found in *Johnson v. Grand Forks County*, 16 N. D. 363, 113 N. W. 1071, 125 Am. St. Rep. 662, warrants its citation as an authority for the doctrine that no fee, whether nominal or otherwise, can be exacted. The second class of cases embraces those which deny the right to charge any fee in excess of a nominal sum, and yet from the reasoning employed seem to authorize the payment of a nominal sum. *People v. Election Com'rs*, 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; *Ballinger v. McLaughlin*, 22 S. D. 206, 116 N. W. 70; *State v. Drexel*, 74 Neb. 776, 105 N. W. 174; *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S. W. 1036. The remaining class includes all those precedents for the doctrine that a reasonable fee may be collected, as in *Ritter v. Douglass*, 32 Nev. 437, 109 Pac. 444; *State v. Brodigan*, 37 Nev. 492, 143 Pac. 238, L. R. A. 1915B, 197; *Socialist Party v. Uhl*, 155 Cal. 776, 103 Pac. 181; *State ex rel. v. Nichols*, 50 Wash. 508, 97 Pac. 728; *State v. Scott*, 99 Minn. 145, 108 N. W. 828; *Kenneweg v. Allegany County*, 102 Md. 119, 62 Atl. 249. The contrariety of judicial opinion is illustrated by *State v. Drexel*, holding that a fee of 1 per centum of the emoluments of the office was unconstitutional, and by *State ex rel. v. Nichols*, where the court sustained a fee of 1 per centum of the salary attached to the office. The first and second classes of cases proceed upon the theory that the Constitution fixes the qualifications for an elector, and that the Legislature cannot, by a mere statute, add as a qualification for the right to be a candidate for a party nomination the payment of a fee, especially if it exceeds a nominal sum. The adjudications embraced by the third class are founded upon the principle that the payment of a fee is only a regulatory measure, and so long as the amount is reasonable, no valid objection is available.

The successful candidates gained no advantage over Patton when they filed their declarations under the act of 1915, because their names were printed on the same ballot and exactly as they would have appeared if they had filed petitions as the petitioner did. There is nothing on the printed ballot to indicate the method selected by the candidate, but his name is printed on the ballot, which is submitted to the voter, in the same place, manner, and form, whether a petition is filed under the 1904 act or a declaration is made pursuant to the statute of 1915. It is argued, however, that the second statute enables a rich person to become a candidate when perhaps the electors might be unwilling to sign

a petition; but this argument fails when viewed in the light of local history, for it is common knowledge that no person has failed to secure a sufficient number of signatures on account of any unwillingness of electors to sign his petition. It is true that all voters will not sign all petitions, but it is also true that electors will usually sign a petition, when requested, to enable the petitioner to become a candidate. The act of 1915 does not, in any way, add to the qualifications of an elector who desires to become a candidate. No person is obliged to pay a fee, for the method requiring a fee is optional. The elector may create the right to become a candidate, either by a mere declaration and the payment of a fee, or by a petition without a fee, and a statute requiring the payment of a reasonable fee places no obstacle or impediment in the way of a person whether he be rich or poor, so long as another method like the one here requiring no fee is open to him, especially when the name of the candidate is printed on the ballot without regard to the method selected. The existence and availability of one concededly valid method destroys the reason assigned in support of the asserted objection to the second and additional method, and when the reason falls, the objection ought to fall with it. It is not necessary to determine what the effect of the 1915 statute would be if it stood alone. The required fees are not unreasonable in amount, and the demurrer to the alternative writ is sustained.

MOORE, C. J., and BURNETT and EAKIN, JJ., not sitting.

BALDWIN CO. v. SAVAGE et al.

(Supreme Court of Oregon. Aug. 1, 1916.)

1. APPEAL AND ERROR ⇐1011(1)—REVIEW—FINDINGS OF FACT BY TRIAL COURT—CONCLUSIVENESS.

The findings of fact by the trial court on conflicting oral testimony, while not conclusive on appeal, are entitled to great weight.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3986; Dec. Dig. ⇐1011(1).]

2. BILLS AND NOTES ⇐520—MORTGAGES ⇐86(3)—"DURESS"—THREATS OF IMPRISONMENT.

Evidence held sufficient to sustain a finding that notes and mortgages should be set aside as procured by "duress" and executed under threats that defendants' son would be sent to the penitentiary for embezzling money while agent of the mortgagee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. ⇐520; Mortgages, Cent. Dig. § 1364; Dec. Dig. ⇐86(3).]

3. BILLS AND NOTES ⇐104—MORTGAGES ⇐79—VALIDITY—DURESS—THREATS OF IMPRISONMENT.

Notes and mortgages, given by parents under the influence of threats that otherwise their son will be sent to the penitentiary for embezzle-

ment of moneys of the mortgages, are voidable for duress.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. ¶¶ 104; Mortgages, Cent. Dig. §§ 182-185; Dec. Dig. ¶¶ 79.]

4. MORTGAGES ¶83—VALIDITY—DURESS—THREATS OF IMPRISONMENT.

Where defendants to save their son from the penitentiary, executed notes and mortgages in payment of money embezzled by him, the taking by them of a chattel mortgage from such son as partial indemnity, on the suggestion of the mortgagee's agents, does not estop them from interposing the defense of duress in an action to foreclose the real estate mortgages.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 192; Dec. Dig. ¶¶ 83.]

5. MORTGAGES ¶86(3)—FORECLOSURE—DEFENSES—DURESS—WAIVER—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to warrant a finding that defendants waived their defense of duress to the foreclosure of mortgages by securing a postponement of the trial by promising to pay the amount.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 194; Dec. Dig. ¶¶ 86(3).]

6. MORTGAGES ¶83—FORECLOSURE—DEFENSES—DURESS—ESTOPPEL.

In foreclosure, defendants are not estopped from asserting the invalidity of the mortgages by reason of duress, consisting of threats to imprison their son for embezzlement by the payment of a chattel mortgage after the statute of limitations (L. O. L. § 1377) had barred the prosecution of such son.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 192; Dec. Dig. ¶¶ 83.]

7. PAYMENT ¶87(2)—VOLUNTARY PAYMENT IN DISCHARGE OF VOIDABLE OBLIGATION—RECOVERY.

A payment, voluntarily made in the discharge of a note and mortgage, cannot be recovered although the note and mortgage were procured by duress, consisting of threats of imprisonment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 284; Dec. Dig. ¶¶ 87(2).]

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by the Baldwin Company, a corporation, against J. F. Savage and others. Judgment for defendants, and plaintiff and defendants Savage separately appeal. Affirmed.

This is a suit to foreclose a mortgage and to recover the amount of four promissory notes, the payment of which was thus undertaken to be secured. The admitted facts, respecting the execution of this mortgage and of other securities, are that the plaintiff is a corporation engaged in manufacturing and selling musical instruments. The company delivered to the defendant L. F. Savage, its local agent at Salem, Or., pianos which he was to sell at stipulated prices, retain a specified commission, and pay over the remainder to his principal. In April, 1913, O. A. Berger, the plaintiff's general agent, visiting Salem, discovered that Savage had sold goods so delivered, receiving therefor more

than \$2,000, which sum he unlawfully appropriated and was unable to repay any part thereof. After several days' effort Berger secured from such local agent and from his father, the defendant J. F. Savage, their promissory notes for the sum so misappropriated. The officers of the plaintiff's Pacific Coast agency at San Francisco, Cal., refused to accept these notes, and demanded that they should be secured. For that purpose E. J. Jorgenson, a representative of the company, called upon L. F. Savage, and on June 25, 1913, procured from him and from his father their new promissory notes, one for \$552, payable October 5th of that year, and three others, each for the sum of \$515 and maturing, respectively, April 5, 1914, August 5th and December 5th of the latter year, with 8 per cent. interest per annum. In order to secure their payment J. F. Savage and his wife, the defendant Margaret, the mother of the defendant L. F. Savage, executed to the plaintiff a mortgage of 30 acres of land in Marion county, Or., which sealed instrument was duly filed for record. At the time this security was given, Berger, again visiting Salem, detected another misappropriation by this local agent, amounting to \$601, to evidence which debt J. F. Savage, on June 28, 1913, also gave the plaintiff his promissory note, maturing December 24th of that year, and secured the same by a chattel mortgage of eight horses and ten cows. As partial indemnity for the liability thus assumed, L. F. Savage, on June 30, 1913, executed to his father a promissory note for \$1,000, maturing in a year, with 8 per cent. interest, and to secure the payment thereof also gave a chattel mortgage upon two horses, one express wagon, one buggy, and one electric piano, which mortgage was duly filed. About July 28, 1913, the plaintiff took from L. F. Savage all its goods then in his possession and discontinued his agency. When the first promissory note secured by the realty mortgage was about due, an agreement was entered into by the plaintiff and J. F. Savage, at his request, whereby it was stipulated that the chattel mortgage note might be paid off in lieu of such first note, the maturity of which was thus deferred until December 24, 1913.

This suit was commenced December 19, 1913, prior to the maturity of the first note, the payment of which had been deferred until the 24th of that month. A supplemental complaint, in the usual form, was filed May 10, 1915, alleging that no payments had been made on the realty mortgage notes. The answer of the defendants J. F. Savage and Margaret Savage denies some of the averments of the complaint, and for a further defense alleges, in substance, that prior to and on June 25, 1913, the plaintiff's agents accused the defendant L. F. Savage of having converted to his own use about \$2,100

belonging to the company, thereby rendering himself liable to a criminal prosecution for a felony, which action would be instituted unless J. F. Savage would repay that sum to the plaintiff or execute to it promissory notes evidencing that amount; that, believing such representations to be true, and that the threat would be executed unless complied with, he, while laboring under the fear and duress caused by the menace, executed the four promissory notes mentioned in the complaint; that thereafter the plaintiff's agent represented to the defendant J. F. Savage and to his wife that their son would be prosecuted in the criminal courts of this state for the misappropriation of such sum of money unless they executed to the plaintiff a mortgage of the real property described in the complaint to secure the payment of the four promissory notes; that under the impulse of such threat they executed the real estate mortgage; and that the lien thus undertaken to be created constitutes a cloud upon the title to such land. For a second defense the execution of the chattel mortgage and note is alleged to have been procured under the same threat as in the first instance; that J. F. Savage paid to the plaintiff \$601, the sum named in the chattel mortgage note, and interest thereon, while laboring under the threats that his son would be prosecuted for the commission of a felony unless such payment were made. The answer prays that the notes and the realty mortgage be set aside, and that the answering defendants recover from the plaintiff the sum of \$601 so paid on account of the chattel mortgage.

The reply put in issue the allegations of new matter in the answer, and further averred that the promissory notes mentioned were executed in consideration of extending to the defendant L. F. Savage further time within which to pay his indebtedness to the plaintiff. For a further reply it is alleged that the defendants ought to be estopped to set forth the separate defense relied upon for that they paid the amount due on the chattel mortgage note, and that after some of the notes secured by the real estate mortgage had become due, they, with full knowledge of all the circumstances and conditions hereinbefore set forth, ratified the contract, and promised to pay the amount of such notes in consideration of an extension of time for the payment thereof. Based on these issues, the cause was tried, resulting in a decree canceling the notes and mortgage sued on herein, but refusing to award a repayment of any part of \$601 received on account of the chattel mortgage note. From this decree the plaintiff and the answering defendants separately appeal.

W. C. Winslow, of Salem, for appellant. Chas. L. McNary, of Salem (McNary & McNary, of Salem, on the brief), for respondents.

MOORE, C. J. (after stating the facts as above). The defendant J. F. Savage testified: That Mr. Berger, the plaintiff's general agent, telephoned from Salem, Or., to the farm where the witness lived, informing him that his son had appropriated money not his own, thereby rendering himself liable to prosecution. That the following morning the witness went to Salem, where Berger told him his son would be prosecuted by the plaintiff if he did not get security or repay the money which he owed it. That prior thereto the witness had no knowledge of his son's failure to keep his contract with the plaintiff, and the information shocked him so that he could scarcely talk, and was thereby induced to execute the first promissory notes. That several weeks thereafter Mr. Jorgenson telephoned the witness from Salem, saying the plaintiff could not accept the notes that had been delivered to it, and that security therefor must be given. That the next day the witness went to the city and met this representative of the company, who also informed him that his son had misappropriated the plaintiff's money, thereby rendering himself liable to a criminal action, and he would be prosecuted therefor unless a mortgage were executed. That after spending the day at Salem he had to return to his home to milk the cows, whereupon Jorgenson said to the witness:

"Father, come on and go; we will care for the boy (meaning L. F. Savage) until you can get back to-morrow morning."

That on the succeeding day the witness again returned to the city, where the mortgage was prepared and Jorgenson returned with him to his home; that after arriving at such place Jorgenson was called to the phone, and, turning to the witness, said:

"What do you know about that? There's another piano that we just now heard from. Mr. Berger has just now found out \$600 for another piano."

That the real estate mortgage was executed the next morning, and the chattel mortgage given three days thereafter, and that these securities were given to save his son from being sent to the penitentiary.

The defendant Mrs. Margaret Savage testified that Mr. Jorgenson visited their farm home, bringing the mortgage with him; that she knew all about the execution of that instrument which was given to save her son; that, referring to this security, she said to Mr. Jorgenson, "I hate awfully bad to do this, but I would have to do it."

F. L. Pound, a notary public, who took and certified to the acknowledgment of the realty mortgage, testified that in the presence of Mr. Jorgenson Mr. Savage said, "I didn't think I would ever be called upon to sign any such paper"; that Mrs. Savage said to the witness she hated to sign the mortgage; didn't feel like signing it. In answer to the question, "Did she say anything about that it was for her son, or anything?" Mr. Pound

replied: "Yes, it was to save their son; they both said that; it was to save their son, that they did it."

O. A. Berger, appearing for the plaintiff, was asked by its counsel:

"At that time, you heard the testimony of Mr. Savage here, as to certain threats that were made against him if this wasn't fixed up and these notes signed—that the company would prosecute Frank (L. F. Savage); now what is the fact about that?"

The witness answered:

"Why, I don't recall making any threats whatsoever, Mr. Winslow, to Mr. J. F. Savage, or any one. Q. Well, did you make those threats to any one? A. No, sir. Q. Now, when you say you don't recall that, what do you mean? A. Well, in fact, I will say that I didn't make any threats. I said to Mr. J. F. (Savage) that Frank violated the terms of his contract."

E. J. Jorgenson, in answer to the inquiry of the plaintiff's counsel, "Was there any intimation or insinuation that if the deal (the execution of the realty mortgage) was not fixed up criminal proceedings would be had?" said, "Not in the least."

[1, 2] It will thus be seen there is a decided conflict in the testimony on the question of threats respecting the prosecution of L. F. Savage upon a criminal charge. The trial court saw the witnesses and was thereby afforded an opportunity to note their appearance, manner of testifying and bearing while under examination, which personal observation is vastly superior to that enjoyed by this court from a mere examination of a typewritten copy of the questions asked, and the answers given. The conclusion thus reached by that court, though not controlling on appeal, is entitled to great respect, and particularly so when it is remembered how Mr. Berger at first hesitated when asked about any threats that had been made. We conclude, therefore, that such threats were made, and that the parents of L. F. Savage, fearing the consequences of his misappropriation of the plaintiff's money which was intrusted to him, were ready to do anything in their power to prevent their son from being convicted upon a criminal charge, and in consequence thereof suffering imprisonment in the state penitentiary.

[3] The question to be considered is whether or not the threats of the plaintiff's agents which were made to J. F. Savage and his wife to have their son prosecuted in a criminal action upon a charge of embezzlement unless the sums of money which were conceded to have been misappropriated by him were either paid or secured so worked upon and affected the minds of his parents as to destroy free agency and to compel them, without their own volition, to execute the notes and mortgage described in the complaint.

"Duress is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind of a person of ordinary firmness. It consists not merely in the act of imprisonment or other hardship to which the party was subjected, but in the state

of mind produced by those circumstances, and in which the act sought to be avoided was done." 9 Cyc. 443.

See, also, *Parmentier v. Pater*, 13 Or. 121, 9 Pac. 59; *Ross v. Ross*, 21 Or. 9, 26 Pac. 1007; *Schoellhamer v. Rometsch*, 26 Or. 394, 38 Pac. 344; *Rostein v. Park*, 38 Or. 1, 62 Pac. 529; *Kester v. Kester*, 38 Or. 10, 62 Pac. 635; *McNair v. Benson*, 63 Or. 66, 126 Pac. 20; *Guinn v. Sumpter Valley Ry. Co.*, 63 Or. 368, 127 Pac. 987; *Hunt v. Hunt*, 67 Or. 178, 132 Pac. 958, 134 Pac. 1180; *Horn v. Davis*, 70 Or. 498, 142 Pac. 544.

[4] A text-writer in discussing this subject observes:

"Duress of the person may be accomplished by unlawful imprisonment or violence. This unlawful imprisonment or violence may be directed directly against the other party to the contract, or the husband or wife, parent or child or other near relative of such party." *Elliott*, Cont. § 140.

Parental love will usually prompt a father or mother to make great sacrifices for a son or daughter, particularly so when such child is threatened with impending danger. In order to avoid the shame and disgrace which the trial of an offspring, charged with the commission of a crime, will necessarily entail, his father and mother will ordinarily impoverish themselves to avoid an indictment or a conviction. Threats, when based upon admitted facts which would render a parent subject to a criminal prosecution and judgment therein, will not usually affect him so much as when a similar charge is preferred against his son or daughter. When, however, such threats are made to a parent against his offspring the menaces will generally produce such apprehensions of evil as to overthrow reason and judgment and to induce the making of a contract whereby the father or mother is ready to make any surrender of right or property to avert the calamity and protect the child. The court in *Meech v. Lee*, 82 Mich. 288, 46 N. W. 398, discussing this subject, say:

"No more powerful and constraining force can be brought to bear upon a man to overcome his will, and extort from him an obligation, than threats of great injury to his child. Both upon reason and upon the weight of the authorities we are of opinion that a parent may void his obligation by duress to his child."

To the same effect, see, also, *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419. Transactions consummated under the supposed circumstances, affecting such rights, are voidable by reason of the duress which impelled their execution.

It is believed the weight of the testimony conclusively shows that the execution of the notes and mortgage was actuated by the threats of the plaintiff's agents, thereby rendering such apparent evidence of indebtedness and the security given for the payment thereof voidable.

The remaining question is whether or not J. F. Savage and his wife are estopped by their conduct from interposing the defense

relied upon in this suit. It will be remembered that L. F. Savage, by way of partial indemnity, gave to his father a promissory note for \$1,000, and undertook to secure the payment thereof by a chattel mortgage. The testimony shows that no payment had been made on this obligation, and that this note and mortgage were executed at the suggestion of the plaintiff's agents. Such being the case, it will be assumed, without deciding the question, that their principal was not prejudiced thereby and in no manner changed its attitude towards the answering defendants in consequence thereof, though the company might possibly have had the mortgage of L. F. Savage executed to it. But, however this may be, the conduct relied upon was that of the plaintiff, and no estoppel can arise by reason thereof as against the defendants.

[5] It is maintained that the trial of this suit was postponed in consideration of the promise of J. F. Savage to pay the amount of the notes. To substantiate this contention reliance is had upon that defendant's testimony an examination of which induces the belief that it is not sufficient for that purpose.

It is insisted by plaintiff's counsel that J. F. Savage paid off the chattel mortgage note before it matured, and at a time when he knew, as he now asserts, that the execution of this evidence of indebtedness was induced by threats, and, this being so, he ratified both mortgage contracts, and by reason thereof is estopped to allege or prove any facts to the contrary. A similar contention was made in the case of Bentley v. Robson, 117 Mich. 601, 697, 76 N. W. 146, 149, where it is said:

"The record shows the learned circuit judge was justified by the record in most of his findings of fact. It is impossible to read the record without coming to the conclusion that Mrs. Bentley understood when she gave the mortgage that her husband was in the custody of the officers, and that to save him from being conveyed to jail it was necessary for him to give the mortgage which she executed. It was this motive which actuated her to make it. There is nothing in the record to indicate it would have been made had she not believed it would have this effect. The case comes clearly within the principles established by the following decisions (citing cases). The court was right in holding the mortgage was tainted with duress. It is now said, even conceding the mortgage was obtained by duress, it was ratified after the duress had passed by making payments upon it, and by attempting to have it discounted. The conclusion we reach from the record is that the wife and family did all that was done in the expectation and belief that it was necessary to be done to save Mr. Bentley from being imprisoned as the result of his criminal act. What was done after the mortgage was given was in the same line as the giving of the mortgage, prompted by the same motive, expecting to bring about the same result."

[8] The punishment of an agent convicted of embezzlement is the same as that upon a conviction for larceny. L. O. L. § 1956. A criminal action for any felony, other than

murder or manslaughter, must be commenced within three years after its commission. Id. § 1377. When the plaintiff's money was converted by L. F. Savage to his own use does not appear, nor is it manifest when the duress was removed. If it be assumed, however, that the statute of limitations had run against the crime when the chattel mortgage note was discharged, and that such liquidation was not induced by fear that the threat to prosecute L. F. Savage could be executed, the settlement of that obligation was no payment of any part of the realty mortgage, and, this being so, no estoppel can arise from such conduct in respect to a different voidable contract.

[7] It will be remembered that an appeal was taken from that part of the decree which denied a recovery of the money expended in liquidating the chattel mortgage note. As that payment was voluntarily made, it cannot be recovered. *Holmes v. Riggs*, 52 Or. 334, 97 Pac. 551.

The decree should be affirmed; and it is so ordered.

BEAN, BENSON and HARRIS, JJ., concur.

STATE ex rel. EVANS v. SUPERIOR
COURT of PIERCE COUNTY
et al. (No. 13556.)

(Supreme Court of Washington. July 29, 1916.)

1. JUSTICES OF THE PEACE §10 — POLICE
JUDGES—POWER TO REMOVE—TENURE.

Under Laws 1899, p. 135, providing that in cities of the first class justices of the peace shall be elected at each general election, and the mayor shall within ten days thereafter name one of them as police judge, and in view of Rem. & Bal. Code, § 8860, declaring the tenure of office of certain officers, the mayor cannot remove the police judge from office, which he can hold for his full term as justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 16; Dec. Dig. §10.]

2. OFFICERS §71—TENURE—POWER TO REMOVE.

An officer holding for a term is not subject to removal by arbitrary will of the executive, although an appointee.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 99; Dec. Dig. §71.]

3. JUSTICES OF THE PEACE §10—POWER TO REMOVE—TENURE.

In the absence of legislation, power to remove a justice of the peace must be taken from the Constitution, which by article 5, §§ 2, 3, provides for removal only for misconduct or malfeasance, in the manner provided by law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 16; Dec. Dig. §10.]

4. JUSTICES OF THE PEACE §2—HOLDING MORE THAN ONE OFFICE—POLICE JUDGES.

Under Laws 1899, p. 135, as to police judges and justices of the peace in cities of the first class, the justice who is appointed police judge holds but one office; Const. art. 4, § 10, providing that a justice may be appointed police judge, not having created a new office, since it

merely confined jurisdiction of violations of ordinances to one justice, instead of all of them.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 2-4; Dec. Dig. ¶2.]

5. JUSTICES OF THE PEACE ¶2—REMOVAL FROM OFFICE—POWERS OF MAYOR.

A justice of the peace takes his office and powers from the Constitution and Legislature, and neither can be taken away, except as provided by law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 2-4; Dec. Dig. ¶2.]

6. JUSTICES OF THE PEACE ¶10—REMOVAL FROM OFFICE—POWERS OF MAYOR.

Under Const. art. 5, § 3, declaring that all incumbents of offices created or recognized by Constitution are subject to removal only as provided by law, justices of the peace, as judicial officers, cannot be removed from office arbitrarily by the mayor, but only after clearly implied charge, hearing, and finding.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 16; Dec. Dig. ¶10.]

7. JUSTICES OF THE PEACE ¶10—REMOVAL FROM OFFICE—POWERS OF MAYOR.

Removal of justice of peace from office of police judge by mayor who appointed him cannot be justified on the ground of public policy, in that the mayor is the chief executive, charged with enforcement of ordinances, since the office is not the creature of the mayor, but of the Legislature.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 16; Dec. Dig. ¶10.]

Department 2. Proceedings by the State, on the relation of De Witt M. Evans, against the Superior Court of Pierce County and others, to review the determination of such court that relator could be removed from office by defendant A. V. Fawcett, Mayor of the City of Tacoma. Reversed and remanded, with directions.

Hayden, Langhorne & Metzger, of Tacoma, for relator. U. E. Harmon, of Tacoma, for respondents.

CHADWICK, J. The relator and two others were duly elected as justices of the peace in the city of Tacoma at the last general election. It is provided:

"Within ten days after such election the mayor of the city shall appoint one of the justices so elected the police justice or police judge of such city [cities of the first class] who shall before entering upon the duties of his office as police judge, give such additional bond for the faithful performance of his duties as the city council may by ordinance direct." Laws 1899, p. 135.

In 1903 (Laws 1903, p. 34) this act was so amended as to give such justice exclusive jurisdiction over all offenses defined by ordinance, and other powers which need not be enumerated.

Within ten days after the election, the respondent A. V. Fawcett, then and now the mayor of the city of Tacoma, appointed the relator as police justice, or police judge. He qualified, and has ever since exercised the powers and duties of the office. On May 15, 1916, respondent Fawcett, acting as mayor, notified relator that his appointment as police justice was revoked. Relator instituted

this proceeding to test the right of the respondent Fawcett to revoke his appointment. The respondent court held that relator had not been appointed for any fixed or definite term, and that the mayor had power to remove him at will without a hearing, and without assigning any cause therefor. It is stipulated that police justices have, since the act of 1899 (Laws 1899, p. 135), held their offices for the same time and term as they held the office of justice of the peace.

[1] With the holding that the police justice does not hold his office for any definite term we cannot agree. The statute does not limit his term, in terms, or make it subject to the arbitrary will of the appointing power. On the contrary, by the strongest implications, it fixes the term as coextensive in time with that of the term of the justice of the peace, upon which the office of police justice is made to rest, and without which one assuming to act as police justice would have no jurisdiction whatever.

Section 1 of the act of 1899 provides that justices of the peace shall be elected by the qualified electors in cities of the first class "at each general election." The meaning of this is that one who had been elected justice of the peace, and has been appointed and has qualified as police justice, holds for a term. Our conclusion is strengthened by the provision of the law that the mayor shall select one of the justices to hear city cases within 10 days after the general election, thus indicating that it was the intention of the Legislature that the term of the one should begin with the other. If it does so begin, it cannot be denied that it would end at the same time. Rem. & Bal. Code, § 3860, is not without bearing. It expresses a legislative intention to define terms of office.

[2] That an officer holding for a term is not subject to removal by the arbitrary will of the executive, although an appointee, is now well settled by authority. Indeed, the power to remove is determined, in the absence of statutes, almost entirely by reference to the fixity of the term. Without the citation of other authority, this proposition may be rested upon State ex rel. McReavy v. Burke, 8 Wash. 412, 36 Pac. 281, where it is said that the rule, as stated, is sustained by the great weight of authority. The court then proceeds to inquire whether that case fell within the rule. It was held that it did not, inasmuch as the Legislature had given the Governor the power of removal by positive statute, which in effect made the appointee's official life subject to the will of the Governor, and the acceptance of the office subject to the condition of summary removal.

[3] In the absence of legislation—granting, but not deciding, that the Legislature could provide for the summary removal of

an officer exercising judicial functions—the power of removal, if any, is to be found in the Constitution. A justice of the peace is not subject to impeachment, and is removable only for misconduct or malfeasance in such manner as may be provided by law. Const. art. 5, §§ 2-3. We find no provision of law giving the mayor of a city of the first class the power to remove a police justice.

[4] But the fundamental error in the position assumed by respondents is that they seem to conceive that the office of justice of the peace and police justice are two offices—the one held at the suffrage of the people, the other at the will of the appointing power. There is but one office, that of justice of the peace. That he exercises jurisdiction over violations of city ordinances in no way changes his official character or his office. The framers of the Constitution, foreseeing that the time would come in all cities when the convenience of the public would demand that the jurisdiction then exercised by all justices of the peace in corporate limits should be exercised by one or more of them, declared (article 4, § 10), that the Legislature should provide for the number of justices of the peace to be elected in incorporated cities and towns, and prescribe by law their powers, duties, and jurisdiction, and, further, that “justices of the peace may be made police justices of incorporated cities and towns.” No new office was created. The justice who is selected as police justice is exercising the same jurisdiction that he would have exercised if none of the justices had been selected as police justice; the only difference being that the Legislature has provided a way in which the jurisdiction theretofore extending to all of the justices shall, in so far as it relates to city ordinances, licenses, etc., be exclusively exercised by one of them. Necessarily some method of selection confronted the Legislature. It passed the act of 1891, saying that the mayor should appoint a police justice, from among the whole number having jurisdiction of the subject-matters to be considered, who should thereafter be privileged to exercise such jurisdiction exclusively.

[5] The justice takes his office and its powers and duties from the Constitution and the Legislature. The office and its powers cannot be taken away by any authority that does not have the sanction of the Legislature. It must be “provided by law.” The justice of the peace who is selected to act as police justice is entirely independent of the mayor when once selected. The mayor did not give relator his office, nor did he define his jurisdiction. He cannot take the one away or limit the other. The method of selection adopted by the Legislature was one of convenience. It might have said the several justices of the peace should draw lots, or that the one receiving the highest number of votes should be police justice. If

such were the case, who would contend that the mayor could remove the justice at will? The case is not, therefore, to be measured by the manner of selection, but by the character of the office as defined in the Constitution, its tenure, and its attendant duties and jurisdictions as defined by law.

It is only necessary to notice the cases of *Easson v. Seattle*, 32 Wash. 405, 73 Pac. 496, *Price v. Seattle*, 39 Wash. 376, 81 Pac. 847, and *Shurtleff v. United States*, 189 U. S. 311, 23 Sup. Ct. 585, 47 L. Ed. 828, upon which the respondents rely. In the *Easson* Case, the appointee held a position defined by charter (article 24, § 8) providing:

“Unless otherwise provided by law or this charter, each officer, board or department authorized to appoint any deputy, clerk, assistant, or employé, shall have the right to remove any person so appointed.”

The opinion is an able one, but in result goes no further than to hold that the civil service commission did not have power to remove the appointee, and, not having been removed by the appointing officer, he should be reinstated. *Price* was a teamster, an employé in the classified civil service of the city of Seattle. He held his position without term, “until removed or retired.” His case clearly fell within the rule of implied, if not express, power of removal. The *Shurtleff* Case declares no more than the general rule that the power to appoint implies a power to remove.

[6] But the real answer to all these cases is to be found in the Constitution (article 5, § 3), which logically declares that all incumbents of offices created or recognized by that instrument shall be subject to removal only in such manner as is provided by law. This section negatives the thought that officers, holding any office recognized or created by the Constitution, are to be subject to the rule of the cases relied on, or that they can be removed without, or in the absence of, a statute authorizing their removal. This is especially so with reference to judicial officers. It would violate the very principle upon which the judicial function is made to rest—that of absolute freedom from fear or favor of the appointing power. It would not be so if a judicial officer were to be made the subject of the whim or caprice of the appointing power.

The Constitution provides that judicial officers may be impeached. If the rule, that the power to remove is implied in the power to appoint, is as broad, in its application, as counsel would have it, a superior judge, when once appointed by the Governor, would hold his office at the will of the Governor, and might be removed summarily, for surely there is the power to appoint. There the Constitution says that such removal shall be only by impeachment, and here that it shall be only “for misconduct or malfeasance in office in such manner as may be provided by law,” clearly implying, in either case, a charge, a hearing, and a finding.

[7] Respondents contend, further, inasmuch as respondent Fawcett is the executive officer of the city charged with the duty of enforcing the ordinances of the city, and with general supervision over its affairs, with power to take all proper measures for the preservation of public order, etc., that he has more than an implied power of removal; that his power rests in public policy. Having held that relator is not the official creature of the respondent mayor, but that he holds his office in virtue of the Constitution and the general laws, the argument may be passed as without merit.

Reversed and remanded, with direction to issue the writ.

MAIN, MOUNT, and HOLCOMB, JJ., concur.

DANNER et al. v. RITCHIE. (No. 13248.)
(Supreme Court of Washington. July 29, 1916.)

JUDGMENT \Leftrightarrow 779(2)—LIEN—PROPERTY SUBJECT—OWNERSHIP.

Where an action to rescind a sale of land and to quiet title was brought against the vendees and their attaching creditor, and by stipulation between plaintiff and vendees a decree was entered as prayed, a subsequent judgment in the attachment suit, the attachment having been dissolved, was not a lien on the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1842; Dec. Dig. \Leftrightarrow 779(2).]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Suit by John Danner and others against W. F. Ritchie and others. From a judgment for plaintiffs, defendant Ritchie appeals. Affirmed.

Walter B. Allen, of Seattle, for appellant. Aust & Terhune, of Seattle, for respondents.

MOUNT, J. This action was brought to enforce specific performance of a contract, and for equitable relief. A judgment was entered as prayed for by the plaintiff. The defendant Ritchie has appealed.

The facts are in substance as follows: On September 15, 1914, John Danner and Julius P. Johnson sold to the defendant McKenzie a 10-acre tract of land for an agreed consideration of \$10,500. Three thousand dollars of this amount was to be paid on or before January 1, 1915. The balance, \$7,500, was to be secured by a mortgage upon the 10-acre tract. It was also agreed that in order to secure the \$3,000 payment, which was to be made on January 1, 1915, McKenzie and McGinnis were to deed to Danner and Johnson two certain lots in Seattle, and also assign a contract for another lot; that if the payment was not made on January 1st, as agreed, then these lots and contract should become the property of Danner and Johnson. It was also agreed that if, upon

examination of the titles to all the property, the titles were found to be defective, and could not be remedied within 30 days, then the trades were to be rescinded, and deeds delivered to the original owners.

McKenzie and McGinnis went into possession of the 10-acre tract. Certain personal property was purchased by McKenzie and McGinnis at an agreed price of \$1,000. This personal property was not paid for, and was afterwards sold by McGinnis. After January 1st it was discovered by Danner and Johnson that one of the lots was of no value in excess of the incumbrances thereon, and that the contract of sale upon another lot did not exceed in value the sum of \$1,000. Thereafter, while the title to the 10-acre tract was in McKenzie and McGinnis, an action was brought by the appellant, W. F. Ritchie, on October 9, 1914, against McKenzie, to recover a judgment of \$1,442. An attachment was levied upon the 10-acre tract. On February 17, 1915, after the \$3,000 which had been agreed to be paid was past due, and when the equity in the lots given to secure this sum was found to be not more than \$1,000, they brought this action for a rescission according to the terms of the original contract, and to quiet the title to the lots which had been deeded to them. Ritchie was made a party to that action.

On May 25, 1915, the attachment which had been sued out by Ritchie against the 10-acre tract was dissolved by an order of court. Afterwards a stipulation was entered into by the plaintiffs and McGinnis and McKenzie to the effect that a decree might be entered rescinding the contract and quieting the title to the lots in the plaintiffs. A judgment to that effect was entered. Subsequently the appellant, Ritchie, obtained a judgment for \$1,442.73 and costs against McKenzie. He now claims that his judgment is a lien upon the lots which were awarded to the plaintiffs Danner and Johnson. It is plain that there is no merit in this contention, because the title to these lots was in the plaintiffs from January 1, 1915, and before the judgment was entered in favor of Ritchie and against McKenzie the title to the 10-acre tract upon which the attachment had been levied had been revested in the plaintiffs. The attachment did not run against the lots in question, and, if it had, it was dissolved, and was therefore of no force.

Some contention is made by the appellant that these transfers were made in fraud of the rights of Ritchie. But there is no evidence in the record to justify this contention, and the court below so found. The plaintiffs Danner and Johnson were the holders of the title to the lots, and in order to avoid that title it was incumbent upon Ritchie to show fraud in the procurement of it. *White v. McSorley*, 47 Wash. 18, 91

Pac. 243. This was not done. We are satisfied, from a careful examination of the record, that the trial court arrived at a just conclusion.

The judgment is therefore affirmed.

MORRIS, C. J., and FULLERTON, ELLIS, and CHADWICK, JJ., concur.

STATE v. MARTIN.
(No. 18430.)

(Supreme Court of Washington. July 29, 1916.)

1. INTOXICATING LIQUORS — 250 — UNLAWFUL POSSESSION — PRESUMPTION AND BURDEN OF PROOF.

Any stock of intoxicating liquors in the possession of any person in excess of the quantities allowed by Laws 1915, p. 2, regulating the sale and use of intoxicating liquors, is presumed to be contraband, and the burden is on the owner to justify his possession of such liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 386-388; Dec. Dig. ¶ 250.]

2. INTOXICATING LIQUORS — 126 — UNLAWFUL POSSESSION — "DRUGGISTS AND PHARMACISTS."

The words "druggist or pharmacist," as used in Laws 1915, p. 2, permitting the sale of intoxicating liquors by druggists or pharmacists only, means such druggists or pharmacists as are actively engaged in business, and the possession of an excess quantity of liquor by a registered pharmacist not engaged in business is unlawful, even though acquired before such law became effective.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 135; Dec. Dig. ¶ 126.]

For other definitions, see Words and Phrases, First and Second Series, Druggist; Pharmacist.]

3. INTOXICATING LIQUORS — 251 — EXCESS QUANTITIES — CONTRABAND — DEFENSES.

Under Laws 1915, p. 2, regulating the sale and use of intoxicating liquor, a registered pharmacist not actually engaged in business failing to reclaim an excess quantity of liquors seized by showing that he intends to engage in the druggist business cannot reclaim them on the ground that he intends to keep them for private consumption.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 389, 390; Dec. Dig. ¶ 251.]

4. INTOXICATING LIQUORS — 247 — UNLAWFUL POSSESSION OF EXCESS QUANTITIES — CONTRABAND.

The provisions of Laws 1915, p. 2, prohibiting the possession of excess quantities of intoxicating liquor, operates in rem so that any such excess quantity is contraband and subject to condemnation, regardless of the finding as to the owner.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 367; Dec. Dig. ¶ 247.]

Department 2. Appeal from Superior Court, Walla Walla County; Edw. C. Mills, Judge.

Proceedings by the State of Washington for the condemnation of intoxicating liquors in the possession of Fred Martin. From a judgment ordering the return of liquors to claimant, the State appeals. Reversed.

Earl W. Benson and E. F. Barker, both of Walla Walla, for the State. Sharpstein, Pedigo, Smith & Sharpstein, all of Walla Walla, for respondent.

BAUSMAN, J. Proceeding under the initiated act (Laws 1915, p. 2), relating to intoxicating liquors, the sheriff found and seized an excess quantity upon the premises of one Martin, who, in answer to the return, alleged himself lawfully entitled to keep them as a registered pharmacist. Upon a hearing the lower court ordered them returned to him.

It appeared that Martin had bought the liquor before the statute went into effect, but that, though registered as a druggist or pharmacist, he was neither then nor since actually engaged in that business. Asserting a right to keep the liquors with an avowed intent to put them into that business at his convenience, he invokes arguments lately discussed in State v. Eden, 158 Pac. 967.

Under this law on the hour of a certain day we were to start anew as to alcoholic liquors, all persons being commanded to rid themselves of stocks within the next ten days. New supplies after the initial date were to be had only through public officers. All traffic and public drinking being forbidden, druggists remained the sole public dispensers, nor could these resupply themselves except through public agencies. As to previous stocks the law was sweeping; they must be sold at once, with a sole exception allowed to druggists. In a word, after a given date all prior stocks were offenders under the law, unless they could justify themselves as druggists or as individuals come within the Eden decision.

There we held that a householder, though there be found on his premises after the act went into effect more than the statutory allowance, is lawfully entitled to keep what he had purchased before when there is not merely a buying before but a keeping afterwards for merely private drinking. Martin, however, announces his keeping them not for private use, but for future traffic, so a very different question is presented. It is argued that, being a private individual who, before the act, lawfully acquired liquors, what he wants them for now is immaterial if he be not applying them to an unlawful use. Then the argument goes a step further. It contends or implies that he will have a right hereafter to transfer them, not indeed to a third person, but to himself as future druggist.

Two questions accordingly appear: First, whether Martin can, so to speak, put these goods into traffic through himself as future druggist; and, secondly, whether, if that be forbidden, he may not at least retain them or, more accurately, reclaim them from seizure.

[1] By the Eden decision the burden of proof in these situations has not been changed, so whenever an excess quantity is found in any hands or place, it is presumptively an unlawful excess. The law was an anti-traffic law with reduced domestic drinking aimed at through the cutting down of the quantity that might be subsequently stored at home as a consequence of a reduced storing or accumulation at home. As to home consumption the right of householders was merely curtailed; the law being in their way only as to new quantities that might be kept on hand and the manner of getting fresh supply. What Eden claimed was the right to consume what he had bought before the enactment, proposing no change in the use of his liquors, towards which his intent after the law was the same as his intent before.

[2] With Martin it is obviously different. To begin with, he was not a druggist within the meaning of this act either when he bought the liquors or when they were seized. To be sure, he was registered as such, but the act is plain in too many places that "druggist" or "pharmacist" means one actively engaged in the business; this last idea being so frequently expressed in actual words as an appendage to the technical term that, when occasionally not appended, they are plainly omitted for brevity alone. Not a line in the statute indicates that pharmacists merely registered were to have rights like those engaged in business. Thus we are clear that Martin is not a druggist, and that, when he proposes to change these liquors to that use, he will be transferring them to a new owner under this law as much as if he were selling them to another person. The law is as much concerned with the change of status or object in this commodity as in the change of owner.

[3] Now, Martin's position is no better than that of any other person who, having for domestic purposes acquired liquor for his home previously to the law, changes his mind later, applies for a pharmacist's license, and launches himself in that occupation. Such a person, even though he may have had the intention when he bought the liquor in advance of the law, changes his actual employment as well as the actual use after it without complying with the new forms for publicity, producing one of the evils that the law had in mind when it required that holders of existing stocks promptly dispose of them. This conclusion we come to without adding the fact that Martin was a saloon keeper previously to the law keeping up a druggist's license to be used, if he felt like it, afterwards and consequently one of the very traffickers to be extinguished. As for the Eden decision, that rests on the principle that the right to home consumption remained continuous, that the property acquired for that purpose before the act was not intended to be disturbed, and that no new offense was

given later by the owner's continuing to consume his old supply at home. Though Martin, then, may not transfer these liquors to a druggist's use, may he at least reclaim them from the sheriff now, recanting his answer by saying that he will keep them merely to be drunk at home?

[4] Not to be forgotten for a moment is the in rem aspect of our law. A commodity, though its owner be never found, may be itself an offender. Found in excessive quantities after the statute goes into effect, it is presumptively contraband, an inanimate violator of law subject to condemnation. Not until somebody wishes to claim it is its ownership a matter of concern, whereupon the law may let the owner alone and be satisfied with condemnation. The objects, therefore, for which liquors are held or accumulated do become material. The lawful status may be changed to an unlawful status in the same hands. Suppose an individual to have a lawful quantity and yet be selling it at retail. The fact that it was lawfully acquired either before or after the statute would not save the unsold portion from forfeiture. The same would be true if, though no part of it were yet disposed of, the owner be found in full preparation for unlawful sales. The authorities would not have to await the traffic and the crime. In short, the intended use is a most important element in the commodity under this law which condemns the commodity, even when "kept or possessed by any person with the intent of violating any of the provisions of this law."

To conclude, when Martin admitted his keeping this stock for druggist's future business instead of to remove it from the state in the required ten days, this stock was made an offender open to seizure.

Judgment reversed.

MORRIS, C. J., and MAIN, HOLCOMB, and PARKER, JJ., concur.

BROWN v. HAYES et al. (No. 13287.)
(Supreme Court of Washington. July 28, 1916.)

1. LANDLORD AND TENANT §109(1)—IMPLIED SURRENDER OF LEASE.

A surrender of leased premises may be implied from acts and conduct of the parties indicating an intention on the part of the tenant to abandon, and on the part of the landlord to resume possession of the premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350, 352-354, 358, 360; Dec. Dig. §109(1).]

2. LANDLORD AND TENANT §195(1)—ABANDONMENT OF PREMISES—REMEDIES OF LANDLORD.

Where a tenant without just cause abandons leased premises and refuses to pay rent, the landlord may either treat the term as still subsisting and sue for installments of rent as they accrue, or, treating the lease as terminated

by the tenant's breach, re-enter and sue for damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 790, 791; Dec. Dig. ¶ 195(1).]

3. LANDLORD AND TENANT ¶49(3)—ABANDONMENT BY TENANT—REMEDIES OF LANDLORD—MEASURE OF DAMAGES.

Where a tenant abandons leased premises without just cause and the landlord re-enters, the measure of damages is not the rent reserved, but the difference between that amount and the rental value of the premises to the end of the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 119; Dec. Dig. ¶49(3).]

4. LANDLORD AND TENANT ¶49(2)—ABANDONMENT BY TENANT—REMEDIES OF LANDLORD—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to sustain finding that landlord was entitled to damages for tenant's abandonment without just cause of leased premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 118; Dec. Dig. ¶49(2).]

5. LANDLORD AND TENANT ¶288—ABANDONMENT OF PREMISES—WAIVER.

The action of unlawful detainer is an exclusive legal substitute for the common-law right of personal re-entry for breach of lease covenants, and the serving of notice of default and notice to surrender on tenant is not a waiver of damages for subsequent abandonment of premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1205; Dec. Dig. ¶288.]

6. LANDLORD AND TENANT ¶110(2)—ABANDONMENT OF PREMISES—SURRENDER OF KEYS—WAIVER OF LANDLORD'S REMEDIES.

Where tenant surrenders keys but landlord refuses to accept possession except on condition that he find another acceptable tenant, he does not waive right to damages for abandonment of lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 367-369; Dec. Dig. ¶110(2).]

7. TRIAL ¶165—INVOLUNTARY NONSUIT—EVIDENCE—INFERENCES.

On a motion for involuntary nonsuit, the plaintiff is entitled to the benefit of every favorable inference to be drawn from his evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. ¶165.]

8. LANDLORD AND TENANT ¶49(2)—ABANDONMENT BY TENANT—ACTION FOR DAMAGES—TRIAL.

In an action for damages for the wrongful abandonment of leased premises, held, the exclusion of evidence of the rental value of premises and an order granting a nonsuit was error.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 118; Dec. Dig. ¶49(2).]

Department 1. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Action by George A. Brown against Harry T. Hayes and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Miller & Wilkinson, of Vancouver, for appellant. Jas. P. Stapleton, of Portland, Or., for respondents.

ELLIS, J. Action for damages on breach of a lease. The evidence was in substance as follows: Plaintiff, lessee from the owner of

a building for a term of years, on October 30, 1913, sublet a storeroom therein to defendants for a term of five years at a monthly rental of \$91.66 due and payable on the first of each month, defendants also to pay their proportion of the expense of heating the building. Defendants went into possession and occupied the leased premises, plaintiff occupying an adjoining storeroom, and both conducting mercantile establishments. In July, 1914, defendants sold their business to third parties who removed the stock of goods to another location. On August 12, 1914, defendants paid their rent for that month, at that time and several times subsequently advising plaintiff that they would pay no more rent, repeatedly inviting him to sue, but, so far as the evidence shows, at no time offering to surrender possession or deliver up the keys. Plaintiff at all times stated to defendants that, being bound on his own lease for the premises, he could not afford to release them from their contract, and finally advised them that he intended to secure possession of the storeroom, rent it for what it would bring, and hold them for the difference. Accordingly, on September 1, 1914, pursuant to the unlawful detainer statute, he served upon defendants a notice that they were in default for the current month's rent, and that they must either pay the rent within three days or surrender possession of the premises on pain of liability to an action for unlawful detainer. On the following evening one of defendants called at plaintiff's store and handed him an envelope containing one of the duplicates of the lease, the key, and a letter stating that in response to the notice, "We herewith surrender the premises." Plaintiff kept the key but refused to accept the lease as a surrender of the term, handing it back to the defendant, who refused to take it. Plaintiff then stated that he would hold the lease for defendants and that they could have it at any time. Thereafter plaintiff leased the premises to other parties for a term equal to the remainder of defendants' term, and each month on collecting the rent sent defendants a bill for the difference between the rent collected and the monthly rental reserved in their lease. Plaintiff also offered proof of the rental value of the premises for the remainder of the term and to show that it was less than the rent reserved in his lease to defendants. This evidence was excluded, and the court thereupon granted a nonsuit. Plaintiff appeals.

Is the giving of notice by a landlord of an intention to forfeit a lease for nonpayment of rent, and a surrender by the tenant of the possession in response thereto, necessarily equivalent to an unqualified surrender of the term? This is the ultimate question.

[1] The general rule as to what constitutes a surrender of the term is stated as follows:

"A surrender may arise either from the express agreement of the parties, or by operation of law. And, whenever a surrender is implied from the acts of the parties, it is a surrender by operation of law. This inference may be drawn from anything which amounts to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume possession of the premises." 2 Wood, Landlord and Tenant (2d Ed.) p. 1174; *Hart v. Pratt*, 19 Wash. 530, 53 Pac. 711.

[2] But it does not follow that every abandonment on the one hand and resumption on the other constitutes a surrender of the term, either express or by operation of law, so as to relieve either party from all liability for his own antecedent breach of the lease. It is just as well established as is the general rule that, when a tenant abandons the premises without just cause and refuses to pay rent, the landlord may either treat the term as still subsisting and sue for the installments of rent reserved as they accrue, or, treating the lease as terminated by the tenant's breach, re-enter and sue for damages for the breach. *Jones, Landlord and Tenant*, § 549; *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797.

[3] If the landlord pursue the latter course his damages are measured, not by the amount of the rent reserved, but by the difference between that amount and the rental value of the premises to the end of the term. *Bradbury v. Higginson*, supra; *Oldfield v. Angeles Brewing Co.*, 62 Wash. 260, 113 Pac. 630, 35 L. R. A. (N. S.) 426, Ann. Cas. 1912C, 1050.

[4, 5] The evidence shows that such was at least the purpose of the appellant here. It can hardly be questioned that had he re-entered under all the antecedent circumstances here presented, save his notice to pay rent or surrender, he could have maintained this action for damages. By the giving of that notice did he so acquiesce in the respondents' desire to abrogate the lease and avoid the term as to estop him from claiming damages? We think not. The action of unlawful detainer is an exclusive legal substitute for the common-law right of personal re-entry for breach. *Spencer v. Commercial Co.*, 80 Wash. 520, 71 Pac. 53. It follows that a re-entry by that action has no different results from those implied from a re-entry for breach without the necessity of action. This phase of the case here cannot be distinguished from that presented in *Barrett v. Monroe*, 69 Wash. 229, 124 Pac. 369, 40 L. R. A. (N. S.) 763. There the re-entry was by notice and action in unlawful detainer. The tenant had made a deposit under the terms of the lease for liquidated damages in case of breach. We held that the re-entry for default in payment of rent was not a waiver of the right to the liquidated damages. Ordinarily a surrender on the one hand and an acceptance of pos-

session on the other, if unexplained, constitutes a surrender of the term by operation of law; but, if it appear from all the circumstances that the landlord resumed possession for the communicated purpose of caring for abandoned premises and renting them in order to minimize his damages, no such implication arises. *Brown v. Cairns*, 107 Iowa, 727, 77 N. W. 478.

[6] Such was the professed purpose of the appellant here, and the fact that he gave the notice as the first step toward securing peaceable possession does not necessarily create the implication. That implication must arise if at all from other acts inconsistent with the professed purpose. We fail to find them here. True, he accepted the key and resumed possession, but at the same time he refused to accept the lease as a surrender of the term. His attitude then clearly carried the information which he had repeatedly given defendants that he intended to hold them in damages for their breach of the lease. Under these circumstances his acceptance of the key was no waiver of that right. "Too much importance should not be attached to a delivery of the keys to the landlord, and his attempt to relet the premises. The legal effect of these acts depends largely on the intent with which the keys were delivered and for what purpose they were accepted. The landlord's words at the time he accepted the keys are good evidence on this subject. There is no surrender where landlord refuses to accept the keys except on condition that he is to find another tenant, if possible, and hold the lessee responsible for any deficiency in the rent." *Jones, Landlord and Tenant*, § 549; *Lucy v. Wilkins*, 38 Minn. 441, 23 N. W. 861; *Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727; *Dorrance v. Bonesteel*, 51 App. Div. 129, 64 N. Y. Supp. 307; *Martin v. Stearns*, 52 Iowa, 345, 3 N. W. 92.

[7] On the motion for a nonsuit, the appellant was entitled to the benefit of every favorable inference to be drawn from his evidence. The question was one of intention, and we are clear that the evidence presented a case for the jury. *Sessinghaus v. Knocke*, 127 Mo. App. 300, 105 S. W. 283; *Leggett v. Louisiana Purchase Expo. Co.*, 121 Mo. App. 70, 97 S. W. 976; *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673; *Hays v. Goldman*, 71 Ark. 251, 72 S. W. 563.

[8] The court erred in refusing to admit evidence of the rental value of the premises for the unexpired term and in granting the nonsuit.

Judgment reversed, and cause remanded for trial.

MORRIS, C. J., and MOUNT, CHADWICK, and FULLERTON, JJ., concur.

STATE ex rel. BERRY et al. v. SUPERIOR COURT IN AND FOR THURSTON COUNTY et al. (No. 18421.)

(Supreme Court of Washington. July 5, 1916.)

1. CONSTITUTIONAL LAW § 70(3)—AUTHORITY OF COURTS—POLICY OF STATUTE.

Courts will not afford relief against legislation on grounds of policy, expediency, or because a hardship is worked against any person.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 181; Dec. Dig. § 70(3).]

2. CONSTITUTIONAL LAW § 70(1)—AUTHORITY OF COURTS.

Courts will not intervene in any case to hinder or influence the process of legislation in any of its steps.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 182, 187; Dec. Dig. § 70(1).]

3. CONSTITUTIONAL LAW § 70(1), 77—DEPARTMENTS OF GOVERNMENT—LEGISLATURE—INTERFERENCE BY COURTS.

Neither the judicial nor the executive branches of the state can interfere to prevent a delegated member of the legislative body from introducing a bill or law, no matter how arbitrary, novel, or foolish.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 182, 187, 141; Dec. Dig. § 70(1), 77.]

4. CONSTITUTIONAL LAW § 70(1)—ACT PROPOSED BY INITIATOR—DIRECT LEGISLATION—INTERFERENCE BY COURTS—"INITIATOR OF A BILL."

The "initiator of a bill, which means the draft of an act or proposed law, under Const. art. 2, § 1, is not, under this system of direct legislation, a legislator with whose acts in proposing a bill the courts cannot interfere.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 182, 187; Dec. Dig. § 70(1).]

5. INJUNCTION § 88—DIRECT LEGISLATION—METHOD OF FURNISHING—AUTHORITY OF COURT TO REQUIRE COMPLIANCE WITH STATUTE.

The initiator of direct legislation under Const. art. 2, § 1, must proceed in accordance with the positive law prescribing the method of such legislation, and courts will interfere by injunction in proper cases to prevent submission in disregard of such laws.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 160; Dec. Dig. § 88.]

6. WORDS AND PHRASES—"PREAMBLE."

A "preamble" is an introductory clause in a constitution, contract, statute, or other instrument which states the motive, design, reason, or intent thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Preamble.]

7. STATUTES § 210—"LAW"—PREAMBLE—EFFECT.

A law is a rule of action, but an argument by way of preamble is not.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 287; Dec. Dig. § 210.]

For other definitions, see Words and Phrases, First and Second Series, Law.]

8. STATUTES § 210—PREAMBLE—OFFICE AND EFFECT.

A preamble is not an essential part of a statute, has no legislative force, and is of importance only as a guide to an understanding

of the statute with reference to the legislative intent in case of doubt or ambiguity.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 287; Dec. Dig. § 210.]

9. STATUTES § 35½—DIRECT LEGISLATION—CONSTITUTIONAL RESTRICTIONS—RIGHT TO PROPOSE A PREAMBLE.

Under Const. art. 2, § 1, providing for direct legislation, no constitutional right is given to propose a preamble or declaration of purpose to a proposed law.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.]

10. INJUNCTION § 88—ENACTMENT OF LAW—DIRECT LEGISLATION—PUBLICATION OF ARGUMENTS.

The courts will enjoin the publication at the expense of the state of a proposed preamble containing purely argumentative matter in support of an act initiated under Const. art. 2, § 1.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 160; Dec. Dig. § 88.]

11. STATUTES § 35½—DIRECT LEGISLATION—PUBLICATION OF ARGUMENTS—PREAMBLE CONTAINING ARGUMENTATIVE MATTER—INJUNCTION.

A preamble in a proposed act, initiated under Const. art. 2, § 1, amendatory to Fisheries Code (Rem. & Bal. Code, §§ 5150-5275) § 1, reciting the purposes of the act and containing argumentative statements of reason for its adoption, was improper under Laws 1913, p. 418, providing for publication of such argument at expense of proponent and the publication of such preamble at expense of state will be enjoined.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.]

Ellis, Bausman, Parker, and Fullerton, JJ., dissenting.

En Banc. Proceedings, on the relation of Frank Berry and others, to review the proceedings and judgment of the Superior Court of Thurston County and D. F. Wright, Judge thereof, dismissing relator's petition for injunction. Reversed and remanded, with directions.

Chas. S. Gleason, of Seattle, for relators. C. J. France, of Seattle, and W. V. Tanner, of Olympia, for respondents.

HOLCOMB, J. This is a proceeding to review the proceedings and judgment of the superior court, in holding that it had no jurisdiction, and entering a judgment of dismissal and for costs against the relators, in a certain cause begun and tried therein, wherein the relators were plaintiffs and the secretary of state and certain other persons as "The Joint Legislative Committee" and as individuals were defendants, to enjoin the defendants from preparing or causing to be printed blank petitions for proposed initiative measure No. 22, and from printing and attaching to such petitions arguments for said pretended measure No. 22, and from circulating or attempting to obtain signatures of legal voters upon such petitions. A copy of section 1 of initiative measure No. 22, as filed by the joint legislative committee in the office of the secretary of state, is as follows:

"Section 1. Section 1 of the Fisheries Code of Washington is amended to read as follows:

"Section 1. Short Title and Declaration of Purposes.

"This act shall be known as the Fisheries Code of Washington."

"The prosperity and happiness of all of its people are hereby declared to be the highest aim of the state and the protection and utilization of its great natural resources, to the end that all the functions of government may be economically carried on without burdensome and confiscatory taxation being placed upon the home builders and real producers of the state, is paramount. Protection and conservation of the great sources of food supply are necessary that they shall not be monopolized by the few to the detriment and discomfort of the many, and inasmuch as it has been legally determined that the fish in waters of the state of Washington are the property of said state, it is hereby declared that the purposes of this act are to foster the propagation, protection and development of this source of food supply and to create a revenue therefrom by retaining a portion of the value of its own property from those who are hereby allowed to appropriate the same, under the regulations hereinafter set forth, the proceeds of which shall be turned into the state treasury for the general support of the state government, to the end that the burden of taxation on its people may be thereby reduced."

The trial judge held, in effect, that the question raised was political, and therefore a court of equity could not interfere.

During the last 40 years of the Nineteenth Century there arose and grew in democratic republics and commonwealths a powerful distrust and dislike of their parliaments. They became tired of the representative system. In the latter part of that period the people of the democracies submitted to their representative Legislatures only under the pressure of stern necessity. The growing distrust and contempt for legislative bodies, municipal, state, and federal, and the tendency to restrict them, culminated, with the beginning of this century in numerous returns by states to the primitive system of direct legislation, modified by modern systems of election. In this state, after enabling legislation, an amendment to article 2 of the Constitution relating to legislative powers, which established a dual system of legislation, was adopted by vote of the electors in 1912. It was by that amendment provided that:

"The legislative authority * * * shall be vested in the Legislature, * * * but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the Legislature," etc.

Under the further provisions of this constitutional amendment—

"the first power reserved by the people is the initiative. Ten per centum, but in no case more than fifty thousand, of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the Legislature. If filed at least four months before the election at which they are to be voted upon, he [the secretary of state]

shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the Legislature, he shall transmit the same to the Legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all other measures in the Legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the Legislature before the end of such regular session."

It is further provided that the veto power of the Governor shall not extend to measures enacted by the people, either upon initiative or upon the second power reserved to the people and designated the "referendum." It also further provided that the reserved powers of the people "shall be self-executing, but legislation may be enacted especially to facilitate its operation." It is finally peremptorily commanded by this amendment that:

"The Legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred, so that each voter of the state shall receive the publication at least fifty days before the election at which they are to be voted upon."

In obedience to and furtherance of the above mandate, the Legislature at its 1913 session enacted a facilitative measure, providing for regular processes of initiating measures, and for publicity and arguments for and against them at the expense of the persons filing arguments in support of or against such measures respectively, prohibiting the circulation of more than two arguments in support of, and more than three in opposition to, any initiative measure, and providing for the arrangement of ballot title by the Attorney General, the printing of arguments upon the proposed measure by the secretary of state at least 60 days prior to the election at which they are to be submitted, and the transmission of same by him to every voter in the state not less than 55 days before the election.

The facilitating act above partially outlined was not only a complete delegation of power to the Legislature, but a positive command of the paramount law to be produced. Without it the self-executing provisions of the Constitution as amended could be followed, but might result in confusion and disorder in many instances. There can be in such a vast state no assemblage of all or a majority of the voters to propose and vote upon measures or to reject measures already enacted. It is possible for an act, if very brief and concise, to be proposed and voted upon at regular elections in identical form by every voter, but very uncertain. Hence the people provided that their reserved powers of legislation should be facilitated and promoted, but not curtailed or hindered, by a legislative act providing a comprehensive scheme to facilitate the employment of the legislative powers reserved by the people in mass. The facilitating act carefully provides certain steps to be taken in order to prevent

unfairness and fraud and confusion and disorder. It provides that any legal voter or committee or organization of legal voters may "propose" any measure to be submitted to the Legislature or to the people. Upon filing such proposed measure within certain periods prior to a regular election or session of the Legislature, the Attorney General shall prepare the ballot title to such measure. It is carefully provided that the ballot title so prepared shall be of—

"not to exceed one hundred words," and "shall express, and give a true and impartial statement of the purpose of such measure, and shall not be intentionally an argument, or likely to create prejudice, either for or against the measure."

Provision is made for an appeal to the courts from the action of the Attorney General in preparing the ballot title. The act provides for the utmost publicity of the proposed measure within the state, and for not more than two arguments in favor of and three against the proposed measure, the publication of the arguments to be paid for, not by the state but by the parties submitting the arguments. This requirement of the law was sustained in *State ex rel. Chamberlain v. Howell*, 80 Wash. 692, 142 Pac. 1. It is now asserted by appellants that this requirement of the facilitating act is violated and evaded by the proponents of the present measure by a pretended "preamble," which is neither necessary nor proper, and is mere argument and false statements in support of the proposed measure, which, if permitted, will enable the proponents to have their arguments printed by the public at no expense to the proponents under the guise of part of the bill or proposed law, and give undue advantage to proponents and work irreparable injury to the opponents of the measure.

[1-3] To establish that the procedure questioned is unfair is not sufficient. Any law or proposed law may be, and often is, unfair to some. Except when dealing with essential morals or fundamental principles, in the modern complexity of human affairs and relations there is little legislation that can be said to be entirely fair. Legislative bodies, whether delegated, or principals in mass, are not to be stopped from exercising the supreme function of making laws by such considerations. The sole question now to be determined is, Have they the power? Courts will not concern themselves with any questions of policy or hardship or expediency. Nor will they in any case intervene to hinder or influence the process of legislation in any of its steps. Were it a question of whether a delegated member of a legislative body of any kind could introduce to that body a "bill" or law of any kind, no matter how arbitrary, how novel, or how foolish, the answer at the very outset would unhesitatingly be that no other department of our triune form of government could, in any wise, interpose. We now have a dual system of legislation: One by a delegated, bicameral Leg-

islature, deliberative, maker of its own rules of procedure in general; the other by the legal voters of the state in mass. Here we have the question, Is the proponent of an initiative measure in any sense a legislator? And ancillary to that, Is the filing of a proposed bill or law a legislative step? A third and vital question then arises, Can the courts interfere?

[4] As to the first question, we conceive that an initiator of a bill (which means the draft of an act or proposed law) is not, under this system of direct legislation, a legislator. *State ex rel. McNary v. Olcott*, 62 Or. 277, 125 Pac. 303. He is merely given license or privilege to propose and file a proposed measure. This is a preliminary step in the process of legislating. It may be dispensed with, but it is nevertheless provided for in furthering or "facilitating" the system. He must proceed in conformity with the license. The question then is, Are these proponents exercising this privilege legally? In the first place it must be considered that here we have a step or procedure authorized and granted by law and to be exercised and administered under a general law authorized by the supreme law, the Constitution, not a legislator acting in a parliamentary, deliberative body, empowered within certain constitutional limitations to make its own rules of procedure at the moment, and coequal with any other branch of government. But, it is said, the people in their legislative capacity are superior to all other branches of government, superior to the Legislature which made this law; in fact, supreme in their legislative capacity. The people in their legislative capacity are not, however, superior to the written and fixed Constitution. Nor is the individual who proceeds to initiate any legislation. His act in initiating a measure is but a voluntary one, and is permitted and defined, limited and circumscribed, by the Constitution and the laws passed in obedience to and compliance with the Constitution as amended.

[5] Such a step has not the immunity of the old delegated, protected legislative act and privilege. One voting upon the final passage of an initiated or referred bill at the election could not claim the privilege of voting by any method he pleased. He could not go to the polls and cast his vote viva voce under our election system, and demand that it be recorded and counted. Nor could he electioneer or solicit votes within the polling place for such is prohibited. Nor could he insert a new word or clause or expunge anything from the proposed measure. The voter on proposed or referred measures is controlled and regulated by positive general laws. There is no sanctity conferred upon the proposal of an intended law to be initiated and voted upon by the people.

The legal right granted to the proponents is a private and a political right to propose

a "bill, or law," to be initiated by a petition if signed by the constitutional number of legal voters. Now, are proponents proceeding in their legislative capacity by the prescribed method? As private members of the legislative body in mass, certain legal political rights are conferred upon them to be exercised in a prescribed manner. These rights must be considered as no greater than the rights of other members of the legislative body in mass to oppose the proposed measure. It cannot be assumed that the right of one legal voter to attempt to obtain the enactment of a given measure is greater than the right of other legal voters to attempt to prevent its passage. All are equal before the law. There is no presumption that, because certain legal voters or legislators desire and propose certain legislation upon a certain subject, the same is desired by the voters in mass. In fact, it can be assumed as a safe postulate that other members of the voting mass will oppose it. It is the sole ground of relators here that they are entitled to interfere in the matter because they are voters and do oppose the proposed measure, irrespective of the merits of the measure and regardless of the reasons for their opposition, and that if the proponents of the measure are proceeding in accordance with the positive law, their only recourse is at the polls. This position is sound. This brings us to the precise question as to the legality of the procedure of the proponents.

They propose a purely amendatory bill or law upon a subject of legislation long recognized and acted upon in this state, the regulation of fishing in the public waters of the state and deriving a revenue therefrom. The territorial Legislatures of 1877, 1879, 1881, the first Legislature of the state in 1889-90, and each succeeding Legislature to and including that of 1915, passed legislation in some manner regulating fishing, protecting, conserving, and fostering fish, and providing for revenue therefrom. In 1915 the Legislature enacted a comprehensive regulation and revenue act concerning fish and fishing industries, and declared it to be the "Fisheries Code of Washington." The proponents have proposed a bill for direct action by the voters which would amend certain sections of the Fisheries Code, and preface the positive rules of action for the future by proposing to amend section 1 of the existing Fisheries Code so as to include a "preamble" or "declaration of purposes." The proposed amendments in no wise extend or broaden the scope of the existing policy of the law. It is insisted by the proponents that it is their constitutional political right to insert any declarations of purposes or "preamble" in any proposed legislation introduced by initiative; that preambles are legitimate as component and proper portions of legislation, are so recognized by law, and serve several

important functions in connection with the making and interpreting of laws.

[6] In the entrance upon new fields of legislation, in order to justify the legislation "to the impartial consideration of mankind," preambles are frequently adopted. Thus, the framers of the Constitution of the United States explained their purpose to mankind by a preamble which for conciseness and brevity and general and comprehensive breadth of scope is unequalled. A preamble is defined in law to be:

"An introductory clause in a constitution, contract, or other instrument, reciting or declaring the motive or design of what follows." New Standard Dictionary.

"The introductory part of a statute, which states the reasons and intent of the law." Webster's Unabridged Dictionary.

A cursory reading of the proposed preamble must convince any one that it contains much that is more than merely recitative of the motive or design of what follows, for it contains much that must appear to be merely polemic and open to serious controversy as assuming the existence of certain conditions, whether such be actually true or false, and in a very insidious manner. For instance, after reciting the fundamental principle of democracies that "the prosperity and happiness of all of its people are hereby declared to be the highest aim of the state," a principle universally known and acknowledged by every one, and needing no re-enactment into law in the United States, it insinuates that, without such legislation as is now proposed, as if for the first time in history, "burdensome and confiscatory taxation" is "being placed upon the home builders and real producers of the state." It then insidiously argues that:

"Protection and conservation of the great sources of food supply are necessary [as if for the first time asserted legislatively] that they shall not be monopolized by the few to the detriment and discomfort of the many."

And the only changes made in the existing Fisheries Code proposed by this measure to be amended are to prohibit fishing during the closed season in the Columbia river where it forms the state boundary, where it is now permitted, to further regulate or prohibit certain fishing apparatus in certain waters, requiring additional licenses, increasing the fees to be paid the state for certain licenses and for certain quantities of fish caught, further regulating the reports to be made, and limiting licenses, to citizens or persons who have declared intention to become citizens of the United States and actually resident in this state, the existing law extending its permission to such persons resident in adjoining states.

[7] The proposed amendments, while important, are not novel, original, or subversive. They are in harmony with the long-settled and recognized policy of the state. No monopoly in its fish was ever legalized by the state any more than that conferred by the

licensing of certain persons coming within the permission of the law who would pay the required license fees, exactly as is now proposed. This preamble is an argumentum ad hominem, appealing to the uninformed on the face of the proposed enactment, and to be printed by and at the expense of the state. There is further pure argument in the remainder of this proposed preamble, and further assertion of long-established principles as to which there is no necessity to declare anew the reason for the law. A law is a rule of action. An argument is not.

Notwithstanding the obvious, the proponents insist that it is their right to include any declarations of purpose in a proposed measure, under the Constitution and the law, and that the courts have no right to interfere with a legislative procedure or a political right. They illustrate by citing the declaration of purposes as a preamble to our "Workmen's Compensation Act" (Session Laws, 1911, p. 345) reciting long existing and recognized mischiefs and an avowed purpose of subverting a long-established system of private compensation and trial by jury for injuries to workmen. Here was a most manifest need for a preamble containing a declaration of new principles to supplant the old, withdraw the right of trial by jury, and remedy a general condition.

The "Employment Agencies Law" (Laws 1915, p. 1) passed by the people in 1914 and containing a declaration of purpose to bring a new class of occupation within the scope of the police power of the state and regulate or abolish it; and the Oregon "Ten Hour Law" (Laws 1913, p. 169), containing a preamble of the same nature, are also cited as illustrations. As to the last-mentioned law, it is argued that, on appeal to the Supreme Court of the United States to test its constitutionality, a "brief" has been written to demonstrate the facts set forth in the preamble, consisting of two large volumes of 1,000 pages, and that if the Supreme Court of the United States sustains the law, it will sustain it by reason of the statements contained in the preamble and the demonstration contained in the "brief" that the facts recited in the preamble are established economic facts. If that be true, and if preambles are to become the established guide to interpretation by the courts of the laws and of their constitutionality, we may expect such 1,000-paged "briefs" hereafter to be made part of the preamble, published by and at the expense of the state, whenever the proponent of a measure may desire, and forever set at rest, by mere enactment thereof, any arguments that might thereafter be made as to not only the wisdom, necessity, and expediency of the act, which are purely legislative questions, but also as to the constitutionality of an act, which is judicial. In neither of the laws cited, however, and the determination of their constitutionality

by the courts, was there presented the question of the right of the proponent, undisturbed, to include anything he pleased as a preamble, under such system as has been provided in this state.

It is also urged by respondents that we have declared in regard to the "Workmen's Compensation Act" (State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. [N. S.] 466) and in regard to the "Employment Agencies Law" of 1914 (Huntworth v. Tanner, 87 Wash. 670, 152 Pac. 523), that a preamble is a most necessary and important constituent part of a law.

In the Davis Case a mere recital was made (65 Wash. 169, 117 Pac. 1101, 37 L. R. A. [N. S.] 466) of the declared mischiefs to be remedied and purpose of the new law, a law entirely novel and original here, in that it takes away the right of trial by jury in large classes of cases and from large numbers of employers and employes and substitutes another remedy. In the Huntworth Case the preamble was resorted to as a source of interpretation of the true scope and intent of a prohibitive and highly penal law, and as a designation of the persons to be brought within the protection of the law, the declaration in the preamble of purpose and mischiefs to be remedied being "a declaration of a policy to advance the police power into a new field," and the preamble was more than a mere preamble, and disclosed an intention to protect, from the conditions existing and brought about by the employment agencies, as "workers" only those who were liable to imposition and extortion.

[8, 9] Both in England and in this country it was at one time a common practice to prefix to each law a preface or preamble stating the motives and inducement to the making of it; but it is not an essential part of the statute, and is now generally omitted. It is not only not essential and generally omitted, but it is without force in a legislative sense, being but a guide to the intentions of the framer. As such guide it is often of importance. In this sense it is said to be a key to open the understanding of a statute. The preamble is properly referred to when doubts or ambiguities arise upon the words of the enacting part. It can never enlarge. It is no part of the law. Sedgwick, Constr. Stat. & Const. Law, pp. 42, 43; 1 Story, Constitution, Book 3, c. 6; Edwards v. Pope, 3 Scam. (Ill.) 465; Bouvier's Law Dictionary. If it is no part of the law, proponents have no constitutional right to propose it as a law under article 2 as amended.

In the instant case there is no need or place for the alleged declaration of purpose, and it is simply and purely the especial argument advanced by the proponents in advocacy of the measure. Its proper place is in the publicity pamphlet to be issued by the secretary of state under the "facilitating" law, and paid for pro rata by the proponents.

The principal question remains yet to be decided: Can the judicial department interfere with the legislative and enjoin the publication at the expense of the state of the proposed preamble as a part of a "bill" or proposed law? This we approach with considerable concern.

Respondents cite, and his honor below relied largely upon, *State ex rel. Crawford v. Dunbar*, 48 Or. 109, 85 Pac. 337, to the effect that courts of equity have no jurisdiction to interfere in political matters where no property rights are affected, and that the presentation of arguments as parts of initiative measures is such a political matter. We should have decided in that case, as did the Supreme Court of Oregon, for the reason that the direct legislation provision of the Oregon Constitution contained no provision for further legislation to facilitate its operation, and no mandate to the Legislature to provide methods of publicity of proposed laws or arguments. An act passed by the Legislature (Laws of Oregon, 1906, p. 244), regulating initiative and referendum procedure, which provided that the ballot title of such measures should be designated by the proponents, contained no restrictions upon argumentative ballot titles, but did provide that both proponents and opponents thereof might file pamphlets, printed at their own expense, containing their respective arguments, to be circulated by the secretary of state. This was the state of the law at the time of the decision in the cited case, and the case therefore furnishes us no assistance. The above decision was made in 1906 and the next session of the Oregon Legislature repealed the act of 1903 and enacted one providing that the ballot titles of initiative measures should be prepared by the Attorney General, and should not be argumentative. Laws of Oregon 1907, p. 398.

[10] We have no hesitancy in saying that, if the opponents of the measure under consideration could induce the secretary of state to include in some way in the proposed ballot their arguments against the measure, however brief, the proponent would forthwith demand and be entitled to the interference of the courts to prevent it as in violation of their rights. Nor can it be doubted that, if the opponents could induce the secretary of state to print and distribute their arguments against the proposed measure at the expense of the state, and without expense to the opponents, the proponents would demand and be entitled to equity's interference to restrain such unlawful expenditure of public money. How then can it be asserted with any reason that the political right of the proponent is any greater, or the legal and equitable right of the opponent any less, than the other?

We have said that public officers will be restrained from the threatened illegal expenditure of public money. *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480; *Krieschel v.*

County Commissioners, 12 Wash. 428, 41 Pac. 186. We have said that we will no longer in this state draw any fine distinctions between personal and property rights, unless it may be in favor of personal liberty. *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523. It is impossible to foresee all the exigencies of society which may require the aid and assistance of courts of equity to protect rights or redress wrongs. The jurisdiction of such courts is manifestly indispensable in a great variety of cases for the purposes of social justice, and therefore should be fostered and upheld by a steady confidence. *Story, Equity Jurisprudence* (13th Ed.) 268.

In *State ex rel. Mohr v. Seattle*, 59 Wash. 68, 109 Pac. 309, we held that an injunction against the enforcement of a city ordinance, at the suit of one who had no interest except as a voter and signer of a referendum petition, should be granted. In *State ex rel. Klehl v. Howell*, 77 Wash. 651, 138 Pac. 286, we assumed jurisdiction to determine the political question whether the secretary of state could refuse to proceed with an initiative measure filed more than 10 months prior to a regular election. We entertained jurisdiction to determine the political question and right of relator to have the secretary of state file, print, and distribute at the expense of the state the arguments presented in favor of an initiative measure, in *State ex rel. Chamberlain v. Howell*, 80 Wash. 692, 142 Pac. 1.

[11] The present situation seems, in some measure, to be an attempt to evade the plain provisions of the statute regarding the publication of arguments and the payment of the expense thereof, and the decision in the last-cited case. Ordinarily the reason for an enactment lies wholly in its enactment. The existence of a law ought to be its own reason. While all preambles to initiative legislation would not be subject to criticism as mere arguments by the proponents, but intended to be proper declarations of purpose in a proposed law, we are convinced that the one under consideration is, and that it is not a mere political question, nor an exempt legislative process, but is regulated by the law, and is subject to judicial interposition.

Reversed and remanded, with instructions to grant the injunction. The proponents may, however, at their election, expunge from the proposed measure all of section 1 after the clause, "This act shall be known as the 'Fisheries Code of Washington,'" and have the remainder of the proposed act submitted under the ballot title prepared by the Attorney General, the proponents to furnish the arguments in support of their measure separately to the secretary of state, for distribution. Relators will recover costs.

MORRIS, C. J., and MAIN, MOUNT, and CHADWICK, JJ., concur.

ELLIS, J. (dissenting). The majority opinion gives intrinsic evidence of most careful

and conscientious study, but it seems to me that the result reached is unsound for several reasons:

1. It seems to be conceded, as it must be conceded, that the judiciary has no power to interfere with, construe, or pass upon any bill or law while it is undergoing any phase of the legislative process. This is as true of bills initiated by the people as it is of bills in the Legislature.

"The appellant concedes that the courts are powerless to restrain a member of the Legislature from introducing any measure, valid or invalid, for the reason that the courts cannot interfere with the action of the legislative department. What legal warrant has a court to enjoin the secretary of state from certifying a measure, whether valid or invalid? Is not the initiative petition also a step in the process of legislation? For the secretary of state, or the courts, to assume in advance the power and right to decide whether the proposed measure was invalid would be tantamount to claiming the power of life and death over every initiated measure by the people. It would limit the right of the people to propose only valid laws, whereas the other lawmaking body, the Legislature, would go untrammelled as to the legal soundness of its measures." *State ex rel. Bullard v. Osborn*, 16 Ariz. 247, 249, 143 Pac. 117, 118.

As said by the Supreme Court of Ohio in *Pfeifer v. Graves*, 88 Ohio St. 473, 104 N. E. 529, in which it was sought to restrain the secretary of state from submitting a proposed initiative bill to the electors:

"There is another indisputable and imperative reason why the remedy they invoke must be denied. We cannot intervene in the process of legislation and enjoin the proceedings of the legislative department of the state. That department is free to act upon its own judgment of its constitutional powers. We have not even advisory jurisdiction to render opinions upon mooted questions about constitutional limitations of the legislative function, and we will not presume to control the exercise of that function of government by the General Assembly, much less by the people, in whom all the power abides."

If as held by the majority the filing of the bill is no part of the legislative process of proposing and passing laws, which right is reserved by section 2 of the Constitution as amended, then the Legislature had no power to provide for such filing, since its power in the premises is expressly limited by the constitutional amendment itself to legislation, "especially to facilitate its operation," that is, to facilitate the operation of the constitutional amendment. It would seem to be begging the question to say that the initiator of a bill is not, under this system of direct legislation, a legislator, and that "he is merely given the license or privilege of proposing and filing a proposed measure," that "this is a preliminary step in the process of legislation," and that "it may be dispensed with, but is nevertheless provided for in furthering or 'facilitating' the system." The argument answers itself. The Legislature can no more confer a right in the premises than it cannot take away a right. The right to propose direct legislation is conferred, or, more correctly speaking, reserved, by the Consti-

tution itself. The Legislature can only provide the process or procedure "facilitating" the exercise of that right. Whatever it provides is therefore part of the legislative process or procedure, since it has no power under the Constitution to provide for anything else. In *State ex rel. McNary v. Olcott*, 62 Or. 277, 125 Pac. 303, largely relied upon by the majority, this question is but meagerly argued, and the fundamental consideration which I have attempted to point out is wholly overlooked. As applied to our Constitution, that decision is basically unsound.

The other case most strongly relied upon by the majority (*State ex rel. Halliburton v. Roach*, 230 Mo. 408, 130 S. W. 680, 189 Am. St. Rep. 639), in so far as it seems to sustain the majority is ably, and, it seems to me, conclusively answered by the dissenting opinion of Judge Woodson. But, in any event, it is not apposite on the question here presented. That case involved a proposed amendment to the state Constitution of Missouri by an initiative petition. The proposed amendment provided for dividing the state into senatorial districts. The court held that this proposed amendment to the Constitution was not in its nature a constitutional amendment at all, but was merely a legislative enactment of a temporary nature in the guise of a constitutional amendment. Furthermore, the court found a sufficient reason for the result reached, in that the whole text of the measure was not included in the petition as required by the initiative provision of the Missouri Constitution itself.

It seems to me that the very fact that the Legislature has provided this procedure makes it *ipso facto* a part of the legislative process or procedure. If this be true, it is elementary that the judiciary has no right to interfere.

2. Reduced to specific terms, the basic idea of the majority opinion seems to be that the last paragraph of the constitutional amendment in question imposes a mandate upon the Legislature to provide by statute that no argumentative matter shall be included in any initiative bill or measure. That paragraph reads as follows:

"The Legislature shall provide methods of publicity of all laws, or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred, so that each voter of the state shall receive the publication at least 50 days before the election at which they are to be voted upon."

It seems to me that this language is capable of no such construction. It certainly does not so provide in terms, and it is working implication to the rag-ends to say that the power conferred to provide methods of publicity of such laws with arguments for and against them implies, either necessarily or at all, any power to say what shall or shall not go into any initiative bill or measure. When this plain fact is clearly grasped, the case of *State ex rel. Crawford v. Dunbar*,

48 Or. 100, 85 Pac. 337, clearly sustains the position that the question here is a political one of which a court of chancery has no jurisdiction. Even after the Legislature of Oregon had provided a remedy by injunction to prevent the filing of defective ballot titles, the Supreme Court held that the question was political, and that the remedy by injunction could only be invoked by the state through its proper law officer. *Friendly v. Olcott*, 61 Or. 580, 123 Pac. 53. The court said:

"The plaintiff does not show that he will be injured in any property or civil right by the contemplated action of the secretary of state in certifying the ballot title to the county clerks. Neither will his political right to vote on the measure at the election be infringed. He can then as always exercise his electoral franchise unaffected by anything shown in his bill. If he can enjoin the secretary of state now, he can sue out a writ the day before that officer would certify the ballot title, and thus balk the whole people in the exercise of their constitutional reserve power to reject at the polls any law passed by the Legislative Assembly. The principle is sound and well settled that as against public officers, where their action involves purely public or political rights, the drastic remedy of injunction can be invoked only by the state acting through its proper law officer. In some instances a suit may be maintained in the name of the state on the relation of a citizen who can show some special injury to his civil or property rights, but this case is not in that category. To sustain plaintiff's suit when he shows no injury to his private rights would be a pronounced example of government by injunction."

In my opinion, to confer such power of censorship upon either Legislature or court at the suit of a private party would require a further amendment to the Constitution.

3. But even conceding that the Legislature has the power to say what the proposed bill or measure shall or shall not contain, the Legislature has not exercised, nor attempted to exercise, any such power. It has merely fixed the length of the arguments to be published with the bill, and declared that the parties interesting themselves for or against a bill shall pay for printing their respective arguments. It is a far cry from this to a declaration that the bill itself shall be subjected to censorship and purged by the courts of all argumentative matter, whether found in the preamble or distributed throughout the various sections of the bill, as it easily might be. If it is the duty of the court to so purge the preamble, it is equally its duty to so purge every section. Every preamble is in its nature essentially argumentative, and every law carries in its provisions an argument for its own existence. Assuming the power, it is difficult for me to believe that either the people, when they adopted the constitutional amendment, or the Legislature, when it passed the facilitating act, ever intended that the courts should so scan and rewrite initiative bills as to purge them of argumentative matter.

The argument of the majority touching the exclusion by the facilitating act of argumen-

tative matter from the title to be prepared by the Attorney General may be passed with the simple observation that the Legislature has covered the matter of title in terms. The title and the body of the act, including the preamble, are wholly different matters. The framing of a title in order to cover succinctly, yet sufficiently comprehensively, the contents of the act is a matter requiring certain technical skill. There is a reason why it should not be argumentative, but terse and complete, which cannot be applied to the body of the act without in effect taking away from the people the power to propose bills or laws. The preparation of the title is facilitation. The rewriting of the bill is usurpation.

The majority also concede, as of course it must be conceded, that the preamble, though not a necessary or operative part of a bill or law, is at least a proper part, often performing a very important function as a "guide to the intentions of the framer." The preamble in the legislative sense is defined:

"Preamble. A clause at the beginning of a constitution or statute explanatory of the reasons for its enactment and the objects sought to be accomplished." *Black's Law Dictionary* (2d Ed.) 927.

While it is sometimes said that the preamble is "no part of the law," the very definition and the authorities cited in support of that statement in the majority opinion show that this language is used in the qualified sense that it is no part of the law as an operative rule of action, but that it may be a very important part in determining that rule of action.

"The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim, in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute." 1 *Story, Constitution* (5th Ed.) book 3, c. 6, § 459, p. 350.

As authority for the view that in this broader sense the preamble is not only a part of the law, but sometimes a most important part, whether enacted by the Legislature or initiated by the people, we have only to consult our own comparatively recent decisions, notably, *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, *Huntworth v. Tanner*, 87 Wash. 870, 152 Pac. 523, and the recent decision of *Stertz v. Industrial Ins. Comm.*, 158 Pac. 256. In these cases, and especially in the *Huntworth* Case, the preamble was resorted to, not merely to explain what was ambiguous, but to limit the operative part of the law in which but for the preamble there was not a shadow of ambiguity. In all modesty I would suggest that it is no sufficient answer to say that in these statutes the preambles were important parts because they were statutes exercising the police power in new fields.

The bill here in question, if it ever becomes a law in any form, will be an exercise of the police power, and whether in a new field or an old one, the preamble in such legislation is peculiarly important as determining the intended scope of the operative part of the law as a rule of action. Indeed, the comparatively recent extending of the exercise of the police power seems to have worked a necessary revival of the formerly waning use of the preamble as an aid to intention. How can any court know, until concrete cases arise under any law exercising the police power touching either a new or an old field, whether or when or where, in the practical operation of the law, an ambiguity or doubt may arise as to the intention and scope of the law requiring a resort to the preamble for its solution? If the courts are to be required to remodel, reform, and purge the preamble of all argumentative matter not necessary to solve ambiguities in the operative part of the law, then the courts must, in every instance, either say that there shall be no preamble, thus abrogating the admitted power of the law-makers to define their intentions, or scan the entire act as to its every provision without the aid of briefs and determine in advance every ambiguity that might arise in every possible case, which a reference to the preamble might be necessary to solve. Aside from the intolerable burden which the latter course would necessarily impose upon the courts, its performance in most cases would be manifestly impossible. It can hardly be doubted that, of all bills or laws, initiative measures will be as a rule the most inartificially drawn and the most open to the charge of ambiguity. It would seem therefore that of all laws those initiated by the people most require the aid of a preamble as a key to the intention of the proponents.

4. The assertion of the majority that it is unfair to permit argumentative matter in the preamble to be published at the expense of the state, while the opponents of the bill must pay for publishing their own arguments offers no excuse for this court to legislate in the premises. This court has already decided that this is a legislative question. In *State ex rel. Chamberlain v. Howell*, 80 Wash. 692, 696, 142 Pac. 1, 2, this court said:

"The Constitution appears to make no distinction between the publicity of the initiative measure itself and the publicity of the arguments for or against such measure or proposed law. But there is nothing in the Constitution prohibiting the Legislature from requiring a fee for filing, printing, or binding either the proposed measure, or the arguments. It is clear that, where the Constitution does not prohibit the Legislature from requiring a fee in such case, it is within the power of the Legislature to require a fee. This is elementary, and no authority is needed to sustain it."

This is direct authority, if authority for a thing so obvious were needed, that the Legislature has the same power to provide that the proposers of a bill shall pay for its pub-

lication that it has to provide that the persons, whether opposed to or in favor of a bill, shall pay for publishing the separate arguments. A law exercising that power would furnish a complete remedy for any supposed abuse of the preamble. The argument of the majority opinion on this point might well be addressed to the Legislature. It certainly should not move this court to invade the legislative province, as this court itself has so recently defined it. This also disposes of what seems to me the groundless fear that, unless the courts, as legal knights-errant, come to the rescue, 1,000-page briefs may hereafter become a part of the preamble. It may be, as stated by the majority, that there is a growing popular distrust of the representative system of legislation, but the courts have no constitutional power to entertain that distrust and proceed to supply legislation, however much needed, on a matter within the admitted province of the Legislature through fear that the Legislature may not supply it.

5. Finally, even assuming that all that I have said in the foregoing is unsound, and that the court has a discretionary power to review and revise initiative bills, it seems to me that the bill here in question presents no such flagrant violation of the rule or law against argumentative matter evolved by the majority as to invoke the supposed discretion. I invite a reading of the preamble here presented in comparison with that involved and set out in the opinion in the case of *Huntworth v. Tanner*, supra. A candid comparison will demonstrate that the one is not a whit more argumentative, nor a priori false or insidious in its premises, than the other. Yet in the *Huntworth* Case this court employed the very argument of the preamble to control, circumscribe, and limit the broader language of the operative part of the act. No one would have said in advance of a concrete case that the plain words of the operative part of that bill required the use of a preamble to construe them, and no one can say in advance that the operative parts of the bill here involved may not require the aid of the preamble to determine whether they apply to concrete cases until the cases arise. Suppose, for example, it were argued in some future concrete case that the prohibited use of given fishing apparatus in given waters had no tendency to conserve or preserve the food supply of this state. Without the preamble it might be successfully answered that the act evinced no purpose to conserve that supply. With the aid of the preamble the argument, if founded in demonstrable fact, would be unanswerable under the doctrine of the *Huntworth* Case. The supposed case is by no means impossible, and in such a case the cancellation of the preamble by the majority of this court would clearly prove to be legislation pure and simple. To sanction the preamble as a controlling part of the law in

one case and cut it out as not part of the law in another amacks of caprice.

In any view of this case I cannot agree with the majority. I therefore dissent.

BAUSMAN, PARKER, and FULLERTON, JJ., concur.

STATE ex rel. GRIFFITHS et al. v. SUPERIOR COURT IN AND FOR THURSTON COUNTY et al. (No. 13422.)

(Supreme Court of Washington. July 5, 1916.)

1. INJUNCTION \S 88—DIRECT LEGISLATION—PUBLICATION OF ARGUMENTS—PREAMBLE.

A portion of the preamble in a proposed act, initiated under Const. art. 2, \S 1, amendatory to 3 Rem. & Bal. Code, \S 6604, known as the Workmen's Compensation Act, containing argumentative matter, held improper under Laws 1913, p. 418, providing for the publication of such arguments at the expense of proponent, and the publication of such preamble as a part of the proposed law at the expense of the state will be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 160; Dec. Dig. \S 88.]

2. STATUTES \S 35 $\frac{1}{2}$ —DIRECT LEGISLATION—PREAMBLE OF PROPOSED LAW—SUFFICIENCY.

A portion of the preamble of a proposed act, initiated under Const. art. 2, \S 1, amending the Workmen's Compensation Act (Laws 1911, p. 345), Laws 1915, p. 674, being section 6604-1 to and including section 6604-32, 3 Rem. & Bal. Code, so as to include surgical and hospital treatment of injured employees at the expense of the industries to be paid for out of the accident fund, is legislation, not mere preamble.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35 $\frac{1}{2}$.]

3. CONSTITUTIONAL LAW \S 46(1)—PROPOSED LEGISLATION—DETERMINATION OF VALIDITY.

The validity of proposed legislation initiated under article 2, \S 1, will not be determined by the court prior to the enactment of such legislation, and whether such proposed act violates the provision of article 2, \S 37, of the Constitution, providing that no act shall be amended by mere reference to its title, will not be determined.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 43, 45; Dec. Dig. \S 46(1).]

En Banc. Proceedings on the relation of Stanley A. Griffiths and others, to review a judgment of the Superior Court of Thurston County and D. F. Wright, Judge thereof, dismissing relator's petition for an injunction. Reversed and remanded, with directions.

Chas. S. Gleason, of Seattle, for appellant. C. J. France, of Seattle, and W. V. Tanner, of Olympia, for respondents.

HOLCOMB, J. This is a proceeding to review a judgment of the superior court in holding that the court had no jurisdiction, and entering a judgment of dismissal and for costs in a certain cause, wherein the relators were plaintiffs and the secretary of state and certain other persons as a joint legislative committee and as individuals

were defendants, to enjoin the defendants from circulating and printing, and causing to be distributed as a proposed initiative measure, initiative measure No. 20 as filed in the office of the secretary of state. Initiative measure No. 20 as shown by the files of the secretary of state commences as follows:

"Section 1. That there be added to Remington & Ballinger's Annotated Codes and Statutes of Washington a new section to be known as 6604-7a, as follows:

"Section 6604-7a: It is the policy of this state that industry shall bear the greater portion of the burden of the cost of its accidents. Compensation awarded injured workmen in a very large percentage of cases is insufficient to pay for surgical and hospital services. This expense now being borne by the injured workman is as much a burden of the industry as loss of time resulting from an injury to a workman. A workman's compensation law without provisions for surgical and hospital services is incomplete and inefficient. It not only works an injustice to the injured, but, through lack of proper treatment, an unnecessary burden on the industry. The welfare of the workman and the industries of the state demand that efficient surgical and hospital treatment be provided all injured workmen in extra hazardous employment, and to that end the Workman's Compensation Act, chapter 74, Laws of 1911, and chapter 188, Laws of 1915, being section 6604-1 to and including section 6604-32, Remington & Ballinger's Annotated Codes and Statutes of Washington, is hereby amended so as to include surgical and hospital treatment of the injured workmen at the expense of the industries to be paid for out of the accident fund."

The same contentions and the same arguments for and against the same were made in this case as in the case of State ex rel. Berry v. Superior Court, just decided, 159 Pac. 92, reference to which is now made for a discussion of the questions involved.

[1] There is some difference, however, between the supposed preamble in the present case and that in the other case. This proposed initiative measure is one to amend the so-called Workman's Compensation Act. An examination of the supposed preamble discloses that there is a declared purpose in this act to extend the policy of the state with reference to workmen's compensation for injuries. The first sentence in this section is a preamble, but it is not a mere preamble. As was the case in the original Workman's Compensation Act, it is broader than a preamble, and is in fact a legislative enactment. The sentences or clauses most complained of in this alleged preamble are these:

"Compensation awarded injured workmen in a very large percentage of cases is insufficient to pay for surgical and hospital services;" and "A workman's compensation law without provisions for surgical and hospital services is incomplete and inefficient."

These sentences are in fact argumentative and should not be placed in the proposed law. They are statements which may or may not be true. They are simply controvertible. The first clause of the section comes within the definition, stated in the

other case referred to, of legislation, and not mere preamble or argument.

[2] Relators assert that the concluding portion of section 1 of the proposed measure is void in violating section 37, art. 2, of the Constitution, providing that "no act shall ever be amended by mere reference to its title," etc. This concluding portion of section 1 is in the form of legislation, not mere preamble, as follows:

"The Workman's Compensation Act, chapter 74, Laws of 1911, and chapter 188, Laws of 1915, being sections 6604-1 to and including section 6604-32, Remington & Ballinger's Annotated Codes and Statutes of Washington, is hereby amended so as to include surgical and hospital treatment of the injured workmen at the expense of the industries to be paid for out of the accident fund."

[3] With the ultimate question of the validity of this proposed legislation we have no present concern. Courts will not determine such questions as to contemplated legislation which may, perchance, never be enacted.

For the reasons stated in the other case the judgment will be reversed, with directions to grant the injunction. The defendants may, however, expunge from the section which is argumentative all after the first sentence down to "the Workman's Compensation Law, chapter 74, Laws of 1911," etc. The remainder of the proposed initiative measure, with such argumentative matter eliminated, may go upon the ballot with the ballot title prepared by the Attorney General. Relators will recover costs.

MORRIS, C. J., and MAIN, MOUNT, and CHADWICK, JJ., concur.

CONRADS v. GREEN et ux. (No. 13005.)
(Supreme Court of Washington. July 21, 1916.)

1. REFORMATION OF INSTRUMENTS ¶45(1)—EVIDENCE.

The equitable remedy of reformation will be granted only upon clear and convincing evidence.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 157; Dec. Dig. ¶45(1).]

2. REFORMATION OF INSTRUMENTS ¶21—ILLITERACY.

In an action to reform notes and a mortgage, where all plaintiff's actions would and did lead defendants to believe that he could read and write English, he could not rely on the claim that they took advantage of his illiteracy.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 80; Dec. Dig. ¶21.]

3. CONTRACTS ¶94(1)—LACK OF BUSINESS EXPERIENCE.

The law does not prohibit a person learned in the intricacies of the business world from dealing with one utterly ignorant of business transactions, fairness alone being required, and that no unfair advantage be taken of ignorance or lack of business experience.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420, 428, 430, 1160; Dec. Dig. ¶94(1).]

4. REFORMATION OF INSTRUMENTS ¶21—GROUNDS.

Where the seller of land who agreed to take a mortgage on other lands in part payment insisted that the mortgagors become personally liable to him in the sum of \$5,000, which they refused to do, finally agreeing to become personally liable for \$3,000, the seller knowing the meaning of a deficiency judgment, and being advised at all times that the mortgagors would not become personally liable on the mortgage in any further sum than \$3,000, his attorney explaining the papers and their contents to him, which he at first refused to accept, but finally did so, he was not entitled to a reformation of the notes and mortgage.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 80; Dec. Dig. ¶21.]

5. NEW TRIAL ¶108(2)—NEWLY DISCOVERED EVIDENCE NOT AFFECTING RESULT.

In an action for reformation of notes and a mortgage, where the weight of the evidence was clearly that plaintiff understood the purport of the instruments when he accepted them for part of the purchase price of land, he was not entitled to new trial for newly discovered evidence going to show that he could not read or write the English language, since newly discovered evidence which cannot affect the result is not ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 227; Dec. Dig. ¶108(2).]

6. MORTGAGES ¶559(7)—FORECLOSURE—ATTORNEY'S FEES.

In an action for the reformation of notes and a mortgage and for foreclosure, where the provision for attorney's fees in the notes and mortgage was but part of the general obligation of the notes, governed by the terms of the mortgage, limiting the amount of the deficiency judgment, the refusal of personal recovery for such fees was proper.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1602, 1603; Dec. Dig. ¶559(7).]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by Iulif Iulfs Conrads against Ralph W. Green and Myrtelle I. Green, his wife. From a judgment granting plaintiff partial relief, he appeals. Judgment affirmed.

Butcher & Butcher, of Seattle, for appellant. Roney & Loveless, of Seattle, for respondents.

FULLERTON, J. This action was brought to reform two notes and a mortgage given to secure the same. There was also a prayer for a judgment of foreclosure of the mortgage. The lower court decreed a foreclosure, but denied the reformation. From this judgment, plaintiff appeals.

In order that the questions presented may be fully understood, a somewhat lengthy statement of the facts is necessary. Appellant was a native-born German having lived in that country for 35 years before coming to the United States in 1891. He came to this state about the year 1904, and located on 160 acres of land situated some 10 miles from Bellingham, which he improved and stocked. In the early part of 1913 the appel-

lant, desiring to sell his farm, listed the same with Shaver, Maskell & McCue, a real estate firm doing business in Bellingham. In May of that year Shaver took appellant to Eagle Harbor on a possible deal, and on the way called on respondent R. W. Green, at Seattle, to discuss with him the Eagle Harbor proposition. This deal was rejected by the appellant, and on the return to Seattle another call was made on the respondent, at which time the respondent stated that possibly he might be able to handle the appellant's property. The appellant had known the respondent previous to these visits.

On or about June 26, 1913, the respondent went to Bellingham at the request of Shaver. While there he met the appellant, went out and examined the farm, and after some little negotiation entered into a tentative agreement for its purchase. At the request of the appellant the parties went to the offices of Hans Bugge, an attorney of Bellingham, to execute the necessary papers. An escrow agreement was drawn up and executed whereby the respondent agreed to purchase the farm for \$23,300, \$5,000 to be paid in cash, \$2,800 in some Seattle lots, and \$15,500 by an assignment of a second mortgage on 30 acres of land situated in Yakima county. The respondent informed the appellant that there was a first mortgage of \$4,500 on the Yakima land, but that the land was ample security for both mortgages.

At the time of making the escrow agreement the respondent had practically closed a deal for the sale of his Yakima land, by the terms of which he was to accept an initial cash payment and take back a mortgage on the land for \$15,500. It was this mortgage respondent intended to assign to appellant in accordance with the escrow agreement. This sale, however, was not consummated, and the respondent on or about July 2, 1913, appeared with wife before appellant's attorney, Bugge, as a notary, and executed a mortgage for \$15,500 on the Yakima land, and proposed this mortgage in lieu of the mortgage agreed to be assigned. At a meeting of the parties held shortly thereafter the appellant rejected the mortgage for the reason that it contained a provision expressly relieving the mortgagors from any personal liability thereunder. At this meeting Bugge fully explained to the appellant the meaning of a deficiency judgment and a deficiency clause, advising him of the effect of an acceptance of a mortgage which repudiated personal liability.

Shortly after the rejection of this mortgage the appellant, desiring to ascertain for himself the actual value of the Yakima land, went to North Yakima and convinced himself by investigation that the land was not worth more than \$15,000. Bugge also, in order to get information for his client, wrote several letters to persons in North Yakima making inquiries concerning the land, and, having

received replies thereto during the appellant's absence, read them to him upon his return. The values stated in these letters agreed substantially with the value found by the appellant in his personal investigation; one of them placing the value as low as \$10,000.

On or about July 16th another meeting was had between the parties. At this time the appellant demanded \$5,000 personal liability in a deficiency judgment clause, while the respondent first refused to become personally liable for any portion of the debt. After considerable discussion it was finally agreed that the respondent should become personally liable through a deficiency judgment clause limited to the sum of \$3,000. There was some misunderstanding as to just how this personal liability was to be incurred; the appellant seemed to have thought that the deficiency judgment was to be entered up to \$3,000 in the event the land did not sell for enough to satisfy both mortgages, while the respondent's idea was that the mortgagors were to be personally liable only in the event the property did not sell for the amount of the first mortgage and \$3,000 additional. Shortly after this meeting Bugge prepared a mortgage according to his client's understanding of the agreement, and sent the same to respondents, at Seattle, for execution. This mortgage the respondent refused to execute, and shortly thereafter went to Bellingham with two notes and a mortgage which were drawn in accordance with his own idea of the agreement. A meeting was had on July 21st, at which the real estate brokers, the appellant, Bugge, and the respondent were present, when the respondent proposed his notes and mortgage. These were read and explained to the appellant by his attorney, who advised him not to accept them, saying that it was detrimental to his interests to do so, and that the mortgage was contrary to his (the attorney's) understanding of the agreement previously made concerning the \$3,000 personal liability. The appellant, accepting this advice, rejected the notes and mortgage as prepared by the respondent. The respondent thereupon returned to Seattle.

The final meeting was had in Bugge's office on July 26, 1913; the respondent being summoned to Bellingham by one of the real estate brokers. Besides the appellant, the respondent, and Bugge, there were present the three real estate brokers. Again the provisions of the notes and mortgage proposed by the respondent at the former meeting were read and explained to the appellant by Bugge, and he was again advised by him to reject them. Upon the respondent's refusal to make any further concessions, the appellant rejected the notes and mortgage as proposed. The testimony shows that after making this rejection the appellant left the office. He returned

ed, however, in about ten minutes, and without any further discussion accepted the notes and mortgage with the \$3,000 personal liability as proposed by the respondent.

The evidence further shows that during the negotiations between the appellant and the respondent the real estate firm of Shaver, Maskell & McCue had become agents for the sale of certain lands in California, and that they had sought to interest the appellant in this land, offering him the opportunity of trading in the respondent's mortgage on the purchase price in lieu of cash. Subsequent to the consummation of the transaction here involved the appellant purchased on contract 140 acres of the California land through Shaver, Maskell & McCue, turning in as part payment therefor the respondent's notes and mortgage at their full face value. The appellant, however, failed to meet the interest on subsequent payments due under his contract for the land, and the contract was canceled and the notes and mortgage returned to him. This action was thereafter brought.

[1] The principal question involved is the appellant's right to reformation upon the ground of fraud. In determining this question it should be carefully distinguished from the other questions not directly involved, but merely suggested by the facts. The question here is not whether the appellant was fraudulently induced to enter into any certain contract, but whether the notes and mortgage he accepted actually contain the agreement as he understood it at the time of accepting them. In other words, this is not an action for rescission or to recover damages, but for the reformation of certain instruments. It must be remembered also that the equitable remedy of reformation will only be granted upon clear and convincing evidence. *Hapeman v. McNeal*, 48 Wash. 527, 93 Pac. 1076; *Carlson v. Druse*, 79 Wash. 542, 140 Pac. 570; *Moore v. Parker*, 83 Wash. 399, 145 Pac. 440. The reason for the rule is well stated in *Potter v. Potter*, 27 Ohio St. 84, as follows:

"This principle rests upon the soundest reason and upon undisputed authority, and, if not adhered to by the courts, or, when plainly disregarded, is not enforced by reviewing courts, the security and safety reposed in deliberately written instruments will be frittered away, and they will be left to all the uncertainty incident to the imperfect and 'slippery memory' of witnesses."

[2] It is the appellant's principal contention that he was unable to read or write English, and that advantage was taken of him, because of his illiteracy and ignorance. But, if we were to admit the appellant's illiteracy and inability to read and write, we cannot agree with the conclusion counsel draws therefrom, namely, that for this reason fraud was practiced upon him by the respondent. There is no evidence that the appellant ever informed the respondent, or any of the others connected with this trans-

action, that he could not read or write. On the contrary, his every action would, and did, lead them to believe he could read and write English. The appellant admits that while in the real estate office, on various occasions, he would pick up a daily newspaper and hold it before him for a considerable time, to all appearances reading it. When the various papers in the transaction were being discussed, they were handed to him and he apparently read them over. At no time did he intimate to any one that he could not read, or was unable of himself to gather their contents. In view of his actions, from which it would naturally be inferred he could read and write, we fail to see how the appellant can now rely upon the claim that the respondent took advantage of his illiteracy.

[3] Nor does it follow, as is contended, that the appellant, being unable to read and write, was without any business ability whatever, and was therefore an easy subject for imposition. A man's inability to read or write the English language does not indicate his ignorance of business transactions. In searching the record we fail to find the evidence which shows that the appellant is utterly ignorant of business affairs. True, he may be technically unlearned, but there is considerable undisputed testimony showing him to have had some previous business experience of the nature here involved, and the record shows that he had the capacity to amass a considerable property. However, the law does not prohibit a person learned in the intricacies of the business world from dealing with one who is utterly ignorant of business transactions. All that is required is fairness; that no unfair advantage be taken of one's ignorance or lack of business experience.

[4] We are unable to see where the appellant has made out a case entitling him to reformation. He knew well the meaning of a deficiency judgment, and was advised at all times that respondent would not become personally liable upon the mortgage in any further sum than the \$3,000. He knew, and was advised at all times by his attorney, what the result would be should he have to foreclose a mortgage upon the Yakima land which expressly disclaimed any personal liability. Knowing this, he first insisted that the mortgagors become personally liable to him in the sum of \$5,000. This the respondent refused to do, but finally did agree to become personally liable for \$3,000. The appellant also rejected this offer, and solely for the reason that he had sufficient business acumen to foresee that a loss might fall upon the holder of the mortgage should its foreclosure become necessary. His attorney read and fully explained the papers and their contents to him. He did, however, reconsider his rejection and the advice of his attorney, and before the final meeting broke up accepted of his own volition the notes and

mortgage. There is no claim that other offers were proposed during the short period between his last rejection and his subsequent acceptance, and no contention can be made that he might have become confused as to just what he was doing. In view of the record, we cannot reach any conclusion other than that the appellant knew what rights the instruments he accepted conferred upon him. Not only is the record clear upon this point, but it seems to us to give a reason for appellant's seemingly unbusinesslike bargain in accepting respondent's offer after he had personally ascertained the value of the Yakima property, and after he knew the effect of the provisions of the notes and mortgage; the instruments he accepted could be turned in as payment on the California land he had concluded to purchase.

[5] A further contention is made that the trial court erred in denying his motion for a new trial upon the ground of newly discovered evidence. Affidavits were filed in support of the motion which go to show that the appellant could not read or write the English language, and it is averred that upon a retrial this fact could be established. But the trial judge made no finding upon the question whether appellant could read or write, and in denying the motion for new trial stated that his conclusion to the effect that the appellant accepted the instruments knowing what they contained and their effect was based upon other considerations than that of the appellant's ability to read and write, holding, in effect, that this circumstance was not a controlling element in the case. With this conclusion of the trial court we agree. To our minds the weight of the evidence is clearly to the effect that the appellant understood the contract and its purport, and this is all that is necessary even though the record established beyond a doubt that he could neither read nor write the English language. Newly discovered evidence which in no event could affect the result is not ground for a new trial.

[6] One further claim of error is presented, namely, the refusal of the trial court to permit a personal recovery for the attorney's fees provided for in the note and mortgage. But, without following the argument of counsel, we are clear that these were but parts of the general obligations of the notes, governed by the terms of the mortgage limiting the amount of the deficiency judgment. In other words, the provisions for attorney's fees simply enlarge the amount of the obligation in case of a foreclosure of the mortgage. They were not contracts to be independently performed.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, CHADWICK, and ELLIS, JJ., concur.

THOMPSON v. BROZO. (No. 18309.)

(Supreme Court of Washington. July 7, 1916.)

1. HUSBAND AND WIFE \S 48(1)—CONVEYANCE—BURDEN OF PROOF.

The burden is on a husband to show that a transfer made to him by his wife for inadequate consideration was made freely and that the transaction was fair and just.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 242, 247, 248; Dec. Dig. \S 48(1).]

2. HUSBAND AND WIFE \S 52—CONVEYANCE—VACATION FOR FRAUD—DIVORCE.

Where a husband, believing his wife had committed adultery, stated that if she would deed her property to him he would get a divorce for lesser grounds, but that, if she did not, he would get it for other grounds, and she could fight it to her heart's content, so that she, with knowledge of her rights and opportunity to accept his proposition or secure a property settlement through the courts, made the conveyance and permitted him to secure the divorce without seeking alimony, she could not set aside her conveyance on the ground of fraud and duress.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 264-269; Dec. Dig. \S 52.]

3. HUSBAND AND WIFE \S 52—CONVEYANCE—VACATION—EVIDENCE—MATERIALITY.

In a wife's action to set aside for fraud and duress her deed of community property to her husband, made in anticipation of divorce, where the decree of divorce was not attacked, nor did the wife complain of the grounds upon which it rested, the court's refusal to admit her testimony as to her husband's treatment of her throughout their married life was proper.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 264-269; Dec. Dig. \S 52.]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Jeanette L. Thompson against George Brozo. From judgment dismissing the action, plaintiff appeals. Affirmed.

Thos. R. Horner, of Seattle, for appellant. Glenn E. Hoover, of Seattle, for respondent.

ELLIS, J. Action to set aside for alleged fraud and duress in its procurement a deed of community property from wife to husband made in anticipation of a divorce, and to modify the provision of the decree of divorce awarding the property in question to the husband as his separate property. In other respects the decree of divorce is not assailed.

The following facts are undisputed: The property was community property of the parties, and is now worth about \$3,000. No children were born to the marriage. The deed was made on August 8, 1913, in the office of the husband's attorney, who took the wife's acknowledgment. No money consideration passed. The husband's complaint for divorce was based on the ground of incompatibility and desertion, and was verified on August 9, 1913. The wife answered, putting in issue the allegations of the complaint, and appeared by attorney when the decree of divorce was entered on August 23,

1913. This attorney was recommended to her by the husband's attorney, and his fees were paid by the husband. The complaint in the present action was filed in April, 1914. Since bringing this suit plaintiff has married again.

As showing fraud and duress, it is alleged that the husband prior to the making of the deed falsely charged the wife with having committed a statutory offense, threatened to prosecute and send her to the penitentiary if she did not make the deed, represented that the giving of the deed was necessary to save her from prosecution, promised that in consideration of her making the deed he would procure a divorce upon grounds which would not reflect upon her character, and further promised that when the decree was obtained he would reconvey to her one-half of the property or sell it and give her one-half of the proceeds.

At the trial plaintiff testified, in substance, to all of these things, and, further, that she did not know the contents of the deed when she executed it, and did not learn that she had conveyed away her property until after the decree was entered; that when asked by defendant's attorney prior to the taking of her acknowledgment if she knew the nature of the paper she told him that she did not, except that defendant had promised to give her half the property; that the attorney nodded his head; and that neither the husband's attorney nor her own advised her of her rights in the premises. Though she admitted that her own attorney in the divorce suit prior to preparing her answer in that suit asked her if she wanted alimony, she claimed that she then told him that she did not know, whereupon he called up defendant's attorney by telephone, and after talking with him told her that it was all right; that she then signed the answer and went away. She claims that she first learned of her rights in the premises about a week after the decree of divorce was entered.

Defendant testified that he never at any time threatened to prosecute or send plaintiff to the penitentiary, but admits that he said to her:

"You sign the property over to me and I will get the divorce on lesser grounds. If you don't, I will get it for adultery, and you can fight it to your heart's content."

The attorney who acted for defendant when he was plaintiff in the divorce suit testified positively that when the deed was executed the whole situation was explained to her, covering the grounds of divorce, the husband's charges, and the purpose of the deed, both in the presence of the husband and to her alone, and that she fully understood the situation and was perfectly willing to make the deed on condition that the divorce be secured on the milder grounds. Her own attorney in the divorce action testified that when she came to him she made no mention of any property or of any controversy touching property and said she did not want alimony.

The trial court expressed the belief that plaintiff knew just what she was doing when she executed the deed, knew its full purpose and purport and signed the answer with full knowledge of her rights. The action was dismissed. Plaintiff appeals.

[1, 2] Appellant relies mainly upon our decision in the case of Yeager v. Yeager, 82 Wash. 271, 144 Pac. 22. In that case the parties had been estranged. The husband on bad faith, pretending to desire a reconciliation, procured a deed from the wife, on an agreement secured by bond, to pay her \$15 a month as long as she conducted herself with propriety and remained his wife. Immediately on securing the deed he commenced action, secured a divorce, and refused to make further payments. The facts in that case are far from being a parallel with those found here. Rather they present an antithesis. The deed was there procured, not in contemplation of a divorce desired by both parties, but for the professed purpose of preventing a divorce and bringing about a reconciliation. The distinction is too plain to require amplification. On the evidence here we are satisfied that the respondent, believing that appellant had been guilty of a gross infraction of her marriage vows, was determined to secure a divorce, and that appellant was perfectly willing that he should do so. We are further satisfied that the respondent made no threat of a criminal prosecution, but did give her the choice either to make the property settlement according to his desires, in which event he would secure the divorce on the milder grounds, or to take the matter of the property settlement into court, in which event he would ask for the divorce on the ground of adultery. Such was his testimony and he was corroborated by his attorney in that suit, whose character neither as a man nor as an attorney is questioned. We are also satisfied that she knew just what she was doing, and knew the full purpose and purport of the deed. Her claim that she did not, and that she was induced to sign it by respondent's promise to reconvey to her half of the property, is not only inconsistent with itself, but is so inconsistent with her story as to respondent's threats of prosecution as to weaken the inherent credibility of her entire testimony. While it is true, as we said in the Yeager Case, that the burden is upon the husband to show that a transfer made to him by his wife for an inadequate consideration was made freely, and that the transaction was fair and just, we have never said that a settlement of property rights made in contemplation of a divorce in which both parties acted with a full knowledge of all the circumstances is necessarily fraudulent. To so hold would invalidate every such settlement. We fail to find that the respondent's conduct constituted duress or coercion. Appellant knew then as well as now whether she was guilty of the thing charged. She had her free choice el-

ther to contest the divorce and secure a property settlement through the courts or to make the settlement and accept the decree on the milder grounds.

[3] Appellant contends that the court erred in refusing to admit her testimony as to respondent's treatment of her throughout their married life prior to the divorce. We find no error in this. The decree of divorce itself is not attacked, nor does the appellant complain of the grounds upon which it rests. The sole question in this case is whether or not the deed was procured through fraud and duress. We find that it was not.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, FULLERTON, and CHADWICK, JJ., concur.

REMNSNYDER v. LOWMAN & HANFORD. (No. 13403.)

(Supreme Court of Washington. July 7, 1916.)

1. MASTER AND SERVANT ¶97(2)—LIABILITY OF MASTER—INJURIES TO SERVANT.

Where an open elevator shaft is maintained, it is the duty of the master to anticipate and guard against acts of a servant in the exercise of ordinary prudence when proximate to the dangerous agency which might result in his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. ¶97(2).]

2. MASTER AND SERVANT ¶155(1)—LIABILITY OF MASTER FOR INJURIES TO SERVANT—OBVIOUS DEFECTS.

A recess or inset in the wall of an open elevator shaft in which an employé's foot caught, resulting in his injury, *held* not so open and obvious a defect that the employé, who had worked in the place but a short time, and did not know of the defect, was bound to guard against it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. ¶155(1).]

3. MASTER AND SERVANT ¶129(1)—LIABILITY OF MASTER FOR INJURIES TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE OF INJURY.

Where an employé was injured on elevator by having his foot caught in an inset or recess of the wall of an open elevator shaft, *held*, that such defect was the proximate cause of his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 257; Dec. Dig. ¶129(1).]

4. MASTER AND SERVANT ¶236(11)—LIABILITY OF MASTER FOR INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Employé *held* not guilty of contributory negligence where his injury occurred by reason of his foot catching in an inset or recess in the wall of an open elevator shaft merely because he took a position at the rear of the elevator instead of at the side; the evidence showing that he had no reason to anticipate the dangerous defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 735; Dec. Dig. ¶236(11).]

5. MASTER AND SERVANT ¶280—LIABILITY OF MASTER FOR INJURIES TO SERVANT—ASSUMPTION OF RISK.

Evidence *held* insufficient to charge employé with assumption of risk where his injury was

caused by his foot being caught in a recess or inset of the wall of an open elevator shaft, of which he did not know, and which was not so open or obvious as to put him on notice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. ¶280.]

6. MASTER AND SERVANT ¶159—LIABILITY OF MASTER FOR INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Where plaintiff with another employé was riding an elevator, and plaintiff was injured by his foot being caught in an inset or recess of the wall of the open elevator shaft, *held*, the rule of fellow servant does not apply, since such other employé had no connection with the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 818-825; Dec. Dig. ¶159.]

7. APPEAL AND ERROR ¶1083(5)—REVIEW—INSTRUCTIONS—ERROR FAVORABLE TO APPELLANT.

Appellant cannot complain of errors in instructions which were favorable to himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. ¶1033(5); Trial, Cent. Dig. § 587.]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Dewey Remnsnyder against Lowman & Hanford, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Ramey, Jr., of Seattle, for appellant. Roney & Loveless, of Seattle, for respondent.

CHADWICK, J. Respondent, Dewey Remnsnyder, was employed by the appellant company. With another, he took some sectional bookcases from a show window and placed them on the elevator which was used for transporting freight from one floor to another. After the elevator had been loaded the two employés took positions upon the elevator, respondent at the back facing the front, and the other employé at the front. At the fourth floor there was a steel I-beam running horizontally along the side of the shaft, and upon which, as we understand the testimony, the floor rested. The wall at the back of the elevator, but for the I-beam, which had the effect of making an inset or recess in the wall about two inches deep, presented an even surface from the bottom to the top of the elevator shaft. As the elevator passed the recess the heel of respondent's shoe caught on the upper edge of the I-beam or wall where it came flush with the I-beam, and he was painfully injured. From an adverse verdict, appellant prosecutes this appeal. Aside from the assignments going to the admission and rejection of testimony and to the course of the trial, the errors relied on go to the questions of contributory negligence and to what is insisted was a denial of the benefit of other affirmative defenses.

Much of the record is made up of testimony tending to show that the elevator was in bad condition. The accident is not accounted for with certainty. Respondent

seems to depend upon two theories: First, that the elevator moved with an oscillating movement, thus furnishing an hypothesis from which the jury might find that respondent, although he did not move his foot, was caught as a result of the swing of the elevator; second, that one of the beams in the floor of the elevator caught on the I-beam and was loosened, throwing respondent's foot backward into the recess. There is quite as much, and probably more, dependable testimony to show that there was not sufficient play in the movement of the elevator to make it probable, or even possible, that the accident happened on account of any movement of the elevator.

Appellant's case is built up on the theory that respondent voluntarily, and without regard to his own safety, moved his foot backward (he was facing the front of the elevator), and is, in consequence, guilty of contributory negligence; that, if he had not done so, it would have been physically impossible for respondent to have been injured. Respondent says that he did not move his foot backward, but when his testimony is considered as a connected narrative we are impressed, as the jury must have been, that respondent was not conscious of the movement of his feet, and that he must have moved his foot, or the breaking board moved his foot, far enough to catch the I-beam at the very instant the elevator floor passed the inset or recess in the wall. But, if it be admitted that respondent moved his foot, we are still of opinion that he was not guilty of contributory negligence, and that the inset in the wall of the shaft was the proximate cause of the injury.

[1] When an open shaft of an elevator is maintained, and a workman is expected to go up and down in the course of his employment, he is not bound to anticipate or keep in mind the unusual. The only inquiry is whether he is guilty of such imprudence as to make him the prime actor in his own undoing. Or, to state the proposition in another way, the duty was upon the master to anticipate and guard against that which a man exercising ordinary prudence might do when proximate to the dangerous agency.

[2, 3] The defect in the elevator shaft was not so open and obvious as to excite a person to more than ordinary care for his own safety or to cause him to hold his foot within the movement of a few inches—one or two at best. Besides, respondent testified that he had worked at the place but a short time, and did not know of the inset. We hold that the proximate cause of the injury was the defect in the elevator shaft.

The exceptions going to the admission or rejection of testimony and to the instructions given and refused are so numerous that they will not bear discussion *seriatim*. It is enough to say that we have read the record

with care, and find nothing which would call for a reversal of the case unless we follow the theory of appellant, which, as we have endeavored to show, is not well founded.

[4] It is contended further that respondent was guilty of contributory negligence in that he should have stood at the side of the elevator instead of at the back. There was room for him at either place, and he cannot be charged because he took a position which harbored a danger which he had no reason to anticipate, and which we must assume was not appreciated by his more experienced coemployee, who otherwise would have warned respondent of his peril.

[5] The court rejected the defense of assumption of risk upon the theory that the elevator was not constructed and maintained in the manner provided by the ordinances of the city of Seattle. We shall not discuss this assignment. If the ordinances be disregarded, the testimony is quite insufficient to charge respondent with the assumption of the risk. Respondent says he did not know of the recess, and the danger was not so open and obvious as to put him to that hazard.

[6] Neither was appellant prejudiced by a denial of the right to assert the law of fellow servant as a governing rule. The other employé on the elevator may have been a fellow servant, but the accident is in no way chargeable to his act. It happened in consequence of an agency entirely independent.

[7] We believe that the jury arrived at a true verdict which is sustained by the record, and that the instructions, which might be criticized, were favorable to appellant, and that it cannot now complain

Affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

ELMORE v. McCONAGHY. (No. 12975.)
(Supreme Court of Washington. July 21, 1916.)

1. PARTNERSHIP §95 — FIDUCIARY NATURE OF THE RELATION.

The fiduciary relationship existing between partners ceases to exist, when they undertake negotiations for the sale or purchase of each other's interest, in the absence of a showing that the complaining partner was not *sui juris* or had a right to rely on the other partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 142; Dec. Dig. §95.]

2. PARTNERSHIP §311(5)—PARTNERSHIP SETTLEMENT—MISTAKE AS GROUND FOR SETTING ASIDE.

Where partners have an equal opportunity to know the condition of the business at the time of the sale of the interest of one to another, the failure of one partner to investigate the condition of the business is negligence, and relief will not ordinarily be granted for mistakes in such transaction.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 723; Dec. Dig. §311(5).]

3. PARTNERSHIP — §311(5)—PARTNERSHIP SETTLEMENT—MISTAKE AS GROUND FOR SETTING ASIDE.

Fraud or mistake is sufficient ground for setting aside a partnership settlement and retaking the account.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 723; Dec. Dig. §311(5).]

4. PARTNERSHIP — §311(5)—PARTNERSHIP SETTLEMENT—MISTAKE AS GROUND FOR SETTING ASIDE—PROOF.

Before opening a partnership settlement, whether for fraud or mistake, the specific actions of fraud, or the particular mistakes, must be shown by clear and satisfactory proof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 723; Dec. Dig. §311(5).]

5. PARTNERSHIP — §311(5)—SETTLEMENT—SETTING ASIDE FOR FRAUD.

A partnership settlement wherein one partner purchased the interest of another will not be set aside merely because of mistake resulting from reliance by one partner on an inventory prepared by the bookkeeper of the firm, in the absence of a showing of collusion between the bookkeeper and the other partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 723; Dec. Dig. §311(5).]

6. PARTNERSHIP — §334—SETTLEMENT—ACCOUNTING—UNFINISHED MATTERS.

In an action on notes given in a partnership settlement by one partner in payment of the interest of the other, the trial court properly refused to offset credits due the defendant under such settlement, where owing to the unfinished nature of the items a complete adjustment was impossible.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 734; Dec. Dig. §334.]

Department 1. Appeal from Superior Court, King County; E. P. Whiting, Judge pro tem.

Action by A. S. Elmore against Hugh McConaghy. Judgment for plaintiff, and defendant appeals. Affirmed.

Smith, Foster & Worthington and William R. Bell, all of Seattle, for appellant. E. E. Simpson and B. B. Moser, both of Seattle, for respondent.

FULLERTON, J. The plaintiff, A. S. Elmore, and the defendant, Hugh McConaghy, formed a copartnership as coal dealers in the year 1909. On June 30, 1913, they dissolved partnership by agreement, McConaghy buying out Elmore's interest for \$2,600, paying \$600 in cash, and giving 20 promissory notes for \$100 each, dated August 22, 1913, bearing 6 per cent. interest until paid, the notes maturing monthly in a series running from 1 to 20 months after date. After seven of these monthly notes had been paid, McConaghy refused to make further payments until a readjustment of their prior settlement should be had. Elmore brought this action to recover upon the four notes maturing 8, 9, 10, and 11 months respectively after date. The complaint was in the ordinary form of an action on promissory notes, praying judgment for the face of the notes, with interest and reasonable attorney fees.

The answer, by way of affirmative defense

and counterclaim, set up that McConaghy in the year 1909 was conducting a coal business as sole trader, and that he and Elmore entered into a partnership agreement by which the latter was to acquire a half interest in the business, and pay for same out of such of his share of the profits as was left after the members had each drawn down \$100 per month out of the proceeds of the business; that at the time of dissolution Elmore had not paid any portion of the purchase price of his half interest in the business; that on June 30, 1913, McConaghy agreed to buy Elmore's interest, which from a statement prepared by Elmore from the books of the firm, appeared to be of the value of \$2,600; that McConaghy, reposing confidence in Elmore as a bookkeeper and accountant and as a partner in the business, and relying upon the correctness of the written statement, purchased his one-half interest for \$2,600, paying \$600 in cash and executing 20 promissory notes of \$100 each for the balance; that at the date of settlement there was a large number of bills and accounts receivable included in the valuation which were considered worth face value, but it was agreed between the parties that, if any of said accounts were uncollectible, one-half thereof should be paid by Elmore or credited upon the notes; and that there were expenses and costs of pending partnership litigation which it was agreed should be paid share and share alike. It was further alleged that after the dissolution it was discovered that Elmore had drawn from the firm the sum of \$1,500 in excess of the amounts accounted for and credited by him; that during the copartnership Elmore had full charge of the books of account and handled all the cash, and whatever knowledge McConaghy had of these matters was acquired from him; that at the time of the dissolution no accounting was had, but the notes were given with the understanding that a further accounting should be had and the partnership matters adjusted according to the respective rights of the parties; and that one-half of the uncollectible accounts, of the expenses of litigation, and the shortage of Elmore as shown by the books exceeds the amount of all the notes still held by Elmore. That after the discovery of the discrepancies between the accounts and Elmore's statement on which the settlement was made, McConaghy frequently requested Elmore to meet him and adjust all matters of difference between them, which Elmore has neglected and refused to do, and that there is no way to protect the rights and adjust the differences of the parties except by a full and complete accounting covering a period of about five years; and the prayer was for an order of accounting, so that there should be a full, complete, and just settlement of the differences between the parties.

The reply, after denying all the material allegations of the counterclaim, set up affirmatively that the agreement for the purchase by McConaghy of Elmore's interest was evidenced by a bill of sale as set out in defendant's bill of particulars; that two notes had been placed in escrow as security pending settlement of five separate items—the Travis, Craib, Merriman, and Turner accounts, and a suit of R. E. McConaghy v. McConaghy & Elmore; that no other agreement was made between the parties at the time of the transfer of the business; that, prior to closing the transaction between them, Elmore employed an expert accountant to audit the books, but defendant refused to permit this to be done; that, subsequent to that time, settlement was made between them after a full and complete investigation and understanding of all partnership matters; that for four years prior to the sale of his interest Elmore was not in charge of the books, but that they were kept by bookkeepers employed by the firm; that for more than one year last past the partnership books were kept by one Harlow, who is now in the employ of McConaghy, and who compiled all the figures at the time of the sale; that McConaghy has made no effort to collect the five items above referred to; and that the partnership was terminated by mutual consent July 1, 1913, and that on the 22d day of August following a notice of dissolution was signed by both parties.

The trial judge rendered judgment for plaintiff on the four notes sued on for \$400, together with interest and \$100 attorney fees. He denied the cross-complaint for an accounting, without prejudice to any claim defendant might have by reason of the five accounts referred to as the F. F. Travis, McConaghy v. McConaghy & Elmore, J. L. Craib, F. F. Merriman, and Homer Turner accounts, which had been agreed upon by the parties at the time of final settlement as subject to future adjustment. From this judgment defendant appeals.

[1, 2] It is our opinion that the court reached a correct conclusion upon the facts. There is no proof of fraud, overreaching, undue influence, or reliance on fiduciary relations. Both parties were intelligent business men in full possession of all their faculties. The affairs of the firm were equally open to both for inspection; and an investigation of the books would have disclosed the discrepancies that are now put forward as a basis for asking an accounting. Whatever fiduciary relation was imposed on the partners toward each other during the continuance of the partnership, the relation ceased when they began to negotiate between themselves as to the price to be paid by one for the other's interest. They were then dealing with each other at arm's length, in the absence of any circumstance showing that the complaining party was not *sui juris*, or had a

right to rely upon the other. The allegation of trust in one who had been a partner is not sufficient to overthrow a solemn agreement entered into after each had bargained with the other to get the most advantage possible for himself from the agreement. The appellant asserts now that the books of account were not accurately kept, and that in consequence he has got the worst of the bargain, and he asks the court to revise his contract. But he had equal opportunity with his partner to know the exact condition of the business when he bought out the latter, and his failure to improve the opportunity was negligence.

"If both had equal facilities for investigation, relief will not be lightly granted, if at all, for mistakes arising from negligence." 2 Bates Partnership, § 960; Quinlan v. Keiser, 66 Mo. 603; Hamilton v. Wells, 182 Ill. 144, 55 N. E. 143.

[3, 4] It is undoubtedly true that fraud or mistake in a settlement between partners is a sufficient ground to set it aside and retake the entire account. And sometimes a partnership settlement will be opened for error, for the purpose of surcharging and falsifying the account. But before reopening such a settlement, whether for fraud or mistake, specific acts of fraud or particular mistakes must be shown (*Merriwether v. Hardeman*, 51 Tex. 436), and the proof must be clear and satisfactory (*Powell v. Heisler*, 16 Or. 412, 19 Pac. 109; *Hoyt v. McLaughlin*, 52 Wis. 280, 8 N. W. 889; *Mahnke v. Neale*, 23 W. Va. 57).

[5] McConaghy's chief ground for overthrowing the settlement is that he relied upon the inventory compiled by the bookkeeper, which had been indorsed by Elmore as correct. This is not sufficient, unless there was collusion between the bookkeeper and Elmore, and none such was shown.

"The question being whether one partner was induced to pay a certain price for the interest of his copartner by false representations of the latter, if the seller made such statements solely on information derived from a clerk of both of them, and the purchaser knew that such was the case, the falseness of such statements would not avoid the trade, if the seller correctly reported them as received from the clerk." *Hunt v. Hardwick & Co.*, 68 Ga. 100.

See, also, *Scheuer v. Berringer*, 102 Ala. 216, 14 South. 640; *Little v. Little*, 2 N. D. 175, 49 N. W. 736; *Hallock v. Streeter* (C. C.) 102 Fed. 193.

[6] The appellant further contends that the trial court, after holding that the partnership settlement was binding and conclusive upon the parties, should have allowed appellant in this action the benefits expressly allowed him by the terms of that settlement. This has reference to the Travis, Craib, Merriman, and Turner accounts, and the suit of R. E. McConaghy against the firm of McConaghy & Elmore, concerning which it was agreed by the terms of settlement that the loss, if any, should be borne equally between appellant and respondent. There was evi-

dence showing that appellant was entitled to certain credits on those specific items, but the court refused to enter upon the inquiry, reciting, however, that his refusal was without prejudice to the right of appellant to establish his claims in another action. We think the holding of the trial court was proper. As we read the evidence, no complete adjustment of these matters could now be had owing to their unfinished nature. The court was not required to take them up by piecemeal.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and CHADWICK, JJ., concur.

MARSTON v. RUE et al. (No. 13409.)

(Supreme Court of Washington. July 10, 1916.)

1. EVIDENCE — 80(1)—PRESUMPTIONS—LAWS OF OTHER STATES.

Where the marital property laws of another state or territory are not in proof, they are conclusively presumed the same as local laws.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. —80(1).]

2. HUSBAND AND WIFE — 262(1)—COMMUNITY PROPERTY—PROPERTY ACQUIRED DURING MARRIAGE.

An automobile, acquired after marriage, is presumptively community property, although prior to its acquisition certain property has been divided between the husband and wife, under Rem. & Bal. Code, § 8766, as to conveyances between spouses.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 913; Dec. Dig. —262(1).]

3. HUSBAND AND WIFE — 262(2)—COMMUNITY PROPERTY—EVIDENCE AS TO CHARACTER OF PROPERTY—BURDEN OF PROOF.

Where a husband asserts exclusive title to property bought after marriage, the burden of proof is on him to show it was not acquired as community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 914; Dec. Dig. —262(2).]

4. HUSBAND AND WIFE — 264—COMMUNITY PROPERTY—EVIDENCE AS TO CHARACTER OF PROPERTY—SUFFICIENCY.

In replevin by husband of automobile sold by wife as community property, his testimony that he bought it from proceeds of "my mining operations in Alaska," he not having bought it until a year after division of certain property between himself and wife, and his evidence not showing whether in that time he had or had not acquired new property or received new earnings from speculations, or whether this could not have been from former property still undivided, supported a finding that the automobile was a family asset.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. —264.]

5. HUSBAND AND WIFE — 265—COMMUNITY PROPERTY—RIGHTS OF HUSBAND AND WIFE.

A wife's rights in family personality are not of the contingent sort, like dower or survivorship, but a present estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

6. HUSBAND AND WIFE — 267(1)—COMMUNITY PROPERTY—RIGHTS OF HUSBAND AND WIFE.

Although by statute the husband is made manager, with power to sell and dispose of community personality, he cannot waste it or give it away, especially to evil associates.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929, 930, 936; Dec. Dig. —267(1).]

7. HUSBAND AND WIFE — 270(8)—COMMUNITY PROPERTY—RIGHTS OF HUSBAND AND WIFE.

When a wife seeks to interfere with a husband's disposal of community personality, she has the burden of proof, and the presumptions are against her, and she cannot act on whim or caprice.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 931; Dec. Dig. —270(8).]

8. HUSBAND AND WIFE — 267(8)—COMMUNITY PROPERTY—RIGHTS OF HUSBAND AND WIFE.

Notwithstanding the statute giving husband sweeping powers of management of community personality, in a plain case of wrongful giving away of such property by husband the wife may have redress, either by damages or by recovery of the thing itself from his fraudulent donee, since the powers given by statute are for the facilitating of the business of the community.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 934; Dec. Dig. —267(8).]

9. HUSBAND AND WIFE — 265—COMMUNITY PROPERTY—RIGHTS OF HUSBAND AND WIFE.

Where a husband gave an automobile, which was community property, to his mistress, and, returning to Alaska, left it at a garage subject to her order, the wife had the right to take it from the garage.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

10. HUSBAND AND WIFE — 267(2)—COMMUNITY PROPERTY—SALE BY WIFE—"PERISHABLE PROPERTY."

Under such circumstances the wife had the right to sell the automobile; it being "perishable property" requiring expense of insurance and storage and deteriorating in time from mere loss of style.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 931; Dec. Dig. —267(2).]

For other definitions, see Words and Phrases, First and Second Series, Perishable Property.]

11. HUSBAND AND WIFE — 267(2)—COMMUNITY PROPERTY—SALE BY WIFE.

A sale by wife of community personality is not voidable by husband because of insufficient consideration, where the consideration was not fraudulently low.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 931; Dec. Dig. —267(2).]

12. HUSBAND AND WIFE — 267(8)—COMMUNITY PROPERTY—SALE BY WIFE.

A sale by wife of community personality is not voidable because of her unexpressed intention not to convey her husband's half interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 934; Dec. Dig. —267(8).]

13. SALES — 140—PERSONALTY—DELIVERY.

A sale of personal property is good by mere delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 339; Dec. Dig. —140.]

14. HUSBAND AND WIFE \Leftrightarrow 270(8)—**COMMUNITY PERSONALTY—RIGHTS OF PURCHASERS.**

The title of those buying from a wife community personalty in her husband's absence is not presumptively good; but they buy at their peril, as she can deliver title in only an unusual situation, and they have the burden of proving the exception beyond reasonable debate.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 981; Dec. Dig. \Leftrightarrow 270(8).]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by M. H. Marston against Olaf Rue and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lyons & Orton, of Seattle, for appellant. Walter S. Fulton, of Seattle, for respondents.

BAUSMAN, J. The Marstons, married in Alaska, had accumulated there, up to 1912, sundry mining properties, which in that year they divided by deed to the wife of a half interest and her acknowledgment that it constituted the husband's full settlement of her rights in those claims. Under just what relation the mines had been acquired is not clear. The wife's acquittance recites the one-half interest as hitherto held "in trust" for her, and the meager testimony points to a business partnership in mining property, acquired, as she testified, "by joint efforts." Be this as it may, the division by its express terms goes no further than to sever those particular assets. Assuming it sufficient for a severance under Rem. & Bal. Code, § 8766, it was partial only. It settled no other present or any future property rights. "He gave it to me, not because we were separating, but so I would be protected, and he would not throw away everything on that woman. That never released Mr. Marston as far as my support or taking care of me was concerned in any way, shape, or form." These comments on the documents are not controverted, nor does the record show arrangement for divorcé. After this the pair next appear in Seattle, where they lived apart, and, the infatuation of the husband for the other woman becoming shameless, he bought and gave her the use of an automobile costing \$2,200. After this he returned to Alaska. The paramour flaunting herself intolerably in the motor car for three or four months after his departure, the wife took it from the garage and sold it to defendant, not out of necessity for money, but from an assertion of right. The present suit is the husband's replevin against the purchaser.

[1] The marital property laws of Alaska not being in proof, we conclusively assume them to be the same as our own. *Sheppard v. Cœur d'Alene L. Co.*, 62 Wash. 12, 112 Pac. 932, 44 L. R. A. (N. S.) 287, Ann. Cas. 1912C, 909; *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791; *Clark v. Eklings*, 29 Wash. 216, 69 Pac. 786.

[2, 3] The automobile, acquired after mar-

riage, was then presumptively community personalty. To be sure, the husband had a right to prove this machine his own out of the previous property set aside to him, but his own testimony, which is all there is on this subject, is most unsatisfactory. He bought it, he says, from the proceeds of "my mining operations in Alaska." This is uncertain or evasive. He had not bought it until the year following the settlement. Whether in that time he had or had not acquired new property or received new earnings from speculations he does not show, or whether this could not have been from former property still undivided. Now the burden of proof, so long as there was no divorce, was clearly on him.

[4-8] The lower court found the automobile to be a family asset, and we shall not reverse that finding. Now, a wife's rights in family personalty are not of the contingent sort, like dower or survivorship, but a present estate. True, by our statute the husband is made manager, with full power to sell and dispose of this. But it does not follow that he can give it away. He is, so to speak, only the head of a firm. The personal property is just as much hers as his. The very attitude that gives him sale power over the whole restricts his testamentary power to a half. Under our law she has helped to create it as much as he. Consequently the idea is not to be tolerated that a husband can give a mistress stocks and bonds or precious stones out of the family money. No part of those savings can he make gifts of against her consent, even to his own relatives, though mere trifles to the latter no doubt might be sustained under the rule of *de minimis*. The law cannot countenance his right to a willful, premeditated waste of family personal property, which is now so often the bulk of an estate. The burden of proof, to be sure, must be on the wife when she seeks in interfere. The presumptions are all against her. She cannot act upon whim or take things into her own hands every time he goes out of town or snatch back an asset where there can be two minds on the question. But that in a plain case she must have redress either by damages or recovery of the thing itself from his fraudulent donees is undeniable, or we should be taking the statute away from her. On this we had occasion to comment in *Stewart v. Bank*, 82 Wash. 106, 112, 143 Pac. 458, where we said that, while in a common-law jurisdiction a court had been compelled to acknowledge that the husband could beggar the wife by giving away the personal property, he could not do it here. What he was given his sweeping powers for by our statute, we said, is "the facilitating the business of the community."

[9] Between the wife and the mistress, since the latter technically is not claiming

the car, the principle need not be further discussed, but as between the wife and the husband a little more may be said. At the garage the car was left by him subject to the order of the other woman, and not of the wife. Thus Marston had returned to Alaska, leaving valuable joint personalty to be immorally consumed during a period apparently indefinite. The agent of the joint estate had both deserted and violated his trust. He even admits that he had allowed his favorite to assume the name of Mrs. Marston in Seattle, so her authority to complete the wrong use of this motor car is not to be denied.

[10] Under these circumstances the wife clearly had a right to take this automobile away from the garage. But had she a right to sell it? If we class it among perishable things, undoubtedly. And it is with these that an automobile ought to be classed. It requires insurance of various kinds, and cannot even be stored without expense. It deteriorates in time from mere loss of style. The wife in a situation like this ought to be allowed to do with it what she would do with her separate property, or at least what a reasonably prudent person would in his own circumstances to stop waste and expense. To concede her only possession would not be enough. She must have a right to sell or lease or what else will reduce loss. Her property right in it is as great as his. Indeed, it may fairly be said that the only sure protection she could feel that the mistress would not get possession of it again if stored in another garage as family property was in getting it off her own hands entirely by sale. When a husband in fine leaves a wife where she must seize a piece of joint property immorally given by him to her worst enemy, he shall not call her to nice account about the disposition she makes of it when it is expensive to keep and he has gone to a distant region.

Even under the one-sided system of the common law, where the wife had no interest in personalty, she could sell some of it if she were left in distress, and what that law was obliged to extend to a dependent because of her necessity our own cannot deny to a partner in estate. That there is in the wife inherent power under our law to act in a serious absence of the husband is plain. In some cases he may be unavoidably detained at great distance for a year or years, unable to communicate with her. He might be an absconder or in distress or unable from many causes to get back, yet leaving perishable estate. Shall a wife have no right to sell stored eggs after many months? Shall she be forced to hold idle in her hands declining stocks? Shall she be unable to sell a cow to get cash for the farm? In these assets, if they are acquired after marriage, she is an equal partner. Some right to act, therefore, must be given her in extreme

cases. How far solely on account of absence she may go need not be decided, because here we have both his absence and his authority to another to commit a waste.

[11, 12] The lower court having found that the sale by the wife was for a sufficient consideration, we do not feel justified in finding otherwise. The consideration was about half of the estimated secondhand value of a motor car, driven in a few months 14,000 miles, and requiring some expenditures. The question now is not between the husband and the wife, but between the husband and her vendee, to whom, if she had a right to sell at all, she had a right to sell as a husband has, on any terms not fraudulently low. Neither is it of moment that the wife in cross-examination concedes that in selling she may not have intended to convey Marston's half interest also. The vendee of family personalty is not to be affected by mental reservations of the selling spouse.

[13] It is suggested that a bill of sale she gave was deficient, since it was signed not in Marston's name, but her own. A sale of personal property is good by mere delivery. In *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183, a bill of sale we spoke of as necessary was contemplated by a bargain for lodging house effects in a building not owned by the vendors, and where title to some of the articles might be set up by others.

[14] We do not, by this opinion, enlarge the rights of a wife so as to give to such as buy from her any presumption of good title. On the contrary, these must buy at their peril from one who can deliver title only in an unusual situation. They can prevail only after justifying the exception beyond reasonable debate.

Affirmed.

MORRIS, C. J., and HOLCOMBE, PARKER, and MAIN, JJ., concur.

FIRST NAT. BANK OF EVERETT v. NEILSEN et al. (No. 13353.)

(Supreme Court of Washington. July 7, 1916.)

1. PLEDGES §25—WAIVER—INCONSISTENT REMEDIES.

A creditor may not pursue inconsistent remedies, and any act by which he disregards his right under a pledge or lien and seeks to obtain a lien by other means will constitute an implied waiver.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 51-57, 60; Dec. Dig. §25.]

2. PLEDGES §25—LIEN—WAIVER BY RESORT TO INCONSISTENT REMEDIES.

Where bank held insurance policy as collateral security for a loan, and thereafter instituted garnishment proceedings against the proceeds of this policy and others, held, it thereby waived its equitable lien to such insurance policy.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 51-57, 60; Dec. Dig. §25.]

8. GARNISHMENT \Leftrightarrow 105—PROPERTY REACHED—TITLE.

A creditor by garnishment can get no better right or title to property than the debtor has.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 216; Dec. Dig. \Leftrightarrow 105.]

4. PLEDGES \Leftrightarrow 25—LIEN—WAIVER BY INCONSISTENT REMEDY.

Where debtor had agreed with mortgagee that all insurance policies should stand as security for the payment of the mortgage debt, and thereafter pledged such policies as collateral security to plaintiff bank, *held*, that plaintiff waived its equitable lien to the proceeds of one of said policies not payable by its terms to the mortgagee by instituting garnishment proceedings against the proceeds of all the policies.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 51–57, 60; Dec. Dig. \Leftrightarrow 25.]

Department 1. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by the First National Bank of Everett against E. A. Nelsen and another. From an order directing a receiver in garnishment proceedings to pay insurance money to defendants, plaintiff appeals. Affirmed.

Cooley & Horan and R. Mulvihill, all of Everett, for appellant. Herr, Bayley & Wilson, of Seattle, for respondents.

MOUNT, J. This appeal is from an order of the trial court directing a receiver to pay to Nelsen & Elneron, the respondents, the sum of \$592.77, being a part of the proceeds of an insurance policy.

The facts are as follows: The Tacoma Lumber & Shingle Company, a corporation, borrowed from Nelsen & Elneron \$4,000. To secure this loan the Tacoma Lumber & Shingle Company executed a mortgage upon its property, and agreed in the mortgage that the property should be insured by the mortgagor with loss, if any, payable to the mortgagees as their interest might appear. Thereafter several insurance policies were obtained by the mortgagor aggregating the sum of \$9,500. All of these policies, with the exception of one, issued by the Fireman's Fund Insurance Company, of San Francisco, were made payable to the mortgagees "as their interest might appear." That policy, by mistake of the agent who issued the policy, did not contain this clause. These policies were left in the possession of the mortgagor.

Thereafter, and on August 16, 1912, the Tacoma Lumber & Shingle Company borrowed from the First National Bank of Everett the sum of \$500, and executed its promissory note therefor, payable on demand. At the time this loan was made, all the insurance policies were delivered by the Tacoma Lumber & Shingle Company to the bank as collateral security for the repayment of the loan of \$500. Thereafter the mill property was destroyed by fire, and suits were brought by Nelsen & Elneron and the Tacoma Lumber & Shingle Company to recover upon the

insurance policies. While these suits were pending, the First National Bank of Everett brought an action upon the note for \$500, and sued out a writ of garnishment against all of the insurance companies. Thereupon a receiver was appointed for, and took possession of the property of the Tacoma Lumber & Shingle Company. Afterwards an agreement of settlement was made in the action pending against the insurance companies, and it was thereupon stipulated that the policies should be surrendered to the receiver who should collect the money agreed upon to be paid by the insurance companies, and hold the same subject to the order of the court. Upon the Fireman's Fund policy \$647.49 was paid over to the receiver in full settlement of that policy. Upon the other policies collected by the receiver there was not enough to satisfy the mortgage to Nelsen & Elneron. The balance due upon that mortgage, amounted to \$592.77, after applying all of the insurance money except the money received from the Fireman's Fund Insurance Company.

An application was then made to the court for an order directing the receiver to pay from the money collected from the Fireman's Fund Insurance Company the sum of \$592.77 in satisfaction of the respondents' mortgage. This order was made. The bank has appealed from that order.

Upon the facts stated the trial court was of the opinion that the placing of the insurance policies in the hands of the bank gave the bank a prior equitable lien upon the Fireman's Fund Insurance Company's policy, but when the bank sought by writ of garnishment to attach this fund in the hands of the insurance company, and also other funds due from the other insurance companies, that the bank waived its lien, and by the writ of garnishment was entitled only to the rights of the Tacoma Lumber & Shingle Company.

[1] The question presented in the case is whether the appellant by its writ of garnishment waived its equitable right to the proceeds of the policy issued by the Fireman's Fund Insurance Company. The general rule is that a creditor may not pursue inconsistent remedies, and any act "by which he disregards his rights under the pledge and intentionally seeks to obtain a lien on the property by other means for himself, or his assignee, will be construed as an implied waiver of his lien." 31 Cyc. p. 816, b; Drake, Attachment, §§ 540, 604.

[2, 3] We think it is quite clear under the facts in this case that, if the bank had a lien upon the policy, or the fund due thereunder from the Fireman's Fund Insurance Company, it was an equitable lien, and, that, when the bank sought by writ of garnishment of this and other funds to secure a lien thereon, it waived its right to that equitable lien. It thereby sought to establish a different and independent lien by the writ of gar-

nishment. This remedy was, we think, inconsistent with the remedy to pursue its equitable right. We have no doubt of the right of the bank to pursue other funds without waiving its right to that fund. But, in order to pursue its legal remedy against the Fireman's Fund Insurance Company, it necessarily waived its right to pursue its equitable remedy against that fund. We are of the opinion, therefore, that the trial court properly held that the bank waived its equitable right when it pursued its legal remedy by garnishment, because by garnishment the bank could get no better right to the debt garnished than its debtor had, and, if the debtor, the Tacoma Lumber & Shingle Company, had no right to the debt garnished, then the bank acquired none by the garnishment. *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69.

[4] The Tacoma Lumber & Shingle Company at the time the writ of garnishment was served had no right to this fund, because it had agreed with the mortgagees, Nellsen & Elmeron, that this and the other insurance policies should stand as security for the payment of the mortgage. We think the trial court was justified, therefore, in directing the satisfaction of the mortgage from this fund. The judgment is affirmed.

MORRIS, O. J., and CHADWICK, ELLIS, and FULLERTON, JJ., concur.

ANTON v. CHICAGO, M. & ST. P. RY. CO. (No. 13292.)

(Supreme Court of Washington. July 28, 1916.)

1. DAMAGES \S 185(3)—RESULTS OF INJURIES —EVIDENCE—SUFFICIENCY.

Evidence held insufficient to warrant a finding that plaintiff's disability from tuberculosis of the shoulder joint was the result of an injury received while in the employ of defendant.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 507; Dec. Dig. \S 185(3).]

2. DAMAGES \S 185(3)—LIABILITY FOR INJURIES TO SERVANT—NATURE AND PROBABLE RESULT OF NEGLIGENCE.

Tuberculosis of shoulder joint of plaintiff, which developed more than seven months after injury suffered while in defendant's employ, held, under the evidence, not the natural and probable consequence of defendant's negligence, thus entitling defendant to a nonsuit.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 507; Dec. Dig. \S 185(3).]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by D. Anton against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter B. Allen and C. Liliopoulos, both of Seattle, for appellant. Geo. W. Korte, of Seattle, for respondent.

CHADWICK, J. This action was brought to recover damages for personal injuries.

Appeal is taken from a judgment of nonsuit rendered in the trial court.

Appellant was employed as a section hand by respondent and commenced work about September 1, 1913. Several days afterward he and a fellow workman were replacing ties. Dirt and gravel around the old tie would be loosened; then one of the men would pull by means of a pick sunk in the tie, and the other would push with a shovel. Appellant alleges that the pick furnished by the company was dull; that he could not secure a firm hold on the ties; that the pick slipped and, as a result, he fell twice on the day in question. He fell in the morning, striking on his hand. To use the words of appellant:

"* * * And I dropped on my hand this way (illustrating). Side hurt a little; my hand on this side hurt a little. * * * I slip; that pick drop down and hurt my hand."

In the afternoon he fell again.

"That pick slip again, and I drop down on my hand, drop down. Q. What part of your body hit the ground? A. I drop down, was pulling this side of that pick; slip the pick, and I drop down, and this hurt (indicating). Q. The left shoulder? A. Yes; drop down on the gravel, or gravel and big rock."

After appellant fell the first time, he says he called the attention of the foreman to the condition of the pick, and the foreman promised to secure another pick for him. Appellant continued in the employ of respondent under full pay without interruption for seven months after the accident. His shoulder was sore for one or two days, and it bothered him again somewhat in about two months. One day, while felling a tree with an axe, a sharp pain hit him in the shoulder. His arm fell limp to his side. He was unable to continue his work and was sent to the hospital. After a few days given to observation by the attending surgeons, appellant was told that he would never have the use of his arm again. His case was diagnosed as tuberculosis of the shoulder joint. He was put in a cast, which caused a fixation of the joint (the only treatment possible in such cases), and after six or seven months was discharged by the surgeon.

[1] It is appellant's theory that the tubercular joint was caused by the fall, and that respondent is liable in damages. Much of the briefs is given up to a discussion of the assumption of risk, the promise to repair, and the "simple tool doctrine," but we think it will need no discussion of these principles to sustain the judgment of the lower court. The testimony is insufficient to hold defendant to a liability for the present condition of appellant.

The case of appellant rests entirely upon an answer to a hypothetical question propounded to a medical witness:

"Q. From the history that I have given you here, where he fell to the ground and struck himself, and at first felt very little pain at that

time, which afterwards gradually decreased until finally he did not pay very much attention to it, only periodically he felt some pains, and after overstraining his arm gave him to understand there was something radically wrong with it, and it was afterwards diagnosed by the doctor as acute tuberculosis, would you say any other cause outside of the first injury which he received when he fell to the ground has brought about the condition from which he is now suffering? A. Well, it is very natural to attribute it to an injury of that kind where we have a definite injury coming on in a person who has been perfectly healthy and well up to the very day of their injury, and from that time on sickness is manifested and that continues. In such a condition as we find this shoulder joint in, and this sort of a disease coming on in a person who has been perfectly well prior to that time, it is the most natural thing in the world to assume that the injury was the determining cause. The bruise in the shoulder made it possible for the infection to start in that bruised portion and then continue; where, if the tissues had been perfectly normal, as they were in the other shoulder, it would not have started there. Usually requires some such bruised condition of the tissues for the germ to find a lowered resistance in that particular spot, and then it starts to grow there and produces the tuberculosis of the bones and joints."

[2] The witness was a general practitioner who assumed no special skill in the science of orthopedy, and who had not, theretofore, had the case under his personal supervision. The case was taken from the jury after all the evidence was in. Taking the opinion of the witness for the appellant, as quoted above, at its full worth, we think it is no more than a statement of a possibility, or possibly a probability, more or less remote, that the tuberculosis is a result of the injury. This is not enough. The law demands that verdicts rest upon testimony and not upon conjecture and speculation. There must be some proofs connecting the consequence with the cause relied upon. The testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on.

It appears from the testimony of appellant's witness, and these facts do not appear to be disputed, that the development of tuberculosis in the shoulder from traumatism is an unusual consequence. In fact, tuberculosis from traumatic influence is most unusual in all cases. Joint infection from injuries is the exception, and not the rule. Out of 3,500 cases observed at Toronto General Hospital, only 1.9 per cent. of joint infections were in the shoulder. In the hip and knee, the percentage is somewhat greater. It is shown also that tubercular germs are present in the body of most every person; that some are "very subject" to tuberculosis. The opinion of the specialist called by respondent is that it would take, in a man of the age of appellant, from 14 to 24 months to develop the condition in which he found appellant at the time he was brought to the hospital ("that is the shortest time"), and that the condition he found could not have been produced by the accident complained of; that

the germ must be there; that accidents do not produce the germ.

The opinion of the surgeon is epitomized in one of his answers:

"A. No; the accident could not cause tuberculosis in a joint. This man undoubtedly had tuberculosis infection in that joint for a period of two years before it lighted up. These joints always have to start some time, showing acute symptoms, and these acute symptoms started it. A severe accident might hasten it—might hasten it. Q. It would not produce it? A. Not a small injury; it takes a very severe injury. These minor injuries have very little bearing upon the course of the disorder. It is the infection in the joint that is primary, and these other little injuries are only secondary or incidental to the condition. Q. Now, doctor, according to your opinion, then, this disease which you found in the joint must have existed long before the time when he claims he was first injured? A. In the ordinary course? Q. Yes. A. Yes, sir. Q. As far as surgery can determine it? A. Yes, sir."

Granting that a possible or even probable connection between the present condition and the negligent act was shown by the appellant, we think respondent has so far overcome the showing as to leave the subject open to speculation and conjecture rather than to right reason. In such cases, medical expert opinion is but an admeasurement of possibilities, and the court will, upon challenge to the sufficiency of the evidence, consider the whole evidence. In *Parmelee v. C., M. & St. P. Ry. Co.*, 158 Pac. 977, we said:

"If there is nothing more tangible to proceed upon than two or more conjectural theories, it is immaterial that the theory suggested in the interest of the servant is more probable than that suggested in the interest of the master, so that the rule is laid down: 'If the existing state of affairs, however dangerous, might, according to the ordinary experience of mankind, have been due to other causes than negligence for which the defendant was responsible, then it was for the plaintiff to exclude the operation of those causes by the greater weight of evidence.' *Brooks v. Kinsley Iron & Machine Co.*, 202 Mass. 228, 88 N. E. 771. This would seem to imply that in determining the weight of the evidence, and whether the case should have been submitted to the jury, the court might properly take into consideration the several circumstances as testified to by the witnesses for both parties."

See, also, *Stone v. Crewdson*, 44 Wash. 691, 87 Pac. 945.

Bearing in mind the facts, and the long time intervening between the accident and the acute manifestation of the disease during which appellant was not under observation, the following seems apt:

"We do not understand that a slight injury, resulting from negligence, will warrant a recovery for a disease afterwards developed, unless it shall be shown by proof that such latter condition would naturally or probably develop therefrom; and, to make the employer liable, it must have been such that he should have reasonably anticipated that it could or would probably so result or have a like result." *Pecos Ry. v. Collins* (Tex. Civ. App.) 173 S. W. 250-257.

We have hitherto had occasion to apply the principle governing this case. A woman pregnant with child was assaulted. She sued for damages, setting up the assault as the

cause of her misfortune and subsequent suffering. She was so frightened and terrorized by the conduct of the defendant that she fainted and soon thereafter experienced severe pains in the abdomen and through the hips, followed by a slight hemorrhage, which recurred 14 days later. She went about her usual avocations for 83 days, when she miscarried. Two physicians testified that while the cause relied on would be exceptional, the result was probable. One physician said, in answer to the hypothetical question "as to the probability of the fright or nervous shock having produced the miscarriage":

"In the absence of other known causes, I should suspect that was the cause."

To the same question, the other physician answered:

"Yes; in my opinion, that would be the cause of the miscarriage. Yes; I should judge that it was." *Stone v. Crewdson, supra.*

The answer relied on by appellant, and upon which his case must depend, if sustained, is:

"I would say that the injury is the determining cause of it," and, "In such a condition as we find the shoulder joint in and this sort of a disease coming in a person who has been perfectly well prior to that time, it is the most natural thing in the world to assume that the injury was the determining cause. The bruise in the shoulder made it possible for the infection to start in that bruised portion and then continue, whereas, if the tissues had been perfectly normal, as they were in the other shoulder, it would not have started there. Usually it requires some such bruised condition of the tissues for the germ to find a lowered resistance in that particular spot, and then it starts to grow there and produces the tuberculosis of the bones and joints."

The witness goes no further than did the experts in the *Stone* Case. A probable cause in a given case is the likely cause, and the answer of the surgeon that the fall was the determining cause is, after all, only the opinion of the surgeon. From the nature of things and from his testimony taken as a whole, it is clear that he intended to go no further than to say that the tubercular joint was a likely result of the injury.

Although a verdict was sustained upon the testimony of a physician who had attended the party plaintiff from the beginning, and who had the advantage of observation upon which to rest his opinion, just such testimony as we have in this case was rejected by the Supreme Court of Wisconsin in *Gray v. C. & N. W. Ry. Co.* 158 Wis. 637-649, 142 N. W. 505. The court says:

"The defendant's contention is that there is no sufficient evidence to establish any causal relation between the physical injury and the tuberculosis which existed more than a year later, and that the relationship between the two is purely conjectural. There was medical testimony to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, lowering his vitality, and putting him in a condition whereby he is unable to withstand infection. If this testimony were the only testimony tending to show a causal relation between the injury and the tuberculosis, we should agree

with the defendant's contention. If decreased powers of resistance resulting from an injury are to be considered as a link in the chain of causation between the injury and a disease developing years afterward, it is very evident that a large, if not an almost limitless, field is opened up for speculation by juries in a region where there can be no guide and no probability of just results."

We have, then, the established facts that tuberculosis coming from a bruise is the unusual, rather than the usual, thing, and that it often develops without a known cause, and a controversy of opinion, one surgeon saying that he would assume as the most likely thing in the world that the fall caused the injury, and another saying that the theory of the appellant is impossible.

While the law permits expression of opinion, when doctors disagree in their diagnosis and prognosis in a field where the reliance of laymen must depend upon professional skill and learning in an obscure science, it will not tolerate speculation as to the cause of a condition. That must be proven with reasonable certainty. We feel that the reasoning of the court in the *Stone* Case is conclusive:

"The time between the alleged cause and the actual miscarriage—33 days—was, according to the expert testimony, greatly in excess of the ordinary time in such cases; and the answers of the physicians to questions propounded to them, which were based upon the testimony, convince us that the jury could not have determined the proximate cause of the miscarriage without entering into the realms of speculation, conjecture, and guesswork, and this they are not empowered to do. * * *"
Stone v. Crewdson, supra.

We are not to be understood as limiting the extent or scope of medical expert testimony or proper prognosis based upon established facts. That is a very different thing from what is attempted in this case, which is to fix a proximate cause for a disease becoming suddenly aggressive seven months after a slight injury, and which may have developed from some other cause or without a traumatic intervention.

The law will note and compensate for consequences of injuries reasonably certain to occur, and will base its judgments upon opinion evidence, but we know of no cases holding that the proximate cause of a disease can be traced by opinion evidence to an accident when the testimony, considering the lapse of time and the nonobservation of medical men, goes no further than to show that the injury might have been a sufficient cause. The disease with which appellant is afflicted is not shown to be the usual, natural, or probable consequence of the slight injury sustained. The contrary is shown, and the case falls within the general principle, so well stated in *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, and adopted in *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070:

"But it is generally held that, in order to warrant a finding that negligence, or an act not

amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In that case, action had been brought to recover for the death of one who was alleged to have become insane eight months after an accident and who, while laboring under such mental aberration, committed suicide. The court concluded:

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death."

It will be noted that the court concludes that the insanity of Scheffer was as little the natural or probable result of the negligence complained of as the ultimate act of suicide; that each are casual and unexpected intervening causes for which no recovery can be had.

Affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

STATE ex rel. ROGERS v. HOWELL, Sec. retary of State. (No. 13803.)

(Supreme Court of Washington. July 31, 1916.)

1. ELECTIONS \S 126(5) — PRIMARIES — TEN PER CENT. POLITICAL PARTY.

Under Rem. & Bal. Code, \S 4809, providing that "any political organization which at the general or city election last preceding the primary was represented on the official ballot by either regular party candidates or by individual nominees only, may, upon complying with the provisions of this act, have a separate primary election ticket as a political party, if any of its candidates or individual nominees received ten per cent. of the total vote cast at such last preceding general or city election in this state, or subdivision thereof, in which the candidate seeks the nomination," in order to qualify as applied to a candidate for a state-wide office, a political party must have polled 10 per cent. of the vote cast at the last preceding general election for some state-wide office, and that it polled at the last preceding general election 10 per cent. of the vote cast in any given subdivision of the state for any office confined to that subdivision, or that the aggregate of the highest votes received for any of its candidates in each county or other subdivision of the state for county and subdivisional offices equals 10 per cent. of the total vote cast in the state, is not sufficient to entitle the party to a state-wide primary ticket.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 118; Dec. Dig. \S 126(5).]

2. ELECTIONS \S 126(5) — PRIMARIES — TEN PER CENT. POLITICAL PARTY.

Under such statute, the office of United States Senator is a state-wide office, although his functions are not confined to state affairs

nor exercised within the state, since it is the number of votes for any of its candidates or individual nominees in the state which is made the criterion by the statute.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 118; Dec. Dig. \S 126(5).]

3. ELECTIONS \S 126(5) — PRIMARIES — TEN PER CENT. POLITICAL PARTY.

If at any general election no office requiring a state-wide vote is to be filled, the vote at such election cannot be taken as a criterion as to the state-wide status of any political party; but the election could only fix the status of the different political parties in the separate subdivisions of the state.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 118; Dec. Dig. \S 126(5).]

4. MANDAMUS \S 172 — DETERMINATION OF ISSUES — PLEADINGS.

On original application for mandamus, the Supreme Court cannot go outside the pleadings and determine an issue not presented by them.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 381-385; Dec. Dig. \S 172.]

5. CONSTITUTIONAL LAW \S 68(1) — ELECTIONS \S 22 — PRIMARIES — TEN PER CENT. POLITICAL PARTY.

Rem. & Bal. Code, \S 4809, in denying to a less than 10 per cent. party the right to participate in the primary election, does not, in view of section 4826, providing for election of members of the county and state committees of political parties entitled to participate in the primary election, imperil its party integrity and thus impinge Const. U. S. Amend. 14, and Const. art. 1, \S 18, and article 11, \S 5, as to right to vote, since section 4826 applies only to such political parties as are entitled to participate in primary elections, and a less than 10 per cent. party, by necessary implication, would still have the right to hold county conventions or mass meetings, make its nominations, and select its committeemen under the old law, and since the integrity of political parties is a political rather than a judicial question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 125; Dec. Dig. \S 68(1); Elections, Cent. Dig. \S 15; Dec. Dig. \S 22.]

6. ELECTIONS \S 130 — PRIMARIES — TEN PER CENT. POLITICAL PARTY.

Rem. & Bal. Code, \S 4809, providing for the qualification of a political party for place on the primary ballot, does not deprive a party failing to poll 10 per cent. of the total votes cast of the power thereafter to call a convention, as the very fact that such party was qualified to hold such a primary election by having polled at the last prior election 10 per cent. of the vote cast qualifies it to elect its committeemen at such primary election and makes the committeemen so elected the valid party committee with power to call a convention for the succeeding election.

[Ed. Note.—For other cases, see Elections, Dec. Dig. \S 130.]

7. ELECTIONS \S 22 — PRIMARIES — TEN PER CENT. POLITICAL PARTY.

Such statute does not impinge the rule of uniformity in the election of officers prescribed in Const. art. 11, \S 5, since the constitutional provision relates to the election of officers and not to the nomination of candidates for office, and the primary law is uniform in its application to all persons and political parties similarly circumstanced.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 15; Dec. Dig. \S 22.]

Department 1. Original application for mandamus by the State, on the relation of

Bruce Rogers, against I. M. Howell, Secretary of State. Writ denied.

Charlotte F. Jones, of Seattle, for plaintiff.
W. V. Tanner, Atty. Gen., and Lindsay L. Thompson, Asst. Atty. Gen., for defendant.

ELLIS, J. This is an original application for a writ of mandamus, directed to the secretary of state, commanding him to accept the declaration of candidacy and filing fee of the relator, Bruce Rogers, for the office of United States Senator on the Socialist ticket, to be voted for at the primary election on September 12, 1916. Relator bases the right to file his declaration of candidacy in the office of the secretary of state on the claim that the Socialist party is a political organization of the state, having the right under section 6 of the primary election law (Rem. & Bal. Code, § 4809) to have a state-wide primary election ticket as a political party. The petition, exclusive of caption and signature, is as follows:

"The above-named petitioner, Bruce Rogers, respectfully shows to the court:

"(1) That he tendered to the defendant, I. M. Howell, secretary of state of Washington, his declaration of candidacy for the office of United States Senator on the Socialist ticket, with the statutory filing fee, said office to be voted for on September 12, 1916, on the 14th day of July 1916.

"(2) That on the 14th day of July, 1916, the said defendant refused to accept your petitioner's declaration of candidacy and filing fee, as aforesaid.

"(3) That said refusal of said defendant was and is in violation of the Constitution of the United States, article XIV, and of article I, section 19, and section 30, and article XI, section 5, of the state Constitution.

"(4) That said refusal of said defendant was and is contrary to the law in such case made and provided.

"That this petition is based upon the affidavit of Bruce Rogers, hereto attached, and made a part hereof.

"Wherefore your petitioner prays that a writ of mandamus shall issue from this court, directed to said defendant as prayed for in said affidavit of Bruce Rogers, hereto attached."

The relator's affidavit in support of the petition, exclusive of formal parts, is as follows:

"Bruce Rogers, being first duly sworn, on oath deposes and says: That he is the petitioner and plaintiff above named; that I. M. Howell is the duly elected, qualified and acting secretary of state of Washington. That on the 14th day of July, 1916, your petitioner tendered to above-named defendant at his office at Olympia, Wash., his declaration of candidacy for the office of United States Senator on the Socialist party ticket, accompanied by filing fee as provided by law, subject to the primary election to be held on the 12th day of September, 1916, said office to be filled at the general election to be held on the 7th day of November, 1916. That your affiant states and believes it to be a fact that the Socialist party is a political organization and polled more than 10 per cent. of the total vote cast in the state at the last preceding general election, and more particularly, at the election alleged to be a general election held on November 3, 1914, the Socialist party polled more than 10 per cent. of the total vote cast in the state, and more particularly, in the second and third congressional districts, and

in more than 21 counties. That the Socialist candidate for Representative in Congress in the second congressional district received 10,009 votes, and that the total vote cast for said office in said congressional district was 65,794. That in the county of Stevens the Socialist candidate for state senator received 909 votes, and the total vote cast for said office was 6,152, and that Stevens county is the second senatorial district. That a great number of other candidates of said party for county and state offices in counties situated in the first, second, third, fourth and fifth congressional districts of Washington, received more than 10 per cent. of the votes cast for their respective offices in said counties. That it is the duty of the secretary of state of Washington, made and provided by law, to receive all declarations of candidacy for the office of United States Senator for nomination at said primary election, of all political parties or organizations, any of whose candidates having received 10 per cent. of the votes cast at the last preceding general election in this state, or subdivision thereof, in which the candidate seeks the nomination. Notwithstanding the law and the compliance therewith by your petitioner to file as a candidate for said office on the Socialist party ticket, subject to the said primary election, the defendant, I. M. Howell, on the 14th day of July, 1916, refused and still refuses to accept the said declaration of candidacy of your petitioner. That your petitioner has no plain, speedy and adequate remedy at law."

The secretary of state has demurred to the petition and affidavit on the ground that they state no facts entitling relator to any relief. He has also answered, denying the allegations of the petition and affidavit, and denying particularly that the candidates for offices referred to in the affidavit received the number or percentage of votes therein set forth, except where such votes or percentage is the same as that shown by the election report of the secretary of state for the general election of 1914, which report is attached to and made a part of the answer. We shall not consider the answer and demurrer separately, since they present the same question which, as we view the case, must be determinative of relator's rights in the premises. That question is as to the vote of what candidate or candidates of a given political organization shall be taken as the criterion in determining whether such party polled 10 per cent. of the total vote cast at the last preceding general election. The answer to that question depends upon the proper construction of section 4808, which reads as follows:

"Any political organization which at the general or city election last preceding the primary was represented on the official ballot by either regular party candidates or by individual nominees only, may, upon complying with the provisions of this act, have a separate primary election ticket as a political party, if any of its candidates or individual nominees received ten per cent. of the total vote cast at such last preceding general or city election in this state, or subdivision thereof, in which the candidate seeks the nomination."

[1] Relator's main contention is that the words "or subdivision thereof" make the statute mean that if any given candidate of any given political organization received at the last preceding general election 10 per

cent. of the total vote cast in such subdivision, then that party is a 10 per cent. party of the state, and as such is entitled to have a separate state-wide primary election ticket as a political party. The statute taken as a whole is capable of no such construction. Read in context these words cannot be held to dominate the whole section without rendering the clause immediately following them meaningless. The section read as a whole clearly means that a political organization which did not poll for any candidate for any state-wide office 10 per cent. of the total vote of the state cast at the last preceding general election cannot have a separate primary election ticket at the next primary election so far as candidates for the nomination of state-wide offices are concerned, but if it polled 10 per cent. of the vote cast in any given subdivision of this state for any office confined to that subdivision at the last preceding general election, then such party is entitled to a separate primary ticket in that subdivision containing the names of its contestants for the nomination for any or all offices to be filled in such subdivision. Stated differently, the statute means that in order to qualify under the primary law as a 10 per cent. political party as applied to candidates for state-wide offices the party must have polled 10 per cent. of the total vote cast at the last preceding general election in the state for some state-wide office. But as applied to candidates seeking nomination for any office confined to any given subdivision of the state the party qualifies as a political party under the primary law as to such candidates only by having polled 10 per cent. of the total vote cast at the last preceding general election for some subdivisional office in that particular subdivision in which the candidate seeks the nomination. The closing words of the section "in which the candidate seeks the nomination" make this construction imperative and make relator's construction impossible. The only possible confusion in the above-quoted statute arises from the uniting in one sentence provisions for a party status under two separate contingencies, one to be determined by the prior vote for candidates for state-wide offices, the other to be determined by the prior votes for candidates for subdivisional offices. We have been cited to no decision of any court save one touching a statute in which a similar confusion is met. A statute of Illinois relating to the placing of the names of candidates on the official ballot read as follows:

"Sec. 4. Any convention of delegates, caucus or meeting representing a political party which at the general election next preceding polled at least two per cent. of the entire vote cast in the state, or in the electoral district or division thereof or the municipality for which the nomination is made, may for the state, or for the electoral district or division thereof or municipality for which the convention, caucus or meeting is held, as the case may be, by causing a certificate of nomination to be duly filed, make

one such nomination for each office therein to be filled at the election." Hurd's Rev. St. 1899, c. 46, § 291.

The Supreme Court of that state notes the same confusion in the statute there, and arising from the same cause, which we have noted in our statute. That court said:

"It will be observed said section 4 was so framed as to express in a single sentence the authority or privilege to make nominations possessed by a political party which had at the next preceding general election held throughout the entire state, polled at least 2 per cent. of the total vote cast in the state, and also the authority or privilege to make nominations possessed by a political party which had, at the next preceding general election, polled 2 per cent. of the vote cast in one or more of the electoral districts or divisions of the state or municipality therein, but had not at any general state election cast 2 per cent. of the entire vote polled in the state. The incorporation, in the same sentence, of the legislative intent as to each of such political parties did not conduce to clearness of expression or meaning, but a careful reading and study of the section leaves the matter free from doubt. Our construction of the section is, that a political party which polled 2 per cent. of the total vote cast in the entire state at the next preceding general election held throughout the state may certify its nominations and have its nominees placed as candidates on the official ballot for any and all offices to be filled at any and all elections held in the state, or in any electoral division or district of the state, until such party shall at some future general election held throughout the state fail to poll 2 per cent. of the total vote cast in the entire state, and that such authority so possessed by such political party to certify its nominations for places on the official ballots at all elections is not lost or affected by the failure of such party to poll 2 per cent. of the votes cast at an election held in a judicial district of the state after the said next preceding general state election and prior to the next succeeding general state election. The right acquired by a political party, by reason of having polled 2 per cent. of the total or entire vote cast in the state at a general election held throughout the state, to have its nominees appear upon the official ballots can only be lost by the failure of such party, at a future general election held throughout the state, to cast 2 per cent. of the vote polled at such future general state election. Said section 4 also confers upon a political party or political parties which have not polled 2 per cent. of the entire vote cast in the state at a general state election, but which polled 2 per cent. of the vote cast at a general election in some one or more electoral divisions or districts of the state or in some municipality therein, authority to certify its nominees as candidates on the official ballot for offices to be filled by elections in such electoral divisions or districts or municipalities wherein such party cast 2 per cent. of the total vote polled in such electoral divisions or districts of the state or municipalities, and the provisions of the section relating to the requirement that 2 per cent. of the total vote polled in electoral divisions or districts or municipalities shall be requisite to the right to certify nominees on the official ballot have reference only to such political parties as shall have failed to poll or did not poll 2 per cent. of the entire vote cast in the state at the election held throughout the state." People v. Williamson, 185 Ill. 108, 111, 112, 56 N. E. 1127, 1129.

Though the statute there related to official ballots and our statute here in question relates to the primary ticket, the analogy of the two statutes in other particulars is com-

plete. We are clear that our own statute, so far as concerns the question here involved, must be construed in precisely the same manner as the Supreme Court of Illinois construed the Illinois statute. If we attempt any other construction we are met with the utmost uncertainty and confusion. We are finally reduced to the position of holding that any party which has polled at the last preceding general election in only one precinct of the state 10 per cent. of the total vote cast in that precinct is entitled to a primary election ticket for its candidates for nomination for state-wide offices at the next election. This would seem preposterous. Counsel for relator so admits, yet it is the necessary logical result of counsel's contention. Such a holding would be simply construing the statute out of existence and defeating the only possible purpose of the Legislature in enacting it, namely, to avoid the useless expense to the state of furnishing a state-wide primary ticket which there was no reasonable ground for believing 10 per cent. of the voters of the state would call for and use. As said by this court in *State ex rel. Zent v. Nichols*, 50 Wash. 508, 523, 97 Pac. 728, 731:

"A too great multiplication of parties might result if all associations of persons claiming to be such were so recognized, * * * thus entailing upon the state excessive costs in the conduct of primary elections without corresponding benefits."

We do not hold that a party which at the last preceding general election polled 10 per cent. or over of the total vote for some state-wide office is not entitled to a primary ticket in every subdivision of the state and to have its contestants for nomination for local offices placed upon such ticket, even though in some of the subdivisions that party did not poll 10 per cent. of the total vote cast in such subdivision for any office at such preceding election. Obviously it would be so entitled, since in no other way than by furnishing primary tickets in each precinct could a complete primary vote be taken for state-wide offices. *People v. Williamson*, supra; *Gaylord v. Curry*, 145 Cal. 154, 78 Pac. 548.

The same thing may be true of the counties and precincts in a congressional district in which the vote of the district for the party candidate for Congress was 10 per cent. of the total vote of that district at the last preceding general election. But we do not so decide. That question is not before us. Certain it is, however, that the converse of the above proposition is by no means true. The right to a primary ticket in any county or other subdivision of the state cannot confer that right in the whole state because it is not necessary so to extend it in order to have a complete primary vote for the county and precinct offices or other subdivisional offices in subdivisions where the 10 per cent. qualification has been attained.

[2] It is conceded that at the general elec-

tion held November 8, 1914, candidates for no state-wide office were voted for, save that of United States Senator. It is also conceded that the Socialist candidate for United States Senator at that election received less than 10 per cent. of the total vote cast at that election. If our construction of the statute is correct it is clear therefore that the Socialist party is not entitled to a state-wide primary ticket at the primary election to be held on September 12, 1916, for the purpose of nominating candidates to be voted on at the general election on November 7, 1916.

But relator contends that since the United States Senator is not a state officer in the sense that his functions are not confined to state affairs nor exercised within the state, the status of the Socialist party in this state as a 10 per cent. party was not affected by the failure of its candidate for United States Senator to receive 10 per cent. of the entire vote cast at the last general election; the argument being that it is only the vote for state offices in the functional sense that can be used in determining the party's status. The answer is that the statute does not so provide. As we have seen, it makes the polling of 10 per cent. of the total vote cast at such preceding general election "in this state" the criterion as to the status of the party as a 10 per cent. party. The statute neither says nor implies that the character of the duties or functions of the candidate voted for has anything to do with the matter. It is the number of votes for "any of its candidates or individual nominees * * * in the state" which is made the criterion. It is not disputed that the Socialist candidate for United States Senator in 1914 sought a state-wide suffrage. Such was undoubtedly the field of his candidacy. The character of the duties of the office is unimportant.

We are clear that under our statute the status of any political party in this state, so far as the right to a state-wide primary ticket is concerned, is to be determined by whether or not any candidate of that party who stood for any office requiring a state-wide vote received 10 per cent. of the total vote cast in the state at the last preceding general election at which candidates for any state-wide office were voted for.

[3] All that we have said in the foregoing is necessarily subject to the following qualification: If at any general election in this state no office requiring a state-wide vote is to be filled (as would have been the case with the general election of 1914 had not candidates for the office of United States Senator been voted on at that election), the vote at such election cannot be taken as the criterion as to the state-wide status of any political party as a 10 per cent. or less than 10 per cent. party. Such an election could only fix the status of the different political parties in the separate subdivisions of the state, since only candidates for subdivisional offices would be

voted for at such election. As to state-wide offices the party's status would remain as fixed by the last preceding general election at which some state-wide office was filled. Such is the necessary intention imposed upon the entire statute by its last clause "or subdivision thereof, in which the candidate seeks the nomination."

[4] It is suggested that the aggregate of the highest votes received by any of the candidates in each county or other subdivision of the state for county or subdivisonal offices should be taken as the criterion, and that if such aggregate equal 10 per cent. of the total vote cast in the state, then the party is entitled to a state-wide primary ticket. But a fair construction of the petition and affidavit for the writ here in question discloses the fact that neither contains any allegation that such an aggregate of the Socialist vote for the different candidates in the different counties or other subdivisions would equal 10 per cent. of the total vote cast in the state at the general election of 1914. The allegation of a belief that the party polled 10 per cent. of the total vote at the election of 1914 is so qualified by what follows it in the same sentence as to confine its meaning to a statement that in 21 counties of the state and in two congressional districts the highest Socialist vote exceeded 10 per cent. of the total vote cast in such counties and districts. We cannot go outside the pleadings and determine an issue which they do not present. But even assuming that the petition and affidavit were sufficient to raise the question, we are unable to find any warrant in the statute for holding that the aggregate of the highest vote for candidates for subdivisonal offices in different subdivisions can be made the criterion in determining the status of the party as a 10 per cent. party or otherwise. The statute, construed as we have found it must be construed, merely makes the highest vote in each subdivision the determinative factor as to the status of the party in such subdivision alone. It gives to such a vote no force as a determining factor fixing the status of the party throughout the state. The words of the statute, "if any of its candidates or individual nominees receive 10 per cent. of the total vote cast at such last preceding general election," clearly mean any one of its candidates, not a combination of any number of its candidates. Any other view would lead to interminable investigation and computation in every instance. It would necessitate taking, for instance, the vote for sheriff in one county, the vote for county auditor in another, the vote for some other candidate in another, and so on throughout the whole list of candidates, selecting the highest vote in each instance. If this failed to produce a 10 per cent. aggregate we would then be reduced to the necessity of recanvassing the vote throughout the entire state by precincts, taking the highest vote polled by any candidate for each pre-

cinct and adding them together so as if possible to produce an aggregate equal to 10 per cent. of the entire vote cast in the state. It is simply impossible to believe that by the words used in the statute the imposition of any such burden was ever intended.

[5] It is contended, inasmuch as section 22 of the primary election law (Rem. & Bal. Code, § 4826) provides for the election of members of the county and state committees of political parties entitled to participate in the primary election, that if in any county a party is denied the right to participate in the primary election it cannot select such committee; that the act thus denies it a party organization, imperils its party integrity and impinges Amendment 14 of the federal Constitution and article 1, § 19, and article 11, § 5, of the state Constitution. This contention is unsound for two reasons. In the first place section 4826 only applies to such political parties as are entitled to participate in primary elections and a less than 10 per cent. party, by necessary implication, would still have the right to hold county conventions or mass meetings, make its nominations and select its committeemen, under the old law. Moreover, section 28 of the primary law (Rem. & Bal. Code, § 4830) expressly preserves to the less than 10 per cent. parties the right to hold conventions under the old law. In the second place this court has held that the question of the integrity of political parties is a political rather than a judicial question, thus disposing of relator's contention here even on broader ground than that above stated. In *state ex rel. Zent v. Nichols*, supra, this court said:

"The last general objection to be noticed is that the law tends to destroy political parties. Counsel confess that they can find no specific provision of the Constitution on which to base the contention, but they assert the general utility and necessity of parties, and argue therefrom that legislation tending to destroy them must receive the condemnation of the courts. It has seemed to us, however, that this is a political rather than a judicial question, and that an appeal from the legislative decision must be made to the people rather than to the courts."

See, also, *State ex rel. Shepard v. Superior Court*, 60 Wash. 370, 381, 382, 111 Pac. 233, 140 Am. St. Rep. 925.

Relator relies upon the case of *Britton v. Board of Election Com'rs*, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115. But that case is clearly distinguishable. The statute there involved provided an exclusive scheme of nominations, and hence in effect totally denied to less than 3 per cent. parties any right to assemble in convention or otherwise, thus absolutely destroying their status as political organizations and the right of franchise of their members as citizens. That right, however, is not only by necessary implication preserved to the less than 10 per cent. parties by our statute (section 4826), but is expressly preserved as we have seen in section 4830. This meets every requirement of the Constitution. *Morrow v. Wipf*, 22 S. D. 146, 115 N.

W. 1121-1127; *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

[6] Nor do we find merit in the claim that if at a general election a party fail to poll 10 per cent. of the total votes cast its committeemen elected at such election do not constitute a legal committee, and that hence the primary law deprives such party of the power thereafter to call a convention. The very fact that such party was qualified to hold such a primary election by having polled at the last prior election 10 per cent. of the vote cast effectually qualifies it to elect its committeemen at such primary election and makes the committeemen so elected the valid party committee with power to call a convention for the succeeding election.

[7] The claim that the primary election law impinges the rule of uniformity in the election of officers prescribed in article 11, § 5, of the state Constitution is equally unfounded for two reasons. In the first place the constitutional provision relates to the election of officers not to the nomination of candidates for office; in the second place the primary law is uniform in its application to all persons and political parties similarly circumstanced. *State ex rel. Fitz v. Jensen*, 86 Minn. 19, 89 N. W. 1126; *State ex rel. Adair v. Drexel*, 74 Neb. 776, 105 N. W. 174; *State ex rel. Webber v. Felton*, 77 Ohio St. 554-572, 84 N. E. 85, 12 Ann. Cas. 65.

After a most careful consideration of the whole question, we are constrained to hold that the writ should be denied. It is so ordered.

HOLCOMB, FULLERTON, MAIN, and CHADWICK, JJ., concur.

WOODS v. NETHERLANDS AMERICAN MORTGAGE BANK. (No. 18493.)

(Supreme Court of Washington. July 29, 1916.)

1. MORTGAGES § 600(3)—REDEMPTION—RECOVERY OF EXCESSIVE PAYMENT—ACCOUNTING.

Under Rem. & Bal. Code, § 600, one redeeming from the foreclosure sale of real property is not required to pay the certificate holder amounts charged for looking after, selling, and disposing of crops where such amount was not actually expended; and, having paid such charges, the redemptioner is entitled to recover therefor in an action for accounting.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1774, 1775; Dec. Dig. § 600(3).]

2. MORTGAGES § 600(3)—REDEMPTION—EXPENSES.

Under Rem. & Bal. Code, § 600, the holder of a mortgage sale certificate upon redemption has the right to payment for actual work done in preparing the land for future crops, and in case of redemption between April 1st and December 1st he has the option to demand such payment or to hold possession until December 1st.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1774, 1775; Dec. Dig. § 600(3).]

3. MORTGAGES § 600(3)—REDEMPTION—EXPENSES AND DISBURSEMENTS IN IMPROVING LAND.

Under Rem. & Bal. Code, § 600, where the crops for the current year had been removed by the holder of the mortgage sale certificate and money expended by him in fall plowing to prepare ground for next year's crops, held that upon redemption he was entitled to payment of money so expended, but not entitled to hold possession of land for another year.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1774, 1775; Dec. Dig. § 600(3).]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by D. L. Woods against the Netherlands American Mortgage Bank. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Charles P. Lund, of Spokane, for appellant. Merritt, Lantry & Merritt, of Spokane, for respondent.

ELLIS, J. Action for an accounting upon redemption from a foreclosure sale of real estate pursuant to section 600, Rem. & Bal. Code. The cause was tried upon stipulated facts embraced in the court's findings in substance as follows: Defendant held a mortgage upon certain farm lands which it foreclosed, making the owner of the real estate and the plaintiff herein defendants. At the foreclosure sale the land was purchased by defendant herein and certificate issued July 18, 1914. After the sale defendant leased the land for the remainder of that year and for the following year, defendant to receive for the current year one-third of the volunteer crop then growing on the land and agreeing to pay the tenant \$1.50 per acre for fall plowing in case of a redemption preventing the tenant from occupying the land for the following year. On November 24, 1914, plaintiff herein served upon defendant and the sheriff notice of his intention to redeem on December 5, 1914. On November 28, 1914, plaintiff made written demand upon defendant for a sworn statement of the rents, profits, and expenditures realized and paid out by defendant while in possession, as provided by statute. On December 3, 1914, pursuant to this notice, defendant furnished a sworn statement showing that it had received for its one-third of the volunteer crop upon the land for the current year \$179, with a charge of \$50 against this amount for looking after the crop and the sale and disposition thereof, and a further charge of \$232.50 paid to the tenant for fall plowing 155 acres of the land. On December 5, 1914, plaintiff redeemed the real estate from the sheriff's sale, paying, in addition to the amount required for redemption, the sum of \$108.50, being the net amount due to defendant for expenses as shown by its sworn statement after deducting the \$179 realized in rent. It was admitted, and the court so found, that the \$50 charged was not paid out, but was a

mere estimate of the expenses of the local agent for defendant at its office in Coulee City, which agent was regularly employed on a fixed monthly salary for his services of whatever nature for defendant at that place. It was also admitted that the item of \$232.50 paid to the defendant for plowing was not paid until some time after the redemption, but that under the defendant's contract with the tenant defendant was obligated to pay it before the redemption. It was admitted that the sum of \$179 is the exact amount which defendant received for its share of the volunteer crop. The court concluded as a matter of law that defendant was not entitled to be paid either the \$50 item or the \$232.50 item, and that plaintiff is therefore entitled to judgment for \$232.50 and costs. Judgment went accordingly. Defendant appeals.

The statute governing redemptions, so far as here material, provides that the purchaser at sheriff's sale from the time of the sale until redemption and the redemptioner from the time of his redemption until another redemption is entitled to receive from the tenant in possession the rents or the value of the use and occupancy of the property sold, but in case of redemption from the purchaser or first redemptioner the amount of such rents and profits over and above the expenses paid for "operating, caring for, protecting, and insuring the property" shall be credited upon the redemption money to be paid; and that after notice of intention to redeem the purchaser or first redemptioner shall furnish the last redemptioner a sworn statement of such rents and expenses. The person redeeming is required to pay in addition to the redemption money all items of expense over and above rents shown on such sworn statement, and if he questions the correctness of the statement can only do so by an independent action for an accounting. The section closes as follows:

"Provided, that if such property be farming or agricultural property and be in possession of any purchaser or any redemptioner and is redeemed after the first day of April and before the first day of December, and the purchaser or his tenant has performed any work in preparing such property for crops, or planted crops, he shall be entitled to reimbursement for such work and labor or the right to retain possession of such property until the first day of December following, and the redemptioner shall be entitled to collect the reasonable rental value thereof during such farming year, unless such reasonable rental shall have been collected by such purchaser and accounted for to the redemptioner."

[1] We are clear that under no just construction of this statute was the item of \$50 charged as an expenditure for looking after, selling, and disposing of the crop a proper charge against the redemptioner. It is not

claimed that respondent paid out on that account this or any sum. Nor is it claimed that it paid to its agent any additional sum on that account over and above his usual monthly salary. In fact there was nothing to do but receive the hay and sell it. The tenant harvested it for two-thirds of the crop. As to this item the trial court's conclusion was clearly correct.

[2, 3] The item of \$232.50 paid for the fall plowing presents a more difficult question by reason of the obscure phrasing of the above-quoted proviso. The plain purpose of the statute is to do equity between the parties by giving to the certificate holder or his tenant either pay for his actual work done in preparing the land for future crops, or the benefit of such future crops. The language of the proviso reasonably construed gives him the option either to demand the money for his work or hold possession until the 1st day of December next following the date of redemption, but only in case of redemption between April 1st and December 1st of the current year. But it does not follow, as argued by respondent, that in case of redemption after December 1st, the certificate holder or his tenant shall not have pay for his work. It only follows that he shall have nothing else. In such a case he has no option to retain possession instead of taking such pay. He is, however, still entitled to demand and to receive pay for his work. This construction does no violence to the language of the statute, and is the only construction which meets the plain equities of each situation. When a tenant has a crop, let us say, planted in April and almost mature at the time of redemption, made, let us say, in September, simple equity requires that he have the option to elect whether he will take the crop or take pay for his work. But when, as in this case, the crop of the current year has been removed, and, prior to notice of intention to redeem, he has plowed the land preparatory to the next year's crop, his whole equities are met by allowing him pay for his work. To allow him an election to retain possession for another year would work a palpable injustice to the redemptioner. As to the item claimed for plowing, the court's conclusion was clearly incorrect.

We conclude that appellant was not entitled to be paid the \$50 item, but was entitled to reimbursement for the \$232.50 which it paid for the plowing. It has received \$50 more than it was entitled to.

Reversed and cause remanded, with direction to enter judgment for respondent in the sum of \$50.

MORRIS, O. J., and MOUNT, CHADWICK, and FULLERTON, JJ., concur.

BACKMAN v. HOLMAN. (No. 18426.)

(Supreme Court of Washington. July 17, 1916.)

1. HUSBAND AND WIFE \S 833(4)—ALIENATION OF AFFECTIONS—EVIDENCE.

A letter written by defendant to wife of plaintiff suing for alienation of affections, expressing his affection for her, is admissible; the question whether it is what it appears or, as claimed by defendant, was merely written at request of plaintiff to be used by him in procuring a divorce, being a question for the jury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 1124; Dec. Dig. \S 833(4).]

2. APPEAL AND ERROR \S 1053(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Defendant cannot predicate error on admission of a letter in a foreign language, contents of which was not disclosed to the jury; the court, on a translation being offered, reversing its ruling and excluding the letter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4178, 4184; Dec. Dig. \S 1053(1); Trial, Cent. Dig. \S 977.]

3. TRIAL \S 114—MISCONDUCT OF COUNSEL.

That plaintiff's counsel when about to address the jury told plaintiff to take a certain chair may not be complained of as misconduct; it being immaterial where plaintiff sat.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 275-278, 296; Dec. Dig. \S 114.]

Department 1. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Gustaf Backman against Ole G. Holman. Judgment for plaintiff, and defendant appeals. Affirmed.

El. C. Dailey and Clifford Newton, both of Everett, for appellant. Martin J. Lund, of Seattle, for respondent.

CHADWICK, J. Respondent recovered damages in the court below for the alienation of his wife's affections.

[1] Two errors are assigned on appeal: First, that a letter which was written by appellant disclosing his affectionate regard for the wife of respondent was admitted in evidence by the court. Appellant says that he has no regard for the wife of respondent, but wrote the letter at the solicitation of the respondent to be used by him in procuring a divorce, that respondent said that his attorney advised him that he could not get a divorce unless "he had a love letter," and that he wrote the letter to aid the respondent in his purpose to procure a divorce. The parties are foreigners, speaking in part through an interpreter, and it is hard to put the workings of their minds on paper, but we would liken the attitude of appellant in respect to the letter as he now describes it to that of an accommodation maker or indorser in the commercial world. He further contends that, inasmuch as the letter is used in this case, and not for the purpose intended by him, the legal consequence is that it was procured by fraud and misrepresentation, and should have been rejected by the court as a fraudulent document. But appel-

lant overlooks the fact that the jury did not believe his version of the transaction, and did believe respondent, who says that the letter is a copy, voluntarily made by appellant, of a real letter written by appellant to respondent's wife. The letter was admissible in evidence.

[2] Error is also assigned in that the court admitted a letter written by the wife of respondent to respondent. The letter was written in the Swedish language. It was offered as tending to show the relationship then and thereafter existing between appellant and respondent's wife. No translation of the letter had been made at the time it was offered, nor can we say from the record that its meaning was disclosed to the jury. It would seem that it was not. The court held that the letter would be admitted "for the purpose of showing that the relation between them was cordial and affectionate." Thereafter a translation of the letter made by the interpreter was offered, counsel saying:

"With the exception of the translation of the letter, I will close my case.

"The Court: Well, I will reverse my ruling on that. * * * I don't think it is material. I don't think it is competent. I don't know what the letter contains. * * * I think it is hearsay. * * * So I will sustain the objection and stand by my original ruling, and the letter will not go to the jury.

"(Plaintiff excepts.)"

The claim of error in this regard is not well founded.

[3] Misconduct of counsel is urged. When counsel for respondent was about to address the jury, he said:

"Gust, take that chair."

This direction was quickly challenged by counsel for appellant, saying:

"Hold on, now. What does this mean? We object to such conduct on the part of plaintiff's attorney.

"The Court: Well, I don't know as it makes any difference where the plaintiff sits."

Nor do we.

Affirmed.

MORRIS, C. J., and FULLERTON, ELLIS, and MOUNT, JJ., concurring.

NATIONAL UNION FIRE INS. CO. OF PITTSBURG v. DICKINSON et al.
(No. 13311.)

(Supreme Court of Washington. July 17, 1916.)

1. INSURANCE \S 83(2)—DUTY OF AGENTS—ACTIONS FOR NEGLIGENCE.

Insurance agents, sued by their company for loss from not canceling policies as directed by it, cannot deny that it was their duty to do so, they having undertaken to do it, when, had they refused, it might seasonably have been done by the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 166; Dec. Dig. \S 83(2).]

2. INDEMNITY \hookrightarrow 14—JUDGMENT AGAINST INDEMNITY—CONCLUSIVENESS AGAINST INDEMNITOR.

Insurance agents liable to their company for any loss on policies, because they did not cancel them as directed by it, are bound by the judgment against the company in the action on the policies, on the question there litigated whether proper proofs of loss were made, defense of such action having been tendered them by the company, though they, while actively assisting, declined to assume the defense.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. \hookrightarrow 14.]

3. INSURANCE \hookrightarrow 83(2)—AGENTS—FAILURE TO CANCEL POLICIES—EVIDENCE.

Evidence in action by an insurance company against its agents held to authorize a finding that they had not canceled policies as directed by it, or even used ordinary care to do so.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 108; Dec. Dig. \hookrightarrow 83(2).]

4. PARTNERSHIP \hookrightarrow 204—GENERAL APPEARANCE.

Under Rem. & Bal. Code, § 241, declaring every appearance general unless defendant states it to be special, the answer stating "come now defendants R. and C. as a member of the firm of D. & Co., and not otherwise," is, notwithstanding prior successful special appearance by C., to quash service against him, a general appearance, bringing him into court not only as a partner but an individual, individual liability being the essence of partnership obligations.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 876-881; Dec. Dig. \hookrightarrow 204.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by the National Union Fire Insurance Company of Pittsburg against C. E. Dickinson and another, partners as C. E. Dickinson & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

William Wray, of Seattle, for appellants. Jas. B. Murphy, of Seattle, for respondent.

BAUSMAN, J. Defendants are insurance agents who, having themselves issued policies, were instructed by the company to cancel them. Acknowledging this order, they said they would do so. Within two weeks the property was destroyed by fire and the company has been held liable by a jury after an unsuccessful defense that the policies had been canceled. Having paid the judgment, it now sues the agents for neglect to cancel.

[1] That it was the duty of these agents to issue cancellations is abundantly established if proof of custom be proper, but this need not be discussed, for they did undertake a duty which, had they refused to perform it, might seasonably have been done by the company itself. They cannot deny the obligation now.

[2] When the suit was brought by the assured, the company tendered its defense to the agents who, though they declined to assume it, did actively assist. In that suit proofs of loss were admitted which were then contended to be unauthorized and not

in compliance with the policies, for which reason the defendant agents now wish to go into that subject again to show that the company was thus not liable even though the policies had not been canceled. The lower court was correct in holding this question closed by the former judgment. Wash. Gaslight Co. v. Dist. of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712.

[3] As to whether the agents failed to cancel the policies, a similar question might have arisen; but the lower court, leaving the issue open, heard the proofs submitted by the defendants. Their liability is clear. They, for their part, say they immediately mailed cancellations upon receiving the company's letter, but all three addressees testified that none were ever received. The very manner in which the agents acknowledged the company's order was justly commented on by the lower court. Instead of mailing the notices at once and then reporting that, they merely stated that they would attend to this. By their own story they allowed 12 days to pass without hearing from the insured or receiving back the policies. Still more, immediately after the fire they write to the home office that a fire has occurred and that they suppose the company will join in an adjustment along with other insurers. Not a word about there being no liability because of cancellations two weeks before; in fact, the letter unmistakably assumes that there had been no cancellations. This most damaging communication is so poorly explained that we cannot disturb the lower court's judgment, whether under our insurance code mere mailing is or is not enough. As to the degree of vigilance required, even supposing this a purely extra task, the court was justified in its finding that they had not used even ordinary care.

[4] Against whom shall this judgment be entered? By the lower court it was rendered against both defendants. One of them, C. E. Dickinson, a nonresident, was already successful in quashing a service against himself, but the answer brings the parties in as follows: "Come now the defendants R. L. Dickinson and C. E. Dickinson as a member of the firm of C. E. Dickinson & Company, and not otherwise," etc. The lower court in holding this a general appearance by C. E. Dickinson was right. What the latter may have intended is immaterial since courts accept jurisdiction from what a pleader says and not what he has in his mind, or there would be frequent shiftings and little certainty in judgment rolls. Rem. & Bal. Code, § 241, provides that every appearance is general unless the defendant states it to be special, nor is it of any moment that the defendant has before that successfully or unsuccessfully made a special appearance. Bellingham v. Linck, 53 Wash. 208, 101 Pac. 843.

This defendant cannot be in court as a defending partner and not also as an in-

dividual, for individual or separate liability is the essence of partnership obligation. As for the joint assets, these were already defended by the other Dickinson, who by his appearance bound himself personally and the joint property too. This member did not need to have himself named in the appearance either to defend the partnership property or to bind it. When he did appear as a partner he submitted himself also, for he was seeking advantage or protection on the merits. His appearance we must construe as general. In *Bain v. Thoms*, 44 Wash. 382, 87 Pac. 504, we approved the following from *Teater v. King*, 35 Wash. 188, 70 Pac. 688:

"The appearance of appellant was in form special, for the purpose of objecting to the court's jurisdiction over his person; but in the body of his motion he invoked the jurisdiction of the court below on the merits, when he asked for a dismissal."

Judgment affirmed.

MOUNT, PARKER, FULLERTON, and HOLCOMB, JJ., concur.

BALKEMA v. GROLIMUND et al.
(No. 13449.)

(Supreme Court of Washington. July 23, 1916.)

1. PLEADING \S 8(3)—**CONCLUSION OF LAW—COMMUNITY DEBT.**

In action against husband and wife upon a note given by the wife, the allegation in the complaint that when the wife gave the note she was "acting for herself and the use and benefit of the community then and now existing between herself and her husband," unattended by facts, means nothing, as it is a mere conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 12; Dec. Dig. \S 8(3).]

2. EVIDENCE \S 568(1)—**SUFFICIENCY—CONCLUSION OF LAW.**

Testimony of a party, which is a bare repetition of allegations of legal conclusions in his pleading, does not tend to prove any fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2392; Dec. Dig. \S 568(1).]

3. APPEAL AND ERROR \S 1010(1)—**REVIEW—QUESTIONS OF FACT—INSUFFICIENT EVIDENCE.**

Findings of fact based on insufficient evidence are reviewable as erroneous conclusions of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3979-3981; Dec. Dig. \S 1010(1).]

4. HUSBAND AND WIFE \S 234—**CONTRACTS BY WIFE—LIABILITY OF HUSBAND.**

A husband cannot be held liable personally on his wife's note without plaintiff's showing whether the husband knew of it, authorized it, or ratified it, or whether the community estate ever got the proceeds.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 145, 146; Dec. Dig. \S 234.]

5. HUSBAND AND WIFE \S 234—**CONTRACTS BY WIFE—EVIDENCE—PRESUMPTIONS.**

The presumption is that a wife has no right to disburse family money except for necessities.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 145, 146; Dec. Dig. \S 234.]

6. BILLS AND NOTES \S 126—**CONSTRUCTION—ATTORNEY'S FEE.**

An attorney's fee, authorized by a note to be adjudged against maker in suit upon the note, is not recoverable in suit against the maker by indorser who has been compelled to pay the note by previous suit and judgment against the maker and such indorser, whether the later suit be considered one upon the judgment or upon the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 272, 273; Dec. Dig. \S 126.]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by James E. Balkema against Lena Grolimund and another. From a judgment for plaintiff, defendants appeal. Remanded, with instructions.

J. Y. O. Kellogg, of Seattle, for appellants. Howard O. Durk, of Seattle, for respondent.

BAUSMAN, J. The complaint against a husband and wife alleges merely that Mrs. Grolimund while married gave one Seeds her promissory note, that the latter transferred it before maturity to plaintiff and another, who in turn sold it to one Wagner, and that Wagner reduced it to judgment against her and her immediate indorsers, including plaintiff Balkema. The latter, having paid the judgment, now sues Mrs. Grolimund and her husband too for the amount of the note with costs and an attorney's fee, which last the note authorized but the judgment had not included. In this aggregate the court gave judgment against husband and wife, who both appeal.

[1] The only allegation connecting the husband with this transaction was that when Mrs. Grolimund gave this note she was "acting for herself and the use and benefit of the community then and now existing between herself and her husband," but this mere conclusion of law unattended by facts means nothing. *Killingsworth v. Keen*, 89 Wash. 507, 154 Pac. 1096. The defendants, after demurrer overruled, answered with denials of this and other allegations, besides setting up that Seeds had obtained the note from Mrs. Grolimund by fraudulent representations about lands which he was selling her.

[2, 3] Plaintiff's testimony is but a bare repetition of the complaint, while defendants on their side tendered no testimony except a certain offer rejected. There is consequently nothing at all to show whether the cash paid to Seeds was acquired by either of the spouses before or after marriage, whether the transaction with Seeds ever passed beyond the contract stage, what the property was to be used for or by whom, whether Mrs. Grolimund had any separate estate, or finally whether the husband had so much as heard of either contract or note before he was sued. Neither is there any evidence whatever of the husband's adopting any part

of this bargain. What defendants offered to prove and was rejected was that the only consideration for the note was Seeds' agreement to have a federal land office accept a desert land application of the wife's, and that she executed the note without the consent of her husband, who has ever since refused to sign or be bound by it. Indeed, except for mere allegations and rejected offers of proof, we should not be able even to guess why Seeds and Mrs. Grollmund had any business together; plaintiff being at no pains either to plead or prove anything more than the note and how he came by it. The court made a finding that the cash had been paid out of family funds, and that the contract was a family asset, but on such meager testimony these findings, though of facts, we must pronounce erroneous conclusions of law.

[4] The learned trial judge was perhaps misled or carried too far by some expressions of this court on presumptions from postmarital acts of a wife. Summed up, a husband is here held liable personally on his wife's note without plaintiff's showing whether the husband knew of it, authorized it, or ratified it, or whether the community estate ever got the proceeds. In a word, the wife undertakes to buy land after marriage and he is liable. We have no precedent for this. Even if we consider this note as a borrowing and not for deferred payments (as in *U. S. Fidelity, etc., Co. v. Lee*, 58 Wash. 16, 107 Pac. 870), we could not here sustain a personal judgment against him. The cases in which expressions were, it is true, let fall that a wife's borrowing creates both community proceeds and community liability, were none of them cases in which the husband was sued personally, but only of attack by third parties upon the family assets or of internal settlements in marital estates with accounting upon reciprocal endeavors and contributions. *Yesler v. Hochstettler*, 4 Wash. 349, 80 Pac. 398; *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125; *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. Rep. 937.

[5] Nowhere has this court intended to countenance the idea that a person from whom the wife borrows has from the mere circumstance of her borrowing a personal claim upon the husband as well. Indeed, we held in *Conley v. Greene*, 89 Wash. 39, 153 Pac. 1069, that even when the wife's postmarital note was reduced to judgment in her marital name, but in hers only, there was no lien or presumed lien on the family estate. To hold that the wife's separate note is presumptively the joint liability of the husband would be at war with our statute which makes him, except in instances extreme and peculiar, sole manager of the family affairs. Nor is the present ruling to be supported, even if we should assume, without showing

of when it was acquired or where it came from, that the cash paid to Seeds by the wife must be considered as family money, since to disburse family money, save for necessities, the presumption is that she has no right. Consider it as family money, still the wife shall not, for instance, seize secretly upon \$10,000 family cash and buy with it, however valuable, a yacht, or a herd of cattle, or a farm, and the husband's mouth be shut against this because he speaks half an hour too late, a few moments after the property is delivered to her. Such property, indeed, quickly becomes community property. If he acquiesces, but that it can thus be thrust on him is not to be tolerated, tearing down, as that would, a statute which makes him sole manager in order to protect them both against her inexperience.

Of course, we do not say the holders of the wife's note may never hold the husband personally too, since there may be instances where her borrowing is so clearly essential to the common estate, where it is so plainly ratified by the husband, or where the purchased property is so knowingly shared in or enjoyed by the husband that he also should personally respond. *Fielding v. Ketter*, 88 Wash. 194, 149 Pac. 667. But this is not matter of presumption. It must be shown by the facts, none of which are offered here. The law is not unwilling, but ready, to fasten acquiescence on the husband, yet until the contrary is shown a wife's note is presumed to be hers alone. If any encouragement was given to another doctrine in *Williams v. Beebe*, 79 Wash. 133, 139 Pac. 867, it was promptly corrected in *Hammond v. Jackson*, 89 Wash. 510, 154 Pac. 1106.

[6] Accordingly, the motion of the husband for a nonsuit should have been sustained, and the judgment of the lower court must be modified so as to stand only against the wife. As to her also it is modified so as to exclude her attorney's fee. Her contract was that it should be adjudicated against her in the suit upon the note which was not done, and the result must be the same whether we consider this action as the indorser's suit upon the note or upon a judgment assigned. If it is upon the assigned judgment, plainly no attorney's fee is carried with it, for there was none to carry; if it is a suit upon the note, it is still only a suit upon a note as paid and not as assigned, because assigned it could not be after it was merged in a judgment.

The cause is accordingly remanded, with instructions to the lower court to enter a judgment modified as above stated.

MORRIS, C. J., and HOLCOMB, PARKER, and CHADWICK, JJ., concur.

MORGAN v. CHITTENDEN LAND CO.
(WARD et al., Interveners).
(No. 13414.)

(Supreme Court of Washington. July 29, 1916.)

1. APPEAL AND ERROR \S 560 — **RECORD — STATEMENT OF FACT—COUNSEL'S CONCLUSIONS.**

A statement of fact, not purporting to give the testimony of witnesses, either by question and answer or in narrative form, but rather being a statement of the conclusion of counsel as to the force and effect of the testimony considered as a whole, is insufficient in form.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2490-2493; Dec. Dig. \S 560.]

2. APPEAL AND ERROR \S 641 — **RECORD — STATEMENT OF FACT—STRIKING.**

Where the statement of fact is insufficient in form and is not certified in form required by Rem. & Bal. Code, § 391, requiring certificate in certain manner of the statement of facts, it may be stricken on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2789, 2790; Dec. Dig. \S 641.]

3. MECHANICS' LIENS \S 290(2) — **ENFORCEMENT — SUFFICIENCY OF FINDINGS TO SUSTAIN DECREE.**

Findings in foreclosure of mechanic's lien that plaintiff, at the special instance and request of defendant, commenced to perform labor and furnish material to be used in the construction of the building, describing it; that defendant is the owner of the land; that all of it is necessary for the convenient use and occupation of the building; that the material and labor were of the reasonable and agreed value of \$1,900; that after deducting proper credits, \$240 is due and unpaid; that plaintiff has perfected his lien and is entitled to foreclose it — held to sustain the conclusions and decree.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 592, 593; Dec. Dig. \S 290(2).]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Suit by C. E. Morgan against the Chittenden Land Company, in which Lena E. Ward and others intervened and filed cross-complaints. From a decree for plaintiff, defendant appeals. Affirmed.

Myers & Johnstone, of Seattle, for appellant. Walter S. Fulton, of Seattle, for respondent.

PER CURIAM. This action was brought to foreclose a mechanic's lien. The court, after allowing several credits and offsets and counterclaims, entered a decree establishing a lien for the balance due, and ordered a sale of the property. The defendant, Chittenden Land Company, has appealed.

[1, 2] Inter alia, the respondent moves to strike the statement of fact, for the reason that it is not sufficient, either in form or substance, and that it is not certified in the form required by statute. It is not sufficient in form. It does not purport to give the testimony of the witnesses, either by question and answer, or in the narrative form. It is rather a statement of the conclusion of coun-

sel as to the force and effect of the testimony considered as a whole. The certificate is insufficient. Rem. & Bal. Code, § 391; State ex rel. Miller v. Seattle, 45 Wash. 691, 89 Pac. 152. The statement of fact is therefore stricken.

[3] The only question remaining is whether the findings of fact sustain the legal conclusions drawn by the trial court, and the decree entered thereon. Appellant argues in its brief that the respondent waived his right to claim a lien by contracting with appellant that he would take a mortgage for the balance of the contract price, but that question is not before us. The court found that the plaintiff, at the special instance and request of the defendant, commenced to perform labor, and to furnish materials to be used in the construction of "that certain building situated," etc.; that appellant is the owner of the land; that all of it is necessary for the convenient use and occupation of the building; that the material and labor were of the reasonable and agreed value of \$1,900; that after deducting proper credits, \$280.43 is due and unpaid; that respondent has perfected his lien and is entitled to foreclose it, together with the sum of \$50 as an attorney fee. The findings sustain the conclusions and decree of the court.

Affirmed.

DICKIE MFG. CO. v. SOUND CONSTRUCTION & ENGINEERING CO.

(No. 13423.)

(Supreme Court of Washington. July 28, 1916.)

1. ARBITRATION AND AWARD \S 84 — **JUDGMENT—CONCLUSIVENESS—VACATION.**

Where no exceptions are taken to a statutory award of arbitrators under Rem. & Bal. Code, § 420 et seq., an action to set aside a judgment thereon can be maintained only if there was in fact no statutory arbitration or if it was void.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 466-483; Dec. Dig. \S 84.]

2. ARBITRATION AND AWARD \S 2 — **STATUTORY —COMMON-LAW ARBITRATION ABOLISHED.**

Under Rem. & Bal. Code, § 420 et seq., providing for statutory arbitration and award, common-law arbitration no longer exists.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 7-10; Dec. Dig. \S 2.]

3. ARBITRATION AND AWARD \S 16(2) — **COMMON-LAW ARBITRATION—REPUDIATION BEFORE AWARD.**

Either party to a common-law arbitration may repudiate the agreement to arbitrate any time before an award is actually returned.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 65; Dec. Dig. \S 16(2).]

4. ARBITRATION AND AWARD \S 85(1) — **REFUSAL TO PAY—REMEDY.**

Where the defeated party to a common-law arbitration refuses to pay the award, the only remedy is an action at law upon it.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 484-488, 490; Dec. Dig. \S 85(1).]

5. ARBITRATION AND AWARD ¶16(2)—**STATUTORY—RIGHT TO REVOKE AGREEMENT.**

The parties to an agreement for statutory arbitration under Rem. & Bal. Code, § 420 et seq., have no right to revoke such agreement either before or after the award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 65; Dec. Dig. ¶16(2).]

6. ARBITRATION AND AWARD ¶14—**STATUTORY—AGREEMENT—REQUISITES—BOND TO ABIDE AWARD.**

Under Rem. & Bal. Code, § 420 et seq., providing for statutory arbitration, a bond to abide the award is not indispensable to a valid arbitration agreement, nor does the omission to give such bond oust the court of jurisdiction to adopt, modify, and enforce the award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 57-60; Dec. Dig. ¶14.]

7. JURY ¶28(7)—**RIGHT OF JURY TRIAL—WAIVER—ARBITRATION.**

Where the court, under Rem. & Bal. Code, § 422, takes jurisdiction to determine a controversy upon the failure of arbitrators to return a proper award, the trial must be without jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 182; Dec. Dig. ¶28(7).]

8. ARBITRATION AND AWARD ¶73—**JUDICIAL REVIEW—EXCEPTIONS—NECESSITY.**

The jurisdiction of the superior court over a controversy submitted to arbitration under Rem. & Bal. Code, § 420 et seq., is limited to review of the proceedings upon exception.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 368-398; Dec. Dig. ¶73; Appeal and Error, Cent. Dig. § 140.]

9. ARBITRATION AND AWARD ¶78—**REVIEW—JURISDICTION OF COURT.**

Where the superior court cannot adequately correct errors in arbitration proceedings under Rem. & Bal. Code, § 420 et seq., on exception it may, under section 422, take over the whole controversy and determine it without a jury.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 368-398; Dec. Dig. ¶73; Appeal and Error, Cent. Dig. § 140.]

10. ARBITRATION AND AWARD ¶6—**REQUISITES AND VALIDITY—AGREEMENT.**

There can be no valid arbitration, unless the parties enter into a proper agreement under Rem. & Bal. Code, § 420 et seq., for statutory arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 27; Dec. Dig. ¶6.]

11. ARBITRATION AND AWARD ¶78—**ERRORS AND DEFECTS—REVIEW.**

Under Rem. & Bal. Code, § 420 et seq., an independent suit will not lie to set aside an arbitration award for unfairness, prejudice, improper conduct of arbitrators, or other reasons; the only remedy being by exceptions to the superior court.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 409-419; Dec. Dig. ¶78.]

12. ARBITRATION AND AWARD ¶78—**JUDICIAL REVIEW—ACTION TO SET ASIDE AWARD.**

Failure of the arbitrators to use expedition in deciding a controversy submitted under Rem. & Bal. Code, § 420 et seq., as required by the arbitration, resulting in the withdrawal of the arbitrator named by plaintiff, and prejudice or unfairness of the remaining arbitrators, are not grounds for an independent suit to set aside

the award, but can be reviewed only on exceptions.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 409-419; Dec. Dig. ¶78.]

13. MANDAMUS ¶63—**GROUND TO COMPEL ARBITRATORS TO FILE AWARD.**

Mandamus will lie to compel arbitrators appointed under Rem. & Bal. Code, § 420 et seq., to file an award upon their refusal to do so.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 127; Dec. Dig. ¶63.]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by the Dickie Manufacturing Company against the Sound Construction & Engineering Company. From an order sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant.
Weter & Roberts, of Seattle, for respondent.

BAUSMAN, J. This is an appeal from an order sustaining a demurrer to a petition, which sought to declare void a judgment upon an award of arbitration.

In Rem. & Bal. Code, § 420 et seq., we have a comprehensive statute. An agreement to arbitrate must be in writing; each party must appoint one arbitrator; these two must appoint a third, and all must subscribe an oath to make a just award. The board has the right to compel attendance of witnesses, to hear evidence, to adjourn as and for what period it pleases, to decide both law and fact, and to punish for contempt. It is, in short, a temporary court of justice. An award signed by a majority is to be lodged in the superior court. That award, 20 days after copy of it has been served on the losing party, can be converted into an ordinary judgment by order of court. Errors of the board may be corrected by the court on exceptions between this service of the award and entry of the decree, and these exceptions may set up misbehavior of the arbitrators, error in fact or law, or corrupt and undue procurement of the decision. The superior court may set aside the award or recommit the hearing, but when the court does put the award into judgment it stands "as any other judgment" of that tribunal.

Controversies having sprung up between the parties now plaintiff and defendant, they signed an arbitration agreement, each appointed an arbitrator, and these two appointed a third. Plaintiff's arbitrator having after a month of hearings resigned, the others requested plaintiff to appoint a successor, but plaintiff, announcing itself no longer bound, filed a suit on its claims. Thereupon the remaining members proceeded unattended by plaintiff or its witnesses, and after much more deliberation filed an award allowing defendant a recovery for overpayments.

This award, more than 20 days after serv-

ice of a copy upon plaintiff, was put in judgment. Plaintiff filed no exceptions, but some months later brought the present or second suit to set aside the award, with allegations that the two arbitrators other than plaintiff's had been so prejudiced as to resolve everything blindly against plaintiff, that excessive meetings had been wasted in frivolous deliberations, and that plaintiff's arbitrator, after vainly insisting upon expedition, had abandoned the board in spite of plaintiff's request that he remain. When he left the board only 10 per cent. of the whole subject, it was alleged, had been traversed in 5 weeks, so that plaintiff under all these circumstances had revoked his consent to the proceedings and had brought the other suit. As for the judgment on the award, that was before plaintiff's first suit had reached judgment, which it has not arrived at yet, but was after it had been begun. Finally it had been agreed orally that the arbitration should be at common law and not under the statute, for which reason the taking of judgment on it was unfair. There was then a prayer for cancellation of the judgment and award so that plaintiff might pursue the suit on its demands.

[1, 2] Everything plaintiff now complains of could have been reached by statutory exceptions. These were wholly omitted. Accordingly the suit before us can be maintained only on the theory that there was no statutory arbitration to begin with or that it had finally become void. On both points we must hold decidedly against plaintiff. In the face of so complete an act as ours we are clear, and find this proper occasion to say, that common-law arbitration does not exist in this state, and that the plain purpose of our legislation was to clear much unsettled practice by codifying arbitration. The agreement, quite ample to engage this statute, says not a word excluding it or referring to a different kind. It is of little moment if anything was said afterwards. The minds of the parties had met upon the statute.

Much confusion has been brought into our arbitration practice by common-law doctrines and decisions under statutes of other states, nor have the opinions of this court been entirely harmonious. The present seems a suitable occasion to review them.

[3, 4] That common-law arbitration was excluded by our statute is plain. For instance, either party under the former could repudiate the proceedings before an award was actually returned, and even afterwards, should he refuse to pay it, there was nothing left the prevailing party but to bring a suit upon it. Both these burdensome rights are in express terms swept away, for the statute makes the arbitration a preliminary part of judicial hearing; the award in a sense automatically passing into judgment unless the losing party can persuade the court to modify or set it aside.

[5, 6] Most distinctly too does the change appear from the common law where this statute gives the board a right to compel the attendance of witnesses or to punish for contempt. Nowhere is there recognized or suggested the right of revoking the award at any stage, of independent suit to cancel it, or of proceedings that ignore it. On the contrary, the act directly provides, as we have seen, for excellent internal review. There is indeed a provision that the agreement may impose a bond that the party will abide by the award, but this is not made indispensable nor does it in any event override positive provisions giving the court jurisdiction to adopt, modify, and enforce the award. The bond is to secure payment to the winner as well as additional attorneys' fees or damages from delay.

Without reviewing all our previous cases, we may discuss the most noticeable. Tacoma Ry., etc., Co. v. Cummings, 5 Wash. 206, 31 Pac. 747, referred to the fact that our statute was peculiar and that "we can get but little aid from the citation of authorities." What was involved there was this: The lower court having upon exceptions set aside an award and an appeal having been taken from that ruling, the respondents moved here to dismiss the appeal on the ground that the order was not a final one. This in turn involved the question whether under the statute the court, after setting the award aside, could do anything more with the case. The lower court, we held, had full jurisdiction to determine the controversy. If the arbitrators refused to accept the recommendation of it or to comply with the court's directions, the arbitration then in a sense had failed, and we held that the statute directly authorized the court then to take up a case itself. Equally did we uphold this power if upon hearing the exceptions did not recommend the case but chose to take it over then, for we said:

"But if either of the other grounds of exception are sustained, the arbitration has as fully failed without any such referring back to the arbitrators as it has under the contingency mentioned in said section after the matter has been so referred back, and the arbitrators have refused to comply with the direction of the court. * * * In the light of said section 429 (Rem. & Bal. § 425) it seems clear to us that we must interpret the provisions of section 426 (Rem. & Bal. § 422) as having been intended to clothe the court with full jurisdiction of the controversy to proceed to a final determination whenever the arbitration had failed, and that the only object in enacting said section 429 was to give the parties to the arbitration the benefit of a full determination by the arbitrators if they were qualified and willing to act, even although they had made a mistake in their first award."

Rem. & Bal. Code, § 422, provides that:

If no exception be filed, "judgment shall be entered as upon the verdict of a jury, and execution may issue thereon, and the same proceedings [may be had] upon said award, with like effect as though said award were a verdict in a civil action."

Rem. & Bal. Code, § 425, provides that if upon exceptions the court shall find error in fact or law it may refer the case back to the arbitrators directing immediate amendment, returnable to the court, "and on the failure so to correct said proceedings the court shall be possessed of the case and proceed to its determination."

[7] In a dissenting opinion it was suggested that the court's thus taking full possession of the case might result in the imposition of a jury not bargained for by arbitration. This apprehension is ill founded. Since it is very clear that the parties having by the arbitration waived a jury, the court in taking over the case should proceed without one. That the court gets full jurisdiction of this case by the arbitration we concluded, saying:

"Every arbitration is entered into in view of the law upon the subject, and every party to such arbitration consents to such jurisdiction on the part of the court in regard to the controversy as has been by law provided. And the law having provided that the filing of such award with the written agreement to submit the same to arbitration should give the court jurisdiction of the persons of the parties to the arbitration and of the subject-matter of the controversy, every one entering into such an arbitration must be held to have consented thereto."

[8, 9] This first view of our statute is undoubtedly the sound one. Those who enter into arbitration accept in advance the jurisdiction of the superior court. The board is a preliminary, voluntarily created tribunal or referee, and the jurisdiction of the superior court is first to be exerted in a revisory capacity and only when appealed to by exceptions. If it cannot adequately correct errors on the exceptions, it may take the whole controversy over and proceed without a jury. Common-law arbitration has ceased to exist.

[10] If there is no proper agreement under the statute for one, then there is none at all. But once the parties do properly agree on arbitration, there can be no revocation. As to the form of the agreement, as to what constitutes a submission under the statute or as to what departures from it in the agreement will be jurisdictional defects, it is not now necessary to decide.

[11] The next case to be noted is *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 Pac. 380, which held that independent suit would lie to set aside a filed award and to enforce demands in disregard of it upon allegations of unfairness, prejudice, and manipulation by members of the board. That decision we feel we must overrule. Out of harmony with our act, it would encourage those who see themselves losing to hurry revocation on some charge or other or to induce their members to withdraw, so that if they should not make good the charge, they would at least harass, incumber, and keep long in doubt the proceedings of the arbitrators. The statute affords ample protection by exceptions to the award.

School District v. Sage, 13 Wash. 352, 43 Pac. 341, seems to return to the more vigorous doctrine of the *Cummings Case*. The award of the arbitrators was held binding on question of fact, when the lower court had affirmed the award over exceptions and would not review the evidence before the arbitrators.

McDonald v. Lewis, 18 Wash. 300, 51 Pac. 387, is a case which, without citing it, follows the idea of the *Glover Case*. The court sustained an independent action to set aside an award and enforce the original demands because the award "was unfair and unjust to the plaintiffs and was based upon an imperfect and insufficient understanding by the arbitrators of the matters in controversy, and that they did not undertake to inform themselves thereof, but, on the contrary, refused the plaintiffs a hearing." We now feel that the errors complained of should have been reviewed only under exceptions to the award. Any other doctrine must fritter the time of the prevailing party and make arbitration oppressive.

Skagit County v. Trowbridge, 25 Wash. 140, 64 Pac. 901, develops the statute very little, but it was held that the award even of one agreed arbitrator was binding where that was stipulated for and no corruption was shown upon exceptions.

In *Zindorf Constr. Co. v. Western Am. Co.*, 27 Wash. 31, 67 Pac. 374, the court began to return to the earlier and more correct view of this statute. Revocation, indeed, was not involved, for the parties had not proceeded to an arbitration. What we did decide was that where in a building contract there was a provision for arbitration, no suit would lie upon the original demand while that was ignored.

Jordan v. Lobe, 34 Wash. 42, 74 Pac. 817, had the peculiarity of a time limit in the arbitration agreement. The award was to be rendered in 20 days. This we held competent under a section which provides that the arbitrators' oath shall be to make a just award "agreeably to the terms of the submission," so, when this period had elapsed, there was no award for the court to consider.

In *Richardson v. Harkness*, 59 Wash. 474, 110 Pac. 9, we held the court to be open to a direct suit only because the primary nominees were unable to agree upon any third arbitrator.

Passing some intervening cases of little moment, we come to *McElroy v. Hooper*, 70 Wash. 347, 126 Pac. 925. Against a filed award there was a motion to vacate on the double ground that the arbitrators had left some stipulated questions undecided, and that the agreement to arbitrate had itself not been executed by all the parties. These it was held were errors of law, which, not having been excepted to, the award must stand.

In *McCann v. Alaska Lumber Co.*, 71 Wash. 331, 128 Pac. 683, 43 L. R. A. (N. S.) 711, the lower court, having set aside the first award on exceptions, rendered judgment on an amended one. The power to revoke the award or disturb it after that was denied.

Herring-H. M. Safe Co. v. Purcell Safe Co., 81 Wash. 592, 142 Pac. 1153 (on rehearing, 86 Wash. 694, 150 Pac. 1162), emphatically reaffirmed the doctrine of the *Zindorf Case* by denying the right of suit while an agreement to arbitrate was ignored.

From the *Zindorf*, from many intermediate cases not cited, and from the *Herring Safe Case*, it is perfectly clear that, even though a formal agreement for arbitration has not been signed and is only referred to in some general contract regarding differences yet to arise, we will not permit suit by a complaining party who does not invoke the arbitration. For the same good reason we can tolerate no right in him to call the arbitration void after it is begun, and thus ignore ample provisions for direct review. All relief must be had in the court in which the award is to be lodged.

[12] It remains to consider whether in the present case any new reason appears for independent suits and the ignoring or revocation of arbitration. The only thing worth discussing is a clause in the agreement that the arbitrators were to use expedition. No time limit, however, had been prescribed as in the *Jordan Case*. What constituted expedition must accordingly be matter of opinion, and if reviewable at all for excess is easily reviewed by the superior court on exceptions and is no ground for ignoring the arbitration entirely. Nor is it everything, we may add, that can be regulated by these agreements beforehand. The contract of arbitration is merged in the tribunal which it creates. Parties may not set up this little court and yet have its way of conducting itself nicely regulated in advance. Unless they expressly fix a time limit, they can no more say how rapidly it shall proceed than they can control the number of questions that shall be asked. Its procedure they can control only in the degree that they can by stipulation empower themselves to question that of the superior court. Indeed, nothing better illustrates the danger of such a contention than this very case, for while plaintiff's arbitrator says he left the hearings out of disgust with postponements, a whole month's delay appears to have been occasioned by his own.

[13] Again, why claim fiat revocation because of gross delays by a board which had to discuss grievances under four contracts for work in three states? If these delays amounted to denial of justice, they were easily redressed under the exceptions; if they were less, then they are only delays en-

countered in courts as well. Perhaps it will be suggested that arbitrators might refuse to file any award at all. In that event they can undoubtedly be reached by mandamus to utter decision one way or the other, for, having taken the oath, they hold an office exposed to mandate. Nothing, in short, is plainer than if we allow revocation for one thing we must allow it for another. If bias before or dishonesty during the hearing is a ground for absolute revocation, the right to set up these in good faith involves the right to set them up in secret bad faith which would keep the whole proceeding in doubt by interfering writs and disputed jurisdiction.

Order affirmed.

MORRIS, C. J., and PARKER, HOLCOMB, and ELLIS, JJ., concur.

RAYMOND LUMBER CO. v. RAYMOND LIGHT & WATER CO. et al.

(No. 13081.)

(Supreme Court of Washington. July 29, 1916.)

1. WATERS AND WATER COURSES §257(1)—PUBLIC WATERWORKS—CHARGES.

Where to induce a sawmill to locate in a town, the town waterworks, a private corporation, contracted with the sawmill company to furnish water at a certain rate, the Public Service Commission thereafter, under the Public Service Commission Law (Laws 1911, p. 538), upon complaint of the municipality of discriminatory rates and finding that the rates charged the sawmill were discriminatory, could order the water company to terminate the contract with the sawmill, and charge for water at its published tariff rate, since contracts valid when made are subject to change by the exercise of the police power.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 812; Dec. Dig. § 257(1).]

2. CONSTITUTIONAL LAW §27 — POWER OF INTERSTATE COMMISSION.

The commerce clause of the United States Constitution is a delegation of power to the United States.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 31; Dec. Dig. § 27.]

3. CONSTITUTIONAL LAW §26 — POLICE POWER—STATES.

The police power of a state is not a delegated, but a reserved, power.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 30; Dec. Dig. § 26.]

4. CONSTITUTIONAL LAW §117—IMPAIRING OBLIGATION OF CONTRACT—POLICE POWER.

The clause of the federal Constitution which provides that no law shall be passed which impairs the obligation of a contract is not applicable to legislation within the scope of the police power.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 286; Dec. Dig. § 117.]

5. WATERS AND WATER COURSES §257(1)—PUBLIC WATERWORKS—CHARGES.

The Public Service Commission Act, providing in section 34 that "nothing in this act shall be construed to prevent any gas company, electrical company, or water company from continuing to furnish its product or the use

of its lines, equipment, or service under any contract, or contracts in force at the date this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the company party thereto, and thereupon such contract or contracts shall be terminated by such company as and when directed by such order," did not ipso facto terminate when it took effect a discriminatory contract between a waterworks company and a sawmill company, but conferred power upon the commission to direct the termination of such contract.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 312; Dec. Dig. § 257(1).]

6. CONSTITUTIONAL LAW § 305 — PUBLIC WATERWORKS—CHARGES—DUE PROCESS OF LAW.

Under such statute, an order of the commission that the water company should terminate such contract, with service of notice by the water company that water would no longer be furnished under the contract rate, but under the tariff rate, upon which the lumber company brought an action to test the validity of the contract, in which a full hearing was afforded, was due process of law under the direct provision of the United States Constitution, no further notice being required by the law; section 80 relating to notice to be given to a public service corporation when a complaint is filed against it with the Public Service Commission, not applying.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 925-927; Dec. Dig. § 305.]

7. WATERS AND WATER COURSES § 257(1) — PUBLIC WATER SUPPLY — REGULATION OF RATES—PLEADING.

Under such statute, a complaint to the Public Service Commission by a city, charging unreasonable and excessive rates and inadequate and insufficient service by a water company, which by its answer alleged that under existing rates its returns were insufficient to justify a more adequate service, investigation disclosing that under a contract with a sawmill company, that company was receiving water at less than tariff rates, was sufficiently broad to justify an order by the Public Service Commission directing the water company to terminate the contract with the sawmill.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 312; Dec. Dig. § 257(1).]

En Banc. Appeal from Superior Court, King County; Everett Smith, Judge.

Suit by the Raymond Lumber Company against the Raymond Light & Water Company and another, in which the Public Service Commission intervened. From judgment for plaintiff, defendants and the Public Service Commission appeal. Reversed and remanded, with directions.

Murphy & Lee, of Seattle, W. V. Tanner and Scott Z. Henderson, both of Olympia, and C. H. Fuqua, of Raymond, for appellants. Corwin S. Shank and H. C. Belt, both of Seattle, for respondent.

MAIN, J. This action was brought for the purpose of restraining the Raymond

Light & Water Company, a public service corporation, from denying to the plaintiff the right to receive water from that company in accordance with the rate fixed in a contract between the two companies, and for the purpose of recovering the excess payments for water over the contract rate, which payments had been made prior to the institution of the action. Before the case was tried, the Public Service Commission became a party by intervention. The trial of the cause resulted in a money judgment for what the plaintiff claimed to be the excess water payments, and also for the injunctive relief prayed for. From this judgment the defendants and the Public Service Commission appeal.

The facts are briefly these: During the year 1905, the then village of Raymond contained 300 inhabitants. During the month of September of that year, Charles L. Lewis and Edward Hulbert, being desirous of securing a location for a sawmill, visited Raymond with this object in view. As a result of this visit three contracts were entered into, one on September 9, 1905, between the Raymond Light & Water Company, a corporation, and Charles L. Lewis and Edward Hulbert. By this contract that corporation agreed to furnish water, necessary for the use and operation of a sawmill to be thereafter erected and operated by Lewis and Hulbert, for a period of 40 years, at the rate of \$5 per month for each and every steam boiler contained in the mill.

On the same date a contract was made between Stella J. Raymond and Leslie V. Raymond, her husband, and Lewis and Hulbert, by which, for a consideration of \$1, the Raymonds agreed to convey to Lewis and Hulbert, a tract of land consisting of approximately 19 acres, for a mill site. At about the same time, and at least not later than the 11th day of September of the same year, the Raymond Land & Improvement Company, a corporation, contracted with Lewis and Hulbert, that if they would locate and operate a mill upon the site covered by the contract with Stella J. Raymond and her husband, that that company would build, or cause to be built, a spur track, leading from the line of the Northern Pacific Railway Company which passed through Raymond, to the site upon which the mill was to be erected. Thereafter the mill was erected, and in accordance with the agreement the mill site was conveyed.

For a period of about 7 years the Raymond Light & Water Company continued to furnish water to the mill, as provided in its contract with Lewis and Hulbert.

During the month of August, 1912, the city of Raymond, by its proper authorities, filed a complaint against the Raymond Light & Water Company with the Public Service Commission, charging that the rates of the

water company were unreasonable and excessive, and alleging that the supply of water furnished by the water company to the citizens of Raymond was inadequate and insufficient. The Raymond Light & Water Company answered the complaint, and alleged that under the existing rates its returns upon its investment were insufficient, and that it had spent large sums of money in furnishing the city of Raymond with a water supply, and intended to still further extend and expand its system and plant.

Thereafter, and during the month of February, 1913, a hearing was had before the Public Service Commission upon the issues thus raised by the complaint and answer. During this hearing it developed that the water company had been furnishing water to the Raymond Lumber Company, which had succeeded to the rights of Lewis and Hulbert under their contract with the water company, at the rates specified in that contract. The rate at which the lumber company received water was less than that charged to other water users, except that one or more other mills received water at the same rate as the Raymond Lumber Company. The Public Service Commission found that the rates charged the Raymond Lumber Company and the other mill companies, were discriminatory, and ordered that the water company terminate the contracts with the mill companies, including the Raymond Lumber Company. Thereafter the water company installed a meter upon the pipe leading to the Raymond Lumber Company's plant, and notified that company that it would be required to pay for water in accordance with the water company's published rules and tariff.

After this notice, for a period of about 23 months before the institution of the present action, the Raymond Lumber Company paid the tariff rate for water, most of the time under protest. The difference between the sum which it would have paid under the contract and that which it paid under the tariff rate was approximately \$2,218.95. This is the item for which a money judgment was entered in this action.

[1] The principal question in the case is whether the Public Service Commission had power to direct the water company to cease to furnish water under the contract, and charge for the same at its published tariff rate.

By the Public Service Commission Law (Laws 1911, c. 117), the Public Service Commission therein created is given jurisdiction to determine the rate that shall be charged, and the service that shall be rendered by public service corporations, including water companies. This act was passed subsequent to the time when the water contract under which the Raymond Lumber Company is claiming was executed. Hence, at the time the contract was entered into, the parties

thereto had a right to contract with reference to the rate.

In the briefs there is considerable controversy over whether this water contract is a mutual obligation; and also whether the other two contracts could have any bearing when considering the validity of the water contract. Without following this discussion, so far as the decision of this case is concerned, it will be assumed, but not decided, that there was a consideration for the water contract at the time it was entered into, and that the contract, at the time, was a valid obligation between the parties.

The question then arises, if the contract was valid at the time it was entered into, can it be terminated under the provisions of the Public Service Commission Law subsequently passed? As already stated the water company was a public service corporation, and jurisdiction over its rates and service was conferred by the Public Service Commission Law upon the Public Service Commission. The power to regulate and control the rates of public service corporations is within the legitimate exercise of the police power of the state. This power may be exercised by the Legislature itself by enacting a law fixing rates, or the Legislature may delegate the power to fix rates to a properly constituted commission, subject to judicial review. *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78. In this state the Legislature has conferred the rate-making power upon the Public Service Commission by the Public Service Commission Law.

It is contended that even though the state under its police power may fix the rates to be charged by public service corporations, that notwithstanding this fact a contract, valid when entered into, is not subject to be abrogated under the provisions of a law subsequently enacted. This contention cannot be sustained. The rule is that contracts upon subjects which are within the police power, even though valid when made, must be taken to have been entered into in view of the continuing power of the state to control the rates to be charged by public service corporations. *Portland Ry., etc., Co. v. Railroad Commission*, 229 U. S. 397, 33 Sup. Ct. 820, 57 L. Ed. 1248; *Milwaukee Electric, etc., Co. v. Wisconsin R. R. Comm.*, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; *Dawson v. Dawson Telephone Co.*, 137 Ga. 62, 72 S. E. 508; *Atlanta, etc., R. Co. v. Camp*, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. (N. S.) 594, 124 Am. St. Rep. 151, 14 Ann. Cas. 439; *Texas Ry. Co. v. Scott*, 77 Fed. 726,

23 C. C. A. 424, 37 L. R. A. 94; *Manitowoc v. Manitowoc, etc., Co.*, 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056; *Milwaukee Electric, etc., Co. v. Railroad Comm.*, 153 Wis. 502, 142 N. W. 492, L. R. A. 1915F, 744, Ann. Cas. 1915A, 911; *Kenosha v. Telephone Co.*, 149 Wis. 338, 135 N. W. 848; *President, etc., v. Southern Wis. Power Co.*, 149 Wis. 168, 135 N. W. 499; *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 80 S. E. 932.

In the *Portland Railway Case* it appears that this railway company had a system of street railways in the city of Portland, and also two or more interurban lines entering the same city, and connecting with its street railway systems. Upon one of these interurban lines a ten-cent fare was charged to what was known as Milwaukie station. On the other line a five-cent fare was charged to what was known as Lents. The distance of these two stations from the city were approximately the same, and the conditions similar. The rates charged were found to be discriminatory. The lesser rate was sought to be justified because at the time the *Portland Railway Company* acquired a portion of the Lents line, it contracted that the rate upon that line should be five cents. The contract was valid when made. The question there was whether the railroad commission, acting under a law subsequently passed, had the power to order that the contract be abrogated. In the course of the opinion it was said:

"The contract set up by which the fares from Lents were required to be not greater than five cents cannot be held to justify the discrimination, as such contracts must be taken to have been made in view of the continuing power of the state to control the transportation rates of common carriers subject to its jurisdiction."

The reason for this rule is, that if contracts valid when made, covering a subject-matter within the police power, are not subject to the subsequent exercise of that power on the part of the state, it would place in the hands of individuals the power to withdraw from the state the right to subsequently exercise its police power.

In the *Philadelphia, Baltimore & Washington Railroad Co. Case*, supra, it was said:

"The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions."

In the *Louisville & Nashville Railroad Co. Case*, quoting Judge Cooley with approval, it was said:

"If the Legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable."

[2-4] It will be noticed that two of the cases cited and quoted from are based upon the commerce clause of the federal Constitution. But the principle is the same. The commerce clause of the Constitution is a delegation of power to the United States. The federal Supreme Court holds that contracts valid when entered into are made subject to the subsequent exercise of the power of Congress. The police power of the state is not a delegated, but a reserved power. The cases of *Chicago, B. & Q. R. Co. v. Nebraska*, and *Milwaukee Electric, etc., Co. v. Wisconsin R. R. Commission*, supra, are cases involving the exercise of the police power of the state; and the rule is the same whether the contract be one which is within the commerce clause of the federal Constitution, or one which is within the police power of the state. In one case it is subject to the laws subsequently passed by Congress, and in the other it is subject to the laws subsequently passed by the state Legislature. The clause of the federal Constitution which provides that no law shall be passed which impairs the obligation of a contract is not applicable to legislation within the scope of the police power. In the *Chicago, B. & Q. R. Co. Case* it was said:

"Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health and morals, and that clause of the federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature."

In *Cowley v. Northern Pacific Ry. Co.*, 68 Wash. 558, 123 Pac. 908, 41 L. R. A. (N. S.) 559, property had been conveyed to that company during the year 1908. As a consideration for the conveyance, the railway company agreed to issue and deliver annual passes to the plaintiff and his wife during the natural life of each, and to their five chil-

dren for a period of five years from the date of the contract. This contract was performed by the railway company until the taking effect of the act of Congress under date of June 29, 1906 (Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 [U. S. Comp. St. 1913, § 8563]). By the provisions of this act no carrier was permitted to issue and deliver passes. After the taking effect of the act the railway company declined to further issue passes, and the plaintiff brought an action for the purpose of rescinding the contract, and for damages. Both the rescission and the claim for damages were denied, because the contract and conveyance were made subject to the constitutional power of Congress to regulate commerce. It was there said:

"The plaintiff conveyed the property to the defendant upon the faith of defendant's promise to perform conditions which were then wholly lawful but which, after a substantial part performance, became unlawful without any contributing cause upon the part of either party. The full performance has not been arrested by any act or omission of the defendant, but by the Congress of the United States acting within its constitutional powers. It follows from what has been said, that the defendant cannot be mulcted in damages because of, and only because of, its observance of a law making further performance of the contract on its part impossible."

[5] There is nothing in the Public Service Commission Law which prevents the commission from directing that a rate contract be terminated, even though such contract when made was valid, when the performance of the contract results in discriminatory rates. Section 34 of the act (Laws 1911, p. 561) provides:

"Nothing in this act shall be construed to prevent any gas company, electrical company or water company from continuing to furnish its product or the use of its lines, equipment or service under any contract or contracts in force at the date this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the company party thereto, and thereupon such contract or contracts shall be terminated by such company as and when directed by such order: Provided, further, that the commission shall have no power to order the termination of any contract relating to the furnishing of water for irrigation or irrigation and domestic use, where such contract is based upon a consideration passing at the time of the execution of such contract."

A careful reading of this section of the statute discloses that the act itself does not operate to terminate any contracts in force at the date of its taking effect, or upon the taking effect of any schedule of rates subsequently filed with the commission; but by the first proviso, power is conferred upon the commission to direct that such contract or contracts shall be terminated by the company party thereto. This construction is made more obvious when the second proviso is considered, which denies the commission the power to terminate contracts relating to the furnishing of water for certain purposes.

It follows, therefore, that when the statute took effect, it did not ipso facto terminate the contract involved in this action which had previously been entered into, but it conferred power upon the commission to direct the termination of this and other like contracts.

The case of *State ex rel. Raymond Light & Water Co. v. Public Service Commission*, 88 Wash. 180, 145 Pac. 215, is relied upon to support the judgment of the trial court in this case. There the mill companies had previously owned title to the water, and conveyed it to the water company with a reservation, and by reason of the reservation were to be given free water for a period of 49 years. In other words, when the mill companies conveyed the water to the water company, they did not convey the entire title. A portion of the title they retained. The contract was not subject to be terminated under the provisions of the Public Service Commission Law without compensation; the reason being that the title of the mill companies to the water which had been reserved was not subject to be divested except by proper legal proceeding. Here the mill company had no title to the water. It had a contract only by which it was to receive water at the specified rate. This contract, as already shown, covering a matter within the police power, must be taken to have been made in view of the continuing power of the state to control rates; and when such power is exercised, the contract is no longer valid as against the act of the Legislature.

It may be that there is some language in the opinion of the case just referred to, when disassociated from the facts in that case; that would seem to be broad enough to include the contract here involved. But the decision in that case must be read in the light of the facts then before the court. It was not the intention to there hold that private individuals could, by virtue of their contracts, withdraw from the state the right to subsequently exercise its police power. To so hold would be to say that the sovereign right of the state may be limited by private contract. Had the Legislature expressly authorized a contract for rates which were reasonable, and for a limited time, and the contract had been made in pursuance of such authorization, a different question would be presented, upon which no opinion is here expressed, because that question is not involved in this case.

If the distinction suggested between this and the case of *State ex rel. Raymond Light & Water Co. v. Public Service Commission* is not sound, then that case was not rightly decided, and we would be disinclined to give it controlling effect here. So far as we are informed there is no reported decision by any court which would sustain the doctrine that the right of the state to exercise its sovereign power, such as the police power, can be

limited by private contract. Such a doctrine would make the exercise of the police power on the part of the state subject to the contracts of individuals if such contracts had been entered into prior to the exercise of the power by the state.

The case of *Sultan R. & Timber Co. v. Great Northern R. Co.*, 58 Wash. 604, 109 Pac. 320, 1020, is distinguishable. There a contract rate for the shipment of logs had been made prior to the taking effect of the railroad commission law. The law, by its terms, did not make the contract void. There was no finding there by the commission, or by the court, that the rate fixed in the contract was in any manner discriminatory. The commission did not direct its termination. Here the commission found that the contract resulted in discriminatory rates, and directed its cancellation. In one case the contract resulted in a discrimination of rates. In the other it did not. And therein lies the distinction.

[8] In the respondent's brief it is asserted that the Public Service Commission was without power to terminate the contract here involved without first giving notice, and an opportunity for a hearing on the part of the lumber company; and that a termination of the contract by the commission without notice or a hearing would not be in harmony with the due process of law clause of the federal Constitution. This position, however, overlooks the fact that the commission did not terminate the contract; but, as authorized under section 34 of the statute, ordered that the water company should terminate it. In obedience to this order that company might have proceeded in one of two ways, either by bringing an action against the lumber company seeking the cancellation of the contract, or by serving notice that water would no longer be furnished under the contract rate, but would be charged for at the tariff rate. The water company pursued the latter course. The lumber company then had a right, which it exercised, to bring an action for the purpose of testing the validity of the contract. In this action issues were framed and the cause was tried and a full hearing afforded. This is due process. The commission was not required, when it appeared during its investigation as to the rates being charged by the water company and the services being rendered by it, that that company was furnishing water under contract which resulted in discrimination, to give notice to the holder of the contract before it could direct the water company to charge all consumers at the tariff rate. There is no provision in the law requiring such notice. The provision of the statute quoted in the respondent's brief (section 80) relates to the notice to be given to a public service corporation when a complaint is filed against it with the Public Service Commis-

sion, and that it be given an opportunity to be heard upon its rates and service.

[7] Another contention made by the respondent is that the complaint to the Public Service Commission was not sufficiently broad to justify the order to the water company directing it to terminate the contract. The complaint charged unreasonable and excessive rates, and inadequate and insufficient service. The water company, by its answer, alleged that under existing rates its returns were insufficient to justify a more adequate service. During the course of the investigation upon the subject, as already stated, the contract by which the mill company was receiving water at less than the tariff rate was disclosed. Had it not been for this contract, the receipts of the company would have been substantially larger, and would have afforded it an opportunity to render a more adequate service. When it appeared during the hearing that a contract was outstanding which resulted in a discrimination of rates, the commission was then authorized to direct the water company to charge all consumers at its tariff rate, and, further, to direct it to terminate the contract or contracts which resulted in discrimination.

The judgment will be reversed, and the cause remanded, with direction to the superior court to dismiss the action.

MORRIS, C. J., and MOUNT, PARKER, BAUSMAN, CHADWICK, ELLIS, and FULLERTON, JJ., concur.

CORDS v. GOODWIN et al. (L. A. 3738.)

(Supreme Court of California. July 14, 1916.)

1. MORTGAGES \Leftrightarrow 309(3) — RELEASE — SUFFICIENCY OF CONSIDERATION.

Where the purchaser gave a purchase-money mortgage on sale of 797 acres of land, and the question arose whether the parcel contained only 704 acres, his agreement to pay the mortgage to the value of 704 acres was sufficient consideration, in the absence of mutual mistake, for a release of that amount of land and for the agreement of the vendor's assignee to sue to determine ownership of the balance of the acreage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 907-912; Dec. Dig. \Leftrightarrow 309(3).]

2. VENDOR AND PURCHASER \Leftrightarrow 65(1) — SALE BY ACRE — EXTENT OF LIABILITY.

Under a sale of an undetermined acreage at a certain price per acre the purchaser is bound to pay only for the land actually included and conveyed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 93, 94; Dec. Dig. \Leftrightarrow 65(1).]

3. EVIDENCE \Leftrightarrow 460(8) — PAROL EVIDENCE — MONUMENTS.

Where a government survey recited the distances and named the monuments, parol evidence was admissible to show that the actual distance was different from that given in the notes of the survey, under Code Civ. Proc. § 2077, subd. 2, which provides that in case of

inconsistencies monuments control distances, since the purpose of the evidence is not to vary any writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2122; Dec. Dig. ¶460(8).]

4. VENDOR AND PURCHASER ¶157—RIGHTS OF PURCHASER—POSSESSION OF PROPERTY.

Where one makes an agreement of sale binding him to deliver possession to the purchaser, the purchaser is entitled to possession before being called upon to pay the price, and cannot be obliged to accept a mere paper title and rely on his success in an action for possession against adverse holder.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 314-317; Dec. Dig. ¶157.]

5. VENDOR AND PURCHASER ¶176—ABATEMENT—POSSESSION BY THIRD PERSON.

Although certain land is within the description in a purchase-money mortgage, the mortgagor is entitled to an abatement for any portion of the land of which he cannot gain possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-340; Dec. Dig. ¶176.]

6. MORTGAGES ¶309(3)—SATISFACTION—ACTION—PARTIES.

The vendee gave a purchase-money mortgage covering 797 acres. It was afterwards discovered that he obtained possession of only 704 acres, and that an adjoining owner held the balance. The purchaser agreed to pay the mortgage to the extent of the land in his possession in exchange for a release and a seller's agreement to sue to determine title to the balance. Held that, in an action by the assignee of the mortgage to cancel and to reform the release in which the adverse holder was not made a party, the mortgage could not be held to be satisfied, since the mortgagor obtained the record title, and might thereafter establish title as against the adverse holder, in which case the mortgage would be valid as to the balance of the land.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 907-912; Dec. Dig. ¶309(3).]

Department 1. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Suit by R. Cords, Jr., against J. W. Goodwin and others. From an order denying motion for new trial, plaintiff appeals. Affirmed in part, and in part reversed and remanded.

C. M. Fickert, of San Francisco, and E. A. Lane, of Los Angeles, for appellant. Canfield & Starbuck, of Santa Barbara, and Goodfellow, Eells & Orrick and Goodfellow, Eells, Moore & Orrick, all of San Francisco, for respondents.

SHAW, J. This case comes up on an appeal by the plaintiff from an order denying his motion for new trial. The object of the action was to cancel a certain agreement relating to the satisfaction of a mortgage, to reform a release of the mortgage executed in pursuance of said agreement, and thereupon to foreclose said mortgage. The ground on which the relief was asked was that the agreement and release were given in consequence of a mutual mistake of the parties.

On June 18, 1908, one Tillmann made an agreement in writing to sell to Goodwin a tract of land, stating therein that it contained 797 acres, more or less, at \$150 per acre, making a total price of \$119,550. The agreement provided that when two-thirds of the price was paid Tillmann should convey the land to Goodwin and Goodwin should execute a mortgage thereon for the remaining \$30,850. The land at that time was all inclosed by fences except a small tract in the northeast corner. Goodwin took possession of the land within the fences and of the small uninclosed tract, and has ever since held possession thereof. On June 14, 1910, Goodwin having paid the two-thirds of the purchase money, Tillmann conveyed the land to him, and he executed the mortgage to Tillmann thereon for the remainder of the price. At the time this was done Goodwin claimed that the tract contained less than the 797 acres called for by the agreement. It was then understood between them that the matter would be adjusted before the mortgage was paid. Afterwards Tillmann assigned the mortgage to the plaintiff, Cords, who, as it seems, took with knowledge of the facts concerning the shortage. The land was in township 9 north, range 32 west, in Santa Barbara county. The remainder of the description as given in the instruments was as follows:

"Of section 28, the whole; of section 27, the northwest quarter of the northwest quarter, the fractional south half of the northwest quarter, and the fractional southwest quarter."

The land was bounded on the east by the westerly line of a Mexican grant known as the Tinaquale rancho. The intersection of this line caused the fractional subdivisions of section 27.

Soon after the execution of the mortgage Goodwin caused a survey to be made of the land inclosed by the fences and the small uninclosed tract in the northeast corner by Flournoy, the county surveyor, and found that the amount of land of which he had obtained possession was only 704.01 acres, making a difference of 92.99 acres between the actual amount of land obtained and that called for by the agreement of sale. The balance of the purchase price secured by the mortgage became due on June 18, 1911. In July, 1911, being ready to pay the balance justly due, Goodwin showed to Cords, who then held the mortgage, the map of the land made by Flournoy, displaying the lines of the fences and of the tract surveyed by Flournoy, informed Cords that the survey showed only 704.01 acres in his possession, and stated that it was supposed that some part of the land described in the mortgage was in the possession of one Hansen, who owned the land adjoining the tract on the north. The agreement dated July 22, 1911, was then executed by Cords and Goodwin to provide for the adjustment of the discrepancy in the

acreage. It referred to the original agreement of sale with Tillmann, stated that said sale was made on the basis of 797 acres at \$150 per acre, that two-thirds of the price had been paid and the mortgage executed for the remainder, that Goodwin claimed an offset against the mortgage because of a partial failure of consideration growing out of the fact that the land contained less acreage than the contract called for, and declared that it was made to reconcile and settle said claim. It provided that Goodwin should pay at once \$25,901.50 on the mortgage, being the balance of the price for the 704.01 acres; that on receipt thereof Cords should execute to Goodwin "a release from the lien of said mortgage of all land lying south of a line drawn from the northeast corner of section 29 in said township and range; thence east to the westerly line of the Tinaquale rancho, at a point distant south 23° 45' W., 513.13 feet distant from a redwood post marked "T. No. 1, F F F" set for the northwesterly corner of said rancho"; that Goodwin should, at the expense of Cords, immediately sue the claimants of the land lying north of said last-described line; that, if he thereby succeeded in establishing that any of the land described in his deed lay north of said line, and should recover possession thereof accordingly, "then the sum of \$13,948.50 shall be and become immediately due and payable if land so recovered shall equal 92.99 acres, and, if less than 92.99 acres, the balance due and payable upon said mortgage shall be reduced" proportionately; and that upon payment of the amount so ascertained the mortgage should be entirely canceled.

On the same day Goodwin paid the \$25,901.50, and Cords executed the release. The release recited the giving of the mortgage, its assignment to Cords, the payment of \$25,901.50, and declared that Cords thereby released from the lien of the mortgage "all of the property described in said mortgage lying south of the following line, viz.: Commencing at the common corner of sections 20, 21, 28, and 29, in township 9 north, range 32 west, San Bernardino base and meridian, and extending thence easterly to a point in the northwesterly line of the Tinaquale rancho, which point is situated south 23 degrees 45 minutes west and distant 513.13 feet from the northwest corner of said Tinaquale rancho, containing seven hundred and four and $\frac{1}{100}$ acres. It being the intention hereof to leave ninety-two and $\frac{88}{100}$ acres of land still subject to the lien of said mortgage." The court found, and the evidence shows, that the line described in the release was the same line as that described in the agreement, although the release does not mention the redwood post marked "T. No. 1, F F F." Goodwin commenced a suit, as provided in the agreement, against one Hansen, for the recovery of the land believed to be

north of the line above described, but, finding that the fence line on the north coincided with the north line of the land mortgaged, the suit, at the request of Cords, was dismissed.

The complaint alleges that said release and agreement were executed "under a mutual mistake of fact, to wit: It being represented by the defendant J. W. Goodwin, and believed by the plaintiff, that there was an adverse claim to that portion of said mortgaged premises lying north of a line described in said partial release as commencing at the" northwest corner of section 28 "and extending thence easterly to a point in the northwesterly line of the Tinaquale rancho, which point is situated south 23° 45' W., and distant 513.13 feet from the northeast corner of said Tinaquale rancho, containing 92.99 acres," that plaintiff was induced to and did make such agreement and release in the belief that said representations set forth in said agreement were correct, but that, in fact, there is not and never has been any adverse claim to any of said mortgaged premises, and that the same are correctly described in the said agreement of July 18, 1908. The complaint, in a second count, alleges that the agreement and release were executed without consideration. A third count alleges the execution of the mortgage and the part payments aforesaid, and asks foreclosure thereof.

With respect to the alleged mistake the findings are not clear. They state that the agreement and release were not executed by the parties thereto under any mutual or other mistake of fact; that Goodwin did not represent, nor Cords believe, that there was an adverse claim to any part of the land mortgaged. But this is preceded by the finding that they both agreed and admitted that all of the tract mortgaged lying outside of the said fences was held adversely by third parties, but that nevertheless they "mutually doubted whether said northerly boundary thereof coincided with said northerly fence line as shown on said map (made by Flournoy), or ran in a northeasterly direction from" the northwesterly corner of section 28, so as to include north of the fence the whole or a part of the remaining 92.99 acres, and that thereupon, for the purpose of paying for the 704.01 acres received in possession by Goodwin and resolving said doubt as to the remainder of the 797 acres, and to provide for the payment for all or any part of said remainder if any part thereof lay north of said described line, they made the said agreement. The finding last mentioned, taken in connection with the contents of the agreement and release and the finding that none of the land lay north of said line, are, in effect, findings that the agreement and release were both executed under a mutual mistake, and that the mistake consisted in the common belief that some of the land did lie north of the described line. This, in substance,

was the mistake alleged. If the court intended to find otherwise, such finding would be contrary to the effect of the instruments, coupled with the undisputed facts proven by the evidence. We must therefore consider the case on the theory that the mistake alleged was sufficiently established, and that the plaintiff should have the relief he would be entitled to by reason of that fact.

The court also found that the mortgage and any and all indebtedness thereby secured had been and is fully paid and satisfied, that no part of the land described therein remained subject to said mortgage, as security or otherwise, and that the release and agreement of July 22, 1911, were executed for a valuable consideration. These findings are challenged by the plaintiff on the ground that they are contrary to the evidence.

[1] The mutual agreements of the respective parties, that of Goodwin to immediately pay the \$25,901.50 and begin the action against the claimants of the land lying northerly of the described line, and that of Cords to release from the mortgage lien all land lying south of said line, were sufficient consideration to uphold the agreement and release if they had been freely made without mutual mistake. There is no merit in the claim that they were without consideration.

[2] The important and controlling question is whether or not the finding that the mortgage is satisfied is supported by the evidence. If the mortgage is satisfied, the case is at an end. It would avail nothing to the plaintiff to have the release reformed so as to leave a part of the land unreleased, if the mortgage itself is no longer of any force, as would be the case if it is satisfied.

The following propositions are determinative of the question: (1) The sale of the land by Tillmann to Goodwin was a sale of an undetermined area of land by the acre at \$150 per acre for the quantity conveyed by a good and sufficient title. This proposition is established by the terms of the agreement of sale and by the terms of the agreement and release of July 22, 1911. The parties so understood it, and they have acted accordingly. (2) Upon such a sale the purchaser is bound to pay only for the land which is included within the tract described, at the agreed price per acre, and when he has done so his debt for the purchase money is discharged. (3) The agreement of sale bound Tillmann to convey by good title and to deliver possession to the purchaser. In such a case, even if it is a sale in gross, the vendor cannot recover the purchase money for any part of the land of which he is unable to give the purchaser the possession. As to such part, if any, there is a failure of consideration of the mortgage, equivalent to a satisfaction pro tanto.

It needs no argument to establish the proposition that upon the sale of land at a fixed price, by the acre, and not in gross, the price

to be paid is determined by the number of acres actually included in the tract conveyed.

"If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation." 1 Sugden on Vendors, 324 (Perkins' edition, 489).

Upon this rule Goodwin is entitled to a deduction from the mortgage to the extent that there is a shortage in the number of acres included in the tracts described therein. The tracts consisted of government subdivisions which, according to the courses and distances set forth in the government survey, embraced an area of 796.76 acres, instead of 797 acres as stated in the agreement of sale, a discrepancy too small to be worthy of notice. Section 28 by that survey included 640 acres. The survey made by Flournoy showed that it contained only 626.29 acres.

[3] The appellant errs in his claim that the number of acres within that section is conclusively settled by the government survey, and that no evidence can be received to contradict it in that respect. Such evidence does not contradict the record survey, within the meaning of the rule forbidding evidence to contradict writings. It merely serves to show that the distances given in the survey between the monuments at the respective corners of the sections are not accurate. The rule is that measurements always give way to monuments, and that parol evidence can always be given to show that the actual distance is different from the distances given in the notes of the survey. Code Civ. Proc. § 2077. This will of necessity show a discrepancy between the actual acreage and that stated as part of the description.

[4] The third proposition is also well established. Where one makes an agreement of sale binding him to deliver possession to the purchaser, such purchaser is entitled to possession before being called upon to pay the price. He is not obliged to accept a mere paper title to the property and rely upon his success in an action for possession against the person holding adversely. *Pierce v. Edwards*, 150 Cal. 653, 89 Pac. 600; *Benson v. Shotwell*, 87 Cal. 58, 25 Pac. 249, 681; *King v. Knapp*, 59 N. Y. 467; *Shriver v. Shriver*, 86 N. Y. 584; *Tyson v. Eyrick*, 141 Pa. 313, 21 Atl. 635, 23 Am. St. Rep. 287; *Hays v. Hays*, 126 Ind. 92, 25 N. E. 600, 11 L. R. A. 378.

[5] The shortage in section 28 accounts for 13.71 of the total shortage of 92.99 acres. Under the second proposition above stated the mortgagor is entitled to a rebate of \$2,056.50 on the purchase price and a corresponding reduction on the mortgage debt, by reason of this deficiency in the area of that section.

According to the notation on the government survey, there should have been 156.76 acres of land in the subdivisions of section 27 included in the conveyance and mortgage, or, in round numbers, as the parties stated it, 157 acres. The area as determined by Flour-

noy would leave a shortage of 79.28 acres in the several tracts lying in section 27 described in the deed and mortgage. The evidence shows that this shortage is caused by the encroachment of the owner of the adjoining Tinaquale rancho upon the easterly side of section 27. Many years ago, in establishing the boundaries which he claimed, the owner of that rancho set fences along the westerly boundary thereof adjoining section 27. The evidence indicates that he has ever since maintained the fences on the line thus located. It overlaps the boundaries of the subdivisions of section 27 aforesaid far enough to include this shortage of 79.28 acres. This land is properly within the bounds of the descriptions contained in the mortgage, but the purchaser, Goodwin, has never obtained possession thereof, and apparently Tillmann and Cords, his successor in the mortgage, are unable to deliver the possession thereof to him. Under the authorities above stated, Goodwin is clearly entitled to an abatement upon the mortgage debt to the amount of this shortage. A case precisely in point is *Voorhees v. De Meyer*, 2 Barb. (N. Y.) 37. The facts were identical, in effect, with those here disclosed, and the decision was that the purchaser was entitled to compensation by a rebate on the purchase price.

[6] These two discrepancies completely account for the unpaid portion of the mortgage debt. If the proper parties were before the court, so that the decision on the question would be binding on all persons concerned, we could justly hold that the finding that the mortgage is satisfied is sustained by the evidence. The difficulty arises from the fact that the owners of the Tinaquale rancho, who are in possession of the overlap included within the mortgage description, are not parties to the action. The defendants have acquired the record title to the land included in the overlap, but have not received possession. If the judgment stands in its present condition, we cannot say that the defendants may not hereafter be able to obtain possession of this overlap. The mortgage debt is not fully paid. If the defendants should succeed in obtaining possession of the overlap, or if the plaintiff should succeed in procuring it for them, he would be entitled to enforce his mortgage for the balance thereof unpaid and chargeable to this overlap against the land included in the overlap. With the record as it stands, this right cannot be preserved to him. The evidence, it may be observed, indicates that this right is barren of any benefit, and that he would meet with inevitable failure because of the long-continued adverse possession of the adjoining owners. But this cannot be conclusively determined in a suit in which the adjoining owners are not parties. The legal possibility of obtaining possession of this land must, so far as the record as it now stands is concerned, remain open. The mort-

gage is not absolutely satisfied, but only conditionally so; that is, it is satisfied so far as the land in possession of the defendants is concerned, but it remains a possible lien for the proportional part of the balance unpaid thereon upon the land included in the overlap. The finding is to that extent unsupported by the evidence. This possibility of the right is not of sufficient importance to warrant a new trial upon all the issues in the case. Nor does it make it necessary that the judgment be vacated with respect to the land in possession of the defendants. Upon this appeal from the order denying a new trial we cannot modify the judgment so as to preserve this possible lien to the plaintiff, or otherwise protect the respective parties. We can only make a limited order for a new trial respecting it. In order to make a new trial as to the overlap and the mortgage lien thereon of any substantial benefit to the parties, it is necessary that the persons in adverse possession thereof be made parties to the action; as otherwise no judgment respecting the overlap declaring it subject to the mortgage would be of any benefit to the defendants to entitle them to possession, or to the plaintiff to entitle him to foreclose. If those persons have not acquired adverse title by prescription or otherwise, the overlap found to exist would be subject to the mortgage. If they have such title, of course no judgment could be given against them. Substantial justice can be done with respect to this overlap by directing a new trial of the case with respect thereto, providing the plaintiff shall bring in the persons in possession thereof as parties to the action, so that they may be bound thereby, and allowing the judgment to stand as it is with respect to all of the land in the possession of the defendant. As the plaintiff had notice that other persons had possession and claimed title to the land lying easterly of said fence, before he began this action, and did not make them parties, he should not recover costs on this appeal because of the limited reversal of the order.

The order denying a new trial is affirmed so far as it affects the land described in the mortgage and lying westerly of the line of the fence surveyed by Flournoy in 1910 as the westerly line of the Tinaquale rancho. With respect to the land described in the mortgage lying easterly of said fence, the order is reversed, and the cause is remanded for a new trial. Upon such new trial the court below is directed to allow the pleadings to be amended, to bring in as new parties the persons claiming the said overlap, and thereupon to determine whether or not the present defendants, in virtue of their title derived from Tillmann, are entitled to possession of said overlap, and, if it concludes that they are so entitled, to enforce said mortgage against the land by foreclosing the same for the amount of land included in the overlap

at the agreed price of \$150 per acre. It is further ordered that each party shall pay his own costs upon this appeal.

We concur: SLOSS, J.; LAWLOR, J.

LASSEN v. SOUTHERN PAC. CO.
(L. A. 3794.)

(Supreme Court of California. July 15, 1916.)

1. NEGLIGENCE ⇐101—EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.

By the Employers' Liability Act (St. 1911, p. 796), contributory negligence of an employé does not bar his recovery against the employer for personal injuries, if it is slight and that of the employer and fellow servant gross in comparison; and the jury may diminish the damages according to the portion of negligence chargeable to the employé.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. ⇐101; Damages, Cent. Dig. § 371.]

2. MASTER AND SERVANT ⇐146—INJURIES TO SERVANT—NEGLIGENCE.

Where a railroad's agent, or a fellow servant of a machinist's helper in the road's roundhouse, left a cold chisel about two feet from the edge of the locomotive pit, where chisels were never placed for any proper purpose connected with the work, there being a rule of the company that chisels not in use should be put in a box, it was an act of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 284; Dec. Dig. ⇐146.]

3. MASTER AND SERVANT ⇐289(22)—INJURIES TO SERVANT—QUESTION OF FACT.

In an action against a railroad by a machinist's helper employed in the road's roundhouse, whether plaintiff was guilty of contributory negligence in failing to observe a cold chisel on the floor near the edge of a locomotive pit, upon which he dropped a steel "binder," causing the chisel to fly up and strike his eye, was a question of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1113; Dec. Dig. ⇐289(22).]

4. TRIAL ⇐165—NONSUIT—INFERENCES FOR PLAINTIFF.

In deciding a motion for nonsuit, every favorable inference fairly deducible from the evidence produced must be considered as facts proved in plaintiff's favor and any substantial evidence tending to prove all facts in issue constituting plaintiff's case entitles him to go to the jury for a verdict on the merits.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. ⇐165.]

5. MASTER AND SERVANT ⇐286(3), 289(22)—INJURIES TO SERVANT—LIABILITY OF MASTER—QUESTION FOR JURY.

In an action against a railroad by its roundhouse machinist's helper for injuries received when he dropped a "binder" on a cold chisel, causing it to fly up and strike him in the eye, destroying the sight, defendant's negligence and degree of plaintiff's contributory negligence held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010, 1113; Dec. Dig. ⇐286(3), 289(22).]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by John. F. Lassen against the

Southern Pacific Company. From a judgment for defendant on granting of its motion for nonsuit, plaintiff appeals. Reversed.

Riddle & Cheroske, of Los Angeles, for appellant. Henry T. Gage, W. I. Foley, W. I. Gilbert, J. W. McKinley, and R. C. Gortner, all of Los Angeles, for respondent.

SHAW, J. The defendant's motion for a nonsuit was granted, and judgment was thereupon given in its favor. The plaintiff appeals.

The complaint alleges that the plaintiff was employed by the defendant in the capacity of machinist's helper in the defendant's roundhouse in the city of Los Angeles; that on August 9, 1912, while so employed, the plaintiff was directed by the machinist, under whose supervision he worked, to remove a certain "binder," a large, heavy piece of steel used in repairing a locomotive, from one part of the roundhouse to and alongside of the pit in which the machinist was working and over which a locomotive was standing; that he proceeded to do so by dragging the binder and upon arriving at the said pit the plaintiff dropped the end of the binder held by him to the floor, where it struck the end of a steel chisel causing the chisel to fly upward and strike the plaintiff in his left eye, totally destroying his sight therein; that said chisel had been by the defendant, or some of its officers or agents, negligently and carelessly dropped, laid, or left at the place from whence it struck the plaintiff.

There was a trial by jury, and at the close of the plaintiff's testimony the defendant filed a motion for nonsuit, which was granted by the court, judgment thereafter being entered that plaintiff recover nothing in his action and that defendant recover from the plaintiff its costs.

[1] We think the court below erred in granting the motion for nonsuit. At the time of the injury complained of the Employers' Liability Act of 1911 was in force. Stats. 1911, p. 796. That statute abolished the previously available defenses of an employer, in an action by an employé for damages from personal injuries, that the plaintiff had assumed the risk of the hazard from which he was injured, and that the injury was caused by the negligence of a fellow servant. Consequently, the case must be decided upon the principle that the employer was responsible for the negligence of his employés when such negligence caused injury to another of his employés, and for all injuries caused by dangers arising from the work itself or from the place where it is carried on. That statute also provided that contributory negligence of the employé should not bar his recovery if it was slight and that of the employer or fellow servant was gross, in comparison, and that in such cases the jury may diminish the

damages according to the proportion of negligence chargeable to the employé.

The "binder" referred to was a piece of steel nearly 4 feet long, 4 inches thick, 5 inches wide, and weighed 180 pounds. The plaintiff moved this binder along the floor of the roundhouse from the place where it lay, 9 feet from the locomotive pit, to a place by the side of the pit some 18 inches or 2 feet therefrom, where it could be easily reached when needed by persons working in the pit. He did this by holding one end in his hands a foot above the floor and allowing the other end to drag along the floor. When he reached the desired place he let go of the binder, dropping the end he was holding to the floor. It fell upon the beveled end of a cold chisel lying there, causing the chisel to fly upward and strike his eye, inflicting the injury complained of. The place was not well lighted, the floor and the chisel were both of a dark color and he did not see the chisel. He did not know it was there. The machinist used such chisels in his work upon and under the locomotive while in the pit. It was the rule that when not in use the chisels were put in a box kept for that purpose. Sometimes, during hours of work, they would be laid on the edge of the pit, within 12 inches thereof, so as to be reached conveniently from the pit when wanted. All this the plaintiff knew. The end of the binder was dropped at a place from 18 inches to 2 feet from the edge of the pit. The evidence would have justified a finding that it was 2 feet away, and that such chisels were never placed that far away for any proper purpose connected with the work.

[2-5] If an agent of the defendant, or a fellow servant of the plaintiff in the service of the defendant, left the chisel at that place, it was clearly an act of negligence. The jury could reasonably have inferred that it had been carelessly left there by a fellow servant. Its presence there made the place dangerous for the work the plaintiff was doing, as the event fully proved. Under the law as fixed by said statute, the plaintiff did not assume the risk of injury therefrom, and the defendant is not excused by the fact that a fellow servant may have carelessly left it there. If the plaintiff was guilty of contributory negligence in failing to observe the chisel, it was a question of fact for the jury. If it so found, the jury might reasonably have concluded that such contributory negligence was slight and that the negligent act of leaving the chisel there was gross by comparison, in which case the plaintiff would have been entitled to a verdict. In deciding a motion for a nonsuit, "every favorable inference fairly deducible from the evidence produced 'must be considered as facts' proved" in favor of the plaintiff. If there is any substantial evidence tending to prove all the facts in issue constituting the plaintiff's case,

he is entitled to have the case go to the jury for a verdict on the merits. *Estate of Arnold*, 147 Cal. 586, 82 Pac. 252; *Davis v. Crump*, 162 Cal. 515, 123 Pac. 294. Applying these rules it is clear that the case should have been submitted to the jury for its decision. There was substantial evidence of all the facts above stated, as well as of the other facts alleged by plaintiff.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOB, J.

AYERS et al. v. SOUTHERN PAC. R. CO.
et al. (L. A. 3758.)

(Supreme Court of California. July 15, 1916.
Rehearing Denied Aug. 14, 1916.)

1. FRAUD \S 12—NONPERFORMANCE OF PROMISE—STATUTE.

Under Civ. Code, \S 1572, subd. 4, defining actual fraud, breach of a railroad's promise "that no intoxicating liquor would ever be sold or given away" in a town which it was developing did not amount to actionable fraud, since the making of a promise does not constitute fraud unless it is made without any intention of performing it.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. \S 14; Dec. Dig. \S 12.]

2. FRAUD \S 42—FALSE REPRESENTATIONS—PLEADING.

In pleading false representations as fraud, allegations that a promise was made without any intention of performing it, or that it was made with the intent to deceive or defraud the plaintiff, or to induce her to buy the property, are necessary.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. \S 39; Dec. Dig. \S 42.]

3. VENDOR AND PURCHASER \S 79—FALSE REPRESENTATIONS—STATEMENT AS TO FUTURE.

A railroad's statement that intoxicating liquors would never be sold or given away in a town in which it was seeking to sell lots did not constitute a binding contract with, or warranty to, a buyer of lots that the future should be according to the prophecy, or a basis for an action.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. \S 7, 8, 127-131; Dec. Dig. \S 79.]

4. EVIDENCE \S 441(8)—PAROL EVIDENCE AFFECTING WRITINGS—STATUTE.

Under Code Civ. Proc. \S 1856, providing that a written agreement is to be considered as containing all the terms, and that no other evidence can be given, except where a mistake in writing is in issue, the agreement's validity is in dispute, or where it is necessary to explain an extrinsic ambiguity, or to establish illegality or fraud, in an action against a railroad for its failure to prevent the keeping of saloons and the sale of liquors in a town which it has been developing and in which it had sold lots to plaintiff, testimony that the road's agent, during the negotiations attending the sale, said there would never be any liquor sold in the town, etc., which was the only evidence of the undertaking relied on, was inadmissible, where the written agreement for the sale of the lots and the deed contained no stipulation or undertaking on the part of the railroad that it

would undertake to prevent the sale of intoxicants forever or at all in the town.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1778, 2032; Dec. Dig. ¶ 441(8).]

5. EVIDENCE ¶ 443(1)—PAROL EVIDENCE AFFECTING WRITINGS—COLLATERAL MATTERS.

To justify the admission of parol evidence of a contract between parties who have made an agreement in writing on the ground that it is collateral, it must be upon a subject distinct from that to which the subject relates.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2048; Dec. Dig. ¶ 443(1).]

6. PRINCIPAL AND AGENT ¶ 103(12)—SCOPE OF AUTHORITY—AGENT TO SELL.

The agent to sell lots in a town for a railroad, authorized to sell on such terms and conditions as the road should instruct him to make, was not authorized to agree for the road to forever prevent the sale of intoxicants by any and all persons within the area of the town.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 290; Dec. Dig. ¶ 103(12).]

Department 1. Appeal from Superior Court, Kern County; Paul W. Bennett and Howard A. Pears, Judges.

Action by Charlotte E. Ayers and another against the Southern Pacific Railroad Company and others. From a judgment for plaintiffs, an order denying defendants a new trial, and an order denying defendants' motion for a judgment on the findings, the named defendant appeals. Judgment and orders reversed.

Frank McGowan, Frank Thunen and Wm. M. Singer, all of San Francisco (William Singer, Jr., of San Francisco, of counsel), for appellant. Street & Street, of Oakland, and Charles Del Bondio, of Taft, for respondents.

SHAW, J. Three appeals by the defendants are presented by the record, one from the judgment, a second from an order denying a new trial, the third from an order denying defendants' motion for a judgment on the findings. The judgment is against the Southern Pacific Railroad Company alone.

The complaint purports to state a cause of action for damages to plaintiffs' business and property, arising from the failure of the defendants to prevent the keeping of saloons and the sale of liquors in the town wherein the property of plaintiffs was situated. We will now state the allegations of fact upon which the claim is predicated.

The defendant Southern Pacific Railroad Company, being the owner of a tract of land in Kern county, laid it off into blocks, lots, and streets, called it the town of Moron, and filed a map thereof in the office of the county recorder on July 1, 1909. It then adopted and made public "a general scheme or plan" that no alcoholic liquors "should ever be sold or kept for sale or given away upon any of the lands" situated within said town, and that no part thereof should be sold or conveyed, except upon a covenant and condition inserted in the agreement or

deed, as a part of its consideration, by the purchaser, his heirs, successors, or assigns, that no alcoholic liquors should ever be sold, kept for sale, or given away thereon, and that a breach of the condition should work a forfeiture and a reverter to said company. This general scheme or plan was carried out, and every deed and agreement of sale of every lot or parcel of land sold within said town contained the covenant and condition subsequent above stated. Said company, through its agents, engaged in the sale of said lots, "represented and stated to plaintiffs that it was the general scheme and plan of the defendants in laying out and platting said town of Moron that no intoxicating liquor should ever be sold or given away therein, and that no intoxicating liquor would ever be sold or given away therein," and that a covenant would be inserted in every deed and agreement of sale, as above stated. The plaintiff Charlotte E. Ayers is the real party in interest, C. W. Ayers being joined as plaintiff solely because he is her husband. Believing said representations and relying thereon, she bought seven lots in Moron. Believing that said liquor covenant was binding upon every purchaser of a lot, "and that defendants would enforce said covenants and not permit any purchaser or owner of any lot within said town of Moron to sell or give away any intoxicating liquors therein, and relying on said representations and statements of defendants," she erected a hotel on her said lots, furnished it, and on June 16, 1910, engaged in the hotel business therein, and has ever since continued in said business. In January and February, 1911, several saloons and a restaurant were established in said town by divers persons on lots sold by said company by deed containing the aforesaid covenants and conditions, and the business of selling intoxicating liquors has ever since been carried on in said saloons, in violation of said covenants and conditions, and with the "full knowledge, consent, and permission of said defendants." The said restaurant has been and is conducted as a place where intoxicating liquors are sold, and it has caused a loss of patronage to said plaintiff in her hotel dining room, to her damage in the sum of \$5,000. The saloons have caused people to leave plaintiff's hotel and patronize the saloons and restaurant aforesaid. By reason of said withdrawal of patronage from plaintiff's hotel she is unable to sell her property, and by reason of the keeping of said saloons plaintiff's property has depreciated in value to her damage in the sum of \$25,000. Defendants, though often requested by plaintiff so to do, have failed and refused to prohibit, stop, prevent, and enjoin said persons from selling intoxicating liquors in said town of Moron. The court below found these allegations to be true in

the main, and assessed the plaintiff's damage from loss of patronage in her hotel at \$5,000, and from depreciation in the value of her property at \$15,000. The judgment was for \$20,000.

[1, 2] The charge that the defendant represented to plaintiff that it was its general plan that no intoxicating liquors should be sold in Moron and that the covenant to that effect should be inserted in each deed and agreement amounts to nothing as a basis for the action, for these were not false representations. The things occurred in accordance with the representations.

The only other representation was in regard to the future; that is, "that no intoxicating liquor would ever be sold or given away" in said town. Even if this be regarded as a promise, rather than a prediction, and a promise which was not fulfilled, or of which performance was refused, it does not amount to fraud. The making of a promise does not constitute fraud unless it is made without any intention of performing it. Civ. Code, § 1572, subd. 4. "The mere failure to perform the covenant does not relate back to and render the same fraudulent." *Lawrence v. Gayetty*, 78 Cal. 131, 20 Pac. 384, 12 Am. St. Rep. 29. It is not alleged that the so-called promise was made without any intention of performing it, nor even that it was made with intent to deceive or defraud the plaintiff, or to induce her to buy the property. Such allegations are necessary in pleading false representations as fraud. *Heller v. Dyerville Mfg. Co.*, 116 Cal. 133, 47 Pac. 1016. The complaint cannot be sustained on the ground that it states a cause of action for damages produced by fraud or deceit. *Feeney v. Howard*, 79 Cal. 528, 21 Pac. 984, 4 L. R. A. 526, 12 Am. St. Rep. 162; *Woodroof v. Howes*, 88 Cal. 190, 26 Pac. 111.

[3] The complaint does not allege that the statement "that no intoxicating liquor would ever be sold or given away" in the town of Moron was made as a promise or agreement. Literally the allegation means only that the defendant merely stated it as a fact that would occur or as a matter of opinion and prophecy. In neither case would such a statement constitute a binding contract or warranty that the future should be according to the prophecy or a basis for an action. *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Nounnan v. Sutter County L. Co.*, 81 Cal. 6, 22 Pac. 515, 6 L. R. A. 219.

[4] Conceding, however, that it may be taken as an allegation that the Southern Pacific Railroad Company thereupon entered into an undertaking or contract that no intoxicating liquor would ever be sold or given away in said town, we are met with the objection that there was no legal evidence to support the allegation. The only evidence offered consisted of declarations made by the

agent of the railroad company to the plaintiffs at the time of making the sale to Mrs. Ayres of two of the lots. One S. C. Birchard was appointed by the Southern Pacific Railroad Company, as its agent, to effect the sale of the lots in Moron. His appointment was in writing. It authorized him to—"make earnest and active effort to effect the sale of such lots at the prices and upon the terms, and subject to such agreements and conditions and restrictions as the railroad company may instruct."

The method of sale adopted was that each person desiring to purchase a lot should sign a written application to the railroad company to become such purchaser, the application would then be forwarded to the general office of the railroad company at San Francisco for approval, and, if approved, would be returned to Birchard. An agreement for the sale would then be prepared and signed by the railroad company and the purchaser, providing that upon payment of the price the railroad company would execute a deed to said purchaser. The forms of applications for purchase were prepared and printed by the railroad company, and were by it furnished to Birchard. The purchase by the plaintiff Charlotte E. Ayers of lots in Moron was made in this way. The application signed by the plaintiff was not introduced in evidence, and its contents do not appear in the record. There is no evidence that the undertaking alleged was contained therein, as, indeed, it could not be, since it was signed only by the purchaser. The agreement signed by both parties declared that, as a part of the consideration of the sale, it was made subject to the condition that no intoxicating liquor "shall ever be sold or kept for sale or given away upon said premises," upon the penalty of forfeiture and reversion of title to the company in case of a breach thereof, and that said condition and covenant should be written into the deed and should run with the land. These provisions were also inserted in the deed executed by the railroad company to the plaintiff in pursuance of said sale. Neither the agreement nor the deed contained any stipulation or undertaking on the part of the railroad company that it would undertake to prevent the sale of intoxicating liquors forever, or at all, in the town of Moron. C. W. Ayers testified that Birchard, during the negotiations attending the sale, said—

"that there never would be any liquor sold in the town of Moron; that it was intended and purposed to be a dry town, that no liquor would be allowed to be sold under any circumstances by anybody."

This statement is the only evidence of the undertaking relied on. It was admitted over the objection of the defendants that Birchard had no authority to enter into such an agreement on behalf of the railroad company, and that it was incompetent to vary an agreement in writing by evidence of such declarations. That it was inadmissible over

these objections is clear. It comes within the rule of section 1856 of the Code of Civil Procedure that "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms," and, therefore that between the parties "no evidence of the terms of the agreement other than the contents of the writing" can be given. The section states the exceptions to the rule. They are that parol evidence is admissible for some purposes where a mistake or imperfection in the writing is in issue, or its validity is in dispute, or where it is necessary to explain an extrinsic ambiguity, or to establish illegality or fraud. This case does not come within any of the exceptions.

[5] The so-called agreement that sales of liquor should never take place in Moron was essentially a warranty regarding the permanent advantages of the property sold. Such a warranty, if made, would be a part of the contract of sale and not collateral thereto. To justify the admission of parol evidence of a contract between parties who have made an agreement in writing, on the ground that it is collateral, it must be upon a subject distinct from that to which the writing relates. *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 504, 96 Pac. 319. Here the written agreement itself speaks on the subject of the sale of intoxicating liquors, and provides that none shall ever be sold on the premises described. To add to this provision the further stipulation that none should ever be sold in the entire town of Moron and that the railroad company should see that none was ever sold there, would be to add by parol to a written agreement which on its face purports to be complete upon that subject, and which, under section 1856, is presumed to embrace all the terms agreed on. Such evidence is inadmissible. *Harrison v. McCormick*, 89 Cal. 330, 26 Pac. 830, 23 Am. St. Rep. 469; *Germain F. Co. v. Armsby Co.*, supra; *Gardiner v. McDonogh*, 147 Cal. 319, 81 Pac. 964; *Empire I. Co. v. Mort*, 169 Cal. 739, 147 Pac. 960; *Johnson v. Bibb L. Co.*, 140 Cal. 99, 73 Pac. 730.

The case does not come within the rule of such cases as *Sivers v. Sivers*, 97 Cal. 521, 32 Pac. 571, and *Whittier v. Home Savings Bank*, 161 Cal. 317, 119 Pac. 92, cited by respondent, that evidence of a contract in parol may be given if it is upon a subject upon which the contract is silent. The contract was not silent on the subject. The conversation itself, in which the declaration is said to have been made, covered the conditions actually inserted in the agreement, as well as the stipulation claimed to have been made by parol. The presumption is conclusive that by signing the agreement afterwards executed and containing no such stipulation, the parties finally determined not to insist on that stipulation.

[6] It is also clear that Birchard had no authority to make such an agreement for the railroad company. His authority was in writing, and it not only did not authorize him to make such an agreement, but limited his power in that regard to such terms and conditions as the principal should instruct him to make. While it may be that the authority simply to make sales would include power to make the ordinary covenants and stipulations usually included in an agreement of sale, as to which we express no opinion, it cannot be that it would give power to make such an extraordinary and unheard of agreement as that here claimed, an agreement to forever prevent any and all sales of intoxicating liquors by any and all persons, within the area of a town, whether incorporated or not, an undertaking which the state itself, with all its sovereign powers over its inhabitants, is unable to carry out. Such power could not be implied from the mere appointment of an agent to sell land.

Our conclusion is that the judgment is not sustained by the evidence.

The judgment and orders appealed from are reversed.

We concur: SLOSS, J.; LAWLOR, J.

HILDEBRAND et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 7744.)

(Supreme Court of California. July 20, 1916.)

1. APPEAL AND ERROR §78(1)—JUDGMENTS AND ORDERS APPEALABLE.

In an action to quiet title, an order directing the defendant to assign to plaintiff a note and mortgage upon payment to him of principal, interest, and notary and attorney fees, and subrogating plaintiff to the rights of mortgagee, is in legal effect a final judgment as to defendant and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 470, 472; Dec. Dig. §78(1).]

2. CERTIORARI §5(1)—ORDERS REVIEWABLE —APPEALABLE ORDERS.

Such an order, being appealable, cannot, under Code Civ. Proc. § 1068, be reviewed on certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. §5(1).]

3. CERTIORARI §33(2) — WHO MAY MAINTAIN—PERSONS BENEFICIALLY INTERESTED.

Under Code Civ. Proc. § 1069, providing that only persons beneficially interested may maintain certiorari, *held*, that in an action to quiet title an order directing defendant to assign to plaintiff a mortgage, and subrogating plaintiff to the rights of the mortgagee, cannot be reviewed on certiorari on the petition of the mortgagor and of mortgagees under a subsequent mortgage; they not being beneficially interested, since their rights could in no way be affected by the order.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 44; Dec. Dig. §33(2).]

In Bank. Writ of Review to Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Petition for certiorari by Ernest H. Hildebrand and others against the Superior Court in and for the City and County of San Francisco and Hon. Edward P. Shortall, Judge of said court. Proceedings dismissed.

Paul A. McCarthy, R. W. Gillogley, and Alexander D. Keyes, all of San Francisco, for petitioners. John H. Crabbe, of San Francisco, for respondents.

ANGELLOTTI, C. J. This is a proceeding to annul for want of jurisdiction an order made by the superior court in the action of Martin v. Chiossi et al., an action to quiet title, directing the defendant Humboldt Savings Bank to execute to the plaintiff therein on payment of principal and interest due, notary fee, and attorney fee, an assignment of a note and mortgage constituting a first lien on the real property involved in the action, and subrogating plaintiff to the rights of said mortgagee. The petitioners for the writ are Hildebrand, Lettich, and Mr. and Mrs. George H. Chiossi, who were originally the defendants in said action, and Humboldt Savings Bank, which was sued as John Doe, and answered.

The action is one instituted December 15, 1915, plaintiff Martin alleging that ever since December 24, 1914, he has been the owner of the property by virtue of a deed executed to him on that day by George H. Chiossi, who it is alleged was then the sole owner of the property. On January 28, 1916, defendants Lettich and Hildebrand demurred to the complaint, and on February 1, 1916, Mr. and Mrs. Chiossi demurred to the complaint. These demurrers apparently have not been disposed of. The bank answered denying the allegations of the complaint, and alleging that on December 26, 1912, the defendants Hildebrand and Lettich were the owners of the property, borrowed \$3,000 on it, and gave a note payable December 26, 1914, and a mortgage on such land to secure payment thereof, and that no payment was ever made thereon.

On January 31, 1916, plaintiff Martin asked the superior court for an order requiring the bank to show cause why it should not accept from plaintiff the amount due on its note and mortgage and assign same to plaintiff, and why an order should not be made subrogating plaintiff to all of its rights. An affidavit filed by said plaintiff Martin stated substantially that on January 15, 1914, George Chiossi was the sole owner in fee of said property and gave a note and a mortgage on the property to Hildebrand and Lettich for \$3,500 (the second mortgage on the property), that they obtained a decree of foreclosure, and that a sale was had thereunder July 14, 1915, Hildebrand and Lettich becoming purchasers for \$2,000. Allegations were made therein that Martin made a good offer of redemption which was refused, and

that after this Hildebrand and Lettich gave Chiossi a certificate of redemption, and Chiossi gave Hildebrand and Lettich a deed of trust as security for \$3,500.

On January 31, 1916, an order to show cause was made as asked and on February 4, 1916, the motion of plaintiff was granted, the order purporting to subrogate the plaintiff Martin to the rights of the bank. Apparently this order was made without any notice of application whatever to anybody except the bank. On February 5, 1916, a motion to set aside this order was made by Hildebrand and Lettich and Mr. and Mrs. Chiossi. On February 9, 1916, this matter was argued and submitted.

The affidavit of George Chiossi filed on this motion stated substantially that ever since January 15, 1914, he was the sole owner of this property, and that on said day he mortgaged it to Hildebrand and Lettich for \$3,500. That thereafter he executed the so-called deed to plaintiff, but that the same was intended as and was only a mortgage to secure notes given to Martin, that his wife did not sign this instrument to Martin, and that on March 23, 1915, he filed a declaration of homestead covering the property. That thereafter, on June 3, 1915, plaintiff recorded his so-called deed; that Hildebrand and Lettich subsequently foreclosed their mortgage and the property was sold to them; that he, Chiossi, redeemed from said foreclosure and was given a certificate of redemption; and that he objected to the assignment of the mortgage of the bank to plaintiff.

The affidavit of Hildebrand stated that because the wife of Chiossi did not sign the mortgage to plaintiff Martin, and because the homestead was selected prior to such mortgage being placed of record, plaintiff had not thenceforth even a lien. He also stated that plaintiff seeks the assignment for the purpose of harassing affiant and Lettich, and the Chiossis, by enforcing the mortgage.

On February 15, 1916, all objections were overruled and on the same day the formal order was made directing the assignment by the bank to plaintiff Martin of its debt and mortgage, and subrogating said plaintiff to all its rights thereunder. This is the order sought to be annulled.

[1] It seems apparent that in so far as the petitioner bank is concerned the order complained of must be regarded as, in legal effect, a final judgment, and therefore appealable. It completely disposed of the case in so far as the bank was concerned by requiring it, upon payment of the amount alleged by it to be due on its note and mortgage, to assign such note and mortgage to the plaintiff, and subrogating said plaintiff to all its rights thereunder. So far as the bank is concerned, the amount due on the debt on account of which it asserts a lien on the property is adjudicated, and it is ordered, upon payment of such amount, to assign its debt and mortgage to another, with the result that

It can have no further interest in the property involved, and is entirely removed from the cause. Such an order must be held, in view of our decisions, to be substantially a final judgment as to the bank for the purposes of an appeal. This subject was exhaustively discussed in *Title Insurance & Trust Co. v. California, etc., Co.*, 159 Cal. 489-491, 114 Pac. 838, where all the authorities are cited. See, also, *Anglo-Californian Bank v. Superior Court*, 158 Cal. 755, 96 Pac. 803.

[2] It has uniformly been held by this court, in accord with the provisions of section 1068, Code of Civil Procedure, that if a party has the right of appeal from an order in excess of jurisdiction, he cannot have such order reviewed in certiorari proceedings. This necessarily disposes of this proceeding in so far as the petitioner bank is concerned.

[3] As to the other petitioners: Only one "beneficially interested" may maintain certiorari proceedings. Code Civ. Proc. § 1069. Consideration of the question has satisfied us that the facts show no such interest in any other petitioner than the bank as would warrant the maintenance of such a proceeding by him. This question was practically decided in *Swain v. Stockton Sav., etc., Soc.*, 78 Cal. 600, 21 Pac. 865, 12 Am. St. Rep. 118, an action by a plaintiff seeking to be subrogated to all the benefits of a defendant, the beneficiary under a deed of trust given to secure the payment of a debt, and to obtain delivery of the deed and all evidence of indebtedness secured thereby. The action was against the beneficiary (the real creditor) alone. It was claimed that the debtors, the so-called "mortgagors" giving the trust deed, were necessary parties to the action. This court held against such claim, saying:

"What the plaintiff sought in this action was that he might be placed in the same situation as the defendant in relation to the trustees under the trust deed, and to the judgment debtors who were the mortgagors in that instrument. This could only affect the defendant. It did not in any way impinge upon the rights of the trustees or the mortgagors. * * * So far as the mortgagors are concerned, it could not fix the amount of their indebtedness; they could have been heard to resist the payment of a greater sum than they owed, under the trust deed, when an attempt should be made to execute the trust. * * * In so far as the subrogation prayed for was concerned if granted, it could not alter the relation of the parties any more than if the plaintiff had by agreement purchased the debt of the defendant, and had it and the lien securing it transferred to himself."

All the petitioners here, other than the bank, are in the position of the "mortgagors" in the case cited. We cannot see that any legal right possessed by any of them can be affected in the slightest degree by the enforcement of the order complained of, and if this be the situation it is impossible to understand how any of them is "beneficially interested" in the matter within the meaning of our statute.

Regardless of other questions presented it

follows from what has been said that this proceeding must be dismissed.

The proceeding is dismissed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

CAMERON v. PILLSBURY et al., State Industrial Accident Commission.
(S. F. 7829.)

(Supreme Court of California. July 19, 1916.)

1. MASTER AND SERVANT \S 361—WORKMAN'S COMPENSATION—COURSE OF EMPLOYMENT—"EMPLOYÉ."

Where the applicant had a contract for stipulated wage for service as a rental and insurance agent and a further contract with his employer for commission on renewals and new business, the employer being entitled under the contract to the entire time of the applicant and exercising control over his movements during business hours, he was an "employé," whether engaged in the regular work or under his commission contract, all the work being in the course of his employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. \S 361.]

For other definitions, see Words and Phrases, First and Second Series, Employé.]

In Bank. Application by Henry E. Trobitz for compensation before the Industrial Accident Commission, opposed by Hugh M. Cameron, employer. Heard on the employer's application for writ of review of the determination of A. J. Pillsbury and others, members of the Industrial Accident Commission, awarding compensation. Award affirmed.

Dunn, White & Aiken, of Oakland, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. Review to consider the award of the Industrial Accident Commission under the following findings of fact:

"That Henry E. Trobitz, applicant herein, was injured by accident on the 20th day of June, 1914, while in the employment of defendant Hugh M. Cameron.

"That at the time of said accident the applicant was employed by the defendant in his real estate business in Oakland, Cal. That the applicant was paid a salary of \$60 per month and in return for this amount was expected to perform certain services as directed, including the collection of rents, renting of houses, placing of signs upon houses, renewing of insurance policies, and collecting of premiums due upon such renewals. That the hours of labor of the applicant were from 8 a. m. to 6 p. m., and that the defendant had full direction and control over the labor and services of the applicant during these hours to whatever extent he chose to exercise it. That by the terms of said employment the applicant was to give his services exclusively to the defendant's business, unless relieved therefrom by permission of the defendant.

"That, to stimulate additional labor upon the part of the applicant, he was offered, in addition to the said sum of \$60 per month, certain commissions upon new business brought by him into the defendant's office, provided that he did not

neglect any assigned duties to search for such new business. That for all new insurance solicited and secured by the applicant he was to receive 15 per cent. and the defendant was to retain 10 per cent. of the commission accruing from such business; that for sales of real estate negotiated by the applicant he was to receive 33 1/3 per cent. and the defendant was to retain 66 2/3 per cent. of the commission accruing from such sales; that all negotiations instituted by the applicant for sales of real estate were to be brought into the defendant's office to be closed.

"That on the 20th day of June, 1914, the applicant left the office of the defendant to make some collections, and, after collecting one account for his employer, started for Alameda for the purpose of collecting the first premium upon an insurance policy which he had secured, and also for the purpose of entering into negotiations for the exchange of some real estate, both errands to be transacted with the same person; that neither errand was included within the services agreed to be rendered for the salary of \$60 per month, but that, on each of said errands, if successful, the applicant would be entitled to his agreed commission and the defendant would receive the remainder of the profits thereon, in accordance with the agreement stated above. That the defendant knew before the said accident of some but not all of the details of the proposed negotiations for the exchange or sale of the said real estate and had conversed with the applicant concerning some of the phases of said proposed transaction, but that the defendant did not know that the applicant was going to endeavor to exchange or sell the said real estate on the 20th day of June, 1914, and did not direct him to undertake such errand. That, while on his way to Alameda on the said errands, the applicant was run into by a street car receiving the injuries which form the basis of this proceeding.

"And as its conclusions of fact, based upon the foregoing special finding of fact, the Industrial Accident Commission further finds that, at the time of the said accident, the applicant was paid for his services in part by the said salary and in part by a commission upon further business secured by him; that the applicant was, by the terms of his employment, to give substantially the whole of his services to the defendant's business; that the contract of employment of the applicant was one contract for substantially the whole of his services, the applicant to be compensated therefor by a salary and commission, and was not two separate and distinct contracts; that the defendant was authorized by the agreement of hire to exercise full control over the applicant during the whole of his working hours; that the defendant did exercise substantially as much control over the labors of the applicant in securing new business as over the mode of making collections or other services specifically agreed to be rendered; that the defendant exercised as much direction and control over the services of the applicant in securing new business as an average employer exercises over undoubted employes engaged in selling real estate; and that, therefore, at the time of said accident the injured employe was performing a service growing out of, incidental to, and in the course of his employment, and that the said accident arose out of and happened in the course of said employment."

Petitioner presents the proposition that Trobitz sustained a dual relationship to him, the one, that of employe, the other, that of "independent contractor or partner"; that, had he been injured while in pursuance of the duties for which he drew a salary of \$60 a month, the award would be correct,

but having been injured in the performance of these independent duties petitioner is not liable. We cannot agree with this view. The employer was entitled to all of Trobitz's working hours and was empowered to direct his labor. In either capacity he was an employe. It is not an uncommon thing for retail merchants, for laundrymen, and the like to pay a commission to the drivers of their delivery wagons for all new business which they bring in. It has never been held that this circumstance creates a distinct relationship in law. They are still employes, as was properly held by the Court of Appeal under similar facts in *Sumner v. Nevin*, 4 Cal. App. 347, 87 Pac. 1105. A certain amount of freedom of action was inherent in the nature of the work which the injured man performed, but this, however, did not change the character of his employment, for the employer himself still had general supervision and control over it.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

FRANKFORT GENERAL INS. CO. v. PILLSBURY et al., State Industrial Accident Commission. (S. F. 7551.)

(Supreme Court of California. July 14, 1916.)

1. MASTER AND SERVANT §415 — WORKMEN'S COMPENSATION — PROCEEDINGS BEFORE COMMISSION — RECEPTION OF EVIDENCE.

Under Workmen's Compensation Act (St. 1913, p. 279) § 24, subd. "b," the Commission is not confined to a stipulation between the parties, but may take and consider further testimony in making its award.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §415.]

2. MASTER AND SERVANT §385(8)—WORKMEN'S COMPENSATION — COMPENSATION — COMPUTATION.

Under Workmen's Compensation Act, § 15, subd. 2, the workman's ability to do the same work as before the accident is not the sole test, but his disfigurement and age may also be considered.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §385(8).]

3. MASTER AND SERVANT §405(6)—WORKMEN'S COMPENSATION—SUFFICIENCY OF EVIDENCE—COMPENSATION.

Evidence held to sustain the Commission's finding that the loss of a first finger between the knuckle and proximal joint, permanently disabled a 65 year old carpenter and cabinet-maker 20 1/4 per cent., despite a stipulation that he was doing the same work, at the same wage, as before the accident.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §405(6).]

4. MASTER AND SERVANT §417(7)—WORKMEN'S COMPENSATION — PROCEEDINGS OF COMMISSION—REVIEW—QUESTION OF FACT.

The Industrial Accident Commission's determination on a question of fact is not subject to review by the courts, unless clearly contrary to the undisputed evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §417(7).]

5. MASTER AND SERVANT @385(1)—WORKMEN'S COMPENSATION—COMPUTATION.

Under Workmen's Compensation Act, § 17a, providing that where claimant has worked substantially all the preceding year, his compensation shall be calculated upon his average daily wage, *held* that his earnings for the preceding year should be divided by the number of days he actually worked, and not by those he might have worked.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. @385(1).]

6. MASTER AND SERVANT @417(3)—WORKMEN'S COMPENSATION — PROCEEDINGS OF COMMISSION—REVIEW—EXCLUSION OF TESTIMONY.

Under Workmen's Compensation Act, § 77, providing that informalities in taking testimony shall not invalidate the Commission's order, and section 84, specifying the grounds of review, *held* that a referee's exclusion of certain cross-examination while taking testimony for the Commission cannot be reviewed by certiorari.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. @417(6).]

In Bank. Proceeding by Thomas Immel under the Workmen's Compensation Act against the Frankfort General Insurance Company. From an award allowing compensation, the Insurance Company brings certiorari against A. J. Pillsbury, Will J. French, and Harris Weinstock, as members of the State Industrial Accident Commission. Award affirmed.

Gavin McNab and Oliver B. Wyman, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

SLOSS, J. Certiorari to review an award of the Accident Commission, allowing compensation to Thomas Immel for injuries received while in the employ of the American Beet Sugar Company. The petitioner is the insurance carrier, and was substituted for the employer. Immel was a carpenter and cabinetmaker and had been employed by the sugar company in its factory at Oxnard for some years. His injury consisted in the loss of the greater part of the index finger of the left hand. That the facts proven and found make out a case of liability under the terms of the act is not questioned. The main controversy turns on the amount of the award. The case is one of partial permanent disability. The Commission found that the percentage of disability was 20¼ per cent. and, in accordance with the provisions of section 15, (b) 2, (6), and (7), of the Workmen's Compensation Act, made an award of 65 per cent. of Immel's average weekly earnings for a period of 81 weeks. The average weekly earnings were found to be \$23.55 and the total amount of the award was \$1,239.30. The proceeding was twice heard by the Commission, a rehearing having been granted after the first award. Following the rehearing the original award was confirmed. Upon the first hearing the application was submitted upon a written stipula-

tion of the parties. This stipulation stated, among other things, that Immel was 65 years of age; that in consequence of the injury his finger had been amputated between the knuckle and the proximal joint; that he had returned to work 26 days after the accident, having lost 20 days of working time. The stipulation further stated:

"That his main trouble through the loss of the finger is that he has not yet become used to using his second finger to pick up small things instead of the first finger. That so far as he knows he is able to do as much work as he did before he was hurt, in the course of a day's work. That there is no difference in the quality of his work since he was hurt, and that he does just as good work as he did before he lost the finger. That the only trouble he has at this time is that the stump pains him at times and is tender, and, as stated before, that he has some difficulty in picking up small articles. That he receives 40 cents an hour, which is the same rate at which he was paid before he was hurt."

The return shows that the Commission has had prepared for its guidance in cases of partial disability a "schedule for rating permanent disability," and that this schedule, which is not set forth in the record, is taken by the Commission as furnishing a prima facie guide in determining the percentage of disability. It was apparently so used in this case.

There is no occasion to give particular attention to the proceedings upon the first hearing, since a rehearing was granted and the final award was based upon the showing subsequently made.

[1-4] It is argued that the finding that the disability amounted to 20¼ per cent. is contrary to the evidence, in that it conflicts with the facts admitted by the stipulation of the parties, and great stress is laid upon the fact that this stipulation declares that Immel was able to do as much and as good work after as before the accident. But under the act the Commission is not bound to make its award upon the basis of the stipulation alone. Section 24, subdivision "b," after authorizing the parties to stipulate to the facts, declares that:

"The Commission may thereupon make its findings and award based upon such stipulation, or may in its discretion set the matter down for hearing and take such further testimony or make such further investigations as may be necessary to enable it to completely determine the matter in controversy."

In this case further testimony was taken. The ability of the workman to do the exact work for which he had been employed at the time of the injury is not the sole measure of disability.

"In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employé and his age at the time of such injury." Workmen's Comp. Act, § 15, subd. 2 (7).

Even if it be conceded that the facts stipulated may not be controverted, the evidence

tended to show that Immel's ability to do some lines of work incident to his trade as carpenter and cabinetmaker would be seriously impaired by his injury. Furthermore, the Commission was, under the provision last quoted, authorized to take into account the nature of the physical injury or disfigurement and the workman's age. The circumstance that he was 65 years of age, and therefore less able than a younger man to adapt himself to new conditions, was developed in the testimony, and was a proper matter for consideration. The extent of disability occasioned by an injury is not capable of exact measurement. The percentage of such disability is a matter to be determined by the Commission in the exercise of its sound discretion, based upon a fair view of all of the circumstances. Its conclusion on this matter is the determination of a question of fact, and is not subject to review by the courts unless palpably contrary to the undisputed evidence. We cannot say that the finding that Immel's injury caused a permanent disability of 20% per cent. is contrary to the evidence.

[5] The petitioner claims that the Commission improperly computed the average weekly earnings of the applicant. It appears from the stipulation that Immel was paid at the rate of 40 cents per hour, and that he was working 6 days a week at the time of the injury. During the year preceding his injury he had earned \$1,155.20. Section 17a of the act provides as follows:

"The average weekly earnings referred to in section fifteen hereof shall be one fifty-second of the average annual earnings of the employé; in computing such earnings his average annual earnings shall be taken at not less than three hundred and thirty-three dollars and thirty-three cents, nor at more than one thousand six hundred and sixty-six dollars and sixty-six cents and between said limits shall be arrived at as follows:

"(1) If the injured employé has worked in the same employment, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily earnings, wage or salary which he earned as such employé during the days when so employed."

The Commission arrived at the average daily earnings by dividing \$1,155.20, Immel's total earnings for the preceding year, by 283, the number of days during which he actually worked. The petitioner contends that the average daily earnings should have been computed by dividing his earnings for the year by 312, the number of working days in the year. Section 17a (1) bases the annual earnings upon the average daily earnings "which he earned as such employé during the days when so employed." The petitioner argues that "the days when so employed" means the number of working days during which he might have worked or might have been expected to work. The respondents, on the other hand, claim that the phrase refers to the number of days during which the employé

was actually engaged in work. We think the latter is the fair and reasonable interpretation of the language used. The basis of computation is the individual day upon which the workman is employed in the year during which he may have been in the employment. For this purpose each day stands by itself, and his average daily wage is the average for the year, figuring the number of days on which he earned wages. To the argument that this would produce an unjust result where the employé worked only 2 or 3 days a week, it may be said that the provision of the statute deals only with cases where the employé has worked "during substantially the whole of the year." It may well be questioned whether an employment which falls far short of the normal number of working days is an employment during substantially the whole of a given period.

The Commission found the ultimate facts in controversy. It was not required to make specific findings upon probative matters. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 705, 151 Pac. 398.

[6] After the Commission had granted a rehearing, it appointed a referee to take testimony. At the hearing before this referee, one of the witnesses called was an employé of the Commission whose duties were connected with the "permanent disability rating department" of the Commission. This witness, after testifying that he had assisted in compiling the "schedule for rating permanent disabilities" above referred to, was asked regarding inquiries made by him in reaching his conclusions regarding the percentage of disability in a case like the one before us. He testified that he had questioned many contractors and carpenters, and had obtained certain information from them. The referee declined to permit the petitioner to draw from the witness, on cross-examination, the names of the persons whom he had questioned. This ruling is made a ground of attack upon the award. Without in any way approving the action of the referee in thus restricting the cross-examination, we think the objection made is not available in the present proceeding. The refusal to permit certain questions to be answered is a mere error in the taking of testimony. Such errors cannot be reached by a writ of certiorari. The act itself (section 77) provides that the Commission and referees appointed by it shall not be bound by the technical rules of evidence, and that:

"No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the Commission."

The grounds of review specified in section 84 of the act do not include matters like the one under discussion.

Counsel for petitioner have raised certain constitutional objections to the Workmen's Compensation Act, but in view of our recent

decisions these matters do not require particular notice.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; LOBIGAN, J.; LAWLOR, J.

HINDS v. CLARK. (L. A. 3648.)

(Supreme Court of California. July 14, 1916.
Rehearing Denied Aug. 10, 1916.)

1. QUIETING TITLE § 44(2)—EVIDENCE—TAX DEEDS—ADMISSIBILITY.

In suit to quiet title, since defendant may effectually resist decree against himself by showing plaintiff to be without title, a city ordinance, certificate of sale, and tax deed under which he claims are admissible.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. § 90; Dec. Dig. § 44(2).]

2. MUNICIPAL CORPORATIONS § 980(3)—TAXATION—TAX SALES—PROCEEDINGS—FORMAL ERRORS—EFFECT.

Bakersfield Ordinance No. 9, § 71, substantially following Pol. Code, § 3776, provides that certificate of tax sale shall specify when the city shall be entitled to a deed. Sections 73, 75, following Pol. Code, § 3780, and sections 3785, 3786 (before amended by Acts 1911, p. 1102), declare that the city shall not be entitled to a deed until expiration of the five-year period of redemption, and that the deed must contain a statement of the time when the right of redemption has expired, and require that the matters recited in the certificate must be recited in the deed. The certificate recited that the sale was on December 28, 1898, and that the city would be entitled to a deed on December 28, 1903. The deed recited the same matters, except that the purchaser would be entitled to a deed on December 29, 1903. Held, that the proceedings subsequent to the certificate were void for the error in reciting December 28th as the time for deed, thus cutting off one redemption day.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2126, 2128; Dec. Dig. § 980(3).]

3. MUNICIPAL CORPORATIONS § 982 — TAX SALES—PROCEEDINGS—FORMAL ERRORS—EFFECT.

In such case, it is not material that the owner actually allowed several years to elapse after expiration of the redemption period, before suing to quiet title.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2140-2143; Dec. Dig. § 982.]

4. MUNICIPAL CORPORATIONS § 980(3)—TAX SALES—NOTICE OF PLACE—SUFFICIENCY.

Where a city ordinance required the notice of sale for delinquent taxes to state the day and hour when sale would be made, and that the sale be made at the city hall, a notice, in a city of the fifth class, merely fixing the place as the city hall, is sufficiently definite, and the exact room need not be stated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2126, 2128; Dec. Dig. § 980(3).]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by Oscar L. Hinds against F. M. Clark. From a judgment for defendant and order denying motion for new trial, plaintiff appeals. Judgment, and order reversed.

C. E. Arnold, of Bakersfield, for appellant. Geo. E. Whitaker and T. N. Harvey, both of Bakersfield, for respondent.

LAWLOR, J. The plaintiff brought this action to quiet title to a parcel of land situated in the city of Bakersfield in Kern county. The case was tried by the court, a jury having been waived. Judgment was rendered for the defendant, decreeing that plaintiff had no interest in the land, and that the defendant was the owner thereof. The plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The complaint is in the usual form, and alleges the ownership and title of the plaintiff in the land, his continuous possession thereof until four years prior to the commencement of the action, and that the defendant claims some lien, title, right, or interest therein adverse to that of the plaintiff. The defendant in his answer denied all the allegations of the complaint except as to his adverse claim, which he admitted, but denied that such claim was without any right or title. At the trial plaintiff proved that on October 18, 1889, Ida K. Hinds became the owner in fee simple of the property by a conveyance from one Tracy, and that she conveyed the property to plaintiff on January 27, 1903. The defendant then introduced in evidence an ordinance regulating the assessment of property in the city of Bakersfield and the collection of taxes thereon; a certificate of sale to the city for the nonpayment of the taxes for the year 1898 upon the land described in the complaint; a deed conveying the land to the city in pursuance of the provisions of the ordinance and bearing date, October 14, 1908; a deed, dated February 3, 1909, from the city to one Wilson; and a grant, bargain and sale deed in usual form from Wilson conveying the land to defendant Clark. The court found that the defendant was the absolute owner and entitled to the possession of the described property, and that plaintiff was not such owner, and made no other findings.

[1] 1. The appellant contends that the court erred in admitting in evidence the city ordinance, tax deeds, and certificate of sale for the reason that they were not specially pleaded. But this contention is without merit. It is well settled that in an action to quiet title the defendant may always effectually resist a decree against himself by simply showing that the plaintiff is without title. *Sears v. Willard*, 165 Cal. 12, 130 Pac. 869; *Williams v. City of San Pedro et al.*, 153 Cal. 44, 94 Pac. 234; *Hart v. All Persons, etc.*, 26 Cal. App. 664, 148 Pac. 236; *Rogers v. Clark Iron Co.*, 104 Minn. 198, 116 N. W. 739. The denial of the allegations of the complaint placed the plaintiff's title in issue, and it was proper for the defendant, in order to negative such title, to intro-

duce in evidence the city ordinance, and to attempt to show by means of the tax deeds, certificate of sale, and other evidence that in pursuance of such ordinance plaintiff had been completely divested of title.

[2] 2. The plaintiff's property was sold to the city on December 28, 1898. The certificate of the city treasurer, after reciting the date of the sale, contains the following statement:

"And I further certify that the said real estate last aforesaid was sold for taxes and subject to redemption pursuant to the statute and ordinances in such cases made and provided, and unless the said real estate is redeemed within five years from the date of sale to said city, the purchaser thereof will be entitled to a deed thereto on the 28th day of December, 1903."

It is provided in section 71 of the ordinance (Ordinance No. 9, of the City of Bakersfield, passed March 4, 1898, contained on p. 43 of Bk. of Ord.), which follows substantially the provisions of the Political Code (Pol. Code, § 3776), that the certificate of sale shall specify "when the city will be entitled to a deed." Other provisions of the ordinance declare, however, that the city shall not be entitled to a deed to the land until after the five-year period for the redemption of the property by the owner has expired. Ordinance, etc., §§ 73, 75. See Pol. Code, §§ 3780, 3785. In this case, it must be conceded that the period of redemption could not have expired until after the last minute of the 28th day of December, 1903, the end of the five years following the day of the sale. Regarding the form of the deed the ordinance provides that it must contain a statement of "the time when the right of redemption had expired" (Ordinance, etc., § 75. See Pol. Code, § 3785, before it was amended in 1911 [Stats. 1911, p. 1102]), and also declares that "the matters recited in the certificate of sale must be recited in the deed" (Ordinance, etc., § 76. See Pol. Code, § 3786, before it was amended in 1911 [Stats. 1911, p. 1102]). That is to say, the deed must not only specify the time when the right of redemption did expire, but must recite the matter appearing in the certificate as to when the purchaser would be entitled to a deed. Of course, these events cannot occur upon the same day. In attempting to comply with these provisions of the ordinance, it is recited in the tax deed:

"The certificate of sale stated that unless the said real estate was redeemed within five years from the date of the sale to the said city, the purchaser thereof would be entitled to a deed thereof, on the *29th day of December, 1903*; that said certificate bears date the 28th day of December, 1898; the day of said sale; and whereas, the time, to wit, five years, for redeeming said property, expired on the 28th day of December, 1903. * * *" (Italics are ours.)

The appellant contends that in thus correcting the error in the date appearing in the certificate the deed contains a false recital, and, in line with our decisions, such error must be regarded as fatal to the validity of the tax title. See *Hughes v. Cannedy*,

92 Cal. 382, 28 Pac. 573; *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761. But we do not find it necessary to consider whether the latter discrepancy is error, or if so, whether it is fatal to the defendant's alleged title to the land, as we are satisfied that the failure to correctly state in the certificate the time "when the city will be entitled to a deed" renders the certificate void, and annuls the subsequent proceedings.

[3] 3. It has been frequently reiterated that "where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise." *Henderson, etc., v. De Turk*, 164 Cal. 296, 128 Pac. 747; *Baird v. Monroe*, 150 Cal. 560, 564, 89 Pac. 352; *Preston v. Hirsch*, 5 Cal. App. 485, 90 Pac. 965; *Simmons v. McCarthy*, supra. See, also, *Jordan v. Beale*, 155 Pac. 990. The identical question before us was presented in *Stanton v. Hotchkiss*, 157 Cal. 652, 108 Pac. 864, but, although error was conceded by the counsel, it was held to have been cured by the Curative Act of 1903 (Stats. 1903, p. 63), the purpose of which was to confirm, validate and legalize certain tax deeds executed to the state. In other cases where the question was involved, substantially the same conclusions were reached. *Baird v. Monroe*, supra; *Fox v. Townsend*, 152 Cal. 51, 91 Pac. 1004, 1007; *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 239, 90 Pac. 936; *Carter v. Osborn*, 150 Cal. 620, 89 Pac. 608. It is suggested in these cases, however, but for the Curative Act such errors would render the tax proceedings defective, for "it is well settled that proceedings on tax sales are in invitum, and to be valid must be stricti juris." *Preston v. Hirsch*, supra. It has been said that notwithstanding these requirements of the law could not apparently "be of any substantial benefit to the property owner," the tax deed must be held void even though the ruling appear to be extremely technical. *Baird v. Monroe*, supra. But the error under consideration does seem to be material. It is declared in *Bruschi v. Cooper et al.*, 22 Cal. App. Dec. 205, 213:

"One of the objects of the certificate doubtless is to give notice to the owner of the date of the sale and to inform him when the purchaser will be entitled to a deed, i. e., inform him of the period of redemption."

This purpose further appears from the fact that the ordinance expressly provides for the recordation of the certificate. Ord., etc., § 72. The respondent contends, however, that the recital in the certificate could not have misled the owner, as it specified that the purchaser would be entitled to a deed five years from the date of the sale (which is set forth correctly) unless sooner redeemed. Had the recital stopped at that point there would have been no error under the ruling of *Best v. Wohlford*, 153 Cal. 17, 94 Pac. 98. But it

went on and declared the said time to be precisely the 28th day of December, 1903. We cannot agree with the respondent that the giving of the date itself may be regarded as "mere surplusage."

Considering this recital as of the time the certificate was given, it tends to inform the owner that the five-year period for the redemption of the property expires on December 27, 1903, and that the following day the purchaser shall be entitled to a deed. In effect, it gives notice that the period of redemption commences to run with the day of the sale contrary to the general provisions of the law. Civ. Code, § 10; Code Civ. Proc. § 12. To refer again to *Baird v. Monroe*, where a similar question was carefully considered although not expressly decided:

"The Legislature has seen fit, however, to require that the time shall be expressly stated in the deed, and that nothing in that regard shall be left to be determined from one's knowledge of the law."

We do not find that the cases relied upon by the respondent are opposed to this ruling. In *Rollins v. Woodman*, 117 Cal. 516, 49 Pac. 455, the time when the right of the purchaser to the deed became fixed was correctly given as the day following the time when the period of redemption expired. The case is authority for the point that it is immaterial that the day as specified happened to fall upon a Sunday. *Deets v. Hall*, 163 Cal. 249, 124 Pac. 1007, merely decides that it was not error to specify the time when the right of redemption expired as being one day later than the correct day, as the date designated in that instance "was perfectly correct, in that it named a date after the redemption had in fact expired," while the concurring opinion points out that the correct time "was at the infinitely small space of time between the two days." But to state that the purchaser shall be entitled to a deed at any time on the day preceding the correct day is to shorten the period of redemption to that extent and thus cause prejudice to the rights of the owner. In this connection we do not regard it as material that several years elapsed after the expiration of the period of redemption and before the plaintiff commenced this suit to quiet his title.

[4] 4. There is one other point which should be mentioned. Section 67 of the ordinance requires that notice of the sale of property for delinquent taxes be published, and that:

"The publication must designate the day and hour when the property will, by operation of law, be sold to the city * * * and the place shall be at the city hall."

The certificate of sale recites that the publication "did designate the place of said sale, which place so designated was at the city hall of the said city of Bakersfield." But it is urged by the appellant "that the notice of

the place of the sale as simply *city hall* is an insufficient designation of the place of sale."

"From the notice," it is reasoned, "one would not be apprised * * * whether the sale would be made in the city hall, or in what particular part of it, or whether it would be made in front of it, or at its back or on either side."

It is manifestly the purpose of the law, in requiring notice of the sale to be published, to furnish definite information as to the precise location where it will be held. In this way the owner has notice where to go in order to arrest the sale by the payment of the taxes, and other interested persons are given full opportunity to participate in the sale. *Cooley on Taxation*, vol. II (3d Ed.) p. 938; *Blackwell on Tax Titles*, vol. I (5th Ed.) § 501. But it cannot be said, as matter of law, that the designation of the city hall as the place of sale was indefinite or uncertain. The sufficiency of the notice, in this regard, must depend upon the circumstances of each case. No evidence was offered herein descriptive of the city hall building. For aught that appears, at the time of the sale it may have consisted of a single room in a one-story structure of limited dimensions. If that were so, clearly the notice would have been sufficient. It is shown by the record that in 1898, the year of the sale, the city of Bakersfield was organized as a municipal corporation of the fifth class. The United States census shows that Bakersfield had a population in 1890 of 2,626. Possibly the population, when the sale was made eight years later, did not exceed 3,000, the minimum population required for cities of the fifth class by the Municipal Corporation Act. Stats. 1897, p. 421. But we cannot hold that notice of the sale to take place at the city hall of such a municipality was not sufficiently definite to meet the purposes and requirements of the statute.

Since it must, for the reasons given, be held that the certificate of sale to the city is fatally defective, thereby rendering the deed invalid, it will not therefore be necessary to consider the numerous objections made by the appellant to the deed from the city to Wilson touching the absence of proper recitals and the failure, in essential particulars, to otherwise comply with the provisions of the ordinance.

Judgment and order reversed.

We concur: SHAW, J.; SLOSS, J.

PROVIDENT GOLD MINING CO. v.
HAYNES et al. (L. A. 3762.)

(Supreme Court of California. July 11, 1916.)

1. CORPORATIONS § 216--STOCKHOLDER'S LIABILITY--MATTERS DETERMINING.

As a general rule, the liability of a stockholder for the debts of his corporation is determined by the charter of the company and the

laws of the state in which incorporation was had.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. ¶216.]

2. CORPORATIONS ¶216—STOCKHOLDER'S LIABILITY — LIABILITY IN JURISDICTION WHERE BUSINESS IS DONE.

The liability of a stockholder for the corporation's debts, according to the laws of the jurisdiction in which business is transacted by the company, rests upon the stockholder's consent to be bound by such laws, which is inferred from the fact that by his act of becoming a stockholder he has authorized the governing officers of the corporation to transact business in such state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. ¶216.]

3. CORPORATIONS ¶216—STOCKHOLDER'S LIABILITY—GENERAL AUTHORIZATION TO DO BUSINESS IN ANY STATE.

A stockholder who became such in a company whose articles authorized it to do business in "any other state or territory, as the board of directors may deem necessary or expedient," empowered them to engage in business anywhere, and impliedly consented that when they selected a place for the transaction of corporate business, they should have power to bind him so far as the laws of that place might require, so as to subject him to liability for the company's debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. ¶216.]

4. PLEADING ¶126—ANSWER—INSUFFICIENT DENIALS.

In an action against a corporate stockholder to enforce his liability for the company's debts, where the complaint alleged that at the time the liability was incurred the total subscribed stock of the company was 19,159 shares, answers undertaking to deny "that at the time of entering into said alleged contract the total amount of stock * * * then subscribed for was 19,159 shares," were not good traverses being evasive, and admitted the allegation of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. ¶126.]

Department 1. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the Provident Gold Mining Company against Lloyd C. Haynes and others. From a judgment for plaintiff and an order denying new trial, defendants appeal. Judgment and order affirmed.

Thomas C. Job and Joseph E. Hannon, both of Los Angeles, for appellants. Robert Young, of Los Angeles, for respondent.

SLOSS, J. This is an action to enforce the liability of the defendants as stockholders of the Manhattan Securities Company, an Arizona corporation. The liability asserted arose out of the alleged failure of the Manhattan Securities Company to comply with a contract whereby it had agreed to purchase certain shares of the capital stock of the plaintiff. The court entered judgment against the respective defendants, each of whom appeals from said judgment and from an order denying a new trial.

The appellants claim that the agreement

between the two corporations, Provident Gold Mining Company and Manhattan Securities Company, did not bind the latter to purchase any shares of stock, but merely vested in it an option to make such purchase. But, since the taking of the present appeals, this court has had occasion, in another case, to construe the same agreement, and has held that it was a binding contract of purchase and sale. *Provident Gold Min. Co. v. Manhattan Securities Co.*, 168 Cal. 304, 142 Pac. 884.

The main question for decision is whether the defendants are liable, in accordance with the law of California, for a proportion of this obligation of the Securities Company, a corporation organized in Arizona. Under the law of this state, as declared in our Constitution and statutes, every stockholder of a corporation is individually liable for such proportion of its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock of the shares of the corporation. Const. art. 12, § 3; Civ. Code, § 322. Our Constitution further provides that no corporation organized without the state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state. Const. art. 12, § 15. Section 322 of the Civil Code declares specifically that the liability of each stockholder of a corporation formed outside of this state and doing business within this state is the same as the liability of a stockholder of a California corporation.

The law of Arizona, under which the Manhattan Securities Company was organized, gives to corporations the power, among other things, "to exempt the private property of the members from liability for corporate debts." The articles of incorporation must, under the Arizona statutes, state "whether private property is to be exempt from corporate debts." The articles of incorporation of the Manhattan Securities Company contain this provision:

"The private property of every stockholder in this corporation shall be forever exempt from liability for the corporate debts of the corporation."

Said articles declare, further, that the principal place of business of the corporation is to be at Phoenix, Ariz., and that:

"Branch offices may be established and the corporation may carry on business in such other places within the territory of Arizona or in any other state or territory as the board of directors may from time to time deem necessary and expedient."

The purposes for which the corporation was formed, as declared in the articles, were very broad and included the purchase, the leasing, or other acquisition of mines, mining rights, and land and any interest therein

in any state or territory of the United States and in any foreign country.

As indicated by its name, the plaintiff was engaged in the business of mining. The purchase of its stock was within the corporate purposes of the Manhattan Securities Company. The contract which gave rise to the liability here sued upon was made in this state. The court found, and the finding is not attacked, that, prior to and at the time of the making of such contract, the Manhattan Securities Company was transacting business in this state and had a place of business and office in the city of Los Angeles.

[1] As a general rule, "the liability of a stockholder is determined by the charter of the corporation and the laws of the state in which the incorporation is had." *Pinney v. Nelson*, 183 U. S. 144, 146, 22 Sup. Ct. 52, 46 L. Ed. 125. It has, however, been held in a series of cases that where a corporation is formed in some state or country other than California, for the purpose of doing business in this state, the stockholders are, so far as concerns business transacted in California, to be held liable in accordance with the California statutes. *Pinney v. Nelson*, supra; *Peck v. Noe*, 154 Cal. 351, 97 Pac. 865; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942, 139 Am. St. Rep. 120; *Thomas v. Matthiessen*, 232 U. S. 221, 34 Sup. Ct. 312, 58 L. Ed. 577. The first in this line of cases was *Pinney v. Nelson*, and the ground of that decision, as of those following it, is that the stockholders, in forming a corporation for the purpose of doing business in a particular state (e. g., California), must be deemed to have contracted with reference to the laws of that state, and will, so far as concerns business transacted therein, be held to the liabilities which those laws impose upon the transaction of such business. In *Pinney v. Nelson*, the corporation in question was organized in the state of Colorado under articles which declared that the principal plant and operations of the company beyond the limits of the state of Colorado should be in Los Angeles county, state of California. In *Peck v. Noe*, the corporation had been organized in Nevada, and the articles of incorporation declared (as this court construed the findings) that it was the purpose of the corporation to do business in California. In *Thomas v. Wentworth Hotel Co.*, the corporation had been formed in Arizona, and the articles declared that the principal place of business outside of Arizona should be in the city of Los Angeles or the city of Pasadena, in the state of California. The case of *Thomas v. Matthiessen* had to do with the liability of stockholders in the same corporation which was involved in *Thomas v. Wentworth Hotel Co.*, and in the *Matthiessen* case the liability was enforced outside of this state against a stockholder residing in the state of New York.

[2, 3] In each of these cases, the articles of incorporation contained language showing

the purpose of transacting business in the state of California. In the case now before us, there is no such specific reference, the articles declaring merely that the corporation shall have authority to transact business in such places in Arizona or in "any other state or territory as the board of directors may deem necessary or expedient." We think, however, that this distinction does not, in principle, justify the application of any different rule. The liability of a stockholder, according to the laws of the jurisdiction in which business is transacted, rests upon his consent to be bound by such laws. His consent is inferred from the fact that he has, by his act of becoming a stockholder, authorized the governing officers of the corporation to transact business in such state. Where he becomes a stockholder in a corporation whose articles authorize it to do business in any state or country which its directors may select, he empowers the directors to engage in business anywhere, and impliedly consents that, when they select a place for the transaction of corporate business, they shall have power to bind him so far as the laws of that place may require. The test of liability is whether the stockholder has authorized the corporation and its managing officers to bind him by entering upon the transaction of business in a given state. Such authority is conferred as well by general language authorizing the transaction of business in any state which the directors may deem it expedient to enter as by words empowering them to transact business in a specific place. Any other holding would make it easy for corporators, designing to conduct the corporate business in California, to escape the liabilities imposed by our law through the simple expedient of using, in their articles, general instead of specific words in defining the purposes of the corporation and the places of intended operation.

[4] One other point is made. The liability of the stockholder is measured by the proportion which his stock bears to the total subscribed stock of the corporation. The amount of such total subscribed stock must therefore be shown. The complaint alleges that at the time the liability was incurred the total subscribed stock of the Manhattan Securities Company was 19,159 shares. A finding in accordance with this allegation is attacked as unsupported by the evidence. The answers of appellants did not, however, raise an issue on the point. Each of the answers undertook to deny "that at the time of entering into said alleged contract the total amount of stock of said Manhattan Securities Company then subscribed for was 19,159 shares." Without regard to other objections to the pleadings, these answers are evasive. They deny, merely, that the amount of stock subscribed was the specified number of shares alleged in the complaint. The number may, consistently with the truth of the denial, have been 19,160 shares or

any number other than 19,159. Such a denial is not a good traverse, and the allegation of the complaint stands admitted. *Towdy v. Ellis*, 22 Cal. 650, 659; *Doll v. Good*, 38 Cal. 287; *Marsters v. Lash*, 61 Cal. 622; *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

AALWYNS LAW INSTITUTE v. MARTIN et al. (S. F. 6744.)

(Supreme Court of California. July 1, 1916.)

1. CORPORATIONS §617(1) — FORFEITURE OF CHARTER—EFFECT.

When a corporation has failed to pay its license tax and a forfeiture of its charter has been declared, it ceases to be a corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2448, 2452, 2453, 2455, 2456; Dec. Dig. §617(1).]

2. CORPORATIONS §617(2) — FORFEITURE OF CHARTER—EFFECT.

The title to property formerly owned by a corporation whose charter has been forfeited by its failure to pay its license tax vests in the former directors as trustees, and such defunct corporation cannot hold property.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2449; Dec. Dig. §617(2).]

3. CORPORATIONS §617(2) — STOCKHOLDER — INTEREST IN DISSOLVED CORPORATION.

One becoming the owner of shares in a corporation after forfeiture of its charter has a mere equitable interest in the assets thereof.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2449; Dec. Dig. §617(2).]

4. QUIETING TITLE §10(2) — ESTATE OF PLAINTIFF.

An action to quiet title is not the proper remedy for the owner of an equitable interest to invoke against the owner of the legal title, but he may protect his equities in other ways.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 87, 40, 42; Dec. Dig. §10(2).]

5. CONSTITUTIONAL LAW §307 — QUIETING TITLE—DUE PROCESS—DEPRIVATION OF REMEDY—EQUITABLE TITLE.

Denial of remedy by suit by the owner of an equitable interest to quiet title does not deprive him of property without due process of law; there being other remedies.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 925; Dec. Dig. §307.]

6. CORPORATIONS §207 — STOCKHOLDER — SUIT FOR CORPORATION.

Only a stockholder of record can maintain an action to quiet title for the benefit of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 797-805; Dec. Dig. §207.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Aalwyns Law Institute against Peter D. Martin and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Arthur Crane, of San Francisco, for appellant. Morrison, Dunne & Brobeck, Corbet

& Selby, Cooper, Gray & Cooper, Stratton, Kaufman & Torchiana, McCutchen, Olney & Willard, Alfred Sutro, and Pillsbury, Madison & Sutro, all of San Francisco (Peter F. Dunne, W. H. Smith, Jr., Charles A. Gray, W. W. Kaufman, and A. Crawford Greene, all of San Francisco, of counsel), for respondents.

MELVIN, J. Plaintiff appeals from a judgment entered after an order sustaining demurrers of all of the defendants to the fourth amended complaint.

The suit is one to quiet title. It is alleged in the complaint that Ocean Shore Railway Company was a corporation; that its charter was declared forfeited for nonpayment of license tax on November 30, 1910; that on the date of the forfeiture the defendants Martin, Moore, Harvey, Folger, and Pillsbury constituted the board of directors of the corporation, and by the forfeiture became "trustees of said corporation"; and that plaintiff is the owner and holder of 12 shares of the "capital stock of said corporation."

It is next alleged that said Ocean Shore Railway Company "is, and for a long time hitherto has been," the owner in fee simple and entitled to the possession of all that real property situated in the city and county of San Francisco and in the counties of San Mateo and Santa Cruz, and (to quote directly from the pleading)—

"more particularly described as follows, to wit: Rights of way, terminal lands, and all the property known as the 'Ocean Shore Railway property,' more particularly described in the public records of said city and county of San Francisco in Liber 62 of Mortgages, page 29 et seq., and to which reference is hereby made for said description."

This is followed by the averment that the defendants assert individual interests in said property adverse to the Ocean Shore Railway Company, but that their claims are without right, and that the five persons named as trustees have no title nor interest in the property except as such trustees. It is averred on information and belief that defendants individually claim adverse interests in the property "pursuant to a scheme and plan among themselves to go through the form of buying and selling" it, stating and publishing that they were empowered to do so by the company's stockholders, bondholders, and creditors; that said assumption is false; that in pursuance of said scheme they did on December 4, 1911, connive and acquiesce in the execution of a deed of said property given without consideration by defendant Moore, which purported to convey the said property from said Moore to the Ocean Shore Railroad Company; and that said deed was executed and recorded only for the purpose of giving color to the adverse claims of defendants, which were without any right whatever. Plaintiff further alleges that on February 15, 1911, it

became and ever since has been "a stockholder as aforesaid in said Ocean Shore Railway Company"; that immediately prior to the commencement of this action the trustees of the Ocean Shore Railway Company were asked to bring suit in their representative capacity to quiet the title of said corporation to said property and to set aside the fraudulent deed of December 4, 1911; but that they refused to do so, and plaintiff and the other stockholders are without remedy save in a court of equity.

There is a general averment that plaintiff for lack of information cannot be more specific and certain as to dates, names, places, amounts, or other matters, but that all such things are within the actual knowledge of defendants.

The prayer is that defendants may be required to set forth the nature of their several claims, and that the court decree said claims to be without merit, and that it be adjudged that the Ocean Shore Railway Company is the owner of the property, and that the other defendants and each of them be debarred from asserting any claim to the premises. Although there is a general averment that plaintiff owns certain shares of the capital stock of the Ocean Shore Railway Company, there is a special allegation that plaintiff became a stockholder in said company on February 15, 1911, a time subsequent to the forfeiture of the charter of said corporation. It follows that whatever interest plaintiff may have, if any, is equitable, and not such as is derived from the sale of the stock of a going corporation. But, before discussing plaintiff's standing as an alleged "stockholder," we will notice the description of the property to which plaintiff seeks to have the title of the Ocean Shore Railway Company quieted.

It is the contention of respondents that there is in reality no description of the land. The attempted description is of "rights of way, terminal lands, and all the property known as 'Ocean Shore Railway property,' more particularly described," etc., giving the volume and number of a page of the public records. Appellant asserts that this is a good description, but, if it be insufficient, it is vulnerable only for uncertainty, and will not fall before a general demurrer. Both of these contentions are incorrect. There is no description of the rights of way and terminal lands at all, while the other property is vaguely designated as that "known as the 'Ocean Shore Railway property.'" It is a general rule of pleading that a complaint in an action to quiet title must contain a pertinent description of the land in controversy. The court, passing upon the demurrer from the face of the pleading itself, could not possibly determine the location of the property unless recourse were had to the book of records indicated, and this could not be required of the court. To be sure "Ocean Shore Railway property" is given as a common designa-

tion of a part of the realty to which plaintiff seeks to quiet the title, but this does not bring the pleading within the rule of those cases where a well-known tract of land is described by name and by the enumeration of some other identifying characteristics, and the whole description aided by reference to the public records. There must be something in the pleading itself by way of actual description. 32 Cyc. 1355. Appellant cites a number of cases in which descriptions of land have been held sufficient when supported and explained by reference to public records or maps. Courts have shown great liberality in permitting pleaders to set forth very general descriptions which may be made more certain by reference to indicated records, but we know of no authority in which a pleading has been tolerated which attempted no description possible of any sort of identification without reference to a record. For example, in *Miller v. Luco*, 80 Cal. 257, 261, 22 Pac. 195, the description in the deed indicated the acreage, the county, the common name of the tract, and the names of some of the previous grantors and grantees, and finally referred for greater certainty to a deed of record in a specified county. In *Redd v. Murry*, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132, the property involved was described by metes and bounds and as being within a certain city. A map was also mentioned in the description, and the court properly held such map admissible in evidence. In *Carter v. Badgalupi*, 83 Cal. 187, 190, 23 Pac. 361, the description attacked by appellant was based upon a known natural monument coupled with measurements and direction of lines. The description discussed in the opinion of *Joyce v. Tomasini*, 168 Cal. 234, 238, 142 Pac. 67, gave the number of acres and the names of the owners of the encompassing tracts of land.

It is impossible to tell from the face of the pleading whether or not the public record to which reference is made includes within the property described in a mortgage all of that mentioned in the pleading as "rights of way," "terminal lands," and the "Ocean Shore Railway property," or only that last named. This is not mere ambiguity to be attacked only by special demurrer. It is a failure of description, and is vulnerable to a general demurrer. The pleading is to be construed most strongly against the pleader, and this complaint is entirely susceptible of an interpretation which would describe the "rights of way" and "terminal lands" as somewhere in one of the two counties or in the city and county mentioned and the "Ocean Shore Railway property," vaguely located somewhere within the same vast territory, but described particularly in a public record. Such pleading is too vague to be dignified as mere incomplete description.

[1, 2] When a corporation has failed to pay its license tax, and a forfeiture of its charter has been declared, it ceases to be a corpora-

Hon. Newhall v. Western Zinc Mining Co., 164 Cal. 380, 128 Pac. 1040. The title to the property formerly owned by the corporation vests in the former directors as trustees. The complaint in the case at bar does not seek to have the title of the trustees quieted, but, on the contrary, asks that the title of the Ocean Shore Railway Company be quieted, and the whole action is based upon the alleged ownership of the property by the said company. But the company is dead and may not own property. Even if we concede the plaintiff's capacity to sue he is seeking relief upon a false theory and a general demurrer to his complaint will lie. If he were entitled to any relief at all it would be to have the title of the trustees quieted, but for this he has not prayed and his complaint is based upon the false theory that the defunct corporation may hold property.

[3, 4] Although plaintiff avers generally that it is a stockholder, it appears by its special allegation that its interest was acquired after the dissolution of the corporation. Therefore, as we have seen, at most it is the owner of an equitable interest in the assets of the defunct corporation. It appears that a deed to the Ocean Shore Railroad Company has been executed by Mr. Moore, one of the trustees. Plaintiff could do no more than seek to have the last-named corporation declared a trustee for the true owners or to have the deed set aside in the interest of the trustees who by operation of law were made custodians and holders of the property of the dead corporation. An action to quiet title is not the proper remedy for the owner of an equitable interest to invoke against the owner of the legal title. *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460.

[5] Appellant insists that the cited authority announces a rule which is unconstitutional because its application would take away his property from the owner of an equitable interest without due process of law. We cannot see that this follows. The reason for the rule announced in *Chase v. Cameron*, supra, is that if the owner of equities could sue to quiet title he might obtain a judgment based upon his adversary's fraud without setting up in his pleadings the facts constituting such fraud. This would be manifestly unfair. *Burris v. Adams*, 96 Cal. 644, 687, 31 Pac. 565; *McDonald v. McCoy*, 121 Cal. 55, 71, 53 Pac. 421. He may effectively protect his equities in other ways. The law's refusal to permit him to sue for the quieting of a legal title not his own does not deprive him of property without due process of law.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

SHAW, J. I concur in the judgment on the grounds discussed in the last two para-

graphs of the opinion of Justice MELVIN. I also concur in the views of Justice SLOSS.

SLOSS, J. I concur in the judgment. The complaint, read as a whole, shows that the only defendant asserting an interest in the property is the Ocean Shore Railroad Company. No cause of action is therefore alleged against any other defendant.

[6] As against the Ocean Shore Railroad Company, the complaint alleges that it claims title under an unauthorized or fraudulent transfer from the trustees of the Ocean Shore Railway Company. The plaintiff, as a stockholder of the latter corporation, seeks to avoid this transfer. But the complaint shows affirmatively that the Ocean Shore Railway Company had been dissolved before plaintiff's connection with it began. It is not alleged that plaintiff was a stockholder of record, and in view of the status of the corporation when plaintiff acquired its interest it could not have become such. 2 Cook on Corp. (6th Ed.) § 641; *Muir v. Cit. Nat. Bk.*, 39 Wash. 57, 80 Pac. 1007. Only a stockholder of record can maintain an action like the one here sought to be stated. *Brown v. Duluth M. & N. R. Co. (C. C.)* 53 Fed. 889; *Hodge v. U. S. Steel Corp.*, 64 N. J. Eq. 90, 53 Atl. 601. The demurrer of the Ocean Shore Railroad Company also was therefore properly sustained.

We concur: ANGELLOTTI, C. J.; LAW-LOR, J.

Ex parte AHART. (Cr. 1983.)

(Supreme Court of California. June 28, 1916.)

1. CRIMINAL LAW ⇨21—ELEMENTS OF CRIME—CRIMINAL INTENT.

Whether a criminal intent or guilty knowledge is an essential element of a statutory offense is often a matter of construction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 22; Dec. Dig. ⇨21.]

2. CONSTITUTIONAL LAW ⇨48—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY—PENAL STATUTE.

A criminal statute will be upheld unless it is clearly obnoxious.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⇨48; Statutes, Cent. Dig. § 56.]

3. CONSTITUTIONAL LAW ⇨48—CONSTRUCTION IN FAVOR OF VALIDITY—PENAL STATUTE.

Of two permissible constructions, a criminal statute will be given that one which renders it valid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⇨48; Statutes, Cent. Dig. § 56.]

4. INTOXICATING LIQUORS ⇨138—OFFENSES—TRANSPORTATION—CONSTRUCTION.

An ordinance, making it a misdemeanor to transport intoxicating liquors to certain prohibited places, construed to apply only where there is evidence of a wrongful intent, not where the act is merely inadvertent.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. ⇨138.]

5. INTOXICATING LIQUORS — 202—CRIMINAL PROSECUTION—UNLAWFUL NATURE OF ACT—“WILLFULLY AND UNLAWFULLY.”

A complaint that defendant “willfully and unlawfully” transported intoxicating liquors sufficiently charges a wrongful intent.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 222; Dec. Dig. ¶ 202.

For other definitions, see *Words and Phrases*, First and Second Series, Unlawfully.]

In Bank. Application for a writ of habeas corpus by M. B. Ahart, in custody under a charge of violating a liquor ordinance. Writ discharged, and prisoner remanded.

H. N. Wells, of Covina, and Robert P. Jennings, of Los Angeles, for petitioner. A. M. Pence and Gall & Pence, all of Covina, for respondent.

HENSHAW, J. Petitioner was arrested for violating the terms of the liquor ordinance of the town of Covina. He sued for and obtained this writ of habeas corpus under his contention that the ordinance is void, and that consequently the criminal complaint against him, founded upon that ordinance, is likewise void. The ordinance forbids the sale or dispensing of alcoholic liquors, saving in designated places and under prescribed restrictions, and then in section 5 declares that:

“Every person who * * * transports within the city of Covina, spirituous, or vinous, or malt, or mixed, liquors or intoxicating drinks, or vessels for containing the same, to any place, the establishing or keeping of which is prohibited by this ordinance * * * shall be deemed guilty of a misdemeanor.”

The complaint against this defendant was framed under this provision of the ordinance, and specifically charged him with “willfully and unlawfully” transporting such intoxicants to an inhibited place. Petitioner does not question but that the intentional transportation to such a place by one knowing the character of it, which intentional transportation may thus be considered to be in aid of the conduct of the illicit and prohibited business, can be denounced as a crime. His contention, argued with great earnestness and presented in many different forms, is that this ordinance has not done that thing, but has attempted to make criminal acts which any person may do under the sanction and protection of the Constitution of the United States and the Constitution of the state of California. Herein it is pointed out that the ordinance itself would make guilty of crime any innocent person who, without knowledge of the character of the place and without intent to violate the law, innocently and in ignorance of the character of the place transported to it forbidden liquors; that thus a common carrier would subject itself to punishment, as would also the innocent driver of any delivery wagon who would be called upon to leave intoxicants at such a place even though he knew not the character of the

place, nor that the package which he was called upon to deliver contained intoxicants.

[1-3] It is true that the ordinance does not in terms base its punishment upon the knowledge of the defendant of the character of the place, coupled with the intent which may be inferred from the act of delivery when he possesses such knowledge. But we are not greatly concerned with this situation, and need say no more than that if this law deliberately made it a crime for the doing of such an act innocently performed, it would indeed be a harsh one. We say that we are not deeply concerned because the construction which we put upon this ordinance does not compel this harsh construction. It is true that there are some acts made crimes by the very terms of the law where the fraudulent or wicked intent is conclusively presumed from the commission of the act itself, or where the act is denounced as criminal without regard to the factious intent (2 Wharton's Crim. Ev. [8th Ed.] § 1695; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45), but upon the other hand, whether a criminal intent or a guilty knowledge is a necessary ingredient of a statutory offense is often a matter of construction (*Commonwealth v. Weiss*, 139 Pa. 251, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182), and when a criminal statute is thus open to construction two fundamental principles lie at the very threshold of the inquiry into it. The first of these principles is that the law will be upheld unless it be clearly obnoxious, and the other is that of two permissible constructions that one under which the law is valid will be adopted as expressing the intent of the legislative body.

[4] Therefore, we do not construe section 5 of the Covina ordinance as designed to inflict punishment upon an innocent person who shall so transport intoxicants. The case comes quite clearly within the reasoning and principle of the English case of *Regina v. Tolson* (L. R. 23 W. B. Div. 168 [1889], s. c. 40 Alb. L. J. 250), which case itself receives detailed consideration in 2 *Lewis' Sutherland Statutory Construction*, § 527. The case was a criminal charge against a woman for a bigamous marriage. It has been held that one who marries a second time under an honest but an erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. 2 Wharton's Crim. Ev. (8th Ed.) § 1695a. But in the later *Tolson* case the woman had married five years, instead of seven years, after her husband's desertion of her, under the belief held in good faith that her husband was dead. The proposition considered was whether honest belief and good faith constituted a defense. It was conceded that the prisoner “falls within the very words of the statute.” Cave, J., said:

“At common law an honest and reasonable belief in the existence of circumstances, which, if

true, would make the act for which the person is indicted an innocent act; has always been held to be a good defense. * * * So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication."

Placing the ordinance under this construction, it may be given one of two interpretations, either of which confirms its validity. The first of these is that the law does in general terms denounce the transportation to an inhibited place without making the wrongful intent a declared ingredient of the crime, but always, as in *Regina v. Tolson*, making the innocent state of mind of the defendant a complete defense. The second construction to which we incline is that the law intends to denounce the act only when accompanied by some evidence of the wrongful intent. Under either of these, as has been said, the ordinance is not invalid.

[5] Turning next to the complaint. It alleges that the defendant "willfully and unlawfully" transported the intoxicants. "Willfully" of course, imports no more than a design to do the specific act. But the charge is also that the act of transportation was unlawfully performed. This employment of the word is not merely epithetical, but is sufficient to charge the defendant with the performance of this act with a wrongful intent, and is thus sufficient to justify his being placed upon trial.

The writ is therefore discharged, and the prisoner remanded.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

BROOKLYN MINING CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA. (L. A. 4277.)

(Supreme Court of California. June 28, 1916.)

MASTER AND SERVANT §380—WORKMEN'S COMPENSATION ACT—"WILLFUL MISCONDUCT."

Where a miner working in a shaft was instructed by his foreman to complete his work there and then go to another shaft, where the foreman was, and to work there, and, after completing his work in the first shaft, came to the surface, and, the day being exceedingly warm, stopped temporarily to rest in the shade of an ore bin, and while so resting was killed by the collapse of the bin, and where the foreman had been informed that he had finished the work in the first shaft and was waiting for another assignment to work, the act of the deceased in resting was not "willful misconduct," within Workmen's Compensation, Insurance, and Safety Act (St. 1913, p. 283) § 12, subd. 3, barring a right to indemnification.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §380.

For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

In Bank. Proceeding under the Workmen's Compensation Act to obtain compensation for the death of Charles Fremont Goering, opposed by Brooklyn Mining Company and others, employers. Compensation was awarded, and the employers petition for a writ of review against the Industrial Accident Commission of the State of California. Writ of review discharged.

Byron Waters and McNabb, Hartzell & Hodge, all of San Bernardino, and Holcomb & Coy, for petitioners. Christopher M. Bradley, of San Francisco, for respondent.

HENSHAW, J. The writ of review was issued in this case for the consideration of constitutional objections urged against the validity of the Workmen's Compensation, Insurance, and Safety Act. All of those constitutional questions have been considered and disposed of in the opinion of this court in *Western Indemnity Company v. Pillsbury et al.*, 151 Pac. 398.

Nothing remains saving one last contention of the petitioners, which is to the effect that the admitted facts attending the death of Charles Fremont Goering established that he met his death under circumstances which under the terms of the act deprive his widow of the right to any award. The facts are that Goering was employed as a miner working in one of the shafts of a mine belonging to the petitioners. He had been instructed by the foreman to complete his work in the shaft and then go to another shaft, where the foreman was located, and work there. He came to the surface of the ground after completing his work in the shaft. The day was insufferably hot, and he stopped temporarily to rest in the shade of an ore bin, a place quite commonly frequented by the men for this purpose. While so resting the bin collapsed and killed him. Under the circumstances of the case, considering the fact that word had been sent or at least carried to the foreman that he had finished his underground labors and was waiting for another assignment to work, and considering also the additional fact that the shade of the ore bin was a common place for the men to recuperate from the intense heat, that the bin was regarded as a safe structure, and that no one had ever warned any of the men against resting under it, it is quite apparent that the act of the deceased in making it a place of temporary rest and recuperation was not the "willful misconduct" of the law (Workmen's Compensation, Insurance, and Safety Act, § 12, subd. 3) barring a right of indemnification.

The writ of review is therefore discharged.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

BROWN et al. v. DOMESTIC UTILITIES MFG. CO. et al. (L. A. 8377.)

(Supreme Court of California. June 18, 1916.)

1. SALES ⇐50 — FRAUD — WAIVER — NEW AGREEMENT.

Where a buyer aware of a fraud perpetrated upon him suggests, if he does not demand, a rescission, and on its refusal enters into a new and modified agreement covering the subject-matter of the first contract, the new agreement waives the fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 109-114; Dec. Dig. ⇐50.]

2. SALES ⇐50—FRAUD—WAIVER—INDUCEMENT.

Such buyer would be relieved from the legal effect of the waiver only by pleading and proof that he was induced to enter into the new agreement by undue influence, fraud, or mistake, or that the terms of such agreement were not lived up to by the defendant; as in such case the right to sue in an action based on the original fraud would be restored or revived.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 109-114; Dec. Dig. ⇐50.]

3. SALES ⇐126(1)—FRAUD—RESCISSION—DELAY.

Where the buyer discovered facts constituting the seller's alleged fraud in January, 1911, and did not attempt to rescind the contract until January, 1912, the inexcusable delay was fatal to his action to enforce a rescission.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313, 315; Dec. Dig. ⇐126(1).]

4. SALES ⇐126(3)—FRAUD—RESCISSION—UNDUE INFLUENCE.

Where it appeared that plaintiffs were adult persons, familiar with the English language, and able to understand ordinary business transactions, and that there was no relation of confidence between the parties, there was nothing from which the finding of undue influence excusing the delay within the exceptions of Civ. Code, § 1691, could be made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 316; Dec. Dig. ⇐126(3).]

5. SALES ⇐126(1)—CONTRACT—RESCISSION—DEMAND.

Though the contract received by the buyer of washing machines was of no value, he was not thereby excused from making his demand for rescission seasonably, which would give notice to the seller that he had decided to rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313, 315; Dec. Dig. ⇐126(1).]

In Bank. Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by C. S. Brown and another against the Domestic Utilities Manufacturing Company and others. Judgment for plaintiffs, motion for new trial denied, and defendants appeal. Judgment and order reversed.

Davis, Kemp & Post, of Los Angeles, for appellants. Parker & Moote and Arthur C. Vaughan, all of Los Angeles, for respondents.

HENSHAW, J. A hearing before this court in the matter of the above appeal was ordered, after decision by the District Court of Appeal of the Second Appellate District, reversing the judgment of the trial court, which was in favor of the plaintiffs.

The frauds perpetrated by defendants and

appellants upon these plaintiffs, which frauds were established by the evidence and found by the court, were so gross that equity would lend all of its legitimate powers to relieve plaintiffs from the effect of them. It was because the trial court had decreed that such relief should be granted and the Court of Appeals had determined that in the state of the record it could not be granted that this court assumed jurisdiction of the case to resolve this question, if equity so permitted, in favor of the injured parties.

The trial court had excused the plaintiffs for their unwarranted delay in beginning their action for rescission under findings to the effect that they were and continued to be under the influence of defendants unduly and improperly exercised upon them. It was shown in the opinion of the Court of Appeals that these findings could not afford relief to plaintiffs for their laches because there was no pleading of such undue influence or of a confidential relationship, and there was no evidence upon which this relationship could be founded—nothing further, in short, than that the plaintiffs believed the representations of the defendants. But upon petition to this court it was pointed out that in the month of October, 1910, after discovery of the frauds and the worthless character of the contract into which plaintiffs had been induced to enter, Mrs. Brown sought an interview with defendant Crooker and said to him:

"There is nothing about this deal like we expected it to be," and I says, 'Let's give back the papers and quit,' and he says, 'No, we are not in the business to give anything back.'"

No mention of this evidence had been made in the opinion of the Court of Appeals. This court, for the reasons above indicated, thought it worth while to consider the question with a view to determining whether this evidence could be construed, under all of the circumstances, as a sufficient offer of rescission and a refusal by defendants to rescind, and whether, if this position could be sustained, it could properly be said that the subsequent delay in commencing the action to rescind was not unconscionable.

But an examination of the record at once presents an insurmountable difficulty to the following out of this line of thought and reasoning; for it appears that after this interview and refusal by defendant's president to entertain any proposition for rescission a new composition agreement in writing was entered into between the parties, dated the 11th day of January, 1911. It need not be set forth at length. It is sufficient to say that in its legal effect it recognizes the validity and existence of the first contract, and provides for certain modifications of its terms.

[1] As a necessary consequence there is presented the situation of the parties plaintiff becoming aware of the frauds which had

been perpetrated upon them, of having suggested, if not having demanded, a rescission, which was met by refusal, and thereafter having entered into a new and modified agreement covering the subject-matter of the first contract. Under familiar principles, this new agreement thus entered into, with knowledge of the impositions practiced upon them, constituted a waiver of the fraud.

[2] The only facts which would relieve these plaintiffs from the legal effect of this waiver would be pleadings and proof showing either that they were induced to enter into the second composition agreement by undue influence, fraud, or mistake, or that the terms of the second composition agreement were not lived up to by the defendants, wherefore it might be said that their earlier right to sue in an action based upon the original fraud was restored or revived. No such pleading as this, however, is presented, and, as has been said, the court's finding of undue influence, which might possibly accomplish the same result in favor of plaintiffs, is supported neither by pleading nor evidence.

[3-5] It follows therefore that the District Court of Appeal was correct in its reasoning and conclusion: Its opinion, which follows, is adopted, and the judgment and order appealed from are reversed:

"Respondents herein, on the 12th day of July, 1910, entered into a contract with the appellants whereby the purchase of a certain lot of washing machines was agreed to be made. As part consideration moving from the respondents, equities in certain real estate of the agreed value of \$3,500 were conveyed to appellants. Conditions were made by the contract whereby possession of the washers was not to be delivered except upon certain payments being made by respondents. The venture proved unprofitable to respondents, who in January, 1912, tendered the contracts back to appellants and demanded that a reconveyance of the equities in the real property be made to them. Judgment was in favor of the plaintiffs. This appeal was then taken from that judgment and from an order denying the motion of defendants for a new trial.

"The complaint is long and multifarious in its statement of alleged false representations which induced the plaintiffs to enter into the contract with defendants, and but few of these present matters which are sufficient to support an action for rescission. The most of them consist of a narrative of alleged promises and representations as to future conditions which the plaintiffs claimed were made to them and by reason of which they were induced to enter into the contract. But there may be gleaned from the complaint statements of a few representations, the matters embraced in which, if untrue, as found by the trial judge, are sufficient to support the judgment. We find, however, one insurmountable obstacle to a judgment here of affirmance of the decision of the trial court. The defense, as set up in the answer, that plaintiffs did not move promptly upon discovery of the facts constituting the alleged fraud to rescind their contract, is fully sustained by the record. From the record it appears by the testimony of the plaintiff C. S. Brown that he discovered the facts constituting the alleged fraud in January, 1911. This action was not brought until March, 1912, and the plaintiffs affirmatively allege that they attempted to rescind

the contract by tendering back to the defendants on the 8th day of January, 1912, the documents received from them, and then and there made their demand for a reconveyance of the equities in the real property. From these allegations and the evidence given at the trial it appears that there was an inexcusable delay of 12 months after discovery of the alleged fraud before attempt was made to rescind, which occurred prior to the bringing of this action. The trial judge realized that the delay was inexcusable, unless justified by facts showing the case to be within some of the exceptions mentioned in section 1691 of the Civil Code, and made his finding to the effect that the reason why the rescission was not attempted sooner was because the plaintiffs were affected by the undue influence of defendants. There are no facts shown which will justify this finding in excuse of the delay. The plaintiffs were adult persons, familiar, as we must assume, with the English language, and able to understand ordinary business transactions. There was no relation of confidence induced or existing between the plaintiffs and defendants, and nothing at all from which the finding of undue influence could reasonably be made. That the failure of the plaintiffs to act promptly upon discovery of the fraud is fatal to an action to enforce rescission is fully established by the cases. *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Hammond v. Wallace*, 85 Cal. 522, 24 Pac. 837, 20 Am. St. Rep. 239; *Marten v. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107. Notwithstanding the fact that the trial judge by his findings determined that the contract received by respondents was of no value, respondents were not thereby excused from making their demand seasonably which would give notice to appellants that they had decided to rescind. In the case of *McGue v. Rommel*, 148 Cal. 547, 83 Pac. 1000, it is said: "While it is true that, where a rescission in pais under section 1691 is relied on, the party rescinding need not show that he has restored that which is worthless, yet he must always show that he has complied with the requirement to 'rescind promptly,' and this implies some notice to the other party of such determination to extinguish the contract"—citing cases.

"The judgment and order are reversed.

"James, J.

"We concur: Conrey, P. J.; Shaw, J."

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

STONE v. IMPERIAL WATER CO. NO. 1. (L. A. 3782.)

(Supreme Court of California. July 11, 1916.)

1. WATERS AND WATER COURSES §247(1)— NATURE OF PROPERTY—IRRIGATION RIGHTS— CONFLICTING CLAIMS.

The rights of landowners to the use of irrigation water are real property, and conflicting claims may be made the subject of an action to quiet title under Code Civ. Proc. § 738.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. §247(1).]

2. PLEADING §248(17)—AMENDMENTS—DIFFERENT CAUSE OF ACTION.

In an action by a landowner praying that a water company be directed to supply him with water sufficient for 160 acres of land, to use at will on any part of his 200 acres, without designation of a specific tract, the cause of action stated in the original complaint was the same as that stated in the second and amended complaint, though the one alleged the 40 acres of plaintiff's 200, upon which the water was not allowed to be used, as the N. W. ¼ of the N.

E. $\frac{1}{4}$ of section 14, while the other alleged it as the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 14, a statement of the particular place upon which defendant refused to allow water to be used not being essential to the cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 697; Dec. Dig. ¶ 248(17).]

3. APPEAL AND ERROR ¶ 837(4)—REVIEW — SCOPE—RULING ON DEMURRER.

In reviewing a judgment on demurrer to the complaint, the Supreme Court cannot anticipate that plaintiff has stated a cause of action which he cannot prove, or base an opinion on statements of counsel made only in the briefs, the court being confined to the allegations of the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3274; Dec. Dig. ¶ 837(4).]

Department 1. Appeal from Superior Court, Imperial County; Charles Monroe, Judge.

Action by C. P. Stone, as administrator of the estate of N. Alexandrian, deceased, against the Imperial Water Company No. 1. From a judgment for defendant, plaintiff appeals. Reversed.

George H. P. Shaw, of Los Angeles, and H. N. Dyke, of Imperial, for appellant. F. P. Willard, of Heber, R. D. McPherrin, of Imperial, and Hunsaker & Britt, of Los Angeles, for respondent.

SHAW, J. The court below sustained a demurrer to the plaintiff's second amended complaint and thereupon gave judgment for the defendant, from which the plaintiff appeals.

The action was begun by the filing of the original complaint on April 21, 1909. Thereafter, by leave of court, the plaintiff on April 11, 1913, filed the said second amended complaint. The court below sustained the demurrer to the second amended complaint on the ground that the causes of action alleged in the original complaint and in the said second amended complaint were each causes of action for trespass on real property; that the real property described as having been injured by the trespass in the original complaint and the amendments thereto was a different tract of land from that on which the injury was alleged to have occurred in the second amended complaint, and that the latter pleading set forth a new cause of action which accrued more than three years before the date of the filing thereof, and was therefore barred by the statute of limitations. Section 338, Code Civ. Proc. It bases its ruling on the decision in the case of *Atkinson v. Amador, etc., Co.*, 53 Cal. 102.

We think the court below mistook the nature of the respective pleadings, and that the cause of action stated in the second amended complaint was substantially identical with that set forth in the original complaint. The original complaint alleged that the plaintiff was the owner of 200 acres of land described as the south half of the northwest quarter of

section 13, the west half of the northeast quarter, and the southeast quarter of the northeast quarter of section 14, all in township 15 south, range 14 east; that the defendant was a mutual water corporation organized to supply and distribute water to its stockholders for use upon lands owned by them respectively; that, for that purpose, it had constructed a system of water-works and was distributing water therein to its stockholders and had sufficient water in its control for that purpose; that the plaintiff was the owner of a certificate of stock issued by said defendant for 160 shares of its capital stock which recited on its face that the owner thereof was entitled to the flow and use of 640 acre feet of water per annum to be used upon the above-described land, and that the plaintiff thereby was entitled to demand and receive said quantity of water for use upon said land; that on February 12, 1909, the defendant refused, and has ever since refused, to deliver such water to the plaintiff, except upon condition that the plaintiff would specify the particular 160 acres of said land to which he would thereafter confine the use of said water, or would buy 40 more shares of the capital stock of the defendant corporation; that, under the provisions of the contract between the plaintiff and defendant, the plaintiff was entitled to receive from the defendant enough water at one time for the irrigation of 160 acres of land, and that he was entitled to use said water upon any portion of said land owned by him, provided that he did not irrigate more than 160 acres at any one run; that the defendant asserts and claims that it was under no obligation to deliver any water to any portion of said land until the plaintiff designated the particular 160 acres thereof to which he would confine the use of the water so delivered. The original complaint also alleges that the defendant, upon the demand made on February 12, 1909, did deliver water for use on all of said land described except 40 acres thereof, described as the southeast quarter of the northeast quarter of section 14. The second amended complaint contained the same allegations as the original complaint, except that it alleged that the 40 acres upon which the water was not allowed to be used, in pursuance of the demand of February 12, 1909, was the northwest quarter of the northeast quarter of section 14, instead of the southeast quarter of the northeast quarter of section 14, as alleged in the original complaint.

The court below concluded that the respective complaints stated a simple cause of action for the recovery of damages caused by the failure to deliver water to the particular 40-acre tract described therein as having been deprived of the water, and upon that theory it concluded that the cause of action last pleaded was an entirely different cause of action from that first pleaded. It is clear from the allegations above stated that the contro-

versy between the parties is not over the right to irrigate a particular 40-acre tract of land, but arises from the claim on the part of the plaintiff that he is entitled to use the water upon any part of the 200 acres which he owns, as he may choose, and the conflicting claim on the part of the defendant that he must first choose or locate his right upon a specific tract of 160 acres and that he cannot receive water if he insists upon using it elsewhere, or generally upon the entire 200 acres.

[1, 2] The complaint prays that the defendant be directed to supply plaintiff with water so long as he does not, during any one irrigation or run, apply the water to more than 160 acres, for damages in a stated sum, and for such further relief as may be meet and agreeable to equity. There are also allegations showing that the plaintiff has been damaged by the deprivation of water on the tract from which it was withheld. It is apparent that the claim for damages is merely incidental to the main purpose of the action, which is to obtain a decree establishing the rights of the parties with respect to the water in controversy. The plaintiff claimed the right to have the water delivered at large over the entire tract, while the defendant claimed that the plaintiff must select a particular portion containing 160 acres and confine the delivery and use to that portion. Section 324 of the Civil Code provides that mutual water corporations, such as the defendant appears to be, may provide that its water shall be sold only to the owners of its stock—

"and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto."

The complaint does not allege in detail that this section has been complied with or that the stock held by the plaintiff is issued under the provisions thereof. It does allege, however, according to its legal effect, a contract showing that the plaintiff was entitled to receive water, in virtue of his ownership of the stock, for use upon the 200 acres described. The right described is a right to receive the water upon the 200 acres, to the specified quantity, without confining its use to any specific portion thereof. The right, as insisted on by the defendant, is less beneficial than that alleged to belong to the plaintiff. Such rights are real property, and the conflicting claims may be made the subject of an action under section 738 of the Code of Civil Procedure. We are of the opinion that the main cause of action stated in the original complaint is the same as that stated in the second and amended complaint. A statement of the particular place upon which the defendant refused to allow water to be used was not essential to the cause of action, and the fact,

that in the original complaint the 40-acre tract described as such place was different from that described in the last complaint, does not change the character of the cause of action, or make a new action begun at the time of the filing of the last complaint.

[3] From the statements of counsel in their briefs, it is possible that the plaintiff has stated a cause of action which he cannot prove; but we cannot anticipate this condition or base an opinion upon statements made only in the briefs. If the cause had been tried upon its merits and the facts were further disclosed the question might have been presented, but where a judgment is rendered upon a demurrer, the court is confined to the allegations of the complaint in the consideration of the case. There was no demurrer for uncertainty. While the complaint is general in terms, we think it is sufficient as a statement of the right of the plaintiff as stated above. The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

DREXLER v. WASHINGTON DEVELOPMENT CO. (S. F. 6468.)

(Supreme Court of California. June 28, 1916.)

1. EXECUTORS AND ADMINISTRATORS \S 315(6) —DECREE OF DISTRIBUTION—CONCLUSIVE-NESS.

A decree of distribution not appealed from, and which has become final, is the conclusive muniment of title under a will, and controls any language of the will inconsistent therewith.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1809, 1814; Dec. Dig. \S 315(6).]

2. EXECUTORS AND ADMINISTRATORS \S 315(5) —DECREE OF DISTRIBUTION—TITLE.

A decree, distributing realty to a widow "as her sole property and estate," restraining her from the disposition and sale of the property, and adjudging the remainder of the estate, real, personal and mixed, to be distributed to the widow as her sole and separate estate, cut off the right of any children to the remainder therein after her death, and was in effect an adjudication that there were no children or possibility of any, and gave her an absolute fee-simple estate in the property, free from any restraint on alienation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1806, 1807, 1810; Dec. Dig. \S 315(5).]

3. WILLS \S 601(4)—DEVISE OF FEE—RESTRAINT ON ALIENATION—VALIDITY.

A provision in the will of a testator, who left his widow his heir and who made no distribution of the property, except rents and profits thereof accruing during her lifetime, so that it vested absolutely in her by descent at his death, subject only to administration, purporting to impose upon her estate and property the condition that she could not sell or dispose of it, was an ineffectual restriction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1344; Dec. Dig. \S 601(4).]

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Elise A. Drexler against the Washington Development Company. Judgment for defendant, on demurrer to complaint, and plaintiff appeals. Reversed.

Marcel E. Cerf, of San Francisco, for appellant. Alfred B. Weller, of San Francisco, for respondent.

SHAW, J. The court below sustained the demurrer to the complaint, and thereupon rendered judgment for the defendant. The plaintiff appeals.

The action was for the specific performance of a contract to convey real estate. The contract was made on February 18, 1910. By its terms the plaintiff agreed to sell to the defendant the property described for the sum of \$225,000. Of this \$2,250 was paid at the time of the execution of the agreement. The remainder was to be paid upon the examination and approval by the defendant of the title of the plaintiff in the property. The defendant objected to the title exhibited by the plaintiff, and on that account refused to perform the contract. Thereupon the plaintiff began this action. Her right to maintain it depends upon the question whether or not she has a good title to the property, upon the facts stated in the complaint.

[1-3] In 1899, Louis P. Drexler was the owner in fee of the property. On August 17, 1899, he died, leaving surviving him the plaintiff, his wife, as his sole heir at law. His estate was duly administered, and distribution thereof made in regular course of law. The doubt concerning the title results from a peculiar provision of his will which is recited in the decree of distribution. By this clause of the will, being the eleventh paragraph thereof, Drexler gave to his wife, during her life, all the rents accruing from the property in controversy, and authorized her to collect the same. It also empowered her in case the buildings should be destroyed, by fire or otherwise, to collect the insurance, and to mortgage the property, if necessary, for a sum sufficient, with the insurance money, to replace the buildings destroyed. It further provided that on her death—

"the property heretofore mentioned shall go to and belong to her children, if she has any, but in case she should die without issue or have none living at the time of her death, then in that case she may bequeath the before mentioned lots and buildings to any person or persons, or to any charity or charitable institutions that she may think best or wish to do. But in no case shall my wife Elise A. Drexler have the right or power to sell the before mentioned real estate."

The will made no further disposition of the property or of any other estate or interest therein. After reciting the foregoing part of the will, the court, in the same paragraph of its decree, distributed the real estate referred to in said clause of the will to Elise A. Drexler—

"as her sole property and estate, subject, however, to the conditions expressed in said will,

restraining her from the disposition and sale of said property as set forth and provided for in the said eleventh paragraph of said will, in this paragraph quoted and set forth."

The next paragraph, No. 22, of the decree, is as follows:

"It is further ordered, adjudged, and decreed that the rest, residue, and remainder of the estate of said Louis P. Drexler, deceased, real, personal, and mixed, and wheresoever situate, be, and the same is hereby, distributed to the said Elise A. Drexler as her sole and separate estate and property, free and clear of said collateral inheritance tax."

This decree of distribution was made on October 12, 1900. There was no appeal, and it has long since become final. The decree is, of course, the conclusive muniment of the plaintiff's title, and it controls any language of the will inconsistent therewith. This has been decided many times. We cite only the last decision on the subject, *Estate of Schmierer*, 168 Cal. 747, 145 Pac. 99.

The portion of the will purporting to give said property to the children of Elise A. Drexler at her death must, on the principle just stated, be disregarded. The decree, as above shown, distributes the property to her "as her sole property and estate," subject only to the condition that she shall not have the right or power to sell it. This cuts off the right of any children to the remainder therein after her death, and is, in effect, an adjudication that there were no children or possibility of any. The fact is practically conceded by both parties in their briefs.

Under the facts above stated, it is apparent that the plaintiff has an absolute fee-simple estate in the property, free from any condition restraining alienation. The twenty-first paragraph of the decree, which recites the will, purports to impose upon her estate in the property the condition that she shall not sell or dispose of the same. This, however, is a wholly ineffectual restriction. She was the heir of Louis P. Drexler; he made no disposition whatever of the property, except the rents and profits thereof accruing during her lifetime, and consequently the entire remainder, whatever it may be, and of whatsoever rights and powers it may consist, vested absolutely in her by descent at his death, subject only to administration. The twenty-second paragraph of the decree recognized this fact, and formally adjudged to her the rest, residue, and remainder of the estate of Drexler, real, personal, and mixed, as her sole and separate estate and property. This residue included the power of disposition which the eleventh paragraph of the will attempted to withhold from her. By this paragraph of the decree she obtained the power of disposition, which was withheld by the preceding paragraph. Taking the two together, therefore, she has the entire estate. The objections of the defendant to the sufficiency of the title were without foundation. No other objection was made, and the defendant has expressed its willingness to take

and pay for the property if the title offered is found to be good.

We are of the opinion that the plaintiff has a good title, that the defendant should be compelled to perform, and that the court below erred in sustaining the demurrer to the complaint.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

McDOUGALD, City and County Treasurer, v. BOYD. (S. F. 6924.)

(Supreme Court of California. June 24, 1916.)

1. BANKS AND BANKING §129—DEPOSIT—JOINT OWNERSHIP.

Under the express provision of the Bank Act (St. 1909, p. 90), § 16, bank deposits, made under an agreement by husband and wife with the bank that the money deposited was to be held on condition that it and its accumulations should be payable to the husband and wife, or either of them, during their joint lives, and should belong absolutely to the survivor, became the property of the husband and wife as joint tenants.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. §129.]

2. TAXATION §879(1)—INHERITANCE TAX—BANK DEPOSIT—JOINT TENANCY—SURVIVORSHIP.

In such case, the wife surviving did not take any interest in the deposits as heir of or successor to her deceased husband, but took by virtue of her estate originating at the time of the creation of the joint tenancy, so that an inheritance tax could not be sustained on the theory that the deposits formed a part of the husband's estate passing to her on his death; the inheritance law then in force (St. 1911, p. 713) not undertaking to impose a tax on the right accruing to a surviving joint tenant upon the death of his cotenant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. §879(1).]

3. TAXATION §893—INHERITANCE TAX LAW—CONSTRUCTION.

Tax proceedings, being in invitum, must comply strictly with all the requirements of the statute imposing them, and, in order to collect the tax, the government or agency seeking to recover must show the fulfillment of all the conditions upon which the obligation to pay depends.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. §893.]

4. TAXATION §893 — INHERITANCE TAX — TRANSFER—FINDING AND JUDGMENT—CONSIDERATION.

Under Inheritance Tax Law (St. 1911) § 1, subd. 3, imposing a tax upon the transfer of property by assignment or gift, made without valuable and adequate consideration in contemplation of the death of the assignor or donor, or intended to take effect in enjoyment after death, the absence of the consideration is essential to the obligation to pay the tax, and the officer seeking to recover a tax thereunder has the burden of showing that there was no valuable and adequate consideration for the transfer.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. §893.]

5. TAXATION §893 — INHERITANCE TAX — TRANSFER—FINDING AND JUDGMENT—CONSIDERATION.

In such case, findings not declaring the want of such valuable and adequate consideration would not support a judgment declaring the tax due under such provision.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. §893.]

6. TAXATION §893—INHERITANCE—PLEADING—DEMURRER.

In a proceeding to collect an inheritance tax under St. 1911, p. 713, § 1, subd. 3, defendant, in order to raise the point that the petition failed to allege a want of consideration, was not required to demur thereto, as the demurrer would have been of no avail, where the petition alleged the property to belong to her deceased husband at his death, in which case she would have been liable for a tax under other provisions of the law.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. §893.]

7. TAXATION §893 — INHERITANCE TAX — SUFFICIENCY OF EVIDENCE—OBJECTION.

In such case, where the burden of proving consideration was on the plaintiff, the defendant was not bound to offer evidence, and, after judgment, might insist that the facts necessary to establish her liability had not been alleged or proven.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. §893.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by John B. McDougald, treasurer of City and County of San Francisco, against Sara M. Boyd, as executrix of Colin M. Boyd, deceased. Judgment for plaintiff, and defendant appeals, bringing up the evidence by bill of exceptions. Reversed.

Geo. C. Sargent, of San Francisco, for appellant. Hartley F. Peart, of San Francisco, U. S. Webb, Atty. Gen., and Albert H. Elliott, Asst. Inheritance Tax Atty., of San Francisco (Gus L. Baraty, of San Francisco, of counsel), for respondent. Arthur H. Redington, of San Francisco, amicus curiæ.

SLOSS, J. This proceeding was instituted by the treasurer of the city and county of San Francisco against the executrix of the will of Colin M. Boyd, deceased, to require the payment of an inheritance tax on the sum of \$34,268.55, on deposit with the Savings Union Bank & Trust Company of San Francisco. The court entered judgment, requiring the executrix to pay a tax of \$1,168.53. The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

The petition alleges that the money on deposit was a part of the estate of the decedent at the time of his death. The answer denies the allegation, and alleges, in effect, that more than a year before the death of Colin M. Boyd, he and the appellant, his wife, had opened two joint accounts in said Savings Union Bank & Trust Company, and that the money so deposited was the property

described in the petition. The court found that the decedent, at the time of his death, left the sum of \$37,968.55 on deposit with the Savings Union Bank & Trust Company. It further found, in accordance with the allegations of the answer, that on February 27, 1911, something over a year before Boyd's death, said Boyd and his wife, the appellant had opened the joint accounts mentioned in the answer; that at the time of said deposits the sums so deposited were the individual property of Colin M. Boyd; that the deposits were made by said Boyd in contemplation of his death, and were intended by him to take effect in possession and enjoyment as to the appellant herein after the death of said Colin M. Boyd. There is no averment in the petition, nor is there any finding, that the deposits, or the transfers which they constituted, were made without valuable or adequate consideration. The findings that the money on deposit was a part of the estate of Colin M. Boyd at the time of his death, that the transfers were made in contemplation of death, and that they were intended to take effect in possession and enjoyment after the death of Colin M. Boyd are all assailed as unsupported by the evidence.

[1] We think it clear that the evidence does not support the finding that the sums of money remaining on deposit at the time of the death of Colin M. Boyd were a part of his estate. At the time the two joint accounts were opened, Boyd and his wife signed an agreement with the bank, to the effect that the money deposited was to be held on the understanding and condition that the same and all accumulations thereof should be payable to Colin M. Boyd and Sara M. Boyd, or either of them, during their joint lives, and should belong absolutely to the survivor of them. The deposits thereby became the property of the husband and wife as joint tenants. Such is the express declaration of section 16 of the Bank Act, in force at the time of the deposits and of Boyd's death. Stats. 1909, p. 90. See, also, *Est. of Harris*, 169 Cal. 725, 147 Pac. 967; *Kennedy v. McMurray*, 169 Cal. 287, 146 Pac. 647.

[2] Mrs. Boyd did not take any interest in the deposits as heir of or successor to her deceased husband. She took by virtue of her estate originating at the time of creation of the joint tenancies. The imposition of the tax cannot therefore be sustained upon the theory that the deposits formed a part of the estate of Colin M. Boyd, passing upon his death to his wife. *Estate of Harris*, supra; *Kennedy v. McMurray*, supra. Boyd died on March 13, 1912. The inheritance tax statute then in force was the act approved April 7, 1911 (Stats. 1911, p. 713), and this act did not undertake to impose a tax on the right accruing to a surviving joint tenant upon the death of his cotenant. A provision bearing upon this matter was enacted for the first time in the act of 1913. See section 3c of

the act approved June 16, 1913 (Stats. 1913, p. 1068.)

[3-5] The respondent seeks to sustain the tax upon the provisions of section 1, subd. 3, of the act of 1911, which declares that:

"A tax shall be and is hereby imposed upon the transfer of any property * * * in the following cases: * * * (3) When the transfer is of property * * * by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death."

The court found, as has already been stated, that the deposits in question were made in contemplation of Boyd's death, and that they were intended to take effect in possession and enjoyment after his death. We need not here review the evidence in order to determine whether either of these findings has support in the evidence. Assuming that both are fully sustained, the findings do not fill the measure of the statute for want of a further finding that the transfers (or deposits) were made "without valuable and adequate consideration." No authority need be cited to support the proposition that tax proceedings, being in invitum, must comply strictly with all the requirements of the statute imposing them. In order to collect a tax, the government or agency seeking to recover must show the fulfillment of all of the conditions upon which the obligation to pay the tax depends. The act in question does not impose a tax, generally, upon transfers made in contemplation of death, or intended to take effect in enjoyment after death. It imposes a tax only upon such transfers when made "without valuable and adequate consideration." The absence of the consideration is just as essential to the obligation to pay the tax as is the contemplation of death or the intention of the transferor that possession or enjoyment shall be postponed until death. It is plain, therefore, that the officer seeking to recover a tax under subdivision 3 of section 1 must show that there was not a valuable and adequate consideration for the transfer. For like reasons, findings which do not declare the want of such consideration will not support a judgment declaring a tax due under this subdivision. The rule that the burden is on a claimant to establish his right to an exemption from taxation has no application here. It is not a question of exemption. The statute does not assume to relieve from the payment of a tax otherwise imposed on transfers those made on a valuable and adequate consideration. It imposes the tax, in the first instance, only upon transfers made without such consideration. There may be good reason for saying that because of the difficulties of the case—the fact in issue being a negative and peculiarly within the knowledge of the adverse party (see *In re Loewi's Estate*, 75 Misc. Rep. 57, 134 N. Y. Supp. 679, 680)—slight proof would be

required of the party seeking to show that there had been no adequate consideration for the transfer. But this does not alter the fact that the burden of proof is upon such party, and that a finding that there was not a valuable consideration is necessary to support a judgment declaring the tax due.

[8, 7] It is said by respondent that if the appellant wished to raise this point, she should have demurred to the petition for failure to allege a want of consideration. Such a demurrer would, however, have been of no avail, since the petition alleged that the property belonged to Colin M. Boyd at the time of his death. If this allegation had been true, the respondent would have been liable for the tax under provisions of the statute other than subdivision 8 of section 1. It is further urged that the case was tried upon the theory that there was no consideration. We are unable to see that the record sustains this claim. It does not appear that there was any reference to the matter of consideration during the trial, or that there was any evidence specifically directed to this point. If the burden of proof was on the plaintiff, the defendant was not bound to offer evidence, and she has a perfect right, after judgment, to insist that the facts necessary to establish a liability upon her part have not been alleged or proven.

The cause will therefore have to be remanded for a new trial. Respondent may, if so advised, apply to the court below for leave to amend his petition.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

LOVEJOY v. HART et al. (Civ. 1505.)

(District Court of Appeal, Third District, California. June 5, 1916. Rehearing Denied by Supreme Court Aug. 3, 1916.)

GIFTS §49(5)—FIDUCIARY RELATION—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

In an action by a husband to have two gifts of money made by his deceased wife in her lifetime set aside and decreed void, evidence held insufficient to establish any sort of trust or fiduciary relationship between decedent and defendants; that the gifts were secured by undue influence; that the donor was mentally or physically incompetent, or incapable of managing her own affairs or comprehending the nature of the transaction, or that she needed independent advice.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 95; Dec. Dig. §49(5).]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by George P. Lovejoy, as administrator of the estate of Ann La Point, deceased, against Blair Hart and another. From a judgment for defendants, plaintiff appeals. Judgment affirmed.

Fred S. Howell, of Petaluma, and W. D. L. Held, of Ukiah, for appellant. J. W. Ford and Thos. J. Geary, both of Santa Rosa, for respondents.

CHIPMAN, P. J. Plaintiff, as administrator of the estate of Ann La Point, deceased, brought the action to have two certain gifts of money made by deceased in her lifetime set aside and decreed invalid, null, and void.

The complaint is an elaborate statement of facts alleged on information and belief, in which is alleged a conspiracy entered into by defendants to induce the deceased to leave her husband, and representations are alleged to have been falsely and fraudulently made by defendants to deceased with the object of disrupting her marital relations with her husband and to arouse in her a sentiment of hatred towards and dislike of her husband, and that by reason thereof deceased was induced to leave her husband; that this fraudulent conspiracy had for its object the procurement from deceased the money she possessed, and that the gifts made to defendant Martha Hart by deceased were brought about through said conspiracy; that deceased, was an old woman, feeble in mind and body and in poor health, and that her mind was perturbed and deranged thereby, "and that defendants poisoned the mind of deceased against her husband by representing that her husband would cheat her of her money"; that deceased was addicted to the use of alcoholic liquors, particularly beer, and consumed them in such quantities as seriously to affect her mind and understanding and incapacitate her for the management of her or any business; that, about March 1, 1895, defendants, by their said corrupt and fraudulent conspiracy, and while deceased was residing with her then lawful husband, enticed decedent away from her said husband and induced decedent to live with them; that, on or about March 23, 1895, and while decedent was residing with defendants, decedent "did make a purported gift of the sum of \$3,761.09 to the defendant Martha Hart, without any consideration whatever from said Martha Hart or from any other person or persons"; that at said time decedent was of the age of 65 years, "and that at said time decedent was feeble in mind and body, ignorant, and in weak health, and that her mind was perturbed and deranged thereby, and she was easily susceptible of influence and prejudice," and said gift "was procured and obtained by the defendants fraudulently and corruptly combining and conspiring together"; that said gift was the result of undue influence exercised upon decedent "by defendants fraudulently and corruptly combining together," and that, at the time she made said gift, decedent "was not free from duress, menace, fraud, and undue influence, but was in fact subjected to duress, menace, fraud, and un-

due influence by and on the part of defendants, both corruptly and fraudulently combining and conspiring together"; that at the time she made said gift decedent was not of sound mind.

In a second and separate cause of action a gift by deceased to defendant Martha Hart of \$900, on or about July 15, 1907, represented by a certificate of deposit in a Petaluma bank, is alleged. The alleged facts leading up to said gift are much the same as in the first cause of action. It is also alleged "that by reason of the foregoing facts and the domestic relation existing between decedent and defendants, a confidential and fiduciary relationship existed between deceased and defendants at all times while decedent resided with defendants aforesaid."

The court found against plaintiff in respect of all the accusatory charges alleged in the complaint affecting the conduct and motives of defendants. The following findings are all that seem necessary to be stated:

"V. That on or about the 23d day of March, 1895, while said decedent was residing with the defendants, the said decedent made a free and voluntary gift of the sum of \$3,761.09 to defendant Martha Hart.

"VI. That at the time said gift was made decedent was of the age of 65 years or thereabouts. That at said time decedent was not feeble in mind or body, or ignorant, or in weak health, and her mind was not perturbed or deranged and she was not easily susceptible of influence or prejudice, and was at said time of sound and disposing mind. * * *

"VIII. That the mind of said decedent did not become biased, poisoned, or prejudiced against her said husband by reason of any representations or statements made to said decedent by the defendants or either of them. That the said decedent did not avoid meeting her said husband, and did not at any time refuse to see or talk with him. That decedent was not at any time under the control, dominion, or undue influence of the defendants, or either of them. That at no time while the said decedent resided with defendants was she ignorant, or weak in mind or body. * * *

"XI. That on or about the 15th day of July, 1907, while decedent was residing with defendants, the said deceased duly indorsed and delivered to defendant Martha Hart a good and valid certificate of deposit payable to the order of decedent, and drawn on the William Hill Bank of Petaluma, Cal., for the sum of \$900. That said certificate of deposit was a gift from decedent to Martha Hart. That on the 15th day of July, 1908, defendant Martha Hart duly cashed said certificate of deposit at the Petaluma National Bank for the full sum of \$900.

"XII. That at the time said certificate of deposit was indorsed and delivered to defendant Martha Hart as a gift, decedent was of the age of 77 years, or thereabouts. That at said time, or at any other time, said decedent was not feeble in mind or body, or ignorant, or in weak health, and decedent was not at any time stupefied, or her mind perturbed or deranged by the daily or other use and consumption of alcoholic liquor, commonly known as beer, and she was not at any time easily, or at all, susceptible of influence or prejudice. * * *

"XV. That at the time said gift was made, and at all other times, said decedent was of sound mind. * * *

"XVII. That decedent was not, on the 23d day of March, 1895, or at any other time, under the control, dominion, or influence of defend-

ants, or either of them. That at said time decedent was of the age of 65 years or thereabouts. That decedent was not weak in mind or body, or ignorant in business or financial matters. That the mind of said decedent was not, at any time subsequent to the 23d day of March, 1895, nor for a long time, or any time prior thereto, benumbed or stupefied by the daily or long-continued use of alcoholic liquor, commonly known as beer, or any other intoxicating liquor. That decedent was not made incompetent thereby, or at all. That no confidential or fiduciary relationship existed at any time between decedent and defendants, or either of them. That at the time said gift was made, the acts, deeds, or conduct of decedent pertaining to her business or financial matters were not guided, influenced, or controlled by the defendants, or either of them. That no position of trust, confidence, or superiority of mind or intellect over said decedent was ever held or exercised by defendants, or either of them."

As conclusions of law the court found that both said sums were gifts freely and voluntarily made, and judgment passed accordingly. Plaintiff appeals from the judgment on bill of exceptions.

On this appeal, plaintiff, in his brief, states that:

"Actual fraud, sufficient of itself, and standing alone, to avoid the gifts in question, has, perhaps, not been shown here."

It is further stated:

"We are seeking the application of those equitable principles which forbid one standing in a superior and dominant position from benefiting by the act of him who bestows confidence and trust in the donee, which forbid one, while standing in the position of a guardian or protector, the fruits of transactions with his ward, or dependent, to his own financial gain. The confidence and trust which exist between such persons must ever remain inviolate," etc.

It is quite manifest that the grounds now urged for a reversal of the judgment depend upon the truth of the assumption that a fiduciary and confidential relation of trust and confidence existed between defendants and Mrs. La Point, and hence it was incumbent upon defendants "to show affirmatively and clearly that their transactions" with Mrs. La Point "were conducted fairly, openly, and that no undue advantage has been taken" of her. It will at once be seen that the premise from which appellant draws his conclusion is that a fiduciary relation of confidence and trust existed between the parties concerned. The court found that such relation did not exist. No natural or artificial relation existed from which that of confidence and trust might arise by implication or presumption, such as cestui que trust and trustee, parent and child, husband and wife, guardian and ward. These persons, the La Points and Harts, had been neighbors and friends for several years prior to 1895; Mrs. Hart visited Mrs. La Point frequently, and enjoyed the friendship and esteem of the latter to a greater extent perhaps than other of her neighbors. Mr. Hart had no business relations with La Point or his wife, and had no occasion or inducement to sustain other than the ordinary relationship existing between neighbors. There was no evi-

dence that would have justified the court in finding the existence of what in the mind of a chancellor or in the contemplation of law or equity would be regarded as a relation of trust and confidence such as appellant seeks to attribute to these persons. Nor do we think that the subsequent conduct of the Harts and Mrs. La Point, as shown by the evidence, would have warranted the court in finding otherwise than it did—

"that no confidential or fiduciary relationship existed at any time between decedent and defendants, or either of them; * * * that no position of trust, confidence, or superiority of mind or intellect over said decedent was ever held or exercised by defendants, or either of them."

It appeared that, in February, 1895, Ann La Point and her husband were living on a small place at Lakeville, Sonoma county, which belonged to Ann as her separate property, and upon which her husband had conducted a roadhouse or saloon for a number of years. They were married in 1875. They lived together until March 1, 1895, when Mrs. La Point went to the home of the defendants and took up her residence with them, and so remained until about March 19, 1912, when she died intestate, having lived with defendants 17 years. There was testimony as to the cause of her having left her husband, which, among other grounds, tended to show that he had diverted his affection from his wife and bestowed it upon another woman. Mrs. Hart testified:

"She came to me in her trouble and told me she was afraid of her life and she says, 'Fred (her husband) has driven me out of my home.' And for that reason she says, 'I have no roof over my head,' and I says, 'You have one now,' and she says, 'Yes,' and I says, 'Well, stay under it,' and that is all I had to say. She came there crying; an old lady 65 years old."

La Point testified:

"I did not sleep in the old house occupied by my wife during the last year before she left, and not more than two or three times during the last 2 years. I spent most of my spare time in my brother's house, listening to my sister-in-law (his alleged affinity) reading. I lived at Lakeville about two or three weeks and at Petaluma for 1 year after my wife left me, and I made no effort to get into communication with her. My sister-in-law and I went on on several trips together, we went hop picking once for about three weeks. That was not the cause of the trouble between my wife and I. I went to British Columbia with my sister-in-law and my brother, and was gone about 2½ years. I did not write to my wife while I was gone, nor to any one else at Lakeville to inquire about my wife. I felt that if she was satisfied to call it quits I was. * * * From the time I returned from British Columbia in 1899 down to the time of my wife's death about a year ago I never saw her to speak to her. I made no effort to see her. I was perfectly satisfied to let her live as she was living if she would let me alone. I made no effort to ascertain if she was being cared for or not. I do not know how the Harts were treating her. I did not go to my wife's funeral because I did not feel like it. She was buried at Petaluma, and I was living at Petaluma at the time."

He testified that he had a policy for \$2,000 payable to his wife, but, in 1894, he had it made payable to his sister and nephew.

"I had the policy changed because I knew my wife had plenty, and she wouldn't give me any of her money, and I didn't intend she should have any of mine. My wife was pretty stubborn; when she made up her mind I could not change it."

It was shown that, on March 23, 1895, Mrs. La Point caused her credit account of \$3,761.09 in an Oakland savings bank to be transferred to Mrs. Hart, and on July 15, 1907, she assigned to Mrs. Hart a certificate of deposit calling for \$900 in a Petaluma bank, which Mrs. Hart cashed. There was testimony as to the drinking habit of deceased prior to leaving her husband, the purpose being to support the charge that her excessive use of intoxicants weakened her mind and body and rendered her incompetent. The testimony was conflicting on this point, but we think the testimony justified the finding of the court already noted. This testimony related to a period before she left her husband; and, while it may have had a bearing upon her condition when the first gift was made, there was no evidence that she was addicted to the use of intoxicants to excess, or at all for that matter, after she went to live with the Harts, and hence had no bearing upon her condition in 1907, 12 years later, unless the alleged effect of her early alleged intemperance continued, and this is not shown. Testimony as to the mental condition generally of Mrs. La Point was introduced, and some witnesses testified that she was "simple," and that her conversation was "childish" or "childlike." Several witnesses who had known her for many years intimately, both before and after she went to the Harts' home, testified that she was perfectly sound in mind. The court so found on sufficient evidence. There was testimony also that while living with the Harts she appeared "to be happy and contented," and that her affection for the Harts and theirs for her was mutual.

There was but little testimony as to the circumstances immediately attending these gifts, and what there was came from Mrs. Hart, whose testimony was taken at the instance of plaintiff in the matter of the estate of Ann La Point, deceased, and was used at the trial. Speaking of the first gift, she testified that when Mrs. La Point made the transfer she asked Mrs. Hart to go with her to Oakland, and told her she wanted to give her her money.

"She said, 'I want to give you my money, Mattie,' she says, 'I want you to go with me; I want to give you my money.' Q. Did she say anything else? A. No; she wanted to give me her money. * * * Q. What did she ever say about that money that she left? A. Five years ago she told me, she said: 'Mattie, I want you to have my money; I don't want Fred or his people to have \$1 that I have; I want you to have it.' Q. Did you ever have any discussion with the deceased, Mrs. La Point, in regard to board and keeping? A. No. Q. You did not expect to keep her for nothing until she died, did you, Mrs. Hart? A. I never thought of anything like that; she came to me in her trouble

and told me she was afraid of her life and she says, 'Fred has driven me out of my home.'"

It appeared that Mrs. La Point sold the place where she and her husband had formerly lived and, some time later, July 15, 1907, she assigned the certificate of deposit to Mrs. Hart. This was all the property she had left after her gift of the deposit in the Oakland bank.

The property brought \$900. Mrs. Hart testified as to this \$900:

"Q. Wasn't it understood that that money was to be used for her expenses and board? A. No; she never said one thing as to what I was to do with her money. It was used for her funeral expenses and fixing up the cemetery, that money she gave me."

She testified:

"Q. Did she ever consult you and act on your advice in any matter? A. Any matters? Q. Her business matters. A. Her troubles? Q. No, in her family affairs; her business matters. A. No; not her business matters. She didn't have any business matters; only she wanted to give me her money; that's the only business matters. * * * Q. Didn't she say she wanted you to have this money when she died? A. She never said 'died'; she said she wanted me to have the money. * * * Q. Had she been turned out of your house she would have been penniless? A. No; she would not; she would not have been turned out of our house in the first place. Q. I am assuming that she would. A. Well, she would never have been turned out; if anything would have happened to me, my husband would have looked out for her; and if anything would have happened to him, my children would have looked out for her. My children looked to her just the same as if she were a relative; she came to us when they were tiny. * * * Q. As far as you ever noticed or observed, she was perfectly capable of handling her own affairs and did not require any one's advice, is that a fact? A. Yes, sir. * * * Q. And her mind was perfectly bright and clear? A. Oh, yes; bright and clear until the day she died. * * * Q. How long have you known Mrs. La Point, how many years? A. Let's see; oh I guess 33 or 34 years. Q. And you have been friendly all that time? A. Oh, yes; the best of friends. The Court: She was no relation to you? A. No; just old friends."

It does not seem necessary to pursue the evidence further. Appellant failed to establish any sort of trust or fiduciary relation between the parties; or that the gift was secured by undue influence exercised over the donor; or that she was mentally or physically incompetent or in any degree incapable of managing her own affairs or comprehending the nature of the transaction by which she parted with all her property; or that she needed independent advice. She lived in apparent happiness and contentment with defendants for 17 years, and was cared for as one of the family. If, as is claimed, "in stripping herself of every dollar she had without any consideration," she did an improvident and unusual act, this alone carries no implication of fraud, undue influence, or incompetence. She had a right to do what she pleased with her own. She probably, on the score of long friendship, believed that she would find a

home with defendants as long as she might live, and was willing to give her money to Mrs. Hart in this belief, and the facts show that if such was her motive she was not disappointed. But, whatever her motive, we find no facts or circumstances surrounding the transaction which impeach the validity of the gift.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

PEOPLE v. PASQUERIA. (Cr. 484.)

(District Court of Appeal, Second District, California. June 2, 1916. Rehearing Denied by Supreme Court July 31, 1916.)

1. ROBBERY \S 24(1) — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to justify conviction of robbery, where all elements of the offense as defined by Pen. Code, \S 211, were present.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. \S 32; Dec. Dig. \S 24(1).]

2. CRIMINAL LAW \S 1160—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

If evidence against defendant, considered by itself without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law, and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3064; Dec. Dig. \S 1160.]

3. CRIMINAL LAW \S 1166½(1)—CONDUCT OF TRIAL—QUESTION BY COURT—PREJUDICE.

Where the court, to clear up his understanding of testimony, recalled the prosecuting witness and questioned him as to defendant's acts during the alleged robbery, such questions were not prejudicial, where they elicited only reiteration and were in the nature of cross-examination which might have been favorable to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3119-3122; Dec. Dig. \S 1166½(1).]

4. CRIMINAL LAW \S 543(2)—EVIDENCE—DEPOSITIONS—ADMISSIBILITY.

On a showing that the deponent had left the state and would not return, evidence in his deposition, given at preliminary examination, so far as competent, was admissible under Pen. Code, \S 869.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1233, 1236; Dec. Dig. \S 543(2).]

5. CRIMINAL LAW \S 783½ — TRIAL — EVIDENCE—MOTION TO STRIKE.

Where, under objection to evidence of statements of prosecuting witness in a deposition and motion to strike it as incompetent, without pointing out particular testimony, the court struck out statements of a third person not made in defendant's hearing, its refusal to instruct the jury to "disregard any statement" was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1879, 1986; Dec. Dig. \S 783½.]

6. CRIMINAL LAW \S 1184(6) — EVIDENCE — DEPOSITIONS—OBJECTIONS.

Pen. Code, \S 869, provides that deposition of one taken at preliminary hearing may be read at the trial where deponent is out of the

state, subject to objections as if he were present under section 1345, though no objection was taken before the magistrate. *Held*, that objection that evidence of a statement made by deponent within a few feet of defendant was incompetent because not made in his presence was properly overruled, though the court based its ruling on the ground that no objection had been made at the preliminary hearing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2991; Dec. Dig. ¶ 1134(6).]

7. CRIMINAL LAW ¶ 366(4)—EVIDENCE—ADMISSIBILITY.

It is not error to refuse motion to strike testimony of officer to whom prosecuting witness complained of the robbery that such witness was excited and kept saying that accused was the one who robbed him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 819; Dec. Dig. ¶ 366(4).]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Alonzo Pasqueria was convicted of robbery, and from the judgment and order denying motion for new trial he appeals. Affirmed.

Herbert N. Ellis and C. B. Ellis, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of robbery. He appeals from the judgment and an order of court denying his motion for a new trial.

[1] There is no merit in appellant's contention that the evidence is insufficient to justify the verdict. The testimony of Tom Jing, the prosecuting witness, is to the effect that defendant, shortly before 6 o'clock p. m., November 2, 1915, entered his place of business, claiming to be a detective, in proof of which he exhibited what purported to be an official star, and, accusing Jing of having lottery tickets in his possession, stated that he wanted to search his place. Thereupon defendant, under the pretense of making a search for lottery tickets, put his hand in Jing's pockets and took therefrom a pocket-book and purse, from which he abstracted \$30 in money, a diamond ring valued at \$65, and a stickpin worth \$15, and, putting them in his own pocket, struck Jing upon his jaw and ran out of the store, followed by the prosecuting witness, who later pointed out defendant to a police officer who arrested him. At the trial Jing positively identified defendant as the man who, in the manner stated, had taken his property. This and other evidence, with circumstances established, if believed by the jury, was sufficient, not only to justify it in the conclusion that defendant took the property, but that such taking was accompanied by all the elements constituting the crime charged. Section 211, Pen. Code. Hence, it was not error, as claimed by appellant, for the court to instruct the jury as to what constituted robbery.

[2] Counsel for appellant at great length

reviews the evidence and devotes much of his brief to a discussion of the weight which should be accorded the conflicting testimony of witnesses called at the trial, and asserts with much show of sincerity that the testimony of—

"a former member of the Chicago police department is far more likely to be accurate than that of the excited Chinese complaining witness."

With reference to this observation and the lengthy discussion of the subject indulged in by counsel, we can only repeat what has so often been said by the appellate courts of this state, namely:

"If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." *People v. Emerson*, 130 Cal. 562, 62 Pac. 1069.

[3] It is claimed that the substantial rights of defendant were prejudiced by the action of the court in recalling the prosecuting witness after the close of the people's case and interrogating him as follows:

"The Court: There is one point I wish to ask him on that is not clear in my mind. You have stated you had your money in your right-hand trouser pocket? A. Yes, sir.

"The Court: Who took the money out of that pocket? A. The defendant here."

The witness had theretofore testified as follows:

"Q. Where did you have the money? A. On my pocket here. Q. Which pocket? A. The front pocket. Q. Which side, left or right? A. On this side; and then after that he put his hand on this pocket and took my pocketbook out, and after that he put his hand on this pocket and took my purse out, and he couldn't open that purse—it is a spring purse—and I opened and showed him."

And when asked how much was taken out of "your righthand pocket" he replied:

"I later remember I got \$30 there, because I got \$30 to pay my rent."

There was nothing in the question of the court calculated to impress the jury that he thought defendant was guilty. As stated, the interrogation was for the purpose of clearing the mind of the court upon the subject of the inquiry. The answer was but a reiteration of what the witness had already testified to. The facts presented furnish no ground for the claim that the court was guilty of misconduct to the prejudice of defendant. On the contrary, since Jing had theretofore testified that defendant took the money out of his pocket, the question was in the nature of cross-examination, in reply to which Jing might have modified his former answer, making it more favorable to defendant.

[4] Defendant's objection to the admission in evidence of the deposition of one Kingsley, given at the preliminary examination, was overruled. It appears that Kingsley had left the state and would not return. Upon such

showing, the evidence contained in the deposition, so far as competent, was clearly admissible at the trial of defendant. Pen. Code, § 869; *People v. Oiler*, 98 Cal. 102, 4 Pac. 1066.

[5] At the close of the reading of the deposition, defendant moved the court to strike therefrom evidence relating to statements made by Jing, upon the ground that they were incompetent. Counsel did not, other than in this general way, direct the court's attention to any particular testimony. Nevertheless, the court granted the motion as made saying:

"It is difficult for the court to rule on the motion intelligently. Some of them apparently were made while the defendant was in hearing; some of them apparently were not so made. Of course, if the defendant was not in hearing or might reasonably have heard what was said, it would not be binding upon him."

Thereupon defendant's counsel said, "Will you instruct the jury to disregard any statement?" to which the court replied, "I have already told them as to evidence that is stricken out." The court having stated that defendant would not be bound by statements of Jing not made in the former's hearing, this was, under the circumstances, sufficient and, upon the motion made, all that defendant had a right to ask. Certainly there was no error in refusing to "instruct the jury to disregard any statement," as requested by counsel.

[6] During the reading of the deposition counsel for defendant interposed an objection upon the ground that the question was incompetent, to which the court replied:

"There was no objection made below. There having been no objection made or motion to strike out this evidence in the court below at the preliminary, the objection now will be overruled."

As an abstract proposition of law, the statement of the court may be conceded to have been erroneous. While as provided by section 869 of the Penal Code the deposition of one testifying at a preliminary hearing may, under the circumstances there mentioned, be used at the trial, nevertheless, when so used, it is subject to the same objections as though the witness was present and testifying. The fact that no objection was interposed by defendant when the testimony was given before the magistrate does not bar him from objecting when the deposition is read at the trial (section 1345, Pen. Code), while, it is true, the court did not err in overruling the objection, the incompetency of which was based upon the claim that it was a statement made by Jing without the presence of defendant, since, as appears from the record, he was but a few feet away and near enough to have heard the statement. *People v. Osaki*, 25 Cal. App. 330, 143 Pac. 789.

[7] Another alleged error is based upon the fact that the court denied defendant's mo-

tion to strike out an answer given by Officer Cooley to the question:

"What else was said there by the Chinaman in the presence of the defendant?"

To which he replied:

"The Chinaman was excited and kept talking, 'This is the man that robbed me.' I didn't pay attention to everything that he did say; he talked considerable."

There is no merit in the contention. Conceding the court admitted in evidence portions of the deposition which might be said to be immaterial and to which objections interposed were overruled, defendant's substantial rights could not have been prejudiced thereby.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

PEOPLE v. DEATRICK. (Or. 470.)

(District Court of Appeal, Second District, California. May 22, 1916. Rehearing Denied by Supreme Court July 20, 1916.)

1. RAPE §52(1)—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to sustain conviction for statutory rape on girl 14 years of age. [Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71, 72, 76; Dec. Dig. §52(1).]

2. CRIMINAL LAW §1170(4)—APPEAL AND ERROR—HARMLESS ERROR.

Error in restricting cross-examination of prosecutrix by sustaining objections to questions tending to elicit competent evidence of bias held harmless, where the same matters were fully covered by other questions to which answers were permitted to be made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8148; Dec. Dig. §1170(4).]

3. CRIMINAL LAW §1169(2)—APPEAL AND ERROR—HARMLESS ERROR.

Error in a prosecution for rape in excluding correspondence tending to show illicit relations between prosecutrix and a man other than defendant held not prejudicial, where other evidence showed such illicit relations beyond dispute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3188; Dec. Dig. §1169(2).]

4. WITNESSES §330(1) — IMPEACHMENT — CROSS-EXAMINATION—IMPOTENCY.

In a prosecution for rape, where defendant testified that at the time of the alleged offense he was so deficient in sexual ability as to be unable to accomplish an act of intercourse with any person, held, that question on cross-examination tending to show that subsequent to filing of information defendant while visiting with a friend went to door of a woman's bedroom in the morning and asked permission to enter, saying, "I just want to see if I can raise my passions," was proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. §330(1).]

5. RAPE §57(1) — DEFENSES — IMPOTENCY — JURY QUESTION.

In a prosecution for rape, the question of defendant's impotency or sexual ability to commit the offense is for the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. §57(1).]

6. RAPE \Leftrightarrow 52(2) — DEFENSES — IMPOTENCY — EVIDENCE — CONCLUSIVENESS.

In a prosecution for rape, the testimony of defendant and his physician as to defendant's lack of sexual power to commit an act of intercourse held not conclusive on the issue of impotency against positive and direct testimony that he did commit the act.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 73, 76; Dec. Dig. \Leftrightarrow 52(2).]

7. RAPE \Leftrightarrow 43(1) — TRIAL — IMPROPER CROSS-EXAMINATION — PHYSICAL EXAMINATION OF ACCUSED.

It is error in a prosecution for rape to require the defendant to answer a question on cross-examination as to whether he will submit to a physical examination by a physician to be designated by the court to determine whether he was capable of performing an act of sexual intercourse.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 62; Dec. Dig. \Leftrightarrow 43(1).]

8. CRIMINAL LAW \Leftrightarrow 1169(5) — APPEAL — HARMLESS ERROR.

Error in requiring that defendant in a rape case answer on cross-examination whether he would submit to a physical examination to determine his impotency held not prejudicial, where the court instructed the jury that his refusal to be examined must not be considered as giving rise to any inference against him whatever.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. \Leftrightarrow 1169(5).]

9. CRIMINAL LAW \Leftrightarrow 1147 — RAPE — SENTENCE — REVIEW.

The sentence of 25 years imposed for rape, while equivalent to a life sentence in view of defendant's age, is a matter resting entirely in the conscience and discretion of the trial judge, and will not be disturbed on appeal however much the appellate court may doubt its propriety.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3033, 3072, 3073; Dec. Dig. \Leftrightarrow 1147.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

W. R. Deatrick was convicted of rape, and he appeals from the judgment and an order denying a new trial. Affirmed.

Velitch & Richardson, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of rape, and sentenced by the trial court to serve a term of 25 years' imprisonment at San Quentin. The appeal is from the judgment and from an order denying a motion for a new trial.

The act which was denounced by the information as making out the crime charged was alleged to have been accomplished with one Amy Deatrick, the adopted daughter of the defendant. It is alleged in the information that the child was of the age of 14 years. It appears that the girl was brought into the family of the defendant by adoption when she was about the age of 5 years. The family lived at various places during the years succeeding the adoption of the child, and finally took up their residence at Belleflower, in Los Angeles county, where the defendant engaged in the business of raising

poultry. The house in which they lived was a small building divided into three rooms. The household then consisted of defendant, the adopted child and the defendant's wife. The child was sent to school and was also provided with musical instruction by the defendant. The defendant hired a young man named Fay Detrick, who was not related to him in any way, although bearing a similar name. This young man occupied one of the rooms in the little house. In another of the rooms were two beds, in one of which defendant's wife and the little girl habitually slept, and the other, which was a single bed, the defendant used. After Fay Detrick had been in the house for about a month or a little over, a dispute arose between the husband and wife which finally resulted in the wife leaving and going to the city of Los Angeles. The adopted daughter accompanied her, and neither of them afterwards returned to the defendant's place. It was some time before the defendant learned the whereabouts of his wife and the girl, and before he had been able to see them he was arrested on the charge made by the information in this case. The theory upon which counsel for the defense presented their case was that this defendant was wholly innocent of the crime charged, and that his prosecution was brought about by his wife and the girl through a spirit of revenge and for the purpose of protecting Fay Detrick, with whom both Mrs. Deatrick and the girl Amy had sustained illicit relations. It was sufficiently shown by the admissions of Fay Detrick on the witness stand that he had had sexual intercourse with Amy Deatrick while he was working for the defendant at the Belleflower place. It was also shown that after Mrs. Deatrick and the girl came to the city of Los Angeles Fay Detrick had visited them at their apartments, and had upon three occasions stayed at the apartments all night. However, the young girl gave testimony at the trial, and directly charged that the defendant, not only on the day fixed in the information, but on a number of prior occasions, had sustained intimate relations with her. She said that she objected to these relations, but that they were insisted upon by the defendant. She did not deny having occupied the same bed with Fay Detrick while the latter was working for the defendant, but she claimed that this was with the permission and at the suggestion of the defendant himself. Mrs. Deatrick, who, after she left her husband, set up the claim that she had never been married to him, was not called as a witness and did not testify in the case. It was shown, in order to illustrate the erotic tendency of the defendant's mind, that he had made an improper proposal on one occasion to a young school friend of his daughter, while she was visiting at his house. It was further shown by the father of Fay Detrick that after the

wife and girl had left defendant's house, defendant went to the home of Fay Detrick's parents and a conversation was there had in the presence of Fay Detrick. The witness in detailing the conversation made the following statement:

"Well," Fay says, "that Mr. Bush was to tell you where you could find your wife." "Well," he says (meaning defendant), "I seen Mr. Bush, and he won't tell me." "Well," Fay says, "if he won't tell you I won't tell you." And he said—now says Fay, he says, "If you will tell me where my wife is and the little girl is," he says, "I will let bygones be bygones." He says, "There will never be anything said about this nor nothing doing," and he says, "If you do not tell me there will be something done to-morrow." "Well," says Fay, "I will take my medicine." Mr. Deatruck says, "I will take mine," and he says he knew Fay. He says, "You knew that I had three witnesses outside watch you that night." He says, "I had three witnesses watching you that night, and I know just what you done, and Fay says, 'I have never done anything worse than you have done.' He says, 'Amy has told me all about it.' So I think that that was just about all that he said to Fay then, only determined to know where he could find his wife; he was going to know that night."

A physician who made a physical examination of the young girl after the charge had been preferred against the defendant testified that he found her in much the condition of a married woman in his examination of her private organs. This, in brief, was the substance of the testimony introduced on behalf of the prosecution. It was shown in defense that the defendant was a man 56 years of age. Two physicians who had made an examination of him testified that his private organs were in such a state as to indicate to them that the defendant was impotent and had no ability to perform an act of sexual intercourse. The defendant testified that he was unable to commit the crime charged, and testified that he did not have the intercourse with the girl as alleged; that he had discovered relations of intimacy between Fay Detrick and his wife, and also between Fay Detrick and Amy Deatruck; that upon making this discovery he upbraided his wife and made a partial threat to have Fay Detrick arrested: that the wife declared to him that if he did cause the arrest of Fay Detrick the three of them, to wit, Mrs. Deatruck, Fay Detrick, and Amy Deatruck, would shift the charge to the defendant in order to save Fay Detrick from prosecution. There was testimony given by a number of witnesses, evidently reputable citizens of the neighborhood of Belleflower, to the effect that the defendant's reputation for the trait involved in this charge, and also for honesty and integrity, was good. Under this state of the evidence the case went to the jury, and the verdict of guilty was returned.

[1] This court on appeal cannot say that the evidence was insufficient to justify the conviction; for there was ample evidence to sustain the verdict of the jury. A number of errors are assigned, many of which go to the matter of the introduction of testimony and the refusal of the court to allow certain

matters to be shown on the part of the defendant.

It is first claimed that the restriction imposed upon counsel for the defendant in their cross-examination of the girl Amy Deatruck was too close, as to questions asked her designed to extract admissions that there was a conspiracy on the part of Mrs. Deatruck, Fay Detrick, and the witness to send defendant to the penitentiary. While it is true that several of the questions to which objections were sustained were relevant and proper as tending to elicit information as to the bias of the witness, we find in the record that the same matters were in their full substance covered by other questions which were asked and to which latter questions answers were permitted to be made. We agree altogether with counsel for defendant that in a case of this kind very wide latitude should be allowed the cross-examiner.

[2] In a case where the charge is as that made in the information here, and the prosecutrix is a young girl, the sympathies and prejudices of the jury are very easily aroused in her favor, and, as it has been very properly said, the accusation is one which is easily made and hard to disprove. However, while it is the duty of the trial court in such cases to exercise its discretion in the direction of permitting a very liberal, complete, and comprehensive cross-examination to be made of the prosecutrix, the mere fact that that discretion is not resolved as fully as it might have been in the defendant's favor does not justify a reversal of the judgment.

[3] It is secondly objected that the court erred in refusing to admit in evidence certain letters and cards which passed through the mails between Fay Detrick and the prosecutrix. These missives were of an intimate and confidential tenor, but we cannot see how their rejection could have worked any prejudice to the defendant's case, inasmuch as it was abundantly shown and without any dispute whatsoever that the girl had sustained illicit relations with Fay Detrick. The contents of the letters certainly could not have argued to establish a more intimate relation than this.

[4] Defendant had introduced the testimony of two physicians tending to show that he was deficient in sexual power. He testified on his own behalf, and stated that at the time charged in the information he was unable to accomplish an act of intercourse with any person. The prosecuting attorney in cross-examining him asked as to whether subsequent to the filing of the information, while staying at the house of a friend, he had not gone to the door of a woman's bedroom in the morning and asked permission to come into the room, saying: "I just want to see if I can raise my passions." The admission of this testimony furnishes ground for vigorous objection made on behalf of appellant. It is claimed that the prosecuting at-

torney went outside the limits of a proper line of cross-examination. We do not think that the cross-examination was improper. The question was designed to show a contradiction of the assertion of the defendant that he was unable to accomplish sexual acts; to show that he had sought an opportunity to at least attempt such an act at a time subsequent to that charged in the information. The gist of the defendant's declarations on the witness stand was that he was altogether without inclination in the direction mentioned, and the cross-examination was directly in point as being intended to show acts inconsistent with the defendant's declaration. There was no attempt to impeach the witness upon his answering in the negative.

[5, 6] It is contended that the evidence conclusively showed that the defendant was impotent and utterly incapable of performing the act with which he was charged. That question was one for the jury, not for an appellate court, to resolve. There was direct and positive testimony that the defendant did, in fact, commit the crime charged. The testimony of the physicians did not wholly negative the possibility of the defendant being able to accomplish an act of the kind described in the testimony; the jury was not bound either by the opinion of the physicians or the statement of the defendant himself as against the testimony of the prosecutrix and all of the circumstances shown in proof. At one point in the cross-examination of the defendant the prosecuting attorney asked him as to whether he would be willing to submit himself for examination to a physician whom the court might select. He answered, in substance, that he had been examined enough, and did not care to submit himself for the inspection of any more physicians.

[7, 8] We have no doubt but that the asking of this question of the defendant on cross-examination and compelling an answer thereto was error, but we are not prepared to conclude that the damage done was such as to produce in this case a miscarriage of justice. The trial judge was evidently doubtful of the propriety of permitting the question to be answered, for he said at the time:

"I will state to the jury that, as a matter of law, no defendant is required to testify against himself in any manner, and the submitting of one's self to an examination of this character would be giving testimony against himself, so that in case he should decline to be examined you must not in any regard consider that as testimony against him or draw any inference of any character against the defendant if he should so decline."

In view of this direction to the jury, and in view of all of the testimony in the case tending to show that the crime was committed as charged in the information, it would not be declaring a reasonable conclusion to say that the disinclination of the defendant to submit himself to further ex-

amination by physicians as expressed in his answer to the question may have turned the scales in the jury's mind in favor of the prosecution and prompted the verdict of guilty.

[9] In the brief of counsel for appellant it is complained in a general way that certain offered instructions should have been given, certain of those given should have been refused, and modifications of others should not have been made. The argument addressed to these points is general and does not point out specifically wherein error was committed. While it is the duty of counsel to not only specifically point to the instruction the giving, refusing, or modification of which they claim to be error, but to particularize as to the reasons supporting their contention, we have nevertheless made a careful examination of the whole charge as given by the court, and think that it included and properly stated all the matters of law upon which the jury needed to be advised. We agree with counsel for appellant that the sentence imposed in this case, that of 25 years' imprisonment, to a man now 57 years old, means a life sentence. But, however much we might differ with the trial judge as to the propriety of such a judgment, that is a matter which rests alone with the conscience and discretion of the judge who heard the witnesses, and it is not a part of the functions of an appellate tribunal to enter upon any consideration of that question.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

OLSON-MAHONEY LUMBER CO. et al. v. DUNNE INV. CO. et al. (Civ. 1478.)

(District Court of Appeal, Third District, California. May 1, 1916. Rehearing Denied by Supreme Court June 29, 1916.)

1. MECHANICS' LIENS \S 164(1)—FAILURE TO PERFORM CONTRACT—PORTION OF PRICE SUBJECT TO LIEN.

Prior to 1911, under Code Civ. Proc. \S 1200, as to mechanics' liens, where the contractor fails to perform, the amount of the contract price subject to liens of materialmen is not the difference between the amount paid the contractor and the actual value of work and materials already used, but between such amount paid and the value estimated as nearly as may be by the standard of the whole contract price.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. $\S\S$ 285, 287; Dec. Dig. \S 164(1).]

2. MECHANICS' LIENS \S 281(4)—LIEN OF MATERIALMEN—FAILURE TO PERFORM CONTRACT—PORTION OF PRICE SUBJECT TO LIEN—EVIDENCE.

Evidence held to sustain the court's finding as to the amount of the whole contract price subject to mechanic's liens on failure of the contractor to complete the work.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. \S 571; Dec. Dig. \S 281(4).]

3. MECHANICS' LIENS \S 290(1)—FAILURE TO PERFORM CONTRACT—MONEY DUE CONTRACTOR—PORTION OF PRICE SUBJECT TO LIEN.

In arriving at the amount of the contract price to be subject to liens under Code Civ. Proc. \S 1200, where the contractor fails to perform, such amount being the difference between the amount paid the contractor and the value of work and materials already used estimated on the basis of the whole price, it is unnecessary to make a finding as to the cost of completing the work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 591; Dec. Dig. \S 290(1).]

4. MECHANICS' LIENS \S 132(9)—TIME FOR FILING.

Where a building contract was abandoned before completion, on July 20th, and the owner then took possession, and no notice of cessation of labor was filed, but a new contract was made on August 4th, and under it the building was finished November 16th, a notice of lien under the original contract filed December 14th was in time.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 201; Dec. Dig. \S 132(9).]

5. APPEAL AND ERROR \S 197(3)—OBJECTIONS NOT RAISED BELOW—VARIANCE—FINDINGS OF FACT.

Although complaint in mechanic's lien action alleged occupation by owner and cessation of work for over 30 days after abandonment by contractor, where the judge found to the contrary, as was alleged in the answer and supported by evidence not objected to as at variance with the pleadings, the court is justified in adopting the findings instead of the allegations of the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 197(3); Pleading, Cent. Dig. \S 1438-1441.]

6. PLEADING \S 406(9)—DEFECTS—CURE BY TRIAL.

Although the complaint in mechanic's lien action failed to allege that on cessation of work there was a fund subject to lien, trial of such issue without objection cured the defect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1374, 1386; Dec. Dig. \S 406(9).]

7. MECHANICS' LIENS \S 271(15)—ACTIONS—PLEADING—SUFFICIENCY.

The requirement of Code Civ. Proc. \S 1187, that the complaint in a mechanic's lien action allege that the lien contained a statement of the terms, time given, and conditions of the contract is sufficiently met by stating that the notice was filed, referring to it and incorporating it in the pleading, if the notice actually contained the necessary averments.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 509; Dec. Dig. \S 271(15).]

8. APPEAL AND ERROR \S 193(4)—PRESERVATION OF OBJECTIONS—PLEADINGS.

In the absence of demurrer or of objection to introduction of lien in evidence, or denial of allegations of complaint which incorporated the lien, the question of sufficiency of a complaint under Code Civ. Proc. \S 1187, stating requirements thereof, should not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1226; Dec. Dig. \S 193(4); Pleading, Cent. Dig. \S 1363.]

9. MECHANICS' LIENS \S 134—CLAIM—SUFFICIENCY.

A claim for lien alleging materials furnished at contractor's request on agreement to pay on delivery without terms or condition of the rea-

sonable value of \$3,000, which were actually used in, on, or about the premises is sufficient.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 208; Dec. Dig. \S 184.]

10. MECHANICS' LIENS \S 277(6)—ACTIONS—VARIANCE—PLEADING AND EVIDENCE.

In mechanic's lien action, where the claim of lien alleged materials were furnished at contractor's request on agreement to pay on delivery without terms or conditions, of the reasonable value of \$3,000, actually used in, on, or about the premises, and complaint alleged an agreement to pay reasonable value in cash on delivery, and evidence showed that the prices were both the market and reasonable value, and that there was agreement to pay such prices, there was no variance, but judgment foreclosing the lien was supported.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 553, 554; Dec. Dig. \S 277(6).]

11. MECHANICS' LIENS \S 47—WHEN ENFORCEABLE—USE OF MATERIALS.

One who furnishes lumber used in erecting concrete forms without which building could not have been erected, and which were destroyed or given away after such use, being then of no value, has a lien therefor, although the rule cannot be given general application, but is controlled by the particular facts.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 50; Dec. Dig. \S 47.]

12. PLEADING \S 403(5)—OBJECTIONS—CURE BY ANSWER—VARIANCE—EFFECT.

Contradictory averments or statements not true in complaint in mechanic's lien action when at variance with the findings are not fatal to recovery where the answer cures the misstatements and the findings are supported by uncontradicted evidence, since the defendant was not misled or prejudiced.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1344-1347; Dec. Dig. \S 403(5).]

13. ACTION \S 59—CONSOLIDATION—EFFECT.

An order of consolidation unites the causes of action so as to constitute one cause and one pleading, and allegations of one complaint will remedy defects and supply omissions in another.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 690-698; Dec. Dig. \S 59.]

14. MECHANICS' LIENS \S 277(5)—ACTIONS—PLEADING—VARIANCE.

Where the complaint in a mechanic's lien action stated facts raising an implied contract to pay for materials furnished, mere reference to a contract did not present a variance, since it cannot be assumed that any contract save that implied at law was meant.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 552; Dec. Dig. \S 277(5).]

15. MECHANICS' LIENS \S 291(5)—NOTICE—SUFFICIENCY.

Where a claim of mechanic's lien for cement furnished stated the contract price and number of barrels furnished, the claimant could not have a lien for an amount for freight and storage charges not mentioned therein, but was limited to the contract stated.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 603; Dec. Dig. \S 291(5).]

16. MECHANICS' LIENS \S 161(3)—AMOUNT—CONTRACT PRICE.

Where claimant under a lump sum contract had actually furnished work and materials of a specified value and based his lien on the same figures as used in figuring the original contract, he was entitled to claim the full value of materials furnished, regardless of cost of completion under a new contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 282; Dec. Dig. \S 161(3).]

17. APPEAL AND ERROR **§1170(1)—REVERSAL—HARMLESS ERROR—STATUTE.**

Where no prejudice resulted, since but one judgment could have been rendered under the evidence, judgment will not be reversed, as Code Civ. Proc. § 475, prohibits reversal for technical or nonprejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4036, 4454, 4540; Dec. Dig. **§1170(1).**]

18. MECHANICS' LIENS **§142—NOTICE—SUFFICIENCY.**

Claim of mechanic's lien cannot be defeated on the ground that it fails to state the terms and conditions of the contract, where the agreement was merely to furnish and haul sand, and there was only an implied contract to pay therefor at the prevailing rates on delivery.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 239; Dec. Dig. **§142.**]

19. CONTRACTS **§27—IMPLIED AGREEMENTS.**

Where parties contracted to furnish and haul sand, without reference to price, acceptance of that furnished raised an implied agreement to pay for it at the prevailing rates.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 121-132; Dec. Dig. **§27.**]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Separate complaints by the Olson-Mahoney Lumber Company and thirteen others against the Dunne Investment Company and others, consolidated and tried as one. Judgments for plaintiffs, and defendants appeal as to eleven plaintiffs. Judgment as to Santa Cruz Portland Cement Company modified and affirmed, and judgment otherwise affirmed.

Mastick & Partridge and Bartlett & Langdon, all of San Francisco, for appellants. J. R. Pringle, R. R. Moody, D. Hadsell, Frank A. Duryea, Wright & Wright, A. W. Liechti, Corbet & Selby, Morrison, Dunne & Brobeck, Olin L. Berry, Neal Power, Geo. F. Hatton, and Hartley F. Peart, all of San Francisco, for respondents.

CHIPMAN, P. J. Fourteen separate complaints were filed to enforce mechanics' and materialmen's liens, and by order of the court were consolidated and tried in one action. The plaintiffs in eleven of these several complaints are respondents, and the appeal is here under the above title. Judgment was entered in favor of plaintiffs, and from this judgment defendants appeal.

Defendants Condon and McGlynn were the contractors for the work. Certain named persons defendants were owners of the property on which the building in question was erected, and defendant Dunne Investment Company was the owner of a lease executed by said owners, and erected said building in compliance with the terms of said lease. The building is situated on the northwest corner of Stockton and Ellis streets, San Francisco.

The complaints were filed in the latter part of the year 1909, and were brought to issue by answers in 1910, and on January 4, 1912, came on for trial, and findings of fact and

conclusions of law were made on June 27, 1912, and judgment was entered on that day. Notice of appeal was served and filed July 27, 1912. Transcript on appeal was filed in the Supreme Court May 15, 1914. Appellants' brief was filed September 15, 1914, and respondents' brief was filed May 11, 1915. The cause was transferred to this court and papers filed here December 17, 1915, and appellants' reply brief filed here January 18, 1916. It thus appears that more than two years expired after the actions were commenced before they were brought to trial. Nearly two years elapsed thereafter before transcript was filed in the Supreme Court. A year more passed before respondents' brief was filed, and appellants' reply brief was not filed until January 18, 1916, at which time the cause was submitted. We take the liberty of calling attention to the record as typical of many cases coming by transfer to this court as showing that the delay in reaching judgments on appeals in many cases is not, as is popularly believed, the fault of the appellate courts, but of the attorneys in the cases, brought about by stipulations which the courts feel bound to respect.

The attack is first made upon the finding upon which the judgment is based, for the reason that it ignores the element of proportion to the whole contract price, that the evidence is insufficient "to sustain the finding even as to the amount, and that there is no finding of the ultimate facts, but finding No. 10 is only a conclusion of law." Appellants then assail the proceedings in each of the eleven cases on various grounds, some of which are common to all of them, while other grounds are urged to particular cases.

The contract price for the building was \$52,750, and the contract, with its plans and specifications, was duly recorded before the work was commenced. Work commenced under this contract October 26, 1908, and continued until July 15, 1909. The contractors being unable to complete the building, the Dunne Investment Company gave three days' notice, as provided in the contract, to furnish the necessary labor and materials to finish the building, which the contractors being unable to do, the Dunne Investment Company employed one Charles Wright to complete the job. The contractors had received, when they abandoned the work, \$31,397.50. The liens filed amounted to about \$12,000.

The contract provided that:

Payments for the work should be made on the 1st of the month "as the work progresses, in installments, based upon the monthly estimates of all work done and material furnished and paid for in the building, up to and including the last day of the preceding month, in sums equal to 75 per cent. of the value of said work done and material furnished, to be estimated by the architect, provided that no more than 75 per cent. of the whole contract price shall be paid up to the time of the completion." There was the usual provision deferring payment of 25

per cent. "The monthly estimates of the architect, however, subject to correction by him in any subsequent monthly or in his final estimates. Serving merely as a basis for payments on account, they are presumed to be only approximate."

Finding 10 is as follows:

"That the value of the work and materials already done and furnished by said Condon and McGlynn on July 15, 1909, under said contract, including materials then actually delivered or on the ground, estimated by the standard of the whole contract price under said contract, was and is \$41,863.33."

The court found that there was the sum of \$10,465.83, subject to the various liens, being the difference between the amount of the work and materials done and furnished, namely, \$41,863.33, and the amount paid to the contractors, namely, \$31,397.50; that is, the payment in excess of the certificates given by the architect of 75 per cent. of the work as it progressed, as provided in the contract, was the sum of \$10,465.83, and was subject to liens in accordance with the rule enforced in the case of Olson-Mahoney Lumber Co. v. Maxwell, 18 Cal. App. 668, 124 Pac. 100.

[1-3] It is well settled that prior to the revisory statute of 1911 (Stats. 1911, p. 1313), under section 1200, Code of Civil Procedure, the actual value of the work and materials is not the test, but the value "estimated as near as may be by the standard of the whole contract price." Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 Pac. 152; Duffy Lumber Co. v. Stanton, 9 Cal. App. 38, 98 Pac. 38; Olson-Mahoney, etc., Co. v. Maxwell, 18 Cal. App. 668, 124 Pac. 100.

Appellants contend that the value of the work and materials as found by the court represented the actual value, and not the value estimated by the standard of the whole contract price, and that the court reached its estimate by a mathematical calculation, to wit, by dividing \$31,397.50, the amount paid the contractors by .75, thus giving exactly the sum found, namely, \$41,863.33. "Other than this mathematical calculation," it is claimed, "there is not a word of evidence to sustain the finding."

Witness Applegarth was the architect of the building, and made the estimates of the work as it progressed and issued certificates therefor. He testified:

"That \$31,397.50 was three-fourths of the value, or possibly a little less than three-fourths of the value, of the portion of the work done by the Condon-McGlynn Company on the Dunne Building, estimated by the contract price for the whole. We were conservative always so as not to overstep the limit. So I am sure that it was not more than three-fourths of what they had done estimated by the price of the whole."

Again he testified:

"These certificates were our estimates of the value of the work done in the period covered by the certificate estimated by the contract price."

Again:

"We issued our certificates on the basis of three-fourths of the value of the work done estimated by the whole contract price."

He testified that he helped superintend the construction of the building, and was at that time more familiar with the cost of the work required to be done on the building than at the time he was testifying (two years later). He testified:

"In giving the certificates we investigated the cost of doing what had to be done there, and it was fresh in my mind when I gave the certificates, and the certificates I made at the time were my estimates at that time of three-fourths of the value of what had been done there, measured by the contract price for the whole. The contract price was less than the reasonable value of the contract for the building in my judgment."

He also testified:

"Leaving out the contract price of the Dunne Building under the Condon & McGlynn contract, the reasonable market value of what the Condon-McGlynn Company did before they ceased work there was about \$47,000."

Later, in the course of the trial, the architect revised his estimate, reducing it from \$47,000 to \$35,736.50, whence by applying the rule in Hoffman-Marks Co. v. Spires, appellants derive \$30,785 as the true value estimated on the basis of the contract price, and therefore it is claimed there was nothing subject to the lien.

Witness Charles Wright, who took the contract to complete the building, testified that the actual value at abandonment was \$32,850. The testimony of this witness on cross-examination showed that he underestimated the cost of different parts of the work very materially, and that his figures given for various items entering into the cost of completing the building were unreliable, and for reasons shown his estimate of such cost did not represent the reasonable cost of completing the building under the original contract. It was alleged by defendants, in their verified answer to each of the complaints that they had paid to the contractors "a sum equal to 75 per cent. of the value of said work done and material furnished as estimated by the architect, and that the said sum was at no time more than 75 per cent. of the value of the work and materials already done and furnished, estimated by the standard of the whole contract price," and that the amount so paid was as already stated. Appellants say as to this averment in their answer that it "is not binding, in view of the fact that the evidence, as a whole, establishes that these payments were in reality 75 per cent. of the value of the amount actually in the building."

Section 1200, Code of Civil Procedure, directs that the value of the labor and materials done and furnished at the time of abandonment shall "be estimated as near as may be by the standard of the whole contract price." Any just method of arriving at this result may be adopted. There was evidence

warranting the court in finding that the value of the labor done and materials furnished when abandonment occurred was greater than 75 per cent. of the value as estimated by the court, so that appellants cannot complain that the amount was excessive. Just to what mental or mathematical process the court resorted it seems to us immaterial if the result was justified. It may be, and probably was, the fact that the court was satisfied with the architect's testimony that the certificates given by him could safely be assumed as a basis for its finding, especially as he had testified that the value of the labor and materials done and furnished was \$47,000, and in view also of the admissions of the answers as well as the architect's testimony that this 75 per cent. "was at no time more than 75 per cent. of the value of the work and materials already done and furnished, estimated by the standard of the whole contract price." The estimate made by the architect was not, as claimed by appellants, for actual value, but, as was admitted in the answers, and as testified by the architect, was a value "estimated by the contract price." We must assume that the court considered all the evidence in the case, and was, we think, justified therefrom in making the finding it did, although it happens to be, and probably was, based upon the architect's certificate. Finding 10, *supra*, is, we think, a finding of fact, and not a conclusion of law, as claimed by appellants.

It is further claimed that the court failed "to find the value of the work left undone," which, it is insisted, was essential "in estimating the amount subject to liens in cases where the contractor has not finished his contract." We understand our Supreme Court to have held that a finding as to the cost of completing the building is not necessary. *Scheerer v. Deming*, 154 Cal. 138, 97 Pac. 155; *Ganahl v. Weinsveig*, 168 Cal. 664, 143 Pac. 1025. In the *Scheerer* case the court said it was proper as matter of evidence to consider this fact in determining what the value is. We must presume that the court did consider the evidence before it on this fact.

We come now to the attack made upon the several claims separately.

Olson-Mahoney Lumber Company's Claim.

The objections raised to this claim are: 1. That the complaint does not state a cause of action in this: (a) It shows that the lien was filed too late; (b) that it does not allege the value of the labor and materials in the building and on the ground at the time of the abandonment, based on the whole contract price or contain "even an allegation of a fund subject to liens"; (c) the complaint "fails to allege that the lien contained a statement of the terms, time given, and conditions of the contract," as required by section 1187, Code Civil Procedure. 2. That

finding No. 6 is contrary to the admissions in the pleadings. 3. That the lumber charged for was used for concrete "forms," and did not form part of the building. 4. That there is a material variance between the complaint and lien, between the complaint and the evidence, and between the lien and the evidence.

It was alleged in the complaint that on July 20, 1909, the "said contract was abandoned before the completion thereof, and there was on said date an entire cessation of labor upon said unfinished contract and upon said unfinished building or structure," and on said date the defendant Dunne Investment Company entered into the occupation of said building, and ever since has been, and now is, in the use thereof; that said cessation from labor upon said contract and upon said unfinished building or structure and said use and occupation of said unfinished building by said owner, Dunne Investment Company, continued for a period of 30 days, and at the time of said cessation from labor there was in the hands of defendant Dunne Investment Company, after deducting the payments actually due and made under said contract for the value of the work and materials already furnished, estimated according to the whole contract price, sufficient to pay the claim and lien of the plaintiff herein. It is alleged that the notice of lien was duly verified and recorded December 14, 1909, and is made part of the complaint, "and was filed within the time allowed by law." It is also alleged that no notice of the cessation of work on the building or of abandonment of work was ever filed in the office of the recorder. The court found that there was an entire cessation of labor on the building on July 18, 1909, and that there never had been any notice of cessation of labor filed for record.

Several of the complaints alleged, and the court found, that within 30 days (in fact, within a few days) defendant "did enter upon said uncompleted building, exclude therefrom said Condon & McGlynn and all subcontractors, * * * and said defendant did proceed to procure other materials and labor, * * * and did complete said building * * * on November 16, 1909, and there was at no time a cessation of labor for 30 days on said building between said October 21, 1908, and said November 16, 1909."

Appellants say: If the allegation is true that there was a cessation of labor for 30 days after July 20, 1909, as alleged, the time for filing liens would commence to run August 19th, and the right to file a lien would, at most, expire 90 days thereafter. Hence the complaint did not state a cause of action, because, as therein stated, the lien was filed December 14th. Attention is also called to the allegation in the complaint that defendant entered into occupation and use of the building on July 20, 1909, which, it is claimed, brings the case directly within Rob-

ison v. Mitchel, 159 Cal. 581, 591, 114 Pac. 984.

[4, 5] While the court found, as alleged in the complaint, that there was a cessation of labor on July 18, 1909, it found, as we have seen, that no notice thereof had been filed of record, and the court also found that there was no cessation of labor for 30 days on said building, and the same was completed November 16, 1909. This plaintiff filed its lien on December 14, 1909, and was in time, if we may follow the findings of the court instead of the averments of the complaint. In considering this and other of the objections, it is to be noted that there was no demurrer to the complaint, no motion for nonsuit upon the close of plaintiffs' testimony, and no motion made for a new trial. In defendants' answer it was alleged that the contractors abandoned the work on July 15, 1909, "whereupon the said defendant entered upon the said work, excluded the said Daniel E. Condon and Chas. J. McGlynn and their men, and forthwith proceeded to procure other materials and labor and entered into another contract for said work, to wit, a certain contract with one Charles Wright," who agreed to complete the building according to the plans and specifications of the original contract. This contract was dated August 4, 1909, in which the contractor agreed "to enter upon the performance of the work on the 5th day of August, 1909, and to steadily proceed with and hasten the same to completion." The evidence showed that, in fact, there was no cessation of labor for a period of 30 days, that the contractor, Wright, carried out his contract, and in so doing must have been in possession of the building, and that defendant did not "enter into the occupation and use of the building" otherwise than to exclude the original contractors and to arrange for the completion of the building. No question was raised at the trial or objection to evidence as at variance with the pleadings. In this condition of the record we are fully warranted in disregarding the averment of the complaint that the cessation of labor continued for a period of more than 30 days and accepting the finding of the court. Appellant relies on *Robison v. Mitchel*, supra. In that case the complaint alleged and the answer confirmed the allegation, that the contractor ceased work on October 18th, and that the plaintiff thereafter, to wit, on November 19th, "undertook the completion of his said dwelling and proceeded to complete the same." The court held that the finding that "this cessation of labor did not continue for a period of 30 days" was not a finding within the issues, and, being "in conflict with the admissions of the pleadings, cannot be considered." In the case cited, however, "the owner filed for record his verified notice of cessation, as contemplated by the opening paragraph of section 1187 of the Code of Civil Procedure," declaring in said

notice that the work had been abandoned. It was admitted that the lien "was not filed within time if the notice of cessation and abandonment filed upon November 19, 1906, set running the statutory period for filing the lien." This was a case where the statutory notice had been given by the owner, and it undoubtedly started the running of the statutory period for filing the lien unless the facts were that the work had not ceased for that period and 10 days thereafter, as was alleged in the notice of abandonment. Under the peculiar facts of that case the trial court felt warranted in finding that there had not been a cessation of labor for the period of 30 days, thus disregarding the admissions of the pleadings, which the Supreme Court held was unauthorized. In the case here the finding has the support of uncontradicted evidence and of the admissions of the answer and the further very important fact that no notice of cessation of labor was given. The case cited, it seems to us, not only fails to support appellants' contention, but rather demonstrates its fallacy.

[6] The complaint alleged as follows:

"At the time of said cessation from labor there was in the hands of the defendant Dunne Investment Company, after deducting the payments actually due and made under said contract for the value of the work and materials already done and furnished, estimated according to the whole contract price, sufficient money to pay the claim and lien of the plaintiff herein."

It is now urged against the sufficiency of this averment that it does not allege that defendant had "any fund subject to liens." Defendant states in its brief:

"It may be that this plaintiff intended to allege that it had in its hands and subject to liens sufficient money to pay the claim, but the complaint does not say so."

Had plaintiff's failure to express its intention been pointed out by special demurrer, no doubt the additional allegation would have been made. The record shows, however, that the fact here omitted constituted one of the issues tried without objection, which we think cured the defect.

[7, 8] The objection that the complaint "fails to allege that the lien contained a statement of the terms, time given, and conditions of the contract," as required by section 1187, Code of Civil Procedure, is, we think, satisfactorily met. In the first place, the lien was admitted in evidence without the objection now urged being made. The complaint alleged that the notice of lien was filed, giving the date, and that it "contained, among other things, a description of the property thereby sought to be charged, as hereinbefore set forth, a statement of the names of the owners or reputed owners of said land and building or structure, to wit [giving the names], * * * and said notice also contained a correct statement of the demand of plaintiff for said materials furnished after deducting the just claims and offsets." It is then stated that the notice was duly recorded, and reference is made to it, and it is made part of the

complaint. The lien contains a statement of the terms, time given, and the conditions of the contract. The complaint and notice of lien must be read together, as the latter is distinctly made part of the complaint. *Newell v. Brill*, 2 Cal. App. 61, 83 Pac. 76; *Coss v. MacDonald*, 111 Cal. 662, 44 Pac. 325. In the absence of a demurrer, and in view of the fact that no objection was made to the introduction of the lien in evidence, and that there was no denial in the answer of plaintiff's averments, the point, in our opinion, should not now be considered.

[9, 10] It is objected that there is a variance between the complaint and the lien, the complaint and the evidence, and between the lien and the evidence. The lien states that the contractors "requested claimant to furnish lumber and millwork for said building, and agreed to pay for the same upon its delivery; that claimant, at the special instance and request and in accordance with the agreement of said [contractors] furnished lumber and millwork for said building on the dates hereinafter mentioned to the amount and extent presented by the various sums set opposite the respective dates, viz.: [Then follow the items showing date, quantity of material and millwork, and price.] No time was given, and there were no other terms or conditions of the said contract." It is then stated that claimant performed its agreement "and supplied said lumber and materials as specified herein and said materials are of the reasonable value of \$2,902.99, and the same were actually used in, upon, and about said building." The complaint alleged that for said lumber and millwork the contractors "agreed to pay the plaintiff the reasonable value thereof, in cash, and upon the delivery of said lumber and millwork; that no time was given, and there were no other terms or conditions to said contract except such as the law implies; * * * that the reasonable value of said lumber and materials is set opposite the respective dates as follows: [Then follow the items as in the notice of lien.]" The evidence showed that the lumber was sold at a fixed price agreed upon with the contractors. "That the lumber and millwork furnished by the Olson-Mahoney Lumber Company for the building in question were furnished at the reasonable market price prevailing at San Francisco at the time the lumber and millwork were furnished." The introduction of the lien was objected to "on the ground that there is a variance between the evidence and the lien." In the decision rendered by this court in *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, 111 Pac. 760, it was said in the opinion by Mr. Justice Hart:

"The object of the statute in requiring the conditions and terms of the contract to be set forth correctly in the notice of lien is to 'inform the owner as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits.' * * * And the test as to the sufficiency of the notice with respect to the terms and conditions of the contract is whether such

notice so far departs from the terms and conditions of the contract as to render it misleading to the injury of the owner. If it does, the variance is fatal. If, however, there is a substantial agreement between the contract and notice of lien, so that there could not arise in the mind of the owner any misapprehension as to the extent and nature of the lienor's claim, then any technical variance which might appear would be immaterial."

In that case the contention was that, while the complaint charged that plaintiff was "to receive for said materials [corrugated iron] the reasonable market value of the materials so furnished, the evidence shows that such corrugated iron was sold and furnished for a definite or stipulated price * * * agreed upon by the parties." Of this contention the court said:

"Conceding that the evidence shows that the price charged for the corrugated iron was definitely fixed and expressly agreed upon at the time it was sold to the contractor, it nevertheless further appears from the evidence that said price or sum constituted the market value of the materials at the time of the sale. 'The statement in the notice of lien was, therefore, substantially true, which was all that was required to give it validity.'"

In the present case it seems to us that any one reading the notice of lien would see that the agreement was that the materials were to be paid for upon delivery in accordance with the prices carried out against the various items, and that the materials were of the reasonable value as in the notice set forth; for it states that reasonable value was as the price shown. The complaint stated that the agreement was to "pay the plaintiff the reasonable value thereof in cash, and upon the delivery of said lumber and millwork." The evidence was that the prices were both the market value and the reasonable value, as well as that the agreement, was to pay a price agreed upon. We do not think that the notice of lien was insufficient, nor do we think there was any variance as claimed by appellant such as would justify a reversal of the judgment. See *Blanch v. Commonwealth Am. Corp.*, 19 Cal. App. 720, 726, 127 Pac. 806, and cases there cited.

[11] It is next objected that the lumber furnished by plaintiff was used for concrete "forms" which did not enter into or become a part of the building, and hence no lien attached. Appellant rests its point in its opening brief upon the case of *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 74 Pac. 357. That case was decided in 1903, before concrete came into general use in the construction of buildings, and it involved conditions wholly unlike those connected with concrete structures. The contract was for the erection of a bridge to consist of five spans and the balance of steel or wood. Except as to the steel spans, the bridge was completed, but some delay arose in obtaining steel for the uncompleted part, and a temporary structure was agreed upon of timber over which the cars could run. "This structure rested upon planks laid on the ground, and was not in any way physically connected with the

bridge, except that on it was laid the permanent track consisting of stringers, ties, and rails." It was soon after replaced by the steel structure originally contemplated, the "effect being to leave the track supported by the new steel structure in place of the wooden structure removed." Part of the lumber furnished by plaintiff went into this temporary structure and was afterwards carried away by the contractors; and it was claimed by defendant that plaintiff's claim of lien should be reduced by this amount. The lower court held otherwise, but the Supreme Court reversed the judgment. It was said in the opinion:

"It is settled by many decisions in this state that to entitle a materialman to a lien under section 1183 of the Code of Civil Procedure the materials must be furnished to be used, and must be strictly used, in the construction of the building or other structure against which the lien is sought to be enforced [citing cases]; and this we understand means the materials must be used, not merely in the process of construction, but 'in the structure'—that is to say, they must be used as the materials of which it is constructed [citing cases]."

Strictly applied, the rule here laid down would exclude the lumber used for "forms" in constructing a concrete building; for it does not constitute a part of "the materials of which it is constructed." The question seems not to have been passed upon by our Supreme Court. Its wide application justifies its careful consideration.

The evidence was that this building could not have been erected without the use of lumber made into forms into which the concrete was poured there to remain until thoroughly "set"; that is, for a period requiring, as the evidence showed, from 15 to 20 days. The lumber was then removed, and was of no value thereafter. The evidence was that some of it was given away. None was used for another job, and the contractors advertised in the daily papers to get rid of it for firewood. The contract called for a reinforced concrete building to be erected by the use of wooden forms. The provision was:

"Forms must be constructed so as to properly sustain the total weight of the concrete floors and beams during construction without deflection, and shall be thoroughly braced and held in place to avoid any delay during construction to allow of the setting of the concrete."

After making specific provision as to how the lumber was to be used and what kind was required, the contract provided:

"Forms shall be so constructed that their inner surface shall conform strictly to the dimensions called for by the plans. * * * No form design shall be adopted or the lumber sizes collected [selected?] without the approval of the architect, and the architect's approval does not relieve the liability of the contractor for the strength of the forms."

We mention these provisions as showing the intimate connection of the "forms" with the erection of the structure and their indispensability.

In the case of *Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, 667, 124 Pac. 230,

41 L. R. A. (N. S.) 290, where materials were furnished for the alteration of a building, it was held:

"Lard oil applied to the threads of joints of pipe used in the structure, insulated or covered electric wire used for drop lights attached thereto, paste for soldering joints, asbestos comprising a part of the electric switchboard, all constitute parts of the structure, and a lien may be asserted therefor. Some soapstone was used on the inside of pipes, as a lubricant, to facilitate the pulling of wires through the pipes. This being a part of the work of construction, we think it may also be considered as a part of the material used in construction, for which a lien may be claimed."

Soapstone as a lubricant constituted "no part of the materials of which the building was constructed," as was the test in the *Stimson Mill Co. Case*, supra, but it "was material used in the construction" of the building, which was the test in the *Pacific Sash & Door Case*, supra, and should, we think, be the test here. In thus holding we are but applying the familiar rule that the language of a statute must be construed so as to adapt it to changing conditions, the result of improved methods and the progress of inventive arts. In its reply brief appellant cites other cases in support of its contention. *Kennedy v. Commonwealth*, 182 Mass. 480, 65 N. E. 828, was an action by bill of equity which under the statute was maintainable "if the petitioner have a claim that might be a subject of mechanic's lien if the structure belonged to a private owner." The statute provided security "for all labor performed or furnished and for all materials used in such construction or repair." The contractors agreed to furnish material for and to construct all the concrete foundations and arches required for the construction of a pumping station and gatehouse at Spot pond, in Storeham. It appeared that the lumber "did not enter into the construction of the pumping station and gatehouse as a part of the permanent structure, but was bought and used again for a similar purpose in another place, and, after being so used several times, was removed by the purchasers, some of it being finally sold for firewood, and the rest being carried to the yard of the purchasers in Boston." It was held that plaintiff could not recover. "To acquire a lien for materials under the Pub. Sta. c. 191, it is necessary," said the court, "to show that the materials will form a part of the completed structure; that they will enter into it and become a part of the reality."

In *Darlington Lumber Co. v. Westlake Const. Co.*, 161 Mo. App. 723, 141 S. W. 931, where the facts were substantially the same as in the present case, the St. Louis Court of Appeals deduced the following rule:

"Where certain material is provided for by the contract in erection of a structure, and is furnished and used accordingly, and is, either in whole or in part, consumed in its use, the materialman is entitled to a lien for the material thus consumed in the erection of the structure to the extent of the consumption of its

reasonable value, regardless of the fact whether or not such material formed a permanent part of the structure when completed. Consumption of value means the depreciation in the market value of the material by the use provided for by the contract."

In *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 12, 130 N. W. 866, 36 L. R. A. (N. S.) 875, the contract was to build a dam and materials were used in the construction of a temporary cofferdam the erection of which was necessary to the permanent dam. The contractor abandoned the work, and the owner took possession of the work, using for it the material left by the contractor including that in the cofferdam. About one-sixth of the material was destroyed by use, and the major portion of the planking when removed was capable of use in some other similar dam, and had at the time a market value of \$4 or \$5 per thousand, but after the removal the owner used it in tramways and in planking, and after the completion of such use it had no value except for firewood. At the completion of the work there would remain about 50 per cent. of the lumber furnished, a large share of which would be unfit for anything but fuel, and the balance fit for use only in other dams and worth about \$5 per thousand. The planking cost \$18 per thousand, and constituted about three-fourths of the lumber claimed. The hardware used in the cofferdam was of no value except as scrap iron. It was held that there was such a consumption of materials in the erection of the cofferdam as to entitle the materialman to a lien on the permanent dam under the statute giving a lien to a materialman who furnishes any materials "for, or in or about the construction, erection, repair," etc., of any structure which becomes a part of the freehold. *Kennedy v. Commonwealth*, supra, was much relied upon by appellant in that case, as to which the court said it was apparent that "the materials were regarded as appliances or tools." Said the court:

"So far as the concrete forms are concerned, we are inclined to agree that, where such forms are removed and are intended to be used, and in fact are used, again in other buildings, they should properly be regarded as appliances."

In speaking of the cases where the value of explosives used in preparing the ground or rock for the structure and liens have been granted, the court said:

"In these cases the liens have been granted upon one general principle or idea, namely, that where the material is used directly upon the work or structure itself, instrumental in producing the final result, and is actually consumed in the use, it may be said that in every true sense it has entered into and forms a part of the completed structure."

The opinion easily distinguishes the case from one where "coal is used in portable engines or oil in lubricating building machinery, or food eaten by the laborers." "They are at least one step further removed from the actual work of construction. They have

neither physical contact nor immediate connection with the structure at any time."

The logic of the decision in cases where powder is used "does not," said the court, "depend upon the special character of the material, nor upon the extreme rapidity of its consumption, but upon the fact that it is consumed necessarily in the process of constructing the building or other structure, and that its life has gone into the fabric of the structure as effectually as has the stone or cement or the lumber which retains its existence as a part of the structure." The principal case as to explosives is *Schaghticoke Powder Co. v. Greenwich & Johnsonville Ry. Co.*, 183 N. Y. 306, 76 N. E. 153, 2 L. R. A. (N. S.) 288, 111 Am. St. Rep. 751, 5 Ann. Cas. 443. A lien was allowed in such a case in *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419. The question, however, was not discussed. Judge McFarland dissented, stating, among other grounds, that:

A "materialman cannot have a lien for exploded powder after, like the 'unsubstantial pageant' in the Tempest, it has 'melted into air, into thin air.'"

B. F. Avery & Sons v. Woodruff & Cahill, 144 Ky. 227, 137 S. W. 1088, 36 L. R. A. (N. S.) 866, was a consolidated case in which it was agreed as to one of the claims that of the lumber used in forms for the concrete building being erected "nothing remained of any of said lumber but about 10 per cent., which was in a cut-up, sawed-up, and dirty condition, such remnants being the molds (forms) knocked to pieces." The Kentucky statutes provide:

"A person who performs labor or furnishes materials in the erection, altering, or repairing a house, building, or other structure, or for the excavation of cellars * * * or for the improvement in any manner of real estate, * * * shall have a lien thereon."

The court said:

"If the lumber had been furnished to make a scaffold, molds, or forms with the intention of using them in the erection of that building and then carry them away and use them in constructing other buildings, then no lien would attach, as they would be regarded as a part of the appliances of the workmen, and would occupy the same place as a hammer, saw, or other tool used by the workmen, for which no lien is allowed by the statute (some states do, however, allow liens for scaffolding). These appellees furnished material to be used in the erection of a building, which was as necessary as the sand, cement, water, or other material. In fact, the building could not have been erected without lumber to be used for the purpose for which appellees' was furnished."

In a note the editor takes occasion to refer to *Darlington Lumber Co. v. Westlake*, supra, a Missouri case, and *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, supra, the Wisconsin case, and, while saying that they are in the minority, remarks:

"They can hardly be cast aside and disregarded for that reason; for at this writing [1912] they are about the last words on this peculiar phase of the Mechanic's Lien Law, and are based upon a sound distinction which has

always existed and whose observation [observance?] progress now makes desirable."

Further pursuit of the question is deemed unnecessary. We do not think a general rule could be safely stated to govern all cases where lumber is used in making forms for concrete work in the construction of work contemplated by the Mechanic's Lien Law. Each case must be governed by its own facts. This much, we think, however, can be said, and it is as far as the exigencies of the present case require: That, under the circumstances or facts shown, plaintiff is entitled to a lien for the materials it furnished and the millwork necessary for the preparation of such materials for use.

Western Building Material Company's Claim.

To this claim it is objected: (1) That the first two counts are contradictory, the first alleging an abandonment for 30 days on July 14, 1909, and the filing of a lien on September 15; (2) the second alleging that the contractors (not the defendant) completed the building, and that the lien was filed December 2, 1909. As to the first count it is pointed out that the court found against the cessation of labor for 30 days, and hence the lien was prematurely filed; as to the second count no cause of action is stated, "because there is no attempt whatever to allege a fund subject to lien"; that there is a material variance between the complaint and the lien and between the complaint and the evidence.

Respondent calls attention to the fact that the complaint was filed prior to the decision in *Robison v. Mitchel*, supra, under such decisions as *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. 651, holding that the contract was deemed abandoned when there had been a cessation of work by the original contractor for a period of 30 days. After the decision in *Robison v. Mitchel*, a second lien was filed within 30 days after the completion of the building, "but only one suit was brought; both liens being pleaded as separate causes of action." The second lien was the one found by the trial court to be valid.

[12] It is true that the findings are contrary to the allegations of the complaint: (1) That there was an abandonment of work for 30 days on July 14, 1909; and (2) that the building was completed by the contractors. The court found against the averment as to cessation of work, and also found that the building was completed by defendant, and not by the contractors. But this was in strict accord with the averments of the answer many times repeated and in accord with averments in the complaints in the consolidated action. No pretense was made at the trial that the contractors completed the building, and it was not disputed at the trial that there was not a cessation of work for a period of 30 days. We do not think that contradictory averments in or statements not true in the complaint when at variance

with the findings should be held fatal to recovery, where the answer cures the contradictions of misstatements, and the findings are, as alleged by the answer, supported by uncontradicted evidence. Allegations omitted or defectively stated may be cured or supplied by the defendant in its answer. 31 Cyc. 714; *Bliss on Pleading*, 437; *Donegan v. Houston*, 5 Cal. App. 626, 632, 90 Pac. 1073; *Shively v. Semi-Tropic, etc., Co.*, 99 Cal. 259, 33 Pac. 848. It would be a vain thing to reverse the judgment on these grounds in order that the respondent might amend its complaint to harmonize with what the answer admits. It is quite obvious that the alleged variance did not mislead the defendant to its prejudice.

[13] In this respondent's complaint there was a failure to allege a fund subject to liens. Respondent meets the objection by resort to allegations found in other complaints and by the considerations set forth under the Olson-Mahoney claim. This, we think, under the rule governing in a consolidated action, was allowable. This rule we understand to be that the effect of the order of consolidation is to unite the causes of action so as to constitute one cause of action and one pleading, and that allegations in one complaint will remedy defects and supply omissions in another.

In speaking of an issue in *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077, 1081, the court said:

"This issue affected the rights of each of the plaintiffs, and its presentation in any of the original complaints became an issue in the consolidated action, and the finding and judgment thereon operated in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action with this averment in their complaint." *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143; *Coghlan v. Quarataro*, 15 Cal. App. 662, 115 Pac. 664.

[14] It is further urged that there is a variance between the complaint and the lien. The point is that the complaint relied on a contract for recovery. The averment is:

"That the following is a statement of the terms, time given, and conditions of the plaintiff's contract under which it furnished said building materials, to wit: Said Condon-McGlynn Company, while working on said building or structure, ordered from plaintiff, for use in said building, and delivered the same and charged therefor the actual value and market rate thereof."

The lien sets forth the character of the materials and their value and that no part of the same has been paid, etc.:

"That the following is a statement of the terms, time given, and conditions on which said building material was furnished, to wit: From time to time while said Condon-McGlynn Company were engaged in the construction of said building its duly authorized agent ordered from claimant for use in said building said material, to wit, said crushed rock, and claimant furnished and delivered the same upon the order of said Condon & McGlynn Company, and charged therefor the sum of \$650."

The lien says nothing about a contract, but the law implied a promise to pay. The

complaint stated the facts the same way, but chose to say that the terms, time given, and conditions of the contract were, etc., and it then follows the lien. We cannot assume that the pleader meant a contract other than such as would be implied from the facts stated.

Ford & Malott Claim.

The only objection urged to this claim is that the allegation as to the work done and materials on hand at the cessation of work is insufficiently stated. What has been said in the preceding cases upon the point applies here.

Santa Cruz Portland Cement Company.

[15] As to this claim it is alleged that there is a material variance between the claim of lien and the evidence, and that its statements are inconsistent in this:

"It alleges that 2,042½ barrels of cement were furnished, which at \$1.75, the contract price, would be \$3,574.37½. But the lien alleges that the reasonable value was \$3,849.68."

The lien states that respondent "furnished materials consisting of 2,042½ barrels of standard Portland cement of the reasonable value of \$3,849.68, to be used," etc., under a certain written agreement. "Price. One dollar and seventy-five cents (\$1.75) per barrel f. o. b. cars at factory." Shipments to be made "in car load lots as ordered by buyer." It was stated that "375 pounds net of cement, packed in four bags, constitute a barrel"; that the seller would pay 5 cents for each bag returned to the factories in good condition, seller to pay freight on returned bags; that no part of said \$3,849.68 has been paid except the sum of \$500, and there are no offsets except \$29.25 due to said contractors for sacks returned, and there is now due and unpaid the sum of \$3,320.43, etc.

The testimony was that respondent delivered to the contractors 2,042½ barrels of cement under the contract; "that the total price of the same was \$3,849.68; that the reasonable value of said cement was \$3,849.68." It appeared that 722½ barrels were furnished, not at the factory, as the contract called for, but from a warehouse in San Francisco, where respondent had it in storage; that the contractors were charged for all the cement at the rate of \$1.75 per barrel, except as to the 722½ barrels there was added the freight from the factory to the city, \$114.56, and warehouse charges, \$16.25, and 5 cents each for 2,042 casks, \$144.50; that the 722½ barrels were furnished from the warehouse at the contractors' request, and they agreed to pay therefor the contract rate of \$1.75 per barrel, plus the freight, warehouse charges, and 5 cents for each sack; that 2,042½ barrels was all the cement ordered by the Condon-McGlynn Company, "and it was up to standard in every respect." The witness testified that there was due at the commencement of the suit \$3,320.43, from

which should be deducted for sacks returned \$479.20, leaving due \$2,841.23. It thus appears that respondent charged the contract price for the cement, \$3,574.37, to which was added \$275.31, being the freight and warehouse charges on the cement. The notice very clearly stated that the contract called for cement at an agreed price per barrel delivered at the factory f. o. b. cars. Nothing was said in the notice of lien of any other agreement or that delivery might be made at San Francisco at the contract price plus freight and warehouse charges. This arrangement as to part of the cement might have been equally advantageous to the contractors, and as between respondent and the contractors was proper enough, but the defendant had a right to rely upon the terms stated in the notice of lien; for the purpose of the lien is to inform defendant of the extent of the lienor's claim. The notice here informed the defendant that the contractor had agreed to pay \$1.75 per barrel for the cement at the factory, but the owner was not informed that as to part of the cement a different agreement was made which, if enforced against defendant, would add materially to its liability. That all of the cement was not delivered at the factory is not material, as the price charged was the same at the factory and at San Francisco. The amount of respondent's claim, we think, should be ascertained without including the charges for freight and warehousing.

William Cronan Claim.

[16] The point made is that the allegation of the complaint is insufficient to support the judgment under section 1200, Code of Civil Procedure. This allegation is as follows:

"That at the time of said cessation from labor upon said unfinished contract and said unfinished building or structure there was in the hands of the said defendant Dunne Investment Company, after deducting the payments actually due and made on said contract between said defendant Dunne Investment Company and Daniel E. Condon and Charles J. McGlynn, as hereinbefore alleged for the value of the work and materials then already done and furnished, estimated according to the whole contract price, sufficient money to pay the claim and lien of plaintiff herein."

Whatever of insufficiency there may be in these averments it was cured by sufficient allegations in other complaints. It is further contended that the claim as allowed of \$2,179.50 must be reduced to \$1,714.

It appears that claimant had a specific contract for materials and work for the specific price of \$3,165, and that up to July, 1909, when the work on the building was abandoned, the materials and work of claimant amounted to \$2,179.50 on which no payment had been made. The notice of lien set out the contract as above stated, and that the labor and materials done and furnished under said contract at the cessation of work on the building was \$2,179.50, which the lien states was the reasonable value "estimated

according to the market value thereof, also measured according to said contract price." It appeared that after abandonment claimant made a contract with Charles S. Wright to complete the work originally contracted for by claimant, but at an increased compensation, the reason for which was fully explained. The witness testified:

"At the time of making out his claim of lien of \$2,179.50, I took the same figures to make that item as I took in making the original bid," and "that the value of the materials already in at the time of the abandonment, based upon the contract price, was \$2,179.50."

It was brought out on cross-examination of the witness that, if he had figured in making the original contract as he explained would have given him the real value of the job, "the estimate would have been the sum of \$4,018.18, but I made a contract for \$3,165; that the value of each item that I did would be the proportion that I estimated it based upon the proportion of \$3,165 to \$4,018.18." Upon this testimony appellant says that he "can claim only $\frac{3165}{4018}$ of the amount, or \$1,714." This contention is based upon what might have been, and not on what was the fact. We cannot see that respondent's contract with Wright to complete the work agreed upon originally cuts any figure. When the abandonment occurred respondent had done certain work and furnished certain materials under his contract, and, as was testified, "all of these materials were furnished to the building and actually used in the building, and that all the labor was used in preparing the materials and installing them in the building," and "that there were no materials on the ground at the time of the abandonment to his knowledge, and that none of the materials were hauled away after the abandonment." In this condition of the facts we think the finding of the court supported.

The Berger Manufacturing Company.

In alleging the value of the work which had been done, as stated in the first count, the complaint, it is claimed, omitted the element of proportion to the contract price, as also the amount paid; that the complaint alleged that on July 12, 1909, the contractors "ceased the construction of the building or structure, and never thereafter resumed the construction thereof," and there is no allegation of completion. But it was alleged that the lien was filed December 7, 1909, more than 120 days from the time of the cessation of labor as alleged. As to the second count in this complaint it is claimed that there is no allegation of any fund as required by section 1200, Code of Civil Procedure. These averments of the complaint as to the fund were not challenged for insufficiency. The facts as we have seen as to the cessation of labor, the taking over of the work by defendant soon thereafter, and the completion

of the building are all hereinbefore pointed out, and, as we understand the decisions, all the plaintiffs may have the benefit of them.

The Vermont Marble Company Claim.

[17] It is claimed that the first count of the complaint does not state a cause of action, for the reasons urged to the complaint in the case of William Cronan. It is also objected to the second count of the complaint that it "does not allege that the lien contained a statement of the terms, time given, and conditions of the contract." The complaint states that the notice of lien was duly recorded, giving the page of record, and the lien was made part of the complaint, and contained a full statement of the terms, time given, and conditions of the contract, and was received in evidence. It is true that the complaint does not set forth the terms, time given, and conditions of the contract, but it referred to the notice of lien, and alleged that it contained "a correct statement of the demand of plaintiff for said labor performed and said materials furnished after deducting all just credits and offsets," and, as remarked above, the lien was made part of the complaint.

Appellant relies upon Davis v. Treacy, 8 Cal. App. 395, 97 Pac. 78. Very properly the court said in that case: "The complaint is at least unique." It was held insufficient, on demurrer, to state a cause of action, because there was "absolutely nothing in the complaint to show what plaintiff's claim, or 'lien,' as he styles it, filed with the * * * recorder, contained, save the description of the property sought to be charged, or that it contained anything save such description." It does not appear that the lien was made part of the complaint, and, as the court said, it "utterly fails to show a compliance with the provisions of section 1187, C. C. P., and for this reason fails to set forth a cause of action for the foreclosure of a mechanics' or laborers' lien."

In the present case there was no demurrer to the complaint. The only objection to the lien as evidence was that there was a material variance between the lien pleaded, and that the lien was filed too late, both of which objections were properly overruled. It is very certain that no prejudice accrued to defendant from the alleged omission of allegations in the complaint, and on the evidence but one judgment could have been rendered. We think section 475 of the Code of Civil Procedure, framed in accordance with section 4½, art. 6, of the Constitution, should apply in this case. See Vallejo & Northern R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

As to the claims of J. P. M. Phillips and Bay Development Company the objections have been considered in other cases.

[18, 19] Finally, the claim of the San Francisco Teaming Company is attacked: First,

because the complaint does not contain any allegation of abandonment. This objection has been previously noticed, and it was shown that other complaints contained ample allegations as to the fact, as well also the answers, and, besides, the findings are clear upon the point. Second, it is urged that the lien does not state the terms, time given, or conditions of the contract as shown by the contract, and there is a material variance between the lien and the evidence, citing *Cal. P. C. Co. v. Wentworth*, 16 Cal. App. 713, 118 Pac. 103, 113. The lien states that Condon-McGlynn Company "entered into a contract on or about the 1st day of December, 1908, for labor as aforesaid, sand and material for said building with said San Francisco Teaming Company, the claimant herein, by which said labor, sand, and material were furnished, and the following is a statement of the terms, time given, and conditions of said contract, to wit: Said claimant agreed to furnish certain labor, sand, and material for said building; that said labor, sand, and material were to be paid for in cash upon demand at any time after said labor had been performed and at any time after said sand and material had been delivered;" etc.; "that the total amount of the claim of San Francisco Teaming Company for sand, labor, and material furnished as aforesaid is \$631.12; that \$300 has been paid on account thereof; and that the sum of \$331.12 is still due, owing," etc. The lien contained no statement as to the price to be paid for the sand or materials except as above. The points made are: (1) That the evidence showed an agreement for sand at \$1 per load and teams at the ruling market rate, and hence the lien does not contain a statement of the terms of the contract; (2) the variance between the allegations of the lien and the evidence is a material one.

Witness Donaldson, respondent's bookkeeper, testified that there was an agreement to "supply them with sand at \$1 a load; teams at the running rate that was in existence at that time." Later in his testimony he corrected the above statement, and testified that he knew of no specific price agreed upon, that most of the details were handled through him, but that he had no recollection of the price being mentioned. The substance of this witness' testimony was that the contractors verbally as needed ordered teams and sand, and charges were made "at the running rates"—the "ordinary market running rate." Witness Condon, one of the contractors, testified that he did not remember that there was a written contract with respondent, but that the understanding was verbal; the sand was to be delivered "at so much a load, depending on the haul, the minimum would be \$1 a load"; that there was no particular agreement as to the price the teams were to be paid; that the day after

hauling a statement would be made, and, if the price "showed too high a price, it was sent back for correction"; the price payable for sand depended upon the distance it was hauled, and the teams were to be paid "the current rate" and "\$1 a yard for hauling the sand a reasonable distance." The bills from time to time were made out, as we understand the testimony, "at the running rates" for the sand and teaming, amounting to \$631.12, of which \$300 was paid, leaving a balance of \$331.12. We think it fairly inferable from the testimony that the contract such as existed was an implied one, and that payment was to be made upon the performance of the labor or delivery of the sand, and both were to be paid at "the going rates" which the testimony established. The real question then is: Is the notice of lien fatally defective in not stating the terms of payment or price at which the labor was to be done and the sand to be furnished? As the facts appear, the price could not have been stated, since no price was agreed upon. The contractors simply gave orders for the teams and sand as required, and the obligation on their part was such as the law would imply. Such an implied obligation would clearly arise to pay on delivery or performance by respondent, and it would seem to us that there would also arise an implied obligation to pay the current or going rates for the labor or materials thus furnished.

In the case of *Blanck v. Commonwealth A. Corp.*, 19 Cal. App. 720, 726, 127 Pac. 805, it appeared "in some instances that no price was agreed upon," but, as it appeared that the price was the reasonable value, the omission was held not to be fatal. There is in the present case no direct and specific statement that the price was reasonable, but we think when labor is done or materials furnished at the current or going rates, or, in other words, the market rates, it may be assumed that they were reasonable in absence of any evidence to the contrary.

Section 1187, Code of Civil Procedure, requires of the lienor that he make a statement in the notice "of the terms, time given, and conditions of his contract." The notice gave the terms as cash, and as to the time payment was to be on delivery of the materials or performance of the labor. Full and literal compliance with the statute would have required a statement that the price to be paid was the current or market rate at the time for the labor and materials. But as, in fact, this is what was claimed and what was understood by the parties, and would be implied as the contract in the absence of a specific agreement otherwise, we are unwilling to hold that the omission in the notice was fatal to its validity. *Barrett-Hicks Co. v. Glas*, supra.

The lien adjudged in favor of the Santa Cruz Portland Cement Company for the sum

of \$2,760.80 should be reduced by the sum of \$275.31; otherwise the judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

PEOPLE ex rel. WEBB, Atty. Gen., et al. v. MARSH. (Civ. 1890.)

(District Court of Appeal, Second District, California. May 11, 1916. Rehearing Denied by Supreme Court July 10, 1916.)

1. DISTRICT AND PROSECUTING ATTORNEYS §2(5) — RESIGNATION—WHEN EFFECTIVE.

Under Pol. Code, § 996, declaring an office vacant upon the occupant's resignation, and section 995, requiring a county officer's resignation to be given in writing to the board of supervisors' clerk, *held*, that a district attorney's resignation was effective when delivered to the clerk, notwithstanding its revocation before acceptance by the board.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 6, 7; Dec. Dig. §2(5).]

2. DISTRICT AND PROSECUTING ATTORNEYS §2(5) — RESIGNATION—"FILED"—WHAT CONSTITUTES.

A resignation by a district attorney, stating that it was to be effective when filed with the clerk of the board of supervisors, is filed when delivered to the clerk and received by him for the purpose intended.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 6, 7; Dec. Dig. §2(5).]

For other definitions, see Words and Phrases, First and Second Series, File.]

3. OFFICERS §55(1)—HOLDING OVER—AUTHORITY TO FILL VACANCY.

Pol. Code, § 879, providing that officers must continue to act, after their term has expired, until their successors are qualified, does not prevent a vacancy from existing upon the filing of a resignation which may be at once filled by the appointing power.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-78, 80-84; Dec. Dig. §55(1).]

Appeal from Superior Court, San Diego County; W. A. Sloane, T. L. Lewis, and W. R. Guy, Judges.

Proceeding by the People of the State of California, on the relation of U. S. Webb, Attorney General, and D. V. Mahoney, against Spencer M. Marsh, to determine the title to the office of District Attorney of San Diego County. From a judgment for defendant, the relators appeal. Affirmed.

Henning & McGee, of San Diego, for appellants. Luce & Luce, of San Diego, for respondent.

SHAW, J. The purpose of this proceeding was to determine the title to the office of district attorney of San Diego county.

It appears from findings of the court as to which there is no controversy: That on June 22, 1915, D. V. Mahoney was the duly elected, qualified, and acting district attorney of San Diego county; that on said date he signed and delivered to O. H. Swallow, a member of the board of supervisors of said county, his

resignation of the office of district attorney, a copy of which document is as follows:

"June 22, 1915. To the Honorable Board of Supervisors of the County of San Diego, State of California—Gentlemen: I hereby tender to your honorable body my resignation from the office of district attorney of the county of San Diego, state of California, and ask that the same be accepted and take effect on the filing of this my resignation with the clerk of the board of supervisors of the county of San Diego, state of California. D. V. Mahoney, District Attorney of the County of San Diego, State of California."

That at about 7:30 o'clock p. m. on said June 22d, Swallow went to the home of B. Allen, who was a deputy county clerk and acting clerk of the board of supervisors, to whom he delivered said resignation so received by him from Mahoney, upon which said Allen at the time indorsed the words: "Filed June 22, 1915, J. T. Butler, Clerk, By B. Allen, Deputy." And on the following morning, June 23d, upon reaching the county clerk's office where she was employed as such deputy, she delivered the document to J. T. Butler, county clerk and ex officio clerk of the board of supervisors, who retained the same in his custody until June 28, 1915, at which time it was presented to a special meeting of the board of supervisors duly convened pursuant to a call therefor, notice of which as served stated that it was "for the purpose of considering and accepting the resignation of D. V. Mahoney as district attorney and, if accepted, appointing his successor"; at which time, all the members of the board being present, the resignation of Mahoney was accepted, and the respondent, Spencer M. Marsh, was elected to fill the vacancy. At this meeting of the board of supervisors so held on June 28th, and before the board had taken any action with regard to said resignation or the election of Marsh to fill the vacancy, Mahoney caused to be served on the board and each member thereof a written notice of revocation, stating therein that he withdrew and recalled the resignation theretofore tendered. In addition to these facts as to which, as stated, there was no controversy, the court upon conflicting evidence, ample in tendency, however, to support the same, found that the delivery of said resignation by Swallow to the clerk and the filing thereof was in obedience to the instructions of Mahoney given to Swallow when the document was delivered to him, and that at the time Mahoney was mentally competent and well knew the purport and effect of the same and intended the resignation to go into effect according to the terms thereof. As a conclusion of law, the court found in effect that the resignation was duly made to the clerk of the board of supervisors of said county and became effective on June 23, 1915, by reason of which a vacancy existed in the office of district attorney of said county; that Spencer M. Marsh was duly

elected to fill the vacancy on June 28, 1915, on which date he was and ever since has been entitled to said office by virtue of said election.

Judgment followed for the respondent, from which the relator appeals.

[1] Appellant's chief contention is that the question presented must, under section 4468 of the Political Code, be determined by applying the common-law rule which denied the right of a public officer to resign his office without the consent of the appointing power manifested by an express acceptance of the resignation or in some other mode equally significant of its intention so to do (Mechem on Public Officers, § 414; Throop on Public Officers, § 409; *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314; *Reiter v. Durrell*, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681); and, if this be true, it follows, says appellant, there was no vacancy, since, before the resignation was accepted, Mahoney, as he had a right to do (*People v. Porter*, 6 Cal. 26; *People v. Board of Police*, 26 Barb. [N. Y.] 487; *State v. Murphy*, 30 Nev. 409, 97 Pac. 391, 720, 18 L. R. A. [N. S.] 1210), recalled and withdrew his letter of resignation. Section 4468 of the Political Code, however, declares the common law to be the rule of decision only in those cases where it is not repugnant to or inconsistent with the Constitution of the United States or Constitution or laws of this state. Conceding the common-law rule as stated, which it may be noted was based upon a theory not in harmony with but entirely at variance with the modern idea which prevails as to a public office, and conceding also, where acceptance is necessary to render the resignation effective, the right of a public officer who has tendered his resignation to recall it at any time before it is accepted, we are nevertheless of the opinion that such rule has been abrogated in this state by statutory provisions. Webster defines the word "resign," "to give up an office or trust"; and defines "resignation" as being "the act of resigning or giving up, as a claim, possession or position." Section 996 of the Political Code declares that:

"An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. (2) * * * (3) His resignation. * * *"

Now, since resignation means, as stated, the act of giving up a claim, possession, or position, it seems to clearly follow, under this provision of the statute, that a vacancy arises when the incumbent resigns in the mode provided by law, subject of course to the terms contained in the letter of resignation. Section 995 of the Political Code declares the mode in which a public officer may resign his office, namely, that it must be in writing, and, if the incumbent be a county officer not commissioned by the Governor, that it shall be made to the clerk of the board of supervisors. In the case at bar it

was in writing, and since it was, as intended to be by appellant, delivered to and filed with the clerk of the board of supervisors, it was made in full compliance with the statute. We are aware that authorities may be found which appear in conflict with this conclusion. Reference to them, however, shows they were based upon the finding of the court that no statute existed upon the subject changing the common-law rule, such as *Edwards v. United States*, supra, a Michigan case, where it was held the common-law rule prevailed. The case of *State ex rel. Royse v. Superior Court of Kitsap County*, decided by the Supreme Court of Washington, 46 Wash. 681, 91 Pac. 4, involved a statute identical with section 996, Political Code, of this state, under which the court, after reviewing the authorities from a number of states, held that the common-law rule prevailed in that state. After referring to section 1548 of the Washington Code (Ballinger's Ann. Codes & St.) corresponding with said section 996 of our Code, the court said:

"We see nothing in the above which changes the common-law rule. It is true it is declared that an office shall become vacant upon the resignation of the incumbent, *but nothing is said about the method of effecting a resignation.* (Italics ours.) The silence of the statute in that regard should be construed to mean that the established common-law method still obtains."

It will be noted that our statute, section 995, Political Code, in express terms declares the method of effecting a resignation which, according to the Supreme Court of Washington, was wanting in the laws of that state. A number of authorities are cited by respondent in support of the contention that the acceptance of a resignation is not necessary to create a vacancy, but that the vacancy is created by the act of the public officer by delivering his written resignation to the appointing power or official authorized by law to receive the same for such depositary. Among the early cases so holding is that of *People v. Porter*, 6 Cal. 26, where it is said:

"The tenure of an office does not depend upon the will of the executive, but of the incumbent. * * * There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. * * *"

Notwithstanding the fact that this case has been frequently accepted by the courts of other states as an authority in support of the proposition, it is claimed, not without ground therefor, that what was there said upon the subject was not necessary to a determination of the case, and therefore dictum. In a Wisconsin case (*State v. Kotecki*, 155 Wis. 66, 144 N. W. 200), where it was contended that a resignation without an acceptance does not vacate an office, the court, after stating that counsel for defendant cites many cases holding the contrary, continues:

"Fortunately section 962, Stats. 1911, settles the controversy. It provides: 'Every office shall become vacant on the happening of either of the following events: (1) The death of the in-

cumbent. (2) His resignation.' * * * So it must be held that upon the filing of the resignation of the relator the office was vacated."

Our conclusion is based, not upon the authorities, concededly conflicting, bearing upon the question, but upon the fact, as declared in section 4 of the Civil Code, that:

"The Code (sections 995 and 996, Political Code) establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects."

Thus construed, we entertain no doubt that the provisions referred to gave appellant "the privilege of resignation as an absolute right, without any restrictions" (*State v. Murphy*, 30 Nev. 409, 97 Pac. 391, 720, 18 L. R. A. [N. S.] 1210), and his resignation delivered to the officer designated (by law) to receive it, he having no duty to perform in supplying a successor, the mere receipt thereof by such officer rendered it effective and created a vacancy in the office as intended by him, immediately upon being filed with, that is, delivered to, the clerk of the board of supervisors, which occurred several days before the time of the recall and withdrawal thereof. *U. S. v. Justices of Lauderdale County* (C. C.) 10 Fed. 460, and cases cited.

According to our view of the case, it is unnecessary to further review and distinguish the authorities cited by the respective parties as bearing upon the proposition submitted. Necessarily they involve the statutes of the states in which the cases arose.

[2] By its terms the resignation was to take effect upon being filed with the clerk. No express provision is made in the law providing that a letter of resignation shall be filed; but, like documents which are required to be filed, the delivery thereof to the clerk of the board of supervisors, he being the officer designated by section 995 of the Political Code to whom the resignation should be made, constituted the filing thereof. In practice the filing of a document, so far as concerns the act of the party, consists simply in placing the paper in the hands of the clerk to be preserved and kept by him in his official custody as an archive or record of which his office is the repository, subject to such use and reference thereto as the nature of the document contemplates. While it is usual for the clerk to indorse such document, giving the date of its delivery, such file marks are but evidence of the fact of such delivery. In *Tregambo v. Comanche M. and M. Co.*, 57 Cal. 501, it is said:

"A paper in a case is said to be filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause. * * * Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office."

And in *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796, it is said:

"An instrument is 'filed' for record when it is deposited in the proper office, with a person in charge thereof, with directions to record it."

Here, there was no cause, and hence no other papers; nor is there any provision requiring the resignation to be recorded. Hence the filing was complete when it was delivered to the proper officer and by him received for the purpose for which it was intended. Neither is the alleged fact that the clerk, for purposes of his own, suppressed information that Mahoney had resigned, nor the fact that three members of the board of supervisors in calling the special meeting stated that it was for the purpose of accepting Mahoney's resignation, of any weight in determining the question, since, under the foregoing views, it is obvious that neither the clerk by his acts, nor the board of supervisors, could compel the incumbent to retain the office against his will.

[3] Appellant cites section 879 of the Political Code, declaring that "every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified," and, basing his argument thereon, insists there could be no vacancy, since under the provisions of this section appellant was required to continue in office until his successor was qualified. As well suggested by the trial judge:

"Counsel's argument would lead to the conclusion that there could be no vacancy until a successor was appointed, and there could be no successor appointed until there was a vacancy."

While there appears to be a conflict of authority as to whether such provision as that contained in section 879 is applicable in the case of a resignation of a public officer where, to complete the same, no acceptance thereof is required, the decisions of our own Supreme Court seem to justify the conclusion that the provision applies not only to one whose term has expired, but as well where the incumbency is ended by resignation; the continuance in office being regarded as temporary, or, as stated in *People v. Ward*, 107 Cal. 236, 40 Pac. 538:

"He is a makeshift merely, locum tenens, temporarily filling a public office which it is inexpedient to permit to stand without an incumbent."

To the same effect is *People v. Nye*, 9 Cal. App. 148, 98 Pac. 241.

Hence, conceding that one who has tendered his resignation in the mode prescribed by statute to take effect immediately, or, as here, upon the delivery of the document to the clerk, may nevertheless hold over until his successor is appointed, such fact is not inconsistent with the theory that a vacancy exists in the office to be filled by the appointing power.

For the reasons given, the judgment is affirmed.

We concur: CONRBY, P. J.; JAMES, J.

CROWLEY v. SAVINGS UNION BANK & TRUST CO. (Civ. 1477.)

(District Court of Appeal, Third District, California. May 23, 1916. Rehearing Denied by Supreme Court July 20, 1916.)

1. HUSBAND AND WIFE §47(1)—CONTRACT AND CONVEYANCE—STATUTE.

By Civ. Code, § 158, either husband or wife may enter into any engagement or transaction with the other respecting property which they might if unmarried, and a husband may convey realty or personalty to his wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 232, 234, 237, 239-241; Dec. Dig. §47(1).]

2. HUSBAND AND WIFE §262(2) — WIFE'S INTEREST IN INVESTMENT—STATUTES.

Under Civ. Code, § 686, providing that every interest created in favor of several persons in their own right is an interest in common, and section 164, providing that whenever property is conveyed to a married woman by instrument in writing the presumption is that the title is thereby vested in her as her separate property, and that when property is conveyed to a married woman and her husband the presumption is that the married woman takes as tenant in common, where a husband, with consent of his wife, drew money from their joint savings bank account with a mutual understanding that the wife had the same interest in the money as he did, which understanding found expression in the notes received by him for the loan of the money to a third person, which were made payable to both his wife's order and his own, whether the husband intended to transmute the money into separate or community property was immaterial; there being a presumption that the wife's interest in the investment was that of a tenant in common.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 914; Dec. Dig. §262(2).]

3. HUSBAND AND WIFE §133(1) — TENANCY IN COMMON OF NOTES—SUFFICIENCY OF EVIDENCE.

In a widow's action against a savings bank to obtain a decree adjudging her to be the owner of an undivided one-half interest in notes and mortgages, evidence held sufficient to support findings that plaintiff was the owner of such an interest as her separate property; the bank, as executor of her deceased husband, being the owner of a like interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487, 493; Dec. Dig. §133(1).]

4. APPEAL AND ERROR §1170(1)—HARMLESS ERROR—EVIDENCE.

Under Const. art. 6, § 4½, and Code Civ. Proc. § 475, providing that judgment shall not be reversed for harmless error, in a widow's action for a decree adjudging her to be the owner of an undivided one-half interest in notes and mortgages, where it appeared, without contradiction, that the money, which was the consideration for the loans, was impressed with the character of joint ownership by the contract under which it was deposited with defendant bank by the widow and her deceased husband, that the widow consented to its being drawn out and loaned, etc., error allowing her to testify to her husband's declaration that the money belonged to her as much as to him was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. §1170(1).]

Appeal from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

Action by Katherine S. Crowley against the Savings Union Bank & Trust Company, individually, as executor of the last will and testament of Timothy J. Crowley, deceased, and as trustee under the last will of the decedent. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

W. H. Chapman and Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellants. O'Gara & De Martini and Bert Schlesinger, all of San Francisco, for respondent.

CHIPMAN, P. J. The action was brought to obtain a decree adjudging plaintiff to be the owner of an undivided one-half interest in two certain promissory notes and mortgages and directing the sale of said notes and mortgages and the payment to plaintiff of one-half of the proceeds of said sale and one-half of all interest collected and to be collected. The promissory notes, the subject of the action, were as follows: A note of date February 29, 1912, executed by Herman D. Hogrefe and Bertha L. Hogrefe, for the sum of \$15,000, payable to the order of T. J. Crowley and Catherine Crowley, secured by mortgage on real estate. Also, a note of date July 16, 1912, executed by J. B. Bocarde Drayage Company, a corporation, for the sum of \$13,000, payable to the order of T. J. Crowley and Katherine S. Crowley, secured by mortgage on real estate.

Subsequently to the commencement of the action, as appears by a supplemental complaint, there was paid on the Hogrefe note the sum of \$14,000 to defendant Savings Union Bank & Trust Company in its individual capacity, of which sum one-half was paid to defendant Savings Union Bank & Trust Company as executor of the last will of Timothy J. Crowley, deceased. The balance, \$7,000, was retained by it to await the determination of the ownership thereof by the court.

On January 5, 1909, T. J. Crowley and Katherine Crowley opened an account with the San Francisco Savings Union designated as No. 131260. This corporation afterwards changed its name to Savings Union Bank & Trust Company, but the account continued under the same number. The account above referred to was opened pursuant to the following contract:

"San Francisco, Cal., Jan. 5, 1909.
"To the San Francisco Savings Union: All moneys now on deposit, or at any time hereafter deposited by or for us or either of us, to the credit of Timothy J. Crowley or Katherine, wife, ordy. deposit account No. 131260, with the dividends thereon and accumulations thereof, are, and shall be, the joint property (with right of survivorship) of the undersigned, and are payable to us or either of us, or to the survivor of us, or to the executors, administrators or assigns of such survivor, without reference to the

original ownership of such moneys, the act of so depositing said moneys, being absolute termination of any original ownership thereof; and are subject to all national and state laws, governing such moneys, now or hereafter in force.

"This account may be terminated at any time by the board of directors of said San Francisco Savings Union; and the opening of this account is sufficient and complete evidence of the acceptance and ratification by said San Francisco Savings Union of the terms of deposit herein set forth, without other or further action on its part."

["Signed]

T. J. Crowley,
"Katherine Crowley."

This contract remained with the bank from the day of its date until the action was tried, and under its provisions large and small sums of money were deposited with the bank to this account, and both Mr. and Mrs. Crowley individually withdrew money as required by either or both from time to time until Mr. Crowley's death, January 21, 1913. The facts in connection with the execution of this contract and the view this court entertains of its purpose and the intention of the parties in executing it were fully discussed in the action bearing like title to the present action and numbered Civil No. 1476, decided March 16, 1916. *Crowley v. Savings Bank & Trust Co.*, 157 Pac. 516. In that action the question involved was as to the ownership of the balance of the fund remaining on deposit to this account at the death of Mr. Crowley, and we held that this balance passed to Mrs. Crowley by right of survivorship. We also held that the declarations found in the will of Mr. Crowley were inadmissible as evidence of an intention other than that expressed in the deposit agreement. These questions we regard as settled and need not be considered in this opinion.

The case now here calls for a decision as to whether or not Mrs. Crowley is entitled to a one-half interest in the promissory notes or their proceeds above referred to. The facts upon which she rested her claim there-to are briefly as follows: When the Hogrefe note was executed there stood to the credit of this joint account the sum of \$37,241.63. For some reason not appearing, but for temporary purposes, the Crowleys jointly gave their one day promissory note to the bank for \$15,000 and, as the transcript shows, "transferred to the credit of the cashier of the Savings Union & Trust Company \$15,000 from our term deposit No. 131260, with the agreement that upon payment of said note, according to its tenor said amount shall be retransferred to our said deposit account." This amount was loaned to Hogrefe, and he and his wife executed and delivered their note payable to the order of Mr. and Mrs. Crowley. Five days later a deposit was made to this joint account, and the bank retransferred to that account \$15,000 and canceled the Crowley note.

The money for the Bocarde Drayage Company note was drawn from the said joint account, as was stipulated, "upon checks sign-

ed by Timothy J. Crowley alone, but that said moneys were so withdrawn with the consent of said Katherine Crowley." Both notes, as above stated, were made payable to Timothy J. Crowley and one to Catherine Crowley and the other to Katherine Crowley or order and so remained until Mr. Crowley's death. They were kept in his safe deposit box to which Mrs. Crowley had a key. She testified that she was consulted by her husband as to the advisability of making the loans and consented thereto; that he told her she "had just as much right to know where the money was as he had, and he wanted me to be pleased; * * * that it was the joint money; that it belonged to me as much as it did to him. Q. Did you read the note (referring to the \$18,000 note)? A. Yes, sir. Q. Where was the property that you inspected? A. On Bryant; Bryant and White Place. I accompanied my husband at that time. Q. Did Mr. Crowley tell you that there were mortgages made to secure the payment of the notes? A. Yes, sir. The notes were put in the safe deposit box to which I had access. At all times I knew that both of these notes were made payable to me and my husband." Defendants objected to "any declaration which passed between the lady and her husband during the existence of the marriage relation as privileged" under section 1881, Code of Civil Procedure. The court overruled the objection, and this is the only alleged error occurring at the trial in the admission or rejection of testimony and the only ruling to which objection is made except in refusing to admit the Crowley will in evidence.

Upon the principal question in the case, the court made the following findings of fact:

"(1) That prior to and at the time of the death of Timothy Jay Crowley, plaintiff Katherine S. Crowley and Timothy Jay Crowley were the owners, as tenants in common, of these two certain notes and mortgages that are described in the complaint in the above-entitled action; and each of them was the owner of an undivided one-half of said two notes and mortgages as her and his separate property respectively. That, since the death of said Timothy Jay Crowley, plaintiff has been and now is the owner of the undivided one-half of said two notes and mortgages as her separate property; and said Savings Union Bank & Trust Company, as trustee under the last will and testament of said Timothy Jay Crowley, deceased, has been and now is the owner of the other undivided one-half of said two notes and mortgages, to wit, the undivided one-half of said two notes and mortgages held by said Timothy Jay Crowley in his lifetime. * * * (8) That at the time of his death said Timothy Jay Crowley was not and prior thereto had not been the owner of both or either, or any of the notes and mortgages described in the complaint as his separate property and estate, or otherwise. That said Timothy Jay Crowley at no time was the owner of any interest in said notes and mortgages except an undivided one-half interest in and to each of said notes and mortgages, as his separate property and estate. That defendant Savings Union Bank & Trust Company, as executor of the last will and testament of Timothy Jay Crowley, deceased, is entitled to the possession of said notes and mort-

gages as cotenant thereof with plaintiff and not otherwise."

By its judgment the court awarded plaintiff the relief prayed for, except that it was adjudged to the best interests of the parties "not to order a sale of said promissory notes and mortgages or either of them at the present time, but to allow the parties to proceed to collect said notes and mortgages by suit or otherwise, reserving in this court full power to appoint a referee and to order a sale and a division of the proceeds thereof according to the interests of the parties as determined in this action whenever it shall be made to appear that a sale of said notes and mortgages or any of them would promote the interests of the parties." The appeal is from this judgment.

Had Mr. Crowley drawn out the money on his own initiative and loaned it to his own account, taking the notes to himself or order, a question might have arisen not now involved. He did not do this. On the contrary, the money was drawn from the bank by mutual consent and with a mutual understanding that Mrs. Crowley had the same interest in the money to be loaned as he did, and this understanding found expression in the notes themselves by being made payable to the order of both Mr. and Mrs. Crowley. Section 686 of the Civil Code provides as follows:

"Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property."

"An interest in common is one owned by several persons not in joint ownership or partnership." Civ. Code, § 685.

Section 161, Civil Code, provides that "a husband and wife may hold property as joint tenants, tenants in common, or as community property," and section 164 provides that:

"Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument."

[1] In this state, either husband or wife may enter into any engagement or transaction with the other respecting property which they might if unmarried. Civ. Code, § 158. A husband may convey real or personal property to his wife, and it was held, in *Carter v. McQuade*, 83 Cal. 274, 278, 23 Pac. 348, 349, that:

"Whether the property conveyed be his separate property or community property, the presumption is that it thereby becomes and is thereafter to be treated as her separate property." (Citing cases.)

The following cases deal with section 164 Civil Code, and the presumption therein declared as to the wife receiving title to property by written instrument: *Alkeritz v. Arrivil-*

laga, 143 Cal. 646, 77 Pac. 657; *Fanning v. Green*, 156 Cal. 279, 282, 104 Pac. 808; *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

[2] Whether Mr. Crowley intended to transmute this money into separate or community property it seems to us immaterial, for whatever character it assumed when taken out of the bank it was immediately invested in the names of himself and wife, and we think the presumption followed that her interest in the investment was that of a tenant in common, for he expressly so provided by causing or allowing the notes and mortgages to be made payable to himself and wife.

In commenting upon section 164, the court said, in *Volquards v. Myers*, 23 Cal. App. 505, 138 Pac. 964:

"It is true that the presumption established by section 164 of the Civil Code is not conclusive, but may be disputed and overthrown by other testimony. Nevertheless, however, the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony (citing cases); and whether, in any case, a disputable presumption has been dispelled by testimony received in rebuttal thereof, is a question whose solution is solely with the trier of the facts."

[3] There was no evidence offered in rebuttal of the presumption in the present case unless the declaration of Mr. Crowley may be so regarded found in his will which was executed about a year after the Hogrefe note was given and about six months after the execution of the other note, and this we held in the former case, *supra*, was inadmissible. Aside from the investments themselves, whatever testimony is found in the record was given by Mrs. Crowley and tended to aid the presumption rather than rebut it. We think the foregoing findings were supported by the evidence.

[4] The only remaining question relates to the alleged error in permitting Mrs. Crowley to testify as to statements made by her husband in relation to the loan of this money.

Counsel for both parties have with much industry collected the authorities pro and con the ruling. It does not seem to us necessary to decide the point. Mrs. Crowley's testimony is uncontradicted as are certain important facts connected with the transaction otherwise appearing. It thus appeared without contradiction that the money which was the consideration for these loans was impressed with the character of joint ownership by the contract under which it was deposited with the Savings Union Bank & Trust Company; that Mrs. Crowley consented to its being drawn out and loaned to the makers of the notes and mortgages; that she joined in the note given to the bank temporarily when the loan was made to Hogrefe; that she visited and inspected the mortgaged property before the loan was made to Hogrefe; that she knew of the money being drawn for and consented to the making of the loan to the Bocarde Draying Company;

that the notes and mortgages were given to Mr. and Mrs. Crowley jointly and were kept in a safe deposit box to which Mrs. Crowley had access by a key which she carried. It is inconceivable that these facts were unknown to her husband, or that the transactions were consummated otherwise than with his full knowledge and consent. If it be conceded, for the purpose only of this opinion, that it was error to allow Mrs. Crowley to testify to her husband's declaration that the money belonged to her as much as to him, we cannot say that such error caused a miscarriage of justice. Section 475, Code Civ. Proc.; section 4½, art. 6, Const. This declaration by Mr. Crowley was not necessary to strengthen the presumption which the law attached to his acts. Everything he did goes to show beyond dispute that the fact was exactly what he declared it to be to his wife. It seems to us that it would be a gross miscarriage of justice to reverse the judgment for an alleged error in admitting evidence which was not essential to any finding of fact by the court and without which the findings are amply supported.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

DE LIERE v. GOLDBERG, BOWEN & CO.
(Civ. 1830.)

(District Court of Appeal, First District, California. June 1, 1916. Rehearing Denied by Supreme Court July 31, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 1060(1)—**HARMLESS ERROR—CONDUCT OF COUNSEL.**

In an action for personal injuries, where plaintiff's counsel several times, in examining a prospective juror and one of defendant's witnesses, referred to the fact that defendant was indemnified against an adverse verdict by a surety company, but the court expressly instructed the jury to disregard all references to outside parties and to confine their deliberations to the issues between the parties, the fact that the defendant was indemnified being permitted to go before the jury later in the form of evidence without objection, such evidence coming from a witness for defendant, the suggestions of plaintiff's counsel were not prejudicial misconduct justifying reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. \Leftrightarrow 1060(1).]

2. APPEAL AND ERROR \Leftrightarrow 1002—**REVIEW—VERDICT ON CONFLICTING EVIDENCE.**

In an action for personal injuries, the appellate court will not interfere with the verdict on evidence substantially in conflict on the questions of the negligence of defendant's employé and plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. \Leftrightarrow 1002.]

3. DAMAGES \Leftrightarrow 40(4)—**PERSONAL INJURIES—REMOTENESS.**

In an action for personal injuries, damages because plaintiff had been unable to keep up her payments upon land purchased, and so had lost

the installments already paid, were too speculative and remote.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 88; Dec. Dig. \Leftrightarrow 40(4).]

4. APPEAL AND ERROR \Leftrightarrow 1151(2)—**REDUCTION OF VERDICT—IMPROPER ALLOWANCE OF ITEM OF DAMAGES.**

In an action for personal injuries, where plaintiff recovered a verdict including damages suffered by her through being unable to keep up her payments upon land, so that she lost the installments already paid, but the specific amount of such damage was definitely fixed at all times during trial, judgment for plaintiff will not be reversed, but the verdict and judgment will be reduced by the amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4500, 4503-4505; Dec. Dig. \Leftrightarrow 1151(2).]

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Ione Imogene De Liere against Goldberg, Bowen & Co. From a judgment for plaintiff and an order denying new trial, defendant appeals. Judgment modified, and as modified affirmed, with the order.

H. B. M. Miller, of San Francisco, for appellant. Stidger & Stidger and Wm. F. Herron, all of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff in an action for damages for personal injuries, and from an order denying a new trial. The cause was tried before a jury.

The first contention of the appellant is directed against the alleged misconduct of counsel for plaintiff during the proceedings for the impanelment of the jury, consisting in asking of a prospective juror of the question, "Do you know a corporation known as the General Accident, Life & Fire Insurance Company?" and in stating in substance in answer to an objection to said question that the defendant was indemnified by said corporation against liability for injuries of the nature of those involved in this action. The question and statement of counsel were assigned as misconduct. The court sustained the objection to the question; and a little later when the same matter was again adverted to by plaintiff's counsel, and again assigned as misconduct, the court expressly admonished the jury to disregard any reference to outside matters, and confine themselves to the issues between the two immediate parties to the case. Still later, and during the cross-examination of one of the defendant's witnesses, counsel for the plaintiff asked him whether he had not been told by defendant to go down and make a report to the surety company in regard to the accident. This question was also objected to and assigned as misconduct, and the court again sustained the objection to it; but counsel for the defendant did not ask nor did the court give any further admonition to the jury.

In urging here the contention that by this

repeated reference by counsel for the plaintiff, to the effect that defendant was indemnified against an adverse verdict by a surety company, he was guilty of prejudicial misconduct requiring a reversal of the case, the appellant strongly relies upon the cases of *Roche v. Llewellyn*, 140 Cal. 563, 74 Pac. 147, and *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700, wherein the Supreme Court has declared it to be the law in this state that during the trial of an action for damages evidence that the defendant has been indemnified against loss by a surety company is not only inadmissible, but that its offer on the part of the plaintiff is prejudicial misconduct.

It is, however, contended by the respondent that the first of the above-quoted cases has reference only to evidence offered during the actual trial, and that its doctrine is not to be extended to questions asked of jurors upon their voir dire examination with a view to ascertaining whether they are connected in any disqualifying relations with an indemnifying company. It is insisted by respondent that such questions are in themselves admissible when asked of a juror, and even necessary in order to insure the plaintiff a body of jurors unbiased by any connection in favor of the real party interested in the defense of the action, and that such an inquiry being admissible it could not be misconduct to pursue it in the examination of jurors; and it is further contended by the respondent that as to the case of *Pierce v. United Gas & Electric Co.*, supra, the language of the learned justice writing the opinion in that case is to be construed as being limited to cases where the inquiry of the juror is not made in good faith, but where the question is asked, not for the purpose of ascertaining whether the juror is free from bias or interest which may affect his verdict, but merely for the purpose of getting the fact that the defendant is indemnified by a surety company before the jury. In support of these contentions, the respondent cites a number of quite recent cases from other jurisdictions, holding such questions proper when asked in good faith of a juror upon his voir dire examination, and notably the cases of *Blair v. McCormack Construction Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750, and *Rinklin v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125, wherein the rule for which the respondent contends is exhaustively set forth; and earlier cases cited and relied upon by the appellant are criticized.

[1] We do not, however, deem it necessary to determine this disputed question in the instant case, for the reason that the record discloses that, during a later stage of the trial, the fact that the defendant was indemnified by the particular surety company adverted to was permitted to go before the jury in the form of evidence without objection, and that such evidence came from the

lips of one of the defendant's own witnesses. This fact, taken with the further fact that the court did in the earlier stages of the case expressly instruct the jury to disregard all references to outside parties and confine their deliberations to the issues between the actual parties before the court, impels us to the conclusion that the question and suggestions of plaintiff's counsel cannot be held to have amounted to such prejudicial misconduct as to justify a reversal of the case. It is further contended by the appellant that the evidence is insufficient to justify any verdict in plaintiff's favor, and particularly insufficient to justify a verdict for the sum of \$6,000, and that in this latter respect the verdict should be set aside as excessive.

[2] On a careful review of the somewhat voluminous evidence in the case, we are of the opinion that there is a very substantial conflict, upon the questions of the negligence of the defendant's employé, and as to the severity and permanence of plaintiff's injuries, and also as to the plaintiff's contributory negligence; and that therefore these were matters which were properly within the purview of the jury, with whose discretion we will not interfere.

[3, 4] The appellant finally urges that the court committed certain errors of law in overruling the defendant's objection to evidence offered on behalf of the plaintiff in support of the averments in her complaint, to the effect that she had been specially damaged in the sum of \$254.78 by reason of the fact that in consequence of her injuries she had been unable to keep up her payments upon a lot in Richmond, and as a result had lost the installments already paid, amounting to said sum. The plaintiff pleaded this matter in detail in her complaint as special damages. The defendant, instead of seeking to eliminate this element of alleged damage from the complaint by proper motion, responded with denials which put in issue the matter so pleaded, and the parties went to trial upon the issue thus framed. The specific amount of such damage sought was fixed by these pleadings and by the offered evidence of the plaintiff in support thereof. The respondent, while not conceding that damages of this sort are not recoverable, is willing that the verdict should be reduced in that specific sum. We think these damages were too remote and ought not to be allowed; but we do not think the judgment should be reversed for that reason when, as the record shows, the precise amount of this alleged item of damage was definitely fixed at all times during the trial, and also when the parties were content to tender a direct issue as to the fact and amount of this item of alleged detriment. Under these conditions, we think substantial justice will be done by reducing the verdict and judgment in the sum of \$254.78.

It is therefore ordered that the judgment be modified by striking therefrom the sum of

\$254.78, and that otherwise the judgment and order are affirmed, appellant to recover its costs upon this appeal.

PEOPLE v. RIZOTTO. (Cr. 464.)

(District Court of Appeal, Second District, California. June 1, 1916.)

THREATS ⚡6—VARIANCE—DESCRIPTION OF WRITING.

There is a fatal variance where an information, under Pen. Code, § 523, charges the sending of a threatening letter in "words and figures following," giving a letter in English, and the proof is of a letter in a foreign language, of which the letter in the information was a translation, instead of alleging that it was in the foreign language, "a correct translation of which was as follows."

[Ed. Note.—For other cases, see Threats, Cent. Dig. § 11; Dec. Dig. ⚡6.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Jack Rizotto was convicted, denied a new trial, and appeals. Reversed.

Carter & Torchia, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

SHAW, J. Section 523 of the Penal Code provides that:

"Every person who with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section five hundred and nineteen, is punishable in the same manner as if such money or property were actually obtained by means of such threat."

And section 519 of the Penal Code provides that:

"Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of him, or member of his family. * * *

By an information filed by the district attorney defendant was charged with the offense defined by said section 523 of the Penal Code, in that, with intent to extort money and property from one Dominick Lauricella, he sent him—

"a certain letter and writing, which said letter and writing did then and there express and imply, and was adapted to imply, a threat to do an unlawful injury to the person and property of the said Dominick Lauricella, which said letter and writing was then and there and is in the words and figures following, to wit:

"Long Beach, July 5, 1915.

"Dear Friend: This day I tell you to bring One Thousand Dollars of which you know, at one o'clock you will take the road to Anaheim and look for an electric pole. You will find one with Number L20072 and there will be also the number of your house. Near to the pole you will find a pepper tree with a hole in it, and near to that pepper tree there is a can. Therefore, you will put the money in that can, and you will cover the same. You know very well what will happen to you if you don't do as we tell you and that is enough."

At the trial, after showing that Lauricella had received through the post office a letter written in the Italian language, the people, over defendant's objection, were permitted to introduce such letter in evidence, followed by evidence of a translation thereof which, while widely different in words, in substance was the same as that set out and alleged in the information.

Appellant justly insists there was a fatal variance in the allegations of the information and proof so received in support thereof. "It is said by Wharton that when an indictment undertakes to set forth a document in *hæc verba*, or according to its 'tenor' or 'as follows' or 'in words and figures following' then any variance as to the words of the document, unless such variance be a mere fault of spelling, is material." *People v. Phillips*, 70 Cal. 61, 11 Pac. 493. There was nothing whatsoever in the information calculated to acquaint defendant with the fact that the letter which he was charged with sending to Lauricella was written in the Italian language. On the contrary, it was expressly and directly alleged, not only that it was in the English language, but the words and figures thereof were set out therein. Where the information, as here, is in fact based upon an instrument in a foreign language which in the information is alleged to have been "in the words and figures following," followed by an English translation thereof, without disclosing the foreign origin of the document or the fact that the copy set out is a translation thereof, the original is not admissible in evidence as proof of such allegation. *Townsend on Slander and Libel*, § 330; *Stichtd v. State*, 25 Tex. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444; *Wharton's Criminal Evidence* (10th Ed.) § 114a. Where the pleader is not content with the statement of the legal effect of such instrument, it is not only the custom, but sufficient, to allege that it is in the foreign language adopted, "a correct translation of which is as follows," setting the same out according to its English meaning. *People v. Ah Woo*, 28 Cal. 205; *Stevens v. Kobayshi*, 20 Cal. App. 153, 128 Pac. 419. Otherwise a defendant suffers prejudice, since, as here, before trial he was not informed that he would be called upon to defend himself upon a charge of sending a communication other than in the language with which he is charged. It would be unfair towards a defendant charged with sending a threatening letter in the English language, a copy of which is set out in *hæc verba* in the information, to establish such fact by proof that it was a translation of Egyptian hieroglyphics or some secret code, without apprising him that the charge was based upon such code characters from which the letter set out purported to be deciphered. The rule invoked is not one of construction of the document so pleaded, but one of identity and description;

and, in the absence of appropriate allegations, there is nothing in the information under which the letter received in evidence was admissible. There was a fatal and material variance in the allegation and proof offered in support thereof.

The appeal prosecuted by defendant is from the judgment and an order denying his motion for a new trial, both of which are reversed.

We concur: CONREY, P. J.; JAMES, J.

GASKILL v. PACIFIC ELECTRIC RY. CO.
(Civ. 1978.)

(District Court of Appeal, Second District, California. May 27, 1918. Rehearing Denied by Supreme Court July 24, 1918.)

1. CARRIERS — 318(8) — INJURIES TO PASSENGERS — NEGLIGENCE — EVIDENCE — SUFFICIENCY.

Evidence held insufficient to charge defendant railway company with negligence in the operation of its train, whereby plaintiff was injured in attempting to board it while moving.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1313; Dec. Dig. 318(8).]

2. CARRIERS — 346(1) — INJURIES TO PASSENGERS — CONTRIBUTORY NEGLIGENCE — ATTEMPTING TO BOARD MOVING TRAIN.

Evidence held sufficient to sustain a finding that plaintiff's intestate was guilty of contributory negligence in attempting to board a moving passenger train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1401; Dec. Dig. 346(1).]

3. TRIAL — 139(1) — DIRECTED VERDICT — WHEN AUTHORIZED.

The court is authorized to take a case from the jury by directing a verdict for defendant where upon the whole evidence, were a verdict returned for plaintiff, the court would have felt impelled to set it aside as unsupported by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. 139(1).]

4. NEW TRIAL — 147 — GROUNDS — SUFFICIENCY OF AFFIDAVIT.

An affidavit which merely states that a certain witness did not testify as counsel for plaintiff understood she would testify, and that she had made statements inconsistent with her testimony, does not show ground for granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 303-305; Dec. Dig. 147.]

5. NEW TRIAL — 150(2) — GROUNDS — SUFFICIENCY OF AFFIDAVIT.

An affidavit by counsel for plaintiff that he had discovered evidence which would establish a particular fact, but which did not state what particular evidence would be procured upon that point, was insufficient to justify an order for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 308; Dec. Dig. 150(2).]

6. NEW TRIAL — 150(4) — GROUNDS — NEWLY DISCOVERED EVIDENCE — SUFFICIENCY OF AFFIDAVIT.

An affidavit in support of a motion for new trial on the ground of newly discovered evidence was insufficient, where it did not appear therefrom whether the witness had communicat-

ed her knowledge to counsel during the progress of the trial or thereafter.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 310; Dec. Dig. 150(4).]

7. TRIAL — 325(3) — DIRECTED VERDICT — POLLING THE JURY — EFFECT.

The effect of a judgment entered on a directed verdict for defendant is that of a nonsuit, and it is therefore immaterial that upon polling the jury some of them answered that a directed verdict was not their verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 767; Dec. Dig. 325(3).]

Appeal from Superior Court, Los Angeles County; George D. Murray, Judge.

Action by Leo B. Gaskill, administrator, against the Pacific Electric Railway Company. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

M. O. Graves and F. A. Preston, both of Los Angeles, for appellant. Frank Karr and A. W. Ashburn, both of Los Angeles, for respondent.

JAMES, J. Plaintiff as the administrator of the estate of Albert Kolb, deceased, brought this action to recover damages on account of the death of said Kolb, alleged to have been caused by the negligent acts of the defendant corporation. At the conclusion of all of the testimony the trial judge directed a verdict to be returned for the defendant. The judgment, which in effect was that of a nonsuit, was thereupon entered, whereupon subsequently plaintiff made a motion for a new trial, which was denied. This appeal was then taken from the judgment as entered and from the order denying the motion mentioned. The appeal is presented on a statement of the case.

In September, 1911, defendant as a railway corporation was engaged in operating between the city of Los Angeles and the towns of Santa Monica, Ocean Park, and Venice an electric railroad, which was used mainly for the carriage of passengers. On a day about the date mentioned, Albert Kolb, the deceased, in company with a friend named Peter Dombroska, journeyed to the beach town of Ocean Park, where the two men spent the greater part of the day. At about 12 o'clock at night they appeared at one of the stopping places provided by the railroad company at Ocean Park, where they waited for a train to take them back to the city. The men had been drinking intoxicating liquor during the day and evening. At the point where the stopping place referred to was located there was a double-track railway construction, over which the electric cars passed, and which tracks, proceeding from the north toward the station of Venice to the south, cut at right angles, or approximately thereto, various streets which intersected the right of way and defined the blocks of land upon which numerous build-

ings were built. At a point about 60 feet below or southerly from the intersection of Pier avenue with the trolley way was located a sign attached to a post, which bore the legend, "All Cars Stop Here." In considering the action of the court in refusing to submit the issues defined by the pleadings to the jury, the testimony of Dombroska, the friend of deceased, may be taken as furnishing the most favorable evidence offered in the attempt to sustain the cause of action alleged. It may be remarked that, as to many of the material matters testified to by this witness, there was contradictory testimony given on behalf of the defendant. Dombroska testified that he and his friend Kolb had gone to the beach for a day of pleasure. He testified that they had patronized the saloons quite liberally, but he stated that neither he nor his friend at 12 o'clock that night was in a state of intoxication. He testified that Kolb drank "one whisky" in the forenoon and two glasses of beer in the afternoon, while he (Dombroska) had two drinks of whisky in the morning and "a dozen or 18 beers" in the afternoon; that they purchased a pint bottle of whisky before they went to the stopping place where they intended to take the cars for Los Angeles. At the time they arrived at this place it was about 12 o'clock. After going to a neighboring lunch counter and partaking of food, they returned to the railway line and waited for a train. A police officer testified later in the case that he had observed the two men when they first came up and that they were intoxicated; that they asked him when the last car would leave for Los Angeles, and he told them at 12:07; that they then inquired where they could get lunch and he pointed out a lunch counter to them, which they entered; that they did not leave the lunch stand until after the last train had gone, and when they came out he told them that their train had gone, and that the train which was approaching was not going to Los Angeles. Dombroska in his testimony said, referring to this conversation with the policeman:

"I don't remember whether he told me that that car was not going to Los Angeles; that the last car had gone to Los Angeles. I have had a conversation with him, but I don't know if I spoke to him about any car, what time she was going to leave."

This statement by Dombroska may be taken as an admission of the truth of what the officer testified to regarding the inquiries made of him by the two men, and of his responses thereto. Dombroska testified that he and Kolb saw a train approaching from the north and consisting of several cars—the fact was shown by other testimony without dispute that it was a four-car train—and that on the front of the train was a sign bearing the words, "Los Angeles"; that the train, as it approached the point marked as the stopping place by the sign on the post, slowed down to 9 or 10 miles an hour; that

pursuant to an understanding between him and his friend he attempted to get on the front platform of the first car, while Kolb made a like attempt on the second platform of the same car. Dombroska testified that he got on safely, and observed that the car had increased its speed with a jerk, at which moment he observed his friend Kolb fall. The train continued without stopping until a switch was reached, where Dombroska alighted and returned to the place where Kolb had attempted to board the train, and found that he had been badly injured, his legs having been cut off by the wheels of the car, and from which injuries he later died. The operatives of the train testified that the train was out of service at the time of the accident, on its way to the car barns, and that the only sign displayed was a sign reading, "Take Next Car"; that one of the conductors stood upon the front platform and as the train passed the stopping place at Pier avenue, and motioned toward the sign to the several people who were standing there, and at the same time called out that the train was "out of service." It would seem also from the whole of the testimony, a portion of which only is referred to, that both Kolb and Dombroska were intoxicated.

[1, 2] However, even giving full credit to the strongest testimony introduced by the plaintiff, to wit, that of Dombroska, and leaving out of consideration all testimony which conflicts therewith, we are of the opinion that from that evidence no reasonable deduction can be drawn which tends to establish the charge that the defendant was negligent; and, if we assume that the evidence tends to show a negligent act in the operation of the train, then, without any question in our minds at all, by Dombroska's own statements, the men were guilty of contributory negligence in attempting to board a train of cars moving, as Dombroska said, at the rate of from 9 to 10 miles per hour. It must be taken as a fact, for Dombroska did not deny the statement of the police officer witness that he and Kolb were told by the officer that the last train for Los Angeles and gone, and that the approaching train was not one bound for that city. If the train was one upon which it was intended that passengers should be received at that point, Kolb and Dombroska knew that all they had to do was to wait until it had come safely to a stop before attempting to get aboard. They chose rather to take the risk attending the act of getting aboard the rapidly moving cars, and the resultant injury was one which must be directly attributed to their heedless and negligent conduct.

[3] It has been repeatedly held that the court is authorized to take the case from the jury when, upon the whole evidence, were a verdict returned in favor of a plaintiff, the court would have felt impelled to set it aside as unsupported by the evidence.

The cases are collected and cited in the Matter of the Estate of Baldwin, 162 Cal. 472, 123 Pac. 267.

[4-6] Upon the motion for a new trial three affidavits were offered; the first one referring to the testimony of the witness Jessica Maloney. This person it appears did not testify as counsel for the plaintiff had understood that she would testify, and the affidavit only showed she had made statements inconsistent with her testimony given at the trial. There was nothing in the facts stated in this affidavit which established any good cause for the granting of the motion. The second affidavit was made by counsel in the case, who averred in general terms that he had discovered evidence which would establish the fact that the train at the time of the accident stopped and then jerked and threw Kolb under the cars. There is no statement in this affidavit as to what particular evidence the counsel could procure upon that point. The third affidavit was made by Charlotte Jackson, who deposed that she was at the place of the accident on the night in question, and that she stopped near the sign (which was referred to in Dombroska's testimony); that when the two men started to get aboard, the cars made a short stop and immediately jerked and went on; that the jerk of the car threw the younger man backward, and he was run over by the second car. She further deposed that she did not know that any suit was pending until she read an account of the trial in a Los Angeles newspaper, and that she then communicated her knowledge of the case to the attorney for the plaintiff; that the reason she did not appear and give testimony was that she did not know of the suit and was not summoned in the case. It does not appear whether the affiant communicated her knowledge of the case to the counsel before the close of the trial or afterwards. For aught that appears by her statements, she communicated immediately upon reading of the trial in a newspaper, and we cannot surmise whether the trial was in progress at that time or had ended. No other showing was made on the part of plaintiff or his counsel as to why this witness was not produced at the trial.

[7] The point is made that after the jury was instructed to return a verdict for the defendant, the verdict was so returned; upon a poll being taken of the jurors, six answered, affirming the verdict as returned, and six answered that it was not their verdict. The record shows that the court presented a form of verdict to the jury, and directed the foreman to sign the same without the jury leaving the box, and that the verdict was so returned. The effect of the judgment is that of a nonsuit, which might have been entered without any direction requiring the jury to return any verdict in the case. Such being the result, it would seem

immaterial whether the jurors agreed with the court or not, as any view held by them in opposition to that held by the court could not be allowed to prevail.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

WEST v. CITY OF OAKLAND et al. (Civ. 1824.)

(District Court of Appeal, First District, California. May 25, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. MUNICIPAL CORPORATIONS — 336(4) — PUBLIC IMPROVEMENTS — CONTRACTS — "LOWEST RESPONSIBLE BIDDER" — CHARACTER OF MATERIALS.

Under Oakland City Charter, §§ 126, 130, requiring the city council to award a contract to the lowest bidder, except as otherwise provided in the charter, allowing rejection of any and all bids, and requiring rejection of bid of any party who has been delinquent or unfaithful in a former contract with the city, and all bids other than the lowest regular bid, and providing for public work, when costing over \$500, to be done by contract, let to "lowest responsible bidder," the term "lowest responsible bidder" does not mean in every case the lowest bidder who has not been delinquent or unfaithful in a former contract with the city; but where the character of work or materials required calls for the exercise of sound discretion by city officials in determining the lowest bidder whose offer best responds to the requirements of the work, the council may use such discretion and award the bid to such bidder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 862; Dec. Dig. 336(4).]

For other definitions, see Words and Phrases, First and Second Series, Lowest Responsible Bidder.]

2. MUNICIPAL CORPORATIONS — 58 — GOVERNMENTAL POWERS — CONSTRUCTION OF CHARTER.

Where words have been given by the courts a particular meaning, it must be presumed that they were used with such meaning in framing a city charter, in the absence of limiting clauses.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145-147; Dec. Dig. 58.]

3. MUNICIPAL CORPORATIONS — 336(4) — IMPROVEMENTS — CONTRACTS — AWARD TO LOWEST BIDDER — EFFECT OF AWARD.

The honest exercise of discretion of a city council, in considering the adaptability to the use required of goods offered, in determining who is the lowest responsible bidder under a charter calling for award of public works contract to such bidder, is not reviewable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 862; Dec. Dig. 336(4).]

4. MUNICIPAL CORPORATIONS — 893(2) — PUBLIC IMPROVEMENTS — CONTRACTS — LOWEST BIDDER — POWER TO CONSIDER QUALITY OF WORK.

A taxpayer, interested in an unsuccessful bidder for contract for public improvement whose bid was lowest, suing to enjoin award to a higher bidder, could not claim that, because the specifications did not provide for comparison of devices to be offered, the council had no authority to investigate their merits in awarding the contract, where such unsuccessful bidder

co-operated with the council in making such comparisons.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2159; Dec. Dig. ¶ 993(2).]

5. MUNICIPAL CORPORATIONS ¶100—PUBLIC IMPROVEMENTS—CONTRACTS—LOWEST BIDDER—RECORD OF AWARD.

A municipal board, in making a record of its action in the rejection of bids for contract for public work, need not also make an entry of its reason for so doing; but such reason may be shown whenever its action is questioned.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 213–218; Dec. Dig. ¶100.]

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Suit by M. G. West against the City of Oakland and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

R. H. Cross, of San Francisco (Arthur H. Brandt, of San Francisco, of counsel), for appellant. T. C. Van Ness, Jr., of San Francisco, for respondent Pauly Jail Building Co. Paul C. Morf and John J. Earle, both of Oakland, for other respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants and from an order denying a new trial. The facts of the case are these:

The city of Oakland, being about to construct a jail in the upper stories of its city hall, advertised for bids for furnishing and installing said jail. It is conceded that in all respects the legal steps leading up to the award of the contract for such jail construction were duly and regularly taken. In the call for bids the council directed the attention of prospective bidders to the plans and specifications of the proposed work, and required that all bids should be prepared and submitted in accordance therewith. A very material element in the mechanical construction of a modern jail is the locking device, and with reference to this portion of the furnishings to be bid upon the plans and specifications provided that:

"The locking device should be simple in construction and operation and entirely free from complicated parts liable to unusual wear. The device shall have positive lever action, shall have indexes indicating the number of each cell so that the operator can set with the lever each door or the entire bank of cells, which shall then with a single movement of the main operating levers open or close any one door or all."

With respect to locking devices for jails the record sufficiently shows that there are several kinds, or rather designs, of these devices differing in mechanical construction, and either patented or controlled by different companies, who are competitors for the installation each of its own particular form or design of locking device. There were four competitors who responded to the defendant's call for bids—the M. G. West Company, the Pauly Jail Building Company, the Water-

house & Price Company, and the Ralston Iron Works, Incorporated. The M. G. West Company submitted with its bid a design of locking device known as the Stewart locking device, which it offered to install in connection with the rest of the work bid upon for the sum of \$24,528.50. The Pauly Jail Building Company submitted its own pattern of locking device with its bid for the entire work in the sum of \$30,127. The other two bidders were still higher in their bids by several thousand dollars.

When the bids were opened, the officials of the city council held several sessions for the purpose of investigating the merits of the several locking devices presented, and even sent experts in jail construction to the city of Sacramento, and also to the city of Portland, Or., where the M. G. West Company had installed the Stewart design of locking device, identical with that which it was proposed by said company to install in Oakland under its bid; but the city council, after quite a careful and exhaustive investigation, found that the Stewart locking device was unsatisfactory in both design and operation, and that it did not meet in these respects the requirements of the plans and specifications, while, on the other hand, the locking device of the Pauly Jail Building Company did measure up to those requirements. The city council therefore rejected the bid of the M. G. West Company, although it was the lowest in price, and accepted the higher bid of the Pauly Jail Building Company, whereupon this plaintiff, as a citizen and taxpayer of the city of Oakland, instituted this proceeding to have set aside and canceled the award of the contract for the work to the Pauly Jail Building Company and the contract made in accordance therewith, and to enjoin the other officials of the city from the payment of any money due or to become due in the course of its execution.

The court rendered its judgment upon the trial of the cause in favor of the defendants, and denied a motion for a new trial, whereupon the plaintiff prosecutes this appeal.

It was not averred by the plaintiff in his pleadings, nor sought to be proven upon the trial of the cause, that the city council of Oakland, or any of the members thereof, acted fraudulently or corruptly in making the award of the work in question to another than the lowest bidder for such work; but the appellant relies for his success upon this appeal upon his construction of certain provisions of the city charter of Oakland with respect to the award of contracts after competitive bidding for public work. The sections of the city charter thus relied upon by the appellant are sections 126 and 130 thereof. Section 126 is entitled "Requirements for Bids," and after providing with much of detail for the form and method of bidding, and for the opening and examination

of bids, goes on to declare that the city council "shall award the contract to the lowest bidder except as otherwise in this charter provided." It also provides that:

"The council or board, as the case may be, may reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contract with the city, and all bids other than the lowest regular bid."

Section 130 of the charter is entitled "Public Work to be Done by Contract," and provides in part as follows:

"In the erection, improvement and repair of all public buildings and works, in all streets and sewer work, and in all work in and about streams, bays or water-fronts, or in or about embankments or other works for protection against overflow or erosion, and in furnishing any supplies and material for the same, or for any other use, by the city, or in the purchasing of any supplies to be used by the city, when the expenditure required for the same exceeds the sum of \$500, it shall be done by contract, and shall be let to the lowest responsible bidder after advertising for five consecutive days in the official newspaper for sealed proposals for the work contemplated or supplies to be furnished."

[1] It is the contention of the appellant that these two sections of the city charter of Oakland are to be read and construed together, and that, when so construed, the term "lowest responsible bidder," as used in the body of section 130 thereof, and which has reference specially to the construction and equipment of public buildings, is to be held to mean only that the lowest responsible bidder shall be the lowest bidder who has not been delinquent or unfaithful in any former contract with the city, and that otherwise, in every case of contracts awarded by competitive bidding, the council must either award the contract to the lowest bidder or must reject all bids.

[2, 3] We are of the opinion, however, that this is altogether too narrow and binding a construction to place upon these provisions of the Oakland city charter. There are many occasions in the experiences of municipal government when the quality of the thing to be supplied in the course of the public service depends upon conditions which differentiate bidders, and require the exercise of a sound discretion on the part of city officials in determining whether the wares or device which each individual bidder offers in the form of his own exclusive design are such as will meet the particular requirements of the intended work. In order to cover such cases it is quite usual in the provisions of city charters to find such terms as "lowest and best bidder," or as "lowest responsible bidder," and the like; and these phrases have been given by the courts a particular meaning, in which it must be presumed they are used by the framers of city charters, in the absence of other limiting clauses. The term "lowest responsible bidder" has been held to mean the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work, and that where, by the use of these

terms, the council has been invested with discretionary power as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts, in the absence of direct averments and proof of fraud. 2 Dillon on Municipal Corporations (5th Ed.) § 811, p. 1223, and cases cited. And even when in statutes and charters the term "lowest bidder" only is employed, the courts have held that, in determining whether a bid is the lowest among several others, there may be cases where the quality and ability of the thing offered—in other words, its adaptability to the purpose for which it is required—may be considered. *Clapton v. Taylor*, 49 Mo. App. 117; *Cleveland Fire Alarm Co. v. Metropolitan Fire Com'rs*, 55 Barb. (N. Y.) 288. In fact, it is conceded by counsel for the appellant that if, under a fair and liberal construction of this charter, the city council had discretion, in awarding the contract to the lowest responsible bidder, to consider the quality of the respective devices upon which the several bids were predicated, such discretion, honestly exercised, will not be interfered with. We think it evident that the city charter of Oakland is to be given such a construction, and that this is a very appropriate case for the application of the principles above set forth in determining which was the lowest responsible bidder for the furnishing of devices and material to be used in outfitting the city jail, and that in the exercise of its discretion in determining this issue the city council is not only shown not to have acted corruptly, but, on the contrary, is shown to have arrived at its conclusions with quite commendable circumspection and care.

[4] It is, however, insisted by the appellant that since the plans and specifications did not call for nor require the submission of models of locking devices, nor provide for comparison of the merits of the respective devices of the several bidders, the council had no authority to make such investigation, nor to determine as to which bidder otherwise financially responsible was presenting the most suitable and practical device. A sufficient answer to this contention is that apparently the M. G. West Company, far from objecting to these comparisons and investigations, cooperated with the city council in making them, to the extent of exhibiting before that body a working model of its particular locking device, and of suggesting the names of cities where the experts of the city council might observe jails wherein the Stewart locking device of the precise pattern it proposed under its bid to install might be observed in actual operation. The M. G. West Company having thus submitted to the method adopted by the city council for determining the issue before it, the appellant cannot here be held

to complain that the action of that body was in that respect beyond its power.

[5] It is also contended by appellant that it was the duty of the city council, upon determining that the M. G. West Company was not the lowest responsible bidder, to make a specific finding to that effect. Whatever the rule upon that subject may be in other jurisdictions, the question has been determined in this state adversely to the appellant's contention in the case of *Rice v. Board of Trustees*, 107 Cal. 398, 40 Pac. 551, wherein it was discussed and decided that it was not necessary for a municipal board, in making a record of its action in the rejection of certain bids, to also make an entry of its reason for so doing, but that the real reason for its action might be shown upon the trial of the case involving the validity and integrity of the action of the board.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

PORTERFIELD et al. v. CITY OF MODESTO. (Civ. 1512.)

(District Court of Appeal, Third District, California. May 27, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 994(2)—REVIEW—CREDIBILITY OF WITNESSES.

The acceptance by the jury of the truth of the testimony of one witness, rather than that of another, cannot be interfered with by the reviewing court, unless it can be safely said their conclusion was the result of passion and prejudice controlling their minds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3902, 3903; Dec. Dig. \Leftrightarrow 994(2).]

2. MASTER AND SERVANT \Leftrightarrow 150(4)—INJURY—NEGLIGENCE.

For the city engineer in charge of construction of a sewer to send a laborer to work at a point in the trench concededly dangerous, because of removal of the cribbing and existence of a crack, and without specially warning him, was culpable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 306; Dec. Dig. \Leftrightarrow 150(4).]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Estella Porterfield and another against the City of Modesto. Judgment for plaintiffs, and defendant appeals. Affirmed.

L. J. Maddux and E. R. Jones, both of Modesto, for appellant. J. W. Hawkins, of Modesto, for respondents.

CHIPMAN, P. J. This is an action brought by plaintiffs, Estella and Agnes Porterfield, to recover damages for the death of Charles Porterfield, the husband and father, respectively, of plaintiffs. Porterfield's death resulted from injuries received while working as a laborer in a sewer trench being constructed by the city of Modesto.

The councilmen of the city were made parties defendant, but, by consent of plaintiffs' counsel, the court instructed the jury that if they found for the plaintiffs, the verdict should be against the city of Modesto only. The case was tried by the superior court with a jury, and a verdict was rendered in favor of plaintiffs for the sum of \$7,500. Based upon the verdict, a judgment was entered for said sum in favor of plaintiffs, from which defendant has appealed under the alternative method.

The record is singularly free from any claim of errors of the court in conducting the trial. The instructions were clear, and succinct statements of the law necessary for the guidance of the jury and are in no wise challenged. The nature and extent of the grounds for the appeal will be found in the following statement in defendant's brief:

"The theory of the defense at the trial of said action and on this appeal is that the injuries received by said Charles Porterfield, and which resulted in his death, were received not in the line of his duty, but were caused by his gross carelessness in disobeying the orders of his superior, G. H. Freitas (city engineer in charge of the work), and also that the verdict is contrary to the evidence, for the reason that there was an utter failure on the part of the plaintiffs to establish the negligence alleged in the complaint."

In short, the defense was contributory negligence by the deceased. It was alleged in the complaint that the said construction work was in charge of said engineer, Freitas, pursuant to the resolution of defendant; that, on October 9, 1913, a portion of the excavation, or trench, for the sewer pipe had been opened up for some distance, and the sewer pipe laid therein and the trench ordered by the city to be closed; that the soil through which the trench was dug was of such nature that to prevent its caving and falling upon laborers working in the trench it was necessary that the sides of the trench should be secured by cribbing, in the absence of which it was a dangerous and unsafe place to work, a fact well known to defendants; that, notwithstanding such fact and such knowledge by defendants, Porterfield was ordered by defendants to go into the trench and shovel dirt around a manhole being therein constructed; that the bradings or cribbing at the place where Porterfield was directed to work had previously been removed, thus leaving the walls of the trench without support and liable to cave in and fall upon him when he was at work; that it was unnecessary to send him into the trench for the purpose above stated, for the reason that, as had elsewhere been done in filling the trench, earth which had been thrown out of the trench and lying along the sides at the top could have been used for the purpose of filling around the manhole; "that while the said Charles Porterfield was carrying out the instructions of the defendants, and was in said trench for the purpose of shovel-

ing said dirt around said manhole, the said bank of said ditch caved in and upon the said Charles Porterfield and crushed his head, and the said Charles Porterfield did, on the 10th day of October, 1913, die as a result of said injury"; that defendant did not provide said Porterfield a reasonably safe place in which to work, "in that said defendant did not keep said ditch cribbed and braced. That said defendant sent said Charles Porterfield into a place unsafe to work in, with full knowledge of the dangerous condition of said place." With much amplification the complaint sets forth the facts of which the foregoing is a brief summary.

The testimony was that the trench had been closed up to a point near to and east of the manhole, and had also been filled west of the manhole within about 6 or 7 feet of the top. The manhole was in course of construction, and was completed to a point a few feet from the top. The following description of the manner in which the work was done is taken from respondents' brief and is in accordance with the testimony:

"According to the testimony of all the witnesses, the soil in the city of Modesto where the sewer was being constructed had on top a strata of hard material, and underlying this was loose running sand. The cave-in was on F street, between Fifth and Sixth streets. As the excavation was opened up, cribbing was placed in the excavation to keep the ground from caving in. The first row of cribbing extended down 10 feet, and was composed of upright boards placed on both sides of the excavation and held apart by jacks. The second row of cribbing extended down the rest of the distance, and was constructed for the same purpose and in the same manner as the first row of cribbing. Always, prior to the death of Porterfield, it was customary for the excavation to be filled before removing the cribbing. The filling in was done in the following manner: Dirt was filled in until it reached the first row of jacks, then the lowest row of jacks was removed, and dirt filled up to second row of jacks, which were then taken out and the filling in progressed as before until the excavation had been filled up to the top of the lower row or cribbing. Then the lower row of cribbing was pulled out by means of chains and jackscrews, the upper row of cribbing still remaining in place. The lower row of jacks on the upper row of cribbing was then removed, and the filling progressed as before, each row of jacks being removed as the dirt in the excavation was filled until the whole excavation was filled. Thereupon the upper row of cribbing was removed by pulling out the upright boards with chain and jack.

"When Porterfield was killed the cribbing had all been removed but the excavation had not been filled up, and the workmen had placed cribbing at one point only in the excavation, and that was right at the manhole, the excavation being cribbed for the distance of 6 feet directly opposite the place where the manhole was being constructed. The banks of the excavation west of the manhole had cracked, but had not fallen into the excavation. The engineer in charge of the work knew of this fact. Always, prior to the time Porterfield was killed, the excavation had been filled from the top, and at the time Porterfield was killed there was plenty of dirt on top of the ground and adjacent to the excavation to fill up the excavation. This dirt was the same dirt that had come from the excavation. Engineer Freitas was in charge of the work for the city of Modesto. The sewer pipe

had been laid in the trench, and a manhole was being constructed. The manhole was being constructed with brick and was circular in form. As the masons laid the brick it was necessary to fill in dirt around the manhole to give the masons a place to stand on."

The following statement of respondents' counsel presents the only controverted question of importance in the case:

"Some jacks and timbers had been left in the excavation around and near the manhole, and Engineer Freitas told Porterfield to go down into the trench and throw out the jacks and timbers and fill in around the manhole for the purpose of giving the masons a footing on which to work. Porterfield went down into the trench on the west side of the manhole to carry out the orders given him, and the cracked bank of the excavation fell in upon Porterfield and killed him."

There is no substantial conflict in the evidence, except as to the instructions given to Porterfield, in obedience to which he went into the trench, and upon this point the only direct testimony was given by witness G. W. Bowman, a laborer at work at the manhole, and the testimony of George H. Freitas, the engineer in charge. Bowman testified:

That he was working at the manhole mentioned in the evidence, and was asked if he heard Engineer Freitas say anything to Porterfield the afternoon the latter was hurt. "A. Well, he told him to go down in the ditch and clean up and fill in around the manhole. Q. Do you know whether he went down into the ditch or not? A. Yes, sir; he went down. Q. What did he do when he went down there, if you know? A. Well, he taken some jacks and timbers—2x6s and 2x8s out and put them up on the bank. Q. They were lying loose on the ground in there? A. Yes, sir. They had taken out from around the manhole and throwed them back, and he put them on the bank. Q. He put them upon the bank? A. Yes. Q. Now what happened? A. Well, I don't know just how long he had been in there, but it hadn't been but a short time until he got caught—got crushed. He hadn't been very long, however. Q. How did he get crushed? A. Well, he was—it seems as though he was standing leaning up against the north bank, and a chunk of dirt came from the south and caught him. Q. Anyway, he was pinned against the north bank? A. Yes. Q. By a chunk of dirt? A. Yes, sir. Q. How big a chunk was that? A. Oh, I don't know; I guess it would weigh 1,800 or 2,000 or something like that. Q. You were there and saw him pinned? A. No; I didn't see him. I seen him a few seconds afterward. I was up at the mortar box, a little ways. I don't know—15 or 20 feet. Q. What did you do? A. Well, Mr. Freitas and I and Mr. Mueller—Phil Mueller—went down in there and tried to move it and could not do it, and I taken a pick and broke the top of it off, and we pulled him out and laid him out on the bank. * * * Q. Now, had you seen the ground there prior to this time, before he got hurt? A. Yes, sir. Q. What was the condition of it before? A. Well, after the sand tumbled from under it, you know, there was a great long slide of it cracked away back and came out to a peak up here, you know, where that chunk broke off. You see after we taken the timbers out, it cracked out aways from the edge of the ditch, you know; just had been hanging there, I don't know, a couple of weeks or maybe something like that."

He testified that any one going along this ditch could see this crack, and that Mr. Freitas was up and down along the ditch frequently every day. He testified, and other

witnesses testified to the fact, that the top earth for a few feet down was compact, but below the formation was almost pure sand, and had to be cribbed to hold it in place; that the sewer was about 16 or 17 feet deep, and had been filled up at the manhole within 6 or 8 feet of the top; that there was dirt a few feet from the edge of the ditch which had been thrown out in digging it. It appeared that about 25 or 30 feet west of the manhole the trench had been filled up within 3 or 3½ feet of the top. On cross-examination the witness testified that Porterfield went into the ditch at this point. It further appeared that the earth, in filling at this point, assumed a slope down towards the manhole to a point 10 or 12 feet from the manhole. The witness testified:

"That it was after he had seen Porterfield go into the ditch that he saw him throwing out jacks and timbers. * * * He went in there where it was shallow, and went down in there where it was deeper, you see, toward the manhole to clean up. Q. Yes; you say Mr. Freitas told him to do that? A. Yes, sir. Q. Did you hear Mr. Freitas say it? A. Yes. * * * Q. Well, had he taken out all the timbers and jackscrews? A. Yes. He had taken them all out and commenced to shovel the dirt down."

He testified:

"When I got there, you see, to help to get him out, a chunk of dirt had caught him, and he was standing right against the north wall, and the chunk came from the south. * * * His shovel was sitting there when the chunk of dirt caught him, sitting up by his side like."

On further cross-examination he testified, in answer to a question whether he saw Porterfield in the ditch:

"No, I didn't see him in the ditch; only when I was carrying mortar up—you see I carried mortar from the box up to the manhole and dumped it, and I just got dumped out a painful and came back and seen him in there. Q. I say, you did not see Porterfield in the ditch before he was injured? A. Yes. Q. You say you did see him in the ditch? A. Yes."

After the accident Porterfield was found in an upright position with his back against the north wall of the trench, and 10 or 11 feet from the manhole. The "chunk" of earth mentioned by the witness came from the south side, where the crack was.

Engineer Freitas testified:

That he had full charge of the work on the sewer, and that Porterfield was working with pick and shovel under his direction; that, in the afternoon, about 4:30 o'clock, he directed Porterfield to assist in hauling some brick to the manhole referred to in the testimony. "Q. Just state what you told him to do. A. Well, I told Mr. Porterfield that when he got through that brickwork, hauling the brick, that he was to assist the men around the manhole by back-filling or shoveling dirt back against the manhole. Q. Where did you intend or tell him to stand in doing the work, in the ditch or on the ditch? A. I directed that he should stand in the ditch. * * * Q. What did you tell him? A. I told Mr. Porterfield to fill in from a point where the trench was shallowest, and indicated the point where I wanted him to work. Q. Where did you indicate to him? A. I indicated a point down along about between where it is 3½ feet deep and 3 feet deep in the diagram (indicating)."

He testified:

That the sewer at that point was 16 feet deep, but it had been partly filled, and was between 8 and 3½ feet at the point indicated, and sloped down to the manhole where it was about 8 feet deep; that he sent Porterfield into the ditch to fill out the time until 5 o'clock, quitting time; that the ditch was 44 inches wide; that the distance from the point where he testified he directed Porterfield to stand to the center of the manhole was 27½ feet; that the crack in the earth, mentioned by witnesses, commenced about where Porterfield was to stand (a photograph was introduced showing the surface and the ditch in that vicinity). "The back filling was generally done from the top. That was the regular way of doing. Q. What was the object of having it done from this trench on this special occasion? A. Why, at that time the men were working around the manhole, the brickmen and their assistants, and it wasn't possible to throw the dirt from the top over the top of these men; it would interfere with their work. Q. Well, I believe you said it was done for the purpose of filling in a few moments of extra time. A. That is all, just had the time to fill in from that until 5 o'clock, just simply to keep him busy." He also stated that another reason was to avoid making a dust to the annoyance of the brickmasons. * * * "Q. Do you know whether or not the deceased, Charles Porterfield, went to work at the point? A. I do not. Q. Did you see him in the trench at all? A. Not until after the accident happened, and I helped to take him out."

He testified:

That Porterfield was found at a point about 16 feet from where witness directed him to go to work; that he saw no shovel where Porterfield was found; that there was no necessity for his going there in the line of his duty. "Q. What did you say to Charles Porterfield, if anything, about going into dangerous places? A. Well, I don't know that I ever spoke to him directly. I spoke to the men generally—gave them instructions to always be careful and to be sure wherever they were working that everything was safe and secure."

He was asked if Porterfield was present when he gave such instructions and answered, "I believe he was." He testified that at the point where Porterfield was hurt the cribbing had been removed, and that there had been cribbing there and nothing remained to be done but to fill the ditch except the work at the manhole. A photograph was introduced representing a man standing in the trench where the witness testified Porterfield was killed, which, he testified, was 11 feet from the manhole. Several photographs were introduced to assist the jury in understanding the testimony, but we do not think it necessary to incorporate them in this opinion. On cross-examination the witness was again asked what he said to Porterfield, and answered as before:

"I told him I wanted the dirt filled from the point—the shallowest point—low point where the back fill had been made to within 3½ to 3 feet of the top of the ground. Q. Well, did you say all that? A. I don't know that I did. I told him there is the point that I wanted the dirt from. Q. Did you go over opposite or standing where you were? A. Standing where I was standing. * * * Q. All right. Did you say anything more? A. I did not. * * * I was right at the manhole at the time, where they were building the manhole. The top is about 26 inches in diameter and 8 feet down, about 8

feet. * * * The brick was done to about 8 feet of the bottom."

He testified:

That the conditions were such as to justify him in taking out the cribbing "except right around the manhole. Q. Well, there was a big crack there that came after taking it out, wasn't there? A. That occurred after the cribbing was removed. Q. Yes. You saw that crack before the accident happened, didn't you? A. I did. I knew it was there. * * * Q. Now, if you had left the cribbing in there, you could have filled in around the manhole just the same, couldn't you? A. I could have; yes."

Referring to Porterfield when found, he was asked:

"And in what position was he? A. He was standing. Q. He was standing up? A. Yes. Q. And the lump of dirt had apparently just tipped over like that and caught him? A. Yes."

He testified:

That there had been other "cave-ins" during the construction of the work prior to this time. * * * "Q. When you placed Mr. Porterfield at the point where you say you told him to go, did you tell him that to go down further would be dangerous? A. I don't think I did."

He testified that after the ditch had been partly filled there was danger of its breaking back. He also testified that:

When the men were opening the trench at first "they generally throw it pretty well back off the street, and generally get it back to the curb line, which would be about 25 feet from the center line of the street."

[1] Appellant's contention is that the verdict of the jury must necessarily have been formed upon the testimony of these two witnesses.

"We contend," says the brief, "that when the jurors rejected the direct and positive testimony of Mr. G. H. Freitas, and brought in a verdict based upon the testimony of Bowman, they were acting under passion and prejudice, and were carried away by sympathy for the young widow and her child."

And we are admonished to read carefully the testimony, with the assurance that:

"It must be evident from the answers given by Bowman, especially on his cross-examination, that he was trying to build up a case for the plaintiffs."

We have endeavored to comply with this admonition. It is true that Bowman's testimony at the trial did not harmonize in all respects with his testimony at the coroner's inquest; also that he testified at the trial to some important facts not brought out at the inquest. Experience shows that these features are not unusual. In preliminary inquiries, especially in coroner's inquests involving no element of crime, it is seldom found necessary to enter into a minute examination of all the facts. At any rate, the duty of sifting out the truth and determining the credence to be given to testimony given by witnesses is so peculiarly the function of the jury that the reviewing court cannot interfere with their conclusion unless, as is claimed here, it can safely be said that such conclusion was the result of passion and prejudice controlling the minds of the jurors. We do not feel warranted in holding that the

verdict was reached under any such influence.

There was evidence justifying the jury in finding that Porterfield was directed by the engineer in charge to work at a place in the trench admittedly known by the engineer to be dangerous. That it was dangerous appeared from the fact that shortly after he had commenced work Porterfield was killed, and was killed by the caving in of a block of earth which had, for some days, given evidence of its liability to fall into the trench. Whether Porterfield knew of the danger, or to what extent he appreciated it, we do not know. As the cracking of the earth at the point where he was killed was known to Bowman, his fellow laborer at the manhole, it is fair to assume that Porterfield had observed it, but we cannot assume, when told to go into the trench by one who had the authority to direct the work, that he appreciated the danger, and recklessly exposed himself to the consequences and the risks attendant upon the performance of the orders given him. Indeed, we do not understand appellant to claim this. Its claim is that he was told to work at a point in the trench where in fact there was no danger, and that he voluntarily and needlessly assumed a position of peril, and hence plaintiff cannot recover. But appellant overlooks, or entirely rejects, the testimony that deceased was told to go to work at the very point where he was killed.

If we could unhesitatingly accept appellant's view of the evidence, we might accept its construction of the Employers' Liability Act of 1911 (Stats. 1911, p. 798), namely, that while the statute has abolished the doctrine of assumption of risk, and—

"while the employer must furnish his employes with safety appliances and safe places to work, that, nevertheless, the moment the employe, without so being required by his duties and not acting under orders of his employer, leaves that safe place and goes off on private excursions of his own to other parts of the work, he becomes nothing more than a trespasser so far as any liability for injuries received by him is concerned. We do not understand it to have been the intention of the lawmakers, in abolishing assumption of risk, to have intended to make the employer liable regardless of how or when the employe is injured."

[2] This may be a reasonable view of the statute where the facts furnish a proper basis for it. The trouble with accepting it in the present case is that it rests upon an assumed state of facts which the jury, within their powers, manifestly rejected. Upon the facts which the jury were authorized to accept it seems to us that there was culpable negligence in sending the deceased to work in a place concededly dangerous, and especially was it negligence to do so without specifically warning deceased of the danger. The only warning given deceased was of a general nature, at other times, if any was given, or one other occasion, as appeared, when the men were taking out some cribbing. Freitas

was better able to judge of the danger than was deceased, and the latter might well have assumed the work he was told to do was not imminently dangerous or his superior would not have directed him to go there. The law governing such a situation is too well known to call for citation of authorities.

The learned trial judge gave instructions upon the subject, to which no objection is now made, quite as favorable to defendant as the case would admit of, and it seems to us, in taking them as their guide, the jury were supported in their verdict by the evidence.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge, pro tem.

CALIFORNIA CENTRAL CREAMERIES CO. v. CRESCENT CITY LIGHT, WATER & POWER CO. (Civ. 1488.)

(District Court of Appeal, Third District, California. June 2, 1916. On Rehearing, July 1, 1916. Rehearing Denied by Supreme Court July 31, 1916.)

1. JUDGMENT \Leftarrow 485—VOID ON FACE.

To hold a judgment void on its face the fact must appear from an inspection of the judgment roll.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. \Leftarrow 485.]

2. JUDGMENT \Leftarrow 279—JUDGMENT ROLL—DIRECTION AS TO FINDINGS.

Direction of court to counsel to prepare findings is not part of the judgment roll; Code Civ. Proc. § 670, enumerating other papers as constituting it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551; Dec. Dig. \Leftarrow 279.]

3. JUDGMENT \Leftarrow 24—VOID ON FACE.

No matter what errors in practice or procedure may have occurred, the judgment is not void, where on the face of the judgment roll appears a judgment of a competent court, and such as by law it was authorized to make, on a subject-matter within its jurisdiction against a party properly before it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 12; Dec. Dig. \Leftarrow 24.]

4. APPEAL AND ERROR \Leftarrow 931(1)—RECORD—SHOWING ERROR.

The record does not, as is necessary, affirmatively show error; it appearing only that findings prepared by plaintiff at the direction of the court were signed by it, contrary to Code Civ. Proc. § 634, before expiration of five days after service on defendant, as in support of regularity of the court's action it will be presumed defendant waived the service or the five day's time to examine them, or was present and made no objection to the signing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782; Dec. Dig. \Leftarrow 931(1).]

5. TRIAL \Leftarrow 405(1) — FINDINGS — TIME OF SIGNING—WAIVER.

The provision of Code Civ. Proc. § 634, that where the court directs a party to prepare findings a copy of the proposed findings shall be served on all parties five days before findings shall be signed by it, and it shall not sign any findings before expiration of such five days, being solely for the benefit of the party, and not for public reason, may by provision of Civ.

Code, § 3513, be waived by him, giving the court jurisdiction to sign the findings before expiration of the five days.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 963; Dec. Dig. \Leftarrow 405(1).]

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Action by the California Central Creameries Company against the Crescent City, Light, Water & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. A. Cutler, of San Francisco, and Robt. W. Miller, of Crescent City, for appellant. Gavin McNab, of San Francisco, Hersch & McNulty, of Crescent City, and George W. Mordecai and Oliver B. Wyman, both of San Francisco, for respondent.

ELLISON, Judge pro tem. It appears from the record in this case that the court, on the 16th day of June, 1915, directed the attorneys for the plaintiff to prepare findings of facts, conclusions of law, and judgment in favor of plaintiff and against the defendant; that counsel for plaintiff did prepare such findings and judgment and they were signed by the trial judge on said 16th day of June, 1915, and filed. Counsel for appellant invokes the provisions of section 634 of the Code of Civil Procedure and claims that because said findings were not served upon him at least five days before being signed the judgment is void. The part of said section relied upon by counsel is worded as follows:

"In all cases where the court directs a party to prepare findings, a copy of said proposed findings shall be served upon all the parties to the action at least five days before findings shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such five days."

[1-3] 1. The judgment is not void. The court had jurisdiction of the subject-matter of the action and of the defendant. The judgment rendered was one within the jurisdiction of the court. A judgment is only void when, upon an inspection of the judgment roll, it appears that the court either did not have or has exceeded its jurisdiction.

"Whether a judgment is void upon its face can only be determined by an inspection of the judgment roll." *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 800.

"The question is to be determined by an inspection of the record only. *Butler v. Soule*, 124 Cal. 72 [56 Pac. 601]. * * * Unless the record of the judgment itself affirmatively shows that the court was without jurisdiction to render the judgment, it is not void on its face." *Canadian, etc., Co. v. Clarita, etc., Co.*, 140 Cal. 672, 74 Pac. 301.

A judgment prematurely rendered is not void. Thus, a judgment rendered and entered against a defendant by default before the time allowed to him by law to answer is not void, but only erroneous. In *re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 148.

The direction of the court that plaintiff's

attorney prepare findings and judgment is no part of the judgment roll (section 670, Code Civ. Proc.), and hence an inspection of it would not disclose that such direction was given. Upon the face of the judgment roll there appears a judgment of a competent court upon a subject-matter within its jurisdiction, against a party properly before it, and such a judgment as it was by law authorized to make. No matter what errors in practice or procedure may have occurred, such a judgment will not be held to be void, and is not.

[4] 2. Does the record affirmatively show error for which the judgment ought to be reversed? There is in the record what purports to be a "Statement on Appeal," and from it we learn that the court directed the attorneys for plaintiff to prepare findings and that they did so, and that they were signed and filed before the expiration of five days after service upon counsel for the defendant.

"It is presumed that the proceedings in the court below were regular, and where error is claimed, it is incumbent upon appellant to show it affirmatively." *Perry v. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128.

"When a judgment of a trial court is brought here for review, it is incumbent upon the appellant affirmatively to show some reversible error committed by that court. If the appeal is presented upon the judgment roll, the error must appear upon the face of the record. Not only will error never be presumed, but every presumption will be indulged in favor of upholding the judgment." *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848.

"In the absence of an affirmative showing that findings were not waived, in support of the order, it will be presumed that they were waived. *Mulcahy v. Glazier*, 51 Cal. 626; *Tomlinson v. Ayers*, 117 Cal. 570 [49 Pac. 717]. It is not sufficient to merely specify the absence of findings as an error of law, * * * but, in the absence of findings, that findings were not waived, like any other error relied on for a reversal, must be made to appear in the body of the bill of exceptions or in some other appropriate way." *Baker v. Baker*, 139 Cal. 626, 73 Pac. 469.

Under the rule of law established in this state, in support of the regularity of the action of the trial court, nothing appearing to the contrary, it will be presumed that appellant waived the service upon him of the proposed findings or waived the five days' time allowed him to examine them, or that he was present when they were presented to the judge for signature and made no objection but acquiesced in their being then signed. The record does not negative his consent or waiver, and it is not apparent that error was committed in signing the findings on the day they were signed.

[5] 3. It is finally claimed that a waiver of the five days' time in which to examine the proposed findings could not give the court jurisdiction to sign them before the expiration of that time.

The amendment to section 634 of the Code of Civil Procedure relied upon was passed solely in the interest of parties litigant to give them an opportunity to suggest to the

trial judge, before signing findings, certain matters they desired to have incorporated therein in their own interests. The amendment was not enacted for any public reason; and that the provisions of such a law could be waived by a party litigant seems clear. Section 3513 of the Civil Code provides:

"Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

The distinction in the application of the first and second clauses of the section is well illustrated by the reasoning in the case of *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23. In that case it was sought to uphold a final decree of divorce entered before one year had expired after the trial and decision of the case. It was held that the public were interested in divorce cases; that the prohibition against granting a divorce until one year had expired was enacted in the interests of the public; that parties to such action have not the right to control procedure as in other actions; the state is "interested in the matter." "The rule in actions affecting property that the parties interested may control the disposition of the interest involved, and that the judgment of the court will be made to conform to such dispositions, when ascertained, has no application to divorce cases. Hence it follows that in such cases there can be no effectual waiving by the parties of any restriction established by law for the benefit of the public or for the protection of the interest which the state has in the preservation and permanence of the marriage relation."

Our conclusion is that the judgment is not void, and that the record does not affirmatively show error.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

ELLISON, Judge pro tem. In the petition for a rehearing filed herein it is stated: "The opinion herein is in error in stating that the appeal is prosecuted from the judgment roll alone."

We have reread the opinion carefully and fail to find any statement or any reasoning that would suggest that we claimed or assumed, in considering or deciding the case, that the record on appeal consisted only of the judgment roll. On the contrary, the opinion expressly referred to the "statement on appeal" and discussed the force and effect of certain statements of facts therein contained. The court, in considering the case, at all times had it clearly in mind that it was an appeal from a judgment supported by a "statement on appeal," which was deemed for all purposes a bill of exceptions, and that the record contained the full judgment roll properly certified to, as was also the "state-

ment on appeal," and had no other thought.

Counsel for the appellant, in his brief filed before the cause was submitted, did not raise the point that the judgment was erroneous, but only contended it was void. In considering the claim made that the judgment was void, we first considered the question of whether an inspection of the judgment roll alone would disclose that it was void, and held that it did not. It was stated in that connection that the order directing the attorneys for plaintiff to prepare findings is not made by law a part of the judgment roll, and an inspection of it would not disclose that any such order had ever been made, and said:

"Upon the face of the judgment roll there appears a judgment of a competent court upon a subject-matter, within its jurisdiction, against a party properly before it and such a judgment as it was by law authorized to make. No matter what errors in practice or procedure occurred such a judgment will not be held to be void."

We still adhere to the above statement and conclusion. See, in addition to the authorities referred to in the opinion, *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *People v. Temple*, 103 Cal. 447, 37 Pac. 414.

In looking over the opinion it is noticed that on page 2, line 3, it is said: "The judgment is not void." By inadvertence the words "on its face" were omitted, and it is probably this omission that has misled counsel as to the meaning and scope of the decision. The opinion will be corrected to read: "The judgment is not void on its face."

We next considered the case in view of the whole record, including the judgment roll and statement on appeal. From the statement on appeal we found that the court had ordered the attorneys for the plaintiff to prepare findings, and that they were prepared and signed on the same day, but we held that the statement did not affirmatively show error in that it did not show that appellant did not waive service of the findings upon him, and held that the judgment could not be reversed unless error was affirmatively shown, all presumptions being in favor of the regularity of the court's rulings, finding and decision. The questions of whether the provisions of section 670 of the Code of Civil Procedure were mandatory or directory were fully disposed of for the purposes of this case when we held that its provisions were passed for the benefit of individual litigants, not from considerations of public interest, and that a litigant could waive the five days' notice.

All points in the case have received careful consideration in the light of the judgment roll and statement on appeal, and, being satisfied with the conclusion reached, the petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. ANDERSON. (Cr. 338.)

(District Court of Appeal, Third District, California. May 23, 1916.)

1. CRIMINAL LAW §94—VIOLATION OF FISH LAW—EXTENT OF PENALTY—JURISDICTION.

St. 1915, p. 606, entitled an act to amend Pen. Code, § 636, relative to protection of fish, by section 1 provides that Pen. Code, § 636, is amended to read as follows: then follow 12 subdivisions describing the different forms of violation of the fish law, which by each subdivision are declared misdemeanors, without prescribing any penalty. Then follows section 2, merely providing that every person violating any of the provisions of "this section" shall be guilty of a misdemeanor, and punished by fine or imprisonment of not less than \$100, or by imprisonment in jail for not less than 60 days, or by both. Held, that "this section" means section 636, so that a minimum punishment is prescribed for violations thereof, with the result that Pen. Code, § 19, prescribing a maximum punishment for misdemeanors except where a different punishment is prescribed by the Code, does not apply; and therefore the district court has jurisdiction of a prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 137-166; Dec. Dig. §94.]

2. INDICTMENT AND INFORMATION §111(1)—NEGATIVE EXCEPTIONS—FISH LAW.

An information for fishing in violation of Pen. Code, § 636, need not negative that defendant was a member of the game and fish commission, excepted by subdivisions 10 and 12; this being matter of excuse merely.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 295; Dec. Dig. §111(1).]

3. FISH §15—USE OF NET—INFORMATION—"BAY."

Under Pen. Code, § 636, forbidding the casting of any net for purpose of taking fish, it is enough for an information to charge the casting thereof for such purpose within a certain bay, this implying it was cast in waters; a "bay" being composed of water.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 27-30; Dec. Dig. §15.]

For other definitions, see Words and Phrases, First and Second Series, Bay.]

4. CRIMINAL LAW §1213—CRUEL OR UNUSUAL PUNISHMENT.

A fine of \$500 for illegal fishing is not cruel or unusual punishment within the prohibition of Const. art. 1, § 6.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. §1213.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

A. J. Anderson was convicted, and appeals. Affirmed.

Philip B. Lynch, of Vallejo, Frank M. Silva, of Napa, and W. H. Morrissey, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of Napa county for the crime of violating the fishing laws of the state and was convicted of the crime charged. He moved for a new trial, which being denied, he was sentenced to pay

a fine of \$500, and, in default thereof, to be imprisoned in the county jail at the rate of one day for each \$2 of said fine. He appeals from the judgment and order denying his motion for a new trial.

The charge was laid under subdivision 7, § 636, of the Penal Code; the charging part of the information being as follows:

"Did willfully and unlawfully cast, extend, and use a net for the purpose of taking fish at and within fish and game district No. two (2) of the state of California, to wit, at the extreme northern end of and within Fly's Bay, in the county of Napa, state of California," etc.

Subdivision 7 of said section of the Penal Code reads as follows:

"Every person who, in fish and game districts numbers one, two, three, four, fourteen, twenty, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, shall cast, extend or use, or who shall assist in casting, extending or using any net for the purpose of taking fish, mollusks or crustaceans is guilty of a misdemeanor."

[1] 1. Defendant contends that the judgment should be reversed for want of jurisdiction, the contention being that the jurisdiction is in the justice's court, under section 19 of the Penal Code, for the reason that subdivision 7, supra, makes a violation of said subdivision a misdemeanor without specifying the penalty, in which case section 19 governs. It is further contended that, to hold that the superior court has jurisdiction, "it would be necessary to construe section 2 that follows subdivision 12 of section 636 as a part of section 636." Section 2, which follows subdivision 12 of section 636 of the Penal Code, reads:

"Every person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, or by imprisonment in the county jail in the county in which conviction shall be had, not less than fifty days or both by such fine and imprisonment."

The Supreme Court, in *People v. Tom Nop*, 124 Cal. 150, 56 Pac. 786, held that, under section 636, Penal Code, prescribing only a minimum punishment "by a fine of not less than one hundred dollars, or by imprisonment in the county jail not less than fifty days, or by both such fine and imprisonment," for violation of the fish laws, the superior court had jurisdiction. See *People v. Haagen*, 139 Cal. 115, 72 Pac. 836; *People v. Palermo Land, etc., Co.*, 4 Cal. App. 721, 89 Pac. 723, 725. We are only to determine the office of what is designated as "Sec. 2" of the act of May 19, 1915 (Stats. 1915, p. 606), and whether as a part of that act it refers to the preceding subdivisions.

Turning to the statute, we find it entitled: "An act to amend section six hundred thirty-six of the Penal Code of the State of California, relating to the protection of fish." Following the enacting clause the statute reads:

"Section 1. Section six hundred thirty-six of the Penal Code of the State of California is

hereby amended to read as follows: 636. 1. Every person," etc.

Then follow 12 subdivisions describing the different forms of violation which by each subdivision are made misdemeanors. Following subdivision 12 is found: "Sec. 2. Every person," etc., supra. The act purports to amend section 636 of the Penal Code and so declares in what is designated as "Section 1" of the act. It seems to us that, in the so-called "Sec. 2," where it is stated, "Every person violating any of the provisions of this section," etc., reference here is intended to be to section 636, the section being amended, and not to "Sec. 2" itself. There are no "provisions" mentioned in "Sec. 2" of which there may be violations. Manifestly, the direction as to payment into the state treasury to the credit of the fish and game preservation fund "for any violation of any of the provisions of this section" refers to section 636, the subject of the amendatory act, and does not refer to this "Sec. 2," and unless it refers to section 636, i. e., to all the subdivisions of that section, no authority is given to make disposition of the fines and forfeitures therein mentioned. We must give effect to this provision of the statute if it can reasonably be done. The effect we have given seems reasonable to us and no other is possible. Indeed, the paragraph has no meaning at all and serves no purpose whatever unless it can be given the force we have attached to it.

[2] 2. It is further contended that the "information does not state that any public offense was committed." The grounds for this contention are: That there is no mention in the information that defendant is not one of the persons coming within the exceptions provided by subdivisions 10 and 12 of section 636 of the Penal Code. Subdivision 10 provides that the fish and game commission may recover fish from overflowed areas isolated by receding waters, and subdivision 12 authorizes the commission to take fish by nets or traps for scientific purposes. It is claimed:

"That the information, to have stated a public offense, should have charged defendant with taking, extending, or using a net for the purpose of taking fish, etc., from the waters of some prohibited part of the state. Yes, and the information would have to go further and show that the person taking fish from the waters by a net, or otherwise, was no one of the excepted classes mentioned in subdivisions 10 and 12."

The rule as to the necessity to show in the information that the accused does not come within an excepted class is very clearly stated in *Ex parte Horne*, 154 Cal. 355, 360, 97 Pac. 891, as follows:

"The question is whether the exception is so incorporated with, and becomes a part of, the enactment, as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception, and not its location,

which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute. In either case, the only inquiry arises, whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it shall be negative; otherwise it is a matter of defense."

It was further said in the opinion that:

"Such exceptions and provisos were to be negative in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely, they are to be relied on in defense" (citing cases).

We think it was not necessary in the present case to allege that defendant was not a member of the fish and game commission.

[3] Nor is there merit in the claim that the information is fatally defective because it fails to allege that defendant was using a net for the purpose of taking fish "in the waters of the state." The statute forbids the casting, extending, or using "any net for the purpose of taking fish," and the information is in the language of the statute, and it further states that the net was cast for such purpose "at the extreme end of and within Fly's Bay in the county of Napa." This, we think, was sufficient. A "bay" is defined as "an expanse of water between two capes or headlands." The place of casting the net is definitely stated as within a certain fish and game district and within a bay definitely referred to within Napa county. To allege that a net was cast in a certain bay for the purpose of taking fish implies that it was cast in waters. Fishermen do not cast their nets on land for the purpose of taking fish.

3. The court gave the following instructions:

"The defendant is accused by information in this case * * * with violating the fish and game laws of the state of California as in said information set forth. * * * I instruct you that if you believe from the evidence beyond a reasonable doubt that the defendant cast, extended, and used a net in the waters of Fly's Bay in Napa county as charged in the information, you must render a verdict of guilty, even that (though?) the evidence may be circumstantial or partially circumstantial."

The point urged is that the second instruction is inconsistent with the first, in that the first refers to the information and says nothing about waters while the second instruction mentions the waters of Fly's Bay. There is no inconsistency apparent. In effect, the information charged the casting of a net in waters for the reason that a bay is composed of water. The second instruction made the fact charged more definite, but cannot be said to have been inconsistent in any sense prejudicial to defendant.

[4] 4. The claim that the fine imposed was violative of the Constitution of this state and of the United States as excessive is without merit. We do not think it can be said that the punishment was of such character as to

be denominated "cruel or unusual" as contemplated by section 6, art. 1, of the Constitution. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *In re O'Shea*, 11 Cal. App. 568, 105 Pac. 778.

The judgment and order are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

MORRIS v. WINANS. (Civ. 1458.)

(District Court of Appeal, Second District, California. May 26, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. EXECUTION \S 275(2)—SALE—DEFECT IN WRIT.

Execution sale will not be set aside against a bona fide purchaser for a defect in the writ that is amendable, as wrong date of entry of judgment, otherwise sufficiently identified.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 16, 845, 792, 793; Dec. Dig. \S 275(2).]

2. EXECUTION \S 249—SALE—CERTIFICATE OF SALE.

Expression in a certificate of sale under execution, that the sheriff offered the property for a certain sum, is not ground for setting aside the sale, the certificate as a whole showing the property was sold at public auction to the highest bidder, as required by Code Civ. Proc. \S 694.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 697-702; Dec. Dig. \S 249.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by John Edward Morris against Joy A. Winans. From an adverse judgment and order, plaintiff appeals. Affirmed.

Hancock & Lawrence, of Los Angeles, for appellant. Haas & Dunnigan, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment adverse to the plaintiff, and from an order denying his motion for a new trial.

The defendant was the purchaser at sheriff's sale of certain real property described in plaintiff's complaint. A certificate of sale and a deed were issued to him in due course. The plaintiff was the defendant in the action upon the judgment in which the execution was issued. The first judgment entered in that action was vacated on appeal, and, upon a trial being had after reversal, the final judgment was entered, which was one for restitution of premises and costs. The judgment which was set aside on appeal was for restitution and possession of premises, and the sum of \$11.75, costs. The final judgment as entered thereafter was for the sum of \$100 damages and \$89.62, costs. Through error the writ of execution, in describing the judgment upon which it was issued, referred to the date of the first judgment instead of the last, but in all other particulars was regular and conformed to the second judgment, properly stating the amount thereof, et cet-

era. No motion was made to set aside the execution because of any irregularity, and the certificate of sale was issued in December, 1908. This action was commenced in October, 1910, the prayer being that the plaintiff have judgment declaring null and void the sheriff's certificate and deed.

[1] It is claimed, first, that the execution sale was void because in the writ the date of the entry of judgment was misstated in that the date given was that of the first judgment which had been set aside, and not of the last and final judgment in the action. If this irregularity rendered the writ entirely void, plaintiff was entitled to relief; otherwise not. If the writ was merely irregular and subject to an amendment, the plaintiff cannot attack it in this way as against the defendant, a purchaser for value. In the case of *O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389, in considering the power of a court to amend writs, it is said:

"The power of courts to amend writs issuing from them, when defective or irregular, has long been exercised, and in modern times with increasing frequency; nor is it easy to prescribe definite limits to the power (1 *Freeman on Executions*, § 63); and it is also settled that, if the writ be amendable, it will be accorded the same effect, with reference to acts done in execution of it, as if it had been amended. 1 *Freeman on Executions*, § 71b; *Hunt v. Loucks*, 38 Cal. 374 [99 Am. Dec. 404]."

In *Hunt v. Loucks*, cited by the court in the last-mentioned case, we find this expression of the established rule:

"That, as a general rule, an execution must follow the judgment, and conform to it, and that if it varies materially from it, it will be set aside, or quashed, or amended, as the case may be, upon the motion of the parties to it, who are prejudiced by the error, is undoubtedly true, as appears by the cases cited by counsel. * * * We understand the settled rule to be that if the execution be merely erroneous—that is to say, voidable—a sale under it to a bona fide purchaser will be valid, although the execution be afterwards set aside; but if the execution be irregular—that is to say, void—a sale under it, even to a bona fide purchaser, will also be void."

In the same case the court, speaking to the question of a voidable execution as distinguished from a void one, says:

"Nor if B., who is bound to know of the variance between the judgment and the execution, does not interpose by motion for its correction, ought he to be allowed to question the title of a purchaser under it—it may be years afterward? He has a remedy by motion to amend or by action to recover the excess of the levy from the plaintiff in the execution, and the clerk, also; besides, with full knowledge of all defects, he has allowed the sheriff, acting as his agent in the matter, to sell, and the purchaser to buy, without opening his lips; and, in all fairness and justice to the latter, he must keep them closed forever" (citing cases).

The execution in this case was defective only in that the date of the entry of judgment was misstated; there was an existing valid judgment against the defendant at the

time of its issuance, and the amount of that judgment was correctly stated in the writ; there was only one existing judgment and that judgment would appear by an inspection of the record, for the reference as given in the writ referred to and identified the case in which the final judgment had been entered; it was the same case in which the first judgment, entered as of the date mentioned in the execution, had been made and afterwards vacated on appeal. In *Franklin v. Merida*, 50 Cal. 289, that being a case where the execution erroneously recited the date of the judgment, the court said:

"Nor was there any necessity to amend the writ of execution, for, though it erroneously recited that the judgment had been rendered on the 1st day of October, 1874, still it otherwise correctly referred to the judgment in such a manner as to identify it."

Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954, was a case wherein the writ of execution did not correctly state the amount of the judgment. The court there said:

"If amendable, the writ was not void but only voidable, and should have been served and returned by the sheriff. *Freeman on Executions*, § 103; *Hibberd v. Smith*, 50 Cal. 511."

In *Sprott v. Reid*, an Iowa case, reported in 3 G. Greene, 489, 56 Am. Dec. 549, a similar question was considered and the court declared its conclusion as follows:

"The variance between the date of the judgment and the date as recited in the execution is urged as sufficient to invalidate the sale. It is true, as a general rule, that the execution must pursue and be warranted by the judgment. But the variance complained of in this instance is one that might have been amended. It is one of those irregularities which should be regarded as voidable only, and we consider it not enough to invalidate the sale in a collateral proceeding like the present. The execution so describes and identifies the judgment as to render certain the authority upon which it issued, and that was sufficient to invest the sheriff with power to sell."

[2] As a ground for further objection it is said that in the certificate of sale the sheriff declared that he had offered the property for the sum of \$236.55; that, under the provisions of the Code regulating the matter of execution sales, the sheriff was required to offer the property to the highest bidder at public auction. Section 694, Code Civ. Proc. It is true that the certificate of sale issued by the sheriff did contain an expression such as that described, but upon an examination of the whole document, as it is set out by copy in the transcript, we find ample recitals to the effect that the property was sold at public auction in accordance with the statute, and that Winans was the purchaser and highest bidder.

We find no error in the judgment and no sufficient reason why the order denying a new trial should be disturbed.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

FONTS v. SOUTHERN PAC. CO. (Civ. 1468.)

(District Court of Appeal, Third District,
California. June 2, 1916.)

1. MASTER AND SERVANT ⇨278(20)—NEGLIGENCE—EVIDENCE.

Evidence in a servant's action for injury, while assisting in removing a 1,500-pound shaft from a car, held sufficient to authorize a finding of negligence of the foreman in moving it by a pinchbar while one end was elevated, so that the other came onto a steel slate causing it to slip and fall, without any warning of his intention, and while plaintiff was ignorant of such intention and had reason to believe a different method would be adopted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. ⇨278(20).]

2. NEW TRIAL ⇨28—GROUNDS—FAINTING ON WITNESS STAND.

That plaintiff in a personal injury case fainted while on the witness stand, there being no simulation, is not ground for giving defendant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 42; Dec. Dig. ⇨28.]

3. EVIDENCE ⇨512—EXPERT TESTIMONY—MODE OF MOVING HEAVY SHAFTING.

Expert opinion, in a servant's action for injuries in moving a 1,500-pound shafting from a car, as to the proper or more skillful mode of removing down an incline such an article is proper, as necessary for a correct solution by the jury of the question of negligence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2816; Dec. Dig. ⇨512.]

4. MASTER AND SERVANT ⇨293(18)—INSTRUCTIONS—DUTY OF MASTER—METHOD OF WORK.

The instruction in a servant's action for injury in moving a heavy shafting, from the foreman causing it to fall, that it is the master's duty owing to the servant, and which it cannot delegate, to exercise reasonable and ordinary care to adopt safe rules and methods of work, is proper; the word "rules" adding nothing, and the instruction meaning simply that it is the master's duty to adopt the method for performance of the particular work, which, considering its nature and the circumstances, will be the less likely to endanger the workmen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1155, 1156; Dec. Dig. ⇨293(18).]

5. TRIAL ⇨194(19)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction in a servant's action for injury, that, if the jury believed from the evidence certain facts, it was defendant's duty to warn plaintiff, does not unqualifiedly tell them it was defendant's duty to warn, but leaves to their determination whether the facts were such as to have placed on defendant the duty.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ⇨194(19).]

6. APPEAL AND ERROR ⇨1170(9)—HARMLESS ERROR—INSTRUCTIONS.

Even if it was not the master's duty to warn its servant under certain conditions, as the jury were instructed, yet the verdict for him in an action for injury being amply supported on the theory of general negligence pleaded, and it being impossible after an examination of the entire cause, including the evidence, to say that the error, if any, has resulted in a

miscarriage of justice, there cannot, under Const. art. 8, § 4½, be a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543; Dec. Dig. ⇨1170(9).]

7. TRIAL ⇨194(19)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

A requested instruction entering on the domain of fact, by unqualifiedly stating that, on the case as made, plaintiff was not defendant's employe, held to invade the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ⇨194(19).]

8. TRIAL ⇨260(1) — INSTRUCTIONS — REQUESTS COVERED BY OTHER INSTRUCTIONS.

Requested instructions being but a restatement in different language of principles, accurately and clearly covered by other portions of the charge, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⇨260(1).]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Joaquin Fonts against the Southern Pacific Company. From an adverse judgment and order, defendant appeals. Affirmed.

A. A. Moore and Stanley Moore, both of San Francisco, for appellant. Robinson & Robinson, of Oakland, for respondent.

PER OURIAM. Appellant has not pointed out any inaccuracy in the statement of facts as made by respondent, and it may be accepted substantially as the basis for a consideration of the legal questions argued by counsel. That statement, as far as any conflict exists, is the deduction from the testimony favorable to respondent, but, of course, no valid objection on that account can be urged to our according it full credit, since it is not inherently improbable. The action was on account of personal injuries received by plaintiff while in the employment of defendant in assisting in the removal of a steel shafting from a freight car to the station platform, and resulted in a judgment in his favor for \$3,000.

Plaintiff was in the general employment of O. L. Best Gas Traction Company as a moulder's helper, and had been loaned to defendant for the special work in which he was engaged when injured. He had been employed for only a few days by said traction company before the accident occurred. Said shafting was about 21½ feet long, 6 inches in diameter, and weighed about 1,500 pounds. It was smooth and round and was to be used for axles for traction engines. It was in a box car placed on a side track near Elmhurst station, and was part of a shipment which it was the duty of defendant to unload. A few days prior to the accident, one Charles Forsyth, defendant's section foreman, had tried to unload the piece of shafting with the aid of three other men, but found it was too heavy for them to handle. He therefore notified the agent at said station that he needed more men. Said agent

then telephoned to said traction company for more men. Accordingly, two more men were sent, but the six were unable to lift the shafting and upon request plaintiff and another man were sent. Mr. Forsyth had sole charge of the men and was boss of the operation of unloading. The eight men were not able to lift the bar from the floor so as to carry it out of the car. Before the accident one of the workmen informed said station agent that the bar was too heavy for the men to handle. The eight men, however, after great effort, succeeded in lifting one end up to and through the window at the end of the car. The bottom of the window was about three feet and seven inches from the floor of the car and was covered with a smooth piece of steel. The car floor was entirely of wood. The end of the shaft was pushed about three feet through said window, with the other end resting upon the wooden floor about four feet from the car door. Mr. Forsyth, with a "pinch bar," proceeded to move the lower end of said shafting toward said door, moving it about two inches at a time. There was an "apron" consisting of a steel plate placed between the car and the station platform, connecting the open car door with the platform below. The station platform was several inches below the car floor, so that the steel apron was inclined at about the same angle as the shafting. The end of the steel apron extended above the car floor so that a person attempting to pinch the shafting onto the apron would be required to raise the bar several inches. This inclined steel apron had been used a great deal and had been worn smooth. While Mr. Forsyth was thus pinching the bar, the eight men were distributed along in close proximity to it, some on each side, plaintiff with two or three others having their backs toward the car door. Plaintiff occupied a position at the greatest distance from Mr. Forsyth, being at the end and corner of the car. At the time of the accident, some one was looking for rollers to place under the shafting so that it could be rolled out of the car. Before, however, the rollers could be obtained, Mr. Forsyth, without giving any warning, raised the bar onto the steel apron. It is stated by appellant that it is obvious that "the bar would slip when the end Forsyth was prying reached the steel apron. We all know that iron produces but little resistance upon iron." The shafting gave an instantaneous jump, slid for an instant, and came down like a shot. The helpers were surprised and several of them narrowly escaped injury, plaintiff having his foot and toes mashed and his body severely bruised.

The gist of plaintiff's claim from the foregoing facts is that:

"Defendant company failed to supply Forsyth with sufficient men to properly lift the bar down. Forsyth failed to warn the men of what he was going to do, but instead allowed the men

to remain grouped around the shafting while he kept his intentions entirely to himself, raised the bar onto the steel shafting, and caused it to fall down. Forsyth failed to explain to his men the method of work he was going to follow, and allowed all of them to believe that he would cease pinching before the shafting reached the apron, and to believe that the bar would be lifted down from the car window rather than to be suddenly precipitated to the floor. He, alone knowing that he was going to put the smooth steel shafting upon the smooth steel apron, failed to take reasonable or any precautions to prevent this slippery piece of smooth shafting from falling upon the men grouped around it. The recklessness of this act is shown by the fact that the operation of tying a piece of rope around the center of the shafting and fastening the rope around the drawhead of the car would absolutely have prevented the shafting from falling."

[1] We think in the particular thus pointed out by respondent there is presented a sufficient case of negligence, within the purview of the authorities, to warrant the finding of the jury. In fact, it appears to us that Forsyth is chargeable with a high degree of carelessness in failing to give warning to the workmen of his intention. Of course, he may have believed and had cause to believe that they were not ignorant of his purpose, but we cannot so accept the facts. The want of knowledge on the part of plaintiff and the failure of Forsyth to apprise him of what the foreman intended to do seem to be the vital features in the case as far as the liability of defendant is concerned.

Appellant argues, with force and zeal, that the danger was so obvious that the injury must be said to be the result of respondent's own gross and stupid negligence. This view, however, assumes that he had knowledge of the conditions that made the danger imminent and manifest. This assumption, however, as we view it, constitutes the false premise in appellant's argument. There is room for the inference, let us repeat, that not only did plaintiff have no intimation or knowledge that Forsyth intended or was about to raise the end of the bar onto the apron, but he had reason to believe that an entirely different method would be adopted.

In addition to the foregoing contention many points are made by appellant, some of which, presented in the opening brief, are apparently abandoned in the closing argument and will, therefore, receive no specific attention.

[2] Among the incidents of the trial—quite out of the ordinary, we should say—is what respondent denominates the "fainting episode." Plaintiff, while on the witness stand, lost consciousness and fell from his chair. The contention in brief is that this circumstance must have excited the sympathy of the jury, which controlled or at least influenced their verdict. In the morning he had been on the stand for some time within which he had exhibited his injured foot to the jury. In the afternoon he had undergone a searching cross-examination for probably

an hour, when the unfortunate incident occurred. Defendant did not complain of it for several days thereafter, nor is there any contention that the plaintiff was not fully cross-examined after he recovered from his indisposition.

Respondent charges the incident to the menacing conduct of appellant's counsel, and claims that if any detriment was suffered thereby they are responsible for it. It is also argued that, under the peculiar circumstances developed by the cross-examination, the temporary collapse of the witness probably injured his own cause rather than that of his adversary. From a reading of the record we are not justified in holding that there was anything improper in the conduct of said counsel, but we can readily understand how a plaintiff, unacquainted with court proceedings, nervous from sickness and suffering, unfamiliar with our language, and naturally timorous under the influence of a strange judicial investigation, might necessarily misconstrue what was said and done, and be affected thereby as grievously as is claimed. However, we need not pursue the subject as, of course, we cannot say that the verdict of the jury was influenced thereby. The presumption is, manifestly, that they regarded their oaths and determined the cause according to the law and the evidence. If there had been simulation on the part of plaintiff or other intentional misconduct, the case would be obviously different. But to grant a new trial in consequence of the unavoidable illness of plaintiff, sudden though it be and in the presence of the jury, would certainly be something novel in the history of judicial proceedings.

[3] One of the considerations in the case treated most seriously grows out of the action of the court in overruling the objection of appellant to a question propounded to one James Henneberry, an experienced drayman. The interrogatory is of considerable length, reciting the facts as to the freight car, the length and weight of the shaft, its position resting upon the window and the floor of the car, the position of the sheet iron apron, the act in moving the lower end of said shaft towards the door of the car and culminating in throwing said shaft onto said apron, nothing else being done in the way of anchoring the shaft or preventing it from slipping, and concluding:

"That on either side of this piece of shafting were stationed seven men, besides one who was doing the prying with that bar; it being the plan, after having lifted this shaft into the window, to take it down again in the manner in which they had raised it, that is, by the men themselves. Would you say, under the circumstances, that was a proper mode of taking the shaft from the car?"

The objection was that—

"it is not a fair statement or a hypothetical question; also because the matter is not the subject of expert evidence. It does not lay within the domain of expert evidence at all."

The answer was: "I do not think so." A similar objection was also overruled to the following question:

"What reasonable precautions could have been exercised in order to prevent this shaft slipping through and from the window and falling to the floor, as it did, as detailed in my question?"

The answer was:

"The simple method would be to lash it to prevent it from slipping. Just lash a piece of rope around about the center of the shaft, and a couple of men take hold of the end of the rope, prevent it slipping out of the door."

The witness further explained, over objection:

"I would have blocked up under the shaft on the floor of the car. That would be the proper precaution to prevent it from falling to the floor, to put some blocks across here, which would also be underneath that piece of shafting, and after it was pried to the door, to have the block with the end on rollers, to get it out afterwards."

The first objection going to the hypothetical character of the question is not pressed, and we may pass it by with the remark that a basis for the question is found in the record.

The second objection, viz., that the matter about which the witness was asked to give his opinion is not among those subjects as to which expert testimony is necessary and allowable, is not in our opinion, well taken. The general rule is, of course—

"that the opinions of witnesses are never to be received as evidence where all the facts upon which such opinions are founded can be ascertained and made intelligible to the court or jury." 1 Greenleaf on Evidence, § 441b.

Or, as the proposition was clearly stated by Campbell, J., in *Evans v. People*, 12 Mich. 35:

"Where the court or jury can make their own deductions, they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves or described by others, such opinions or deductions should not usually be received."

The general test, then is: Is the matter upon which the opinion of a witness may be asked one as to which the jury themselves are capable of forming a judgment from a description thereof by other witnesses? And, measured by this test, we are inclined to the belief, as before stated, that the opinion of the witness in this case as to the proper or the more skillful mode of removing, down an incline, a heavy, cumbersome, and unwieldy steel shafting, such as the one described in this case, from a freight car to the station platform, was not only proper, but necessary, to a correct solution by the jury of the ultimate question whether the plaintiff's injuries were sustained through the negligence of the defendant by its employé in immediate charge of the work. As seen, the shafting was smooth and round, and weighed about 1,500 pounds. Quite naturally, when raised to an inclined position, it would easily slide downwards and,

if not properly handled, with suddenness and great force. This would particularly be the result where, as here, the smooth iron or steel shafting is moved onto and over a steel-plated apron, worn smooth by use, and inclined at approximately the same angle as the shafting itself. It is therefore plainly manifest that no person but one accustomed to the handling of such heavy and unwieldy materials would know precisely the proper method which, under all the circumstances shown here, ought reasonably to be adopted for the removal of such a piece of iron or steel, of the heft and unwieldiness of the shafting in this case, from one place to another with safety to those engaged or employed in the work of such removal, where, as in the present case, the removal required the shunting of the iron down an incline to the place to which it was to be removed. How such removal is to be accomplished with safety to those engaged in the work of removal is a matter which can obviously be better determined by those who have had experience in the handling of ponderous and unwieldy materials. It is extremely doubtful whether the average jurymen or average judge would be able to say, from the manner of the removal of the shafting from the freight car to the platform as described by witnesses in this case, whether the method so shown was the proper method for its removal to insure the protection of those engaged in so removing it against injury or misadventure of any sort.

As shown, the witness Henneberry was an experienced drayman and as such had been accustomed to handling heavy and cumbersome materials of all kinds. By this experience he undoubtedly acquired a skill in the loading and unloading of heavy freight under a variety of circumstances which a person having no such experience could not be expected to be possessed of. Necessarily a person of such experience would know much better, than one having no such experience, how to proceed in such a case and to prosecute the work of removal according to that method which his experience had taught him was the safer or the less attended by danger to those actively connected with the work. And necessarily, therefore, his opinion as to the proper method of carrying on the work would be superior to that of the jury founded upon the testimony of witnesses who had given only a general description of the circumstances under which the work of removal was attempted. It hence follows that the matter upon which the witness was permitted to express his opinion was not one within the common knowledge of men, and that the testimony was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue. The conclusion thus reached upon this point is, we think, sustained by the cases. A few of these we may well refer to.

In *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 Pac. 972, the plaintiff was injured by an insecure derrick and the court held that:

"Derricks being of such limited use and complicated construction that an ordinary person is not familiar therewith, civil engineers of long experience, who are familiar with the mechanical principles on which they are constructed and operated and with their strength and use, are competent to testify as expert witnesses in relation thereto, and as to the sufficiency and security of the counterbalancing and fastening of the derrick in question."

The case is an instructive one and sets forth clearly the principle upon which such evidence is admitted.

Snyder v. Holt Manufacturing Co., 134 Cal. 324, 66 Pac. 311, was an action for personal injuries, caused by reason of the separation of a defective bolt and nut used to connect the header and separator in a side-hill combined harvester, manufactured for and sold to the plaintiff by the defendant, and it was held that:

"The question whether the bolt and nut were proper and sufficient for the coupling together of the parts of the harvester is peculiarly one for the evidence of a qualified expert, experienced in the construction of such machinery for the purpose intended."

In *Silveira v. Iversen*, 128 Cal. 190, 60 Pac. 688, it was held proper to ask a witness: "How can it be determined, Mr. Erickson, whether a rope has become rotten and unsound?"

In *Callan v. Bull*, 113 Cal. 503, 45 Pac. 1017, plaintiff was injured through the negligent construction of a jetty, and witnesses were called as experts in his behalf for the purpose of showing that the structure to which a certain mat was suspended was not properly constructed to sustain the weight of the mat, and also to show what weight a cap of the dimensions of the one in question would sustain. These questions were objected to by the defendant, upon the ground that it was for the jury to determine, from the facts that might be shown in the case, whether the structure was properly made. But the Supreme Court said:

"These objections were properly overruled. The matters sought to be shown by these witnesses * * * were matters not presumably within the common knowledge of men, and were eminently proper to be shown by those who had made these subjects a matter of special study. *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131 [35 N. E. 675]."

In *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983, expert testimony was admitted as to whether defendant's car could, with proper care and attention, have been stopped in time to avoid a collision and the Supreme Court said:

"Nor is there any question but that the subject was one upon which the opinion of the witness was admissible. The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled is not a matter of such common knowledge that the jury could judge as intelligently as one skilled in their use. It was therefore proper to resort to expert evidence."

Mulholland v. Western Gas Construction Co., 21 Cal. App. 44, 131 Pac. 110, involved personal injuries through the explosion of a scrubber in a plant, and a witness was permitted to answer over objection these questions:

"Is it proper, considering the safety of employees, to equip a scrubber without steam pipes? What is necessary to make a plant reasonably safe for the protection of the plant? Is the steam pipe necessary for the safety of the men in and about the plant?"

It is true that the court said that, "if his answer as to what would be a safe way to equip a scrubber stood alone without explanation, we should be inclined to hold that the overruling of objection thereto was prejudicial error," but the witness gave the reasons for his conclusion and this rendered innocuous the form of the question, so the court held, intimating, however, that it was so largely a matter of discretion with the lower court that if the ruling had been the other way it would not have been error.

In *McLain v. Dahlstrom M. Door Co.*, 19 Cal. App. 475, 126 Pac. 391, plaintiff was injured by an insecure elevator and it was held that the lower court properly allowed evidence to show the insecurity of a knot such as that shown, and the mode of tying knots in such a way as to prevent slipping and accident, which is proper matter of skill, and to show the weakness which was apparent from an inspection of the insecure knot, if had.

In *Colsch v. Chicago Railroad Co.*, 149 Iowa, 176, 127 N. W. 198, 84 L. R. A. (N. S.) 1013, Ann. Cas. 1912C, 915, it was declared that expert testimony is admissible on the question of the proper loading of live stock in a car.

In *Leslie v. Granite Ry. Co.*, 172 Mass. 468, 52 N. E. 542, it was held that an expert can testify as to the methods of handling heavy stones with a derrick.

In *Smith v. Dow*, 43 Wash. 407, 86 Pac. 555, the court declared that an expert may state that the method used in tying lumber for hoisting was not safe.

In *Palmquist v. Mine & Smelter Co.*, 25 Utah, 257, 70 Pac. 904, it was held, in an action for personal injury alleged to have been sustained in moving a boiler, that expert evidence as to the proper method of moving boilers and the appliances ordinarily connected therewith is competent.

For further illustration of the application of the rule permitting opinion testimony, we refer to the following cases: *Zarnik v. Reiss Coal Co.*, 183 Wis. 290, 113 N. W. 752; *Ala. So. Ry. v. Vail*, 155 Ala. 382, 46 South. 587; *O'Brien v. Look*, 171 Mass. 36, 50 N. E. 458; *Wolfe v. Mosler Safe Co.*, 139 App. Div. 848, 124 N. Y. Supp. 541, a case which, on its facts, is strikingly similar to the case at bar; *Melly v. St. Louis & S. F. Ry. Co.*, 215 Mo. 567, 114 S. W. 1018.

Counsel for the appellant cite many cases

which, they insist, support the view that the opinion of the witness Henneberry was upon a matter within the knowledge of the jury or, in other words, not within the range of those subjects upon which the opinions of experts may be received. We need not take the time to review herein all those cases. It is sufficient to say that we have carefully read them and found no difficulty in distinguishing them from the present case. The facts are wholly different from those of this case. The opinion testimony which had been allowed by the trial courts in those cases, and which the appellate courts held to be incompetent and inadmissible, related to ordinary matters as to which the average person could form a correct opinion without the aid of the opinion of those claiming to have had special experience in such matters. For instance, it was held by the Supreme Court of Iowa that the opinion of a witness as to the number of men necessary properly and safely to move a locomotive tender loaded with coal by means of a pinch bar was upon a matter which the jury themselves were competent to determine from a simple statement of the facts. *Cahow v. Chicago Ry.*, 113 Iowa, 224, 84 N. W. 1056. And likewise, in an action wherein the plaintiff set up personal injury through the negligence of the defendant in not properly securing pipe which was being hoisted in bundles of six, it being claimed that the defendant had negligently failed to place bagging at the end of the bundle and thus secured it so as to prevent the single piece from falling out, it was held that the opinion of a witness that the pipes were properly fastened was not admissible; the matter upon which such opinion was given not being such as to require the opinion of an expert. The court said that:

"The witness could properly state the relative efficiency of different methods of hoisting the pipe; but when he was asked to state whether it was necessary, in the proper performance of a duty, to attach bagging to the end of the pipes, he was asked the question which the jury could determine upon a statement of simple facts." *New York Electric Co. v. Blair*, 79 Fed. 896, 25 C. C. A. 216.

In the present case, it will be noted, the witness was not asked how many men would be required to move the shafting properly and with safety; nor (it may be added) was he asked whether the method adopted for the removal of the shafting was unsafe or characterized by inherent or other negligence. He was, as seen, merely asked if the manner in which it was attempted to remove the shafting, as shown by the testimony of the witnesses, was the proper way to do the work, which, it is clear (as counsel suggest), involved certain complex operations. And he not only declared that the method adopted was not the proper way of handling the heavy and cumbersome article under the circumstances, but (as an expert should) explained the reasons for his conclusion. In brief, the whole sum of the witness' testi-

mony was the expression of an opinion upon the relative efficiency of different methods of unloading and removing the shafting. *New York Electric Co. v. Blair*, *supra*.

Counsel for the defendant, Southern Pacific Company, devote considerable space in their briefs in criticism of the alleged refusal by the trial court to grant their client's alleged motion for a nonsuit. But a reply to the extended argument addressed to that proposition is to be found in the fact that, while it appears that a motion for a nonsuit was made by the corporation, C. L. Best Gas Traction Company, which was joined with the Southern Pacific Company as a party defendant, and the same granted, it nowhere is made to appear in the record that the Southern Pacific Company made any such motion.

[4] The next assignments involve attacks upon certain portions of the court's charge to the jury, and upon the action of the court in refusing to allow certain instructions proposed and requested by the defendant. The first of the given instructions to which objection is made reads:

"I instruct you that it is the duty of the master to exercise reasonable and ordinary care to adopt safe rules and methods of work, and that this is a personal duty which the master owes to its servant, and which cannot be delegated or transferred to another in such manner as to relieve it, the master, from responsibility thereof."

That said instruction contains a correct statement of a legal principle in the abstract there can be no doubt; and we are unable to perceive why it is not a rule which may appropriately be stated in almost any case of personal injuries where the latter are alleged to have been sustained by a servant through the negligence of his master while such servant is engaged in the performance of duties the execution of which is attended by more or less danger to the employé.

It has been declared by the text-writers and uniformly held by the courts that:

"It is the duty of railroad companies to exercise reasonable care in the matter of safeguarding and protecting their employés, while engaged in the discharge of their duties as such against the negligence of common employés, or their own negligence through the operation of cars or other machinery, and, to that end, make, promulgate, and enforce reasonable rules for the government of their employés in the performance of their duties as such." *Payne v. Oakland Traction Co.*, 15 Cal. App. 127, 144. 113 Pac. 1074, 1081, and the authorities therein cited.

Of course, this rule is applicable only where the master is engaged in a complex or dangerous business, or a business the carrying on of which is, by reason of its intricate character and other conditions, itself dangerous to employés engaged in the work of actually prosecuting it; and, manifestly, whether in any particular case such rules should be made and promulgated must depend upon the nature or character of the business and the

conditions necessarily surrounding the prosecution thereof.

But even if this were a case to which the rule above mentioned is not strictly applicable, we yet are unable to perceive in the instruction anything which renders it inapplicable to this case; for, as we read and construe it, the instruction, as before suggested, merely states a principle of law quite pertinent to nearly all cases in which an employé claims damages for personal injuries received while engaged in the performance of work for his employer. There clearly can be no doubt that, in any case, it is the duty of the master to use and employ all reasonable precautions for the safety of those in his service and to that end provide his employés with the safest reasonably available methods and means which may be employed for carrying on the work. *Bush v. Wood*, 8 Cal. App. 647, 656, 97 Pac. 709; *Buzzell v. Laconia Man. Co.*, 48 Me. 113, 77 Am. Dec. 212, and cases therein cited. And this is in effect all that the above instruction declared to the jury. If the word "rules" were omitted from the instruction, no possible question could arise as to the applicability of the instruction to this or (as before suggested) almost any other case of personal injury which was sustained by a servant while prosecuting work assigned to him by his employer. We cannot see, however, that the use of the word "rules," unaccompanied by a full exposition of the rule requiring in certain circumstances employers to adopt, promulgate, and enforce rules for the guidance of their employés while actually engaged in the discharge of the duties of their employment, makes the instruction say anything more than what it would have imparted to the jury with that word eliminated. What the instruction really means and was undoubtedly intended to convey was, not that it was the duty of the company to promulgate and enforce set rules according to which the unloading of cars should uniformly be carried on (a course which, in its application to work so varied in character, it would at least seem is not feasible or practicable), but that, as to the particular work in hand, because of its rather intricate character, it was the duty of the defendant to furnish its employés employed in the work with proper appliances and to point out the proper method for performing it with safety to themselves. In short, the instruction, justly and rationally construed by the light of the connection in which it is applied, simply means that it is a duty legally resting upon the master to adopt that method for the performance of the particular work which, considering the nature of the work and the circumstances under which it must be performed, will be the less likely to endanger the lives or limbs of the employés engaged in performing it. As so construed and as no doubt the jury so understood it, the instruction, as before stated, merely de-

clares a general principle applicable to the relations existing between master and servant and announces one of the general duties owing from the former to the latter. What less than this could reasonably be expected or required of an employer in any case or under any circumstances, we are unable to conceive.

[5] The next complaint of the appellant is aimed at the action of the court in reading to the jury several instructions in which it was stated, in substance, that, if they believed from the evidence that the method adopted for unloading the shafting or bar in question from the car was a perilous one and—

"that the perils of the method so adopted were known to defendant's foreman before or at the time of the accident, and believe that the plaintiff did not know and in the exercise of reasonable care should not have known of such peril, then it became the duty of such foreman or boss to notify the plaintiff thereof; and if you believe from the evidence that plaintiff was injured solely by reason of such failure of duty to notify the plaintiff, then in that case I instruct you that your verdict must be against the defendant * * * and for the plaintiff."

One of the grounds of objection to the above instruction and others addressed to the same proposition is that thereby the court unqualifiedly and plainly told the jury that the duty to give warning rested on the defendant. It is further claimed that the instructions were wholly inappropriate to this case, since (so it is argued) the danger attending the act of unloading the heavy and unwieldy bar was so obvious that such danger must have been plainly patent to the plaintiff and the other workmen assisting in the work; hence, so it is urged, the instructions must be assumed and held to have unduly influenced the jury against the defendant.

We are not prepared to acquiesce in the propositions so stated. A reading of the instructions will readily disclose that there exists no tangible ground for declaring that they did not fairly and plainly submit to the sole determination of the jury the question whether the facts were such as to have placed upon the defendant the duty of warning the plaintiff of the perils or hazards of the work in which he was temporarily engaged.

[6] As to the second ground of objection to the instructions, we perceive no necessity for entering into an analysis of the situation as it is presented here to show that the doctrine of warning was, as we believe is true, pertinent to this case. Briefly, we may observe that there are considerations exposed by the evidence upon which the propriety of such instructions in this case may well and reasonably be maintained. The plaintiff, however, relied upon general negligence as well as upon alleged special acts of omission on the part of the defendant which constitute actionable negligence. The verdict is amply supported upon the theory of the general negligence set up in the complaint.

Therefore, even if it were true and necessary to declare that warning by the foreman to the employes of certain unexpected perils necessarily arising in such a case and which perils are obvious to experienced persons, but not so to the one inexperienced in such work, as the evidence shows the plaintiff to have been, was not among the duties legally resting upon the defendant in this case, yet, after an examination of the entire cause, including the evidence, we cannot justly say that the error in giving the instructions upon that subject, if error it was, has resulted in a miscarriage of justice. Section 4½, art. 6, Const.

[7] Counsel for the appellant concede that no just fault can be found with that portion of the court's charge in which it was declared that, if the C. L. Best Company loaned the plaintiff to the Southern Pacific Company for the special service of unloading the iron bar, and that the plaintiff came under the sole power of control and direction of the latter company, and that plaintiff expressly or impliedly consented thereto, then and in that event the plaintiff for the time being became the servant of said Southern Pacific Company; but they insist that the court erred, to the prejudice of their client, by refusing to state the converse of that proposition as proposed in their own language. But, as we read the instruction upon that subject as proffered by the Southern Pacific Company, it goes further than merely to state the converse of said rule upon a hypothetical or assumed situation for which there might be support in the evidence. It would have told the jury unqualifiedly and unconditionally that, upon the case as made, the plaintiff was not an employé and under the control of the Southern Pacific Company. Clearly, the instruction as so proposed is inconsistent with the one given, entered upon the domain of fact, and was properly refused.

[8] Objections are urged against some other instructions dealing with other questions arising in the case. To these we deem it unnecessary to give special attention herein; for, as to the action of the court with reference to the instructions, it is enough to say generally that we have carefully examined the entire charge of the court and have found that, generally speaking, it states all the principles of law pertinent to the issues with accuracy and clearness. And for this reason there is no ground for holding that the court erred in rejecting certain instructions proposed by the defendant. It is obviously true that a principle or rule of law, pertinent to the issues and once stated, is not required to be repeated in other portions of the charge. The rejected instructions in effect merely embraced a repetition of principles in different forms of language which the court announced and submitted to the jury.

The judgment and the order are affirmed.

PEOPLE v. HOVIS. (Cr. 627.)

(District Court of Appeal, First District,
California. June 12, 1916.)

CRIMINAL LAW §511(2)—**EVIDENCE OF ACCOMPLICES—SUFFICIENCY OF CORROBORATION.**

Evidence held to sufficiently corroborate testimony of accomplice in larceny of automobile, being in itself sufficient, without the aid of the accomplice's testimony, to connect accused with the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1129; Dec. Dig. §511(2).]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Ralph O. Hovis was convicted of grand larceny, and from the judgment and order denying new trial, he appeals. Affirmed.

Curtis C. Legerton, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the crime of grand larceny, and from an order denying the defendant a new trial.

The only point urged upon the hearing of this appeal is as to whether or not the testimony of the accomplice of the defendant in the theft of the property—an automobile—has been sufficiently corroborated by other evidence to satisfy the requirements of the statute. We have carefully examined the record, and are satisfied that there is ample evidence which of itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the crime.

The testimony of the accomplice Daley was to the effect that in conversation with the defendant Hovis shortly before the commission of the crime, with reference to the taking and disposal of an automobile, the defendant had told him that if he (Daley) would get the machine the defendant Hovis would tell him where to take it and show him where he could sell the machine, and that they would share the proceeds. He also testified circumstantially to the efforts of himself and the defendant to dispose of the machine after it had been stolen. Other and independent witnesses testified that Hovis and Daley were seen together with the machine on the day of its theft; that they took it to a garage together and left it there for two or three weeks; that the defendant applied to a man named Allyn, who lived in San Jose, to help him find a purchaser for such a machine for a young friend of his who wanted to make a quick sale. Mr. Allyn referred him to a Mr. Seifert in San Jose who might become a purchaser, whereupon the defendant and Daley took the machine to San Jose, where they went under assumed names, and where they attempted to have

Seifert purchase the machine, and from whom they received \$25 on account of a sale; that not long after the theft of the machine he went to the office of a lawyer in San Francisco, and there caused to be made out the form of a bill of sale of an automobile, leaving blank the place for its description, which was afterward filled in with the description of the stolen machine.

We think these facts amply sufficient to furnish the needed corroboration of the testimony of the accomplice under the rule as laid down in the case of *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103.

The judgment and order are affirmed.

PORTER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2089.)

(District Court of Appeal, Second District, California. May 31, 1916.)

1. PROCESS §96(4)—**SERVICE BY PUBLICATION—AFFIDAVIT OF NONRESIDENCE.**

An affidavit for publication, alleging that defendant never resided in California, but that her home and residence was a certain address in Massachusetts, held sufficient to support an order for publication, under Code Civ. Proc. § 412, authorizing publication where defendant resides outside the state.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. §96(4).]

2. PROCESS §96(4)—**SERVICE BY PUBLICATION—AFFIDAVIT OF NONRESIDENCE.**

Affiant's failure to give the information upon which the statement of residence was based, as required by superior court rule 23, does not invalidate the order for publication.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. §96(4).]

3. PROCESS §96(2)—**SERVICE BY PUBLICATION—EFFECT—COURT'S POWER TO DISREGARD.**

A superior court cannot disregard an order for service by publication and service thereunder, where the supporting affidavit conforms to the statute and no fraud is shown.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 114-116, 119; Dec. Dig. §96(2).]

Mandamus proceedings by Walter Porter against the Superior Court of the State of California for the County of Los Angeles, Hon. J. P. Wood, Judge thereof, and Hannah M. Porter. Writ granted.

Lewis Cruickshank, of Los Angeles, for petitioner.

JAMES, J. Petition for mandate. From the facts stated in the petition it appears that the petitioner herein, in August, 1915, filed a complaint in the superior court of Los Angeles county by which action a decree of divorce was sought. After summons had been issued and returned by the sheriff without service, an affidavit was made and filed by the plaintiff, upon which affidavit the court, by Hon. Lewis R. Works, made its order directing service of summons to be

made by publication. As grounds for the order the affidavit set out that the last known residence and address of the defendant was at—

"69 Lakeview avenue, Lynn, Massachusetts; that defendant at all times since the commencement of this action and for some time prior thereto was and is now an actual bona fide resident of the state of Massachusetts; that defendant is not now nor has she ever been, a resident of the state of California, nor has she ever resided in said state of California; affiant knows that a search anywhere in said county or state would be of no avail; * * * that the home of the defendant at the time of the commencement of this action and for some time prior thereto was 69 Lakeview avenue, Lynn, Massachusetts; that she was the owner of said property and made her home therein."

It is recited that the publication of summons was duly made, and that a copy of the summons and complaint, as required by the order of court, was deposited in the United States mail as registered matter, and was on the 24 day of September, 1915, actually delivered personally to the defendant in the divorce action; that the proof of publication of summons was regularly made and filed, and default entered; that thereafter the case was duly and regularly set for trial, to be heard on the 15th day of February, 1916, before Hon. J. P. Wood, judge of said court; that, at the time the case came on for hearing, the court, "deciding on his own motion" that the affidavit for the order for publication of summons was insufficient, struck the cause from the calendar; that the following minute order was thereupon made:

"It is hereby ordered that default of defendant be set aside and that another affidavit for publication of summons be filed, and further that the summons be republished and cause off calendar to be reset."

It is as to the authority of the court to make the last order mentioned that question is made by the petition filed herein. It may be noted that the order as set out does not purport to vacate the order made directing that summons be served by publication, but only that the default of the defendant be set aside. It does appear to direct that another affidavit for publication of summons be filed and the summons republished; but, so far as the record presented shows, the order made by the first-named judge, authorizing the service of summons by publication, still exists, and has never been modified or changed. But evidently this order was intended to have the effect of setting aside the order as made by Judge Works, and it seems to be assumed in this proceeding that it may be treated as of such effect. The return made herein does not call into question the verity of any of the material facts set out by the petitioner, but there is attached to the return a copy of the rules of the superior court.

[1, 2] Our attention is particularly directed to rule 28 of that court, which provides that in any application for an order to publish summons, if the residence (of the defendant) is known and stated in the affidavit, "the affi-

ant must also give the information upon which such statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit." Section 412 of the Code of Civil Procedure provides that service of summons may be made by publication "where the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state. * * *" In order to authorize the making of the order, such facts as are relied upon must be established to the satisfaction of the court. If the affidavit presents facts sufficient to establish either of the conditions specified in section 412 of the Code of Civil Procedure, and the court acts thereon, granting the order, such order will be good and valid, notwithstanding that the court in its discretion might have, before making such order, required further proof to be made. The affidavit in this case plainly and directly stated that the defendant never had been a resident of the state of California, that she never had resided in the state, and that her home and residence was in Lynn, Mass., the particular street number being given. These statements were sufficient prima facie to support a valid order of publication. *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865. The important thing was to prove to the satisfaction of the judge making the order for publication that the defendant did not reside within the state. All that the rule of the superior court to which our attention has been called requires is that, in making proof of the facts as to the residence of an absent defendant, the affidavit "must also give the information upon which such statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit." If the allegations of the affidavit were sufficient to warrant the conclusion that the fact was that the defendant resided out of the state at the time of the application, regardless of whether the rule of the superior court had been strictly followed or not, the order for publication of summons would be fully authorized under the section of the Code we have mentioned.

[3] There is no doubt of the right of a judge to vacate an order for publication of summons where, upon examination of the affidavit, he finds a total lack of a statement of facts sufficient to authorize the order to be made in the first instance; and we may say further that such right might exist where it appeared that the affidavit was fraudulent. No such ground as the last mentioned is suggested here. The fact that a different judge than the one who made the first order acted in attempting to set it aside is of no moment. The second named judge would have no greater authority—and no less—than the judge who first examined the affidavit and passed upon its sufficiency. We think that

the petitioner is entitled to the relief asked for.

It is ordered that a peremptory writ of mandate issue, requiring the respondent court to reset the cause on the trial calendar and hear the same within such reasonable time as may be convenient, considering the business of the court. Petitioner to recover his costs herein incurred.

We concur: CONREY, P. J.; SHAW, J.

HICKS v. BUTTERWORTH. (Civ. 1450.)
(District Court of Appeal, Second District, California. May 25, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. ANIMALS ⚡91—**TRESPASSING—STATUTES—REPEAL.**

St. 1877-78, p. 176, giving right of recovery for trespassing of animals, in certain counties, on private lands, though not fenced, is not repealed by St. 1907, p. 999, giving, generally, right of recovery for trespassing of animals on planted lands inclosed by fence.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 329; Dec. Dig. ⚡91.]

2. LANDLORD AND TENANT ⚡330(1)—**RENTING ON SHARES—INJURY TO CROP—RECOVERY FOR INJURY.**

Under a lease providing that as rental the lessee shall cut and bale the alfalfa crops and deliver and set apart half thereof to the lessor, title to the crop is in the lessee, so that he may sue for injury by another before actual division.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1394-1397, 1399; Dec. Dig. ⚡330(1).]

Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Archie J. Hicks against Harry J. Butterworth. From an order denying his motion for new trial, defendant appeals. Affirmed.

Will H. Willis and Davis & Rush, all of Los Angeles, for appellant. Harriman, Ryckman & Tuttle, of Los Angeles, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained by plaintiff on account of trespass committed by defendant's livestock. The case was tried before a jury, which rendered a verdict in favor of plaintiff, upon which a judgment was entered against defendant, whose motion for a new trial was denied, and from which order he appeals.

It appears that plaintiff was a tenant in possession, under a lease from the owner, of the premises involved, upon which at the time of the trespass he had certain fields of alfalfa growing, and a lot of unbaled hay in the stack; that during the period extending from July 1 to November 1, 1910, defendant's neat cattle entered upon said land, ate and destroyed the growing alfalfa and stacks of hay thereon. Neither the complaint nor proof showed the premises to have been, at

the time, inclosed by a substantial fence, and appellant, conceding the trespass and resultant damage as alleged, insists that plaintiff is not entitled to recover therefor. In 1878 the Legislature passed an act entitled, "An act concerning trespassing of animals upon private lands in certain counties in the state of California" (Stats. 1877-78, p. 176), which act and the provisions thereof were by an amendment thereto approved March 30, 1878 (Stats. 1877-78, p. 878), made to include the county of Los Angeles. This act provides:

"Section 1. It is unlawful for any animal, the property of any person, to enter upon any land owned by or lawfully in the possession of any person other than the owner of such animal.

"Sec. 2. The owner of, or person who is in the lawful possession of, any land trespassed upon, in violation of this act, is entitled to recover, by action in a court of competent jurisdiction, from the owner of, or person in possession of, or person chargeable with the care of, the trespassing animal or animals, all damage sustained by reason of any such trespass, together with costs of suit."

Under the act of 1878 just quoted, no doubt exists as to the plaintiff's right to recover damages for the trespass, since under its provisions he was not required to inclose his land with a fence, substantial or otherwise. Appellant, however, insists that said provisions of the act of 1878 were repealed by an act of the Legislature entitled, "An act concerning trespassing of animals upon private lands, and the recovery of damages resulting therefrom" (Stats. 1907, p. 999), sections 1, 2 and 6 of which are as follows:

"Section 1. It is unlawful for any person, firm or corporation owning, or having possession of, any animal, to suffer or permit such animal to break into and enter upon any land owned by, or lawfully in the possession of any person, firm or corporation, other than the owner of such animal, in all cases where such land is planted to growing crops, vines, fruit trees, or vegetables, and is at the time entirely inclosed by a substantial fence or other inclosure.

"Section 2. The owner of, or person who is in the lawful possession of, any land trespassed upon, in violation of this act, is entitled to recover, by action in a court of competent jurisdiction, from the owner of, or person in possession of, or person chargeable with the care of, the trespassing animal or animals, all actual damages sustained by reason of such trespass, together with costs of suit."

"Section 6. All acts and parts of acts in conflict with this act are hereby repealed; provided, nothing in this act shall be deemed or construed to repeal an act of the Legislature of this state relating to estrays, approved March 23, 1901."

[1] If, as claimed by appellant, the act of 1907 supersedes the provisions of the act of 1878, then it is likewise clear that plaintiff is not entitled to recover damages by reason of the trespass, since it is not claimed the premises were inclosed in any manner whatsoever. In effect, the act of 1878, as at common law, requires the owner of stock to fence them in, and no duty devolves upon the owner of land to inclose the same in order to prevent his neighbor's stock trespassing thereon, and unless repealed by the act of

1907, it is the law in Los Angeles county applicable to the facts of this case.

Appellant has presented a very able and exhaustive brief in support of his contention that the later act repeals that of 1878; and, were the question an open one, we would feel constrained to follow counsel through the maze of legislation touching the subject, commencing with the first session of the Legislature in 1850, to which he directs attention. The identical question, however, was before the court in the case of *Blevins v. Mullally*, decided by the Third Appellate District, 22 Cal. App. 519, 135 Pac. 307. The action arose from a trespass of stock upon land in Colusa county, to which the act of 1878 applied, and, as here, it was there contended that such act was repealed by the act of 1907. The court, however, held otherwise, saying there was no inconsistency between the common-law rule as declared in the act of 1878 and the statute of 1907, and hence there was no repeal of the provisions of the former. This being true, it follows that in Los Angeles county one sustaining damage by reason of trespassing animals upon his uninclosed land may, under the provisions of the act of 1878, recover therefor, regardless of whether the crops be growing thereon or matured, as, alfalfa hay, and stacked thereon.

It is unnecessary to repeat the argument upon which the court, through Justice Hart, based its conclusion; suffice it to say that a petition to have the cause heard in the Supreme Court after judgment in the District Court of Appeal was denied by the Supreme Court. Hence, thus approved, the question, so far as this court is concerned, is no longer an open one. Upon the authority of the decision in *Blevins v. Mullally*, supra, we are constrained to hold that the act of 1878, the effect of which, as at common law, is to require the owners of stock to fence them in, is, so far as Los Angeles county is concerned, still in force, and that plaintiff's failure to maintain a substantial fence inclosing his land did not affect his right to recover damages for the trespass.

From what has been said, it follows that no error was committed by the court in refusing instructions requested by defendant, based upon his theory that the law imposed upon plaintiff the duty of fencing his land as a protection against damages by trespassing animals. The fact that plaintiff did not keep the fence inclosing the land in repair, or failed to keep the gates closed, becomes immaterial.

[2] It is next insisted that the court erred in charging the jury—

"that the undisputed evidence in this case shows the plaintiff had such possession and interest in the land here in question, the crops and herbage growing thereon and the hay stacked upon the land, to enable him to maintain an action for the damage done thereto by trespassing cattle."

And in refusing, at defendant's request, to instruct the jury to the effect that if plaintiff was not the owner of the land in question, but leased it upon terms and conditions known as "farming on shares," and the crops growing thereon belonged partly to the plaintiff and partly to the owner of the land, then, in such event, plaintiff could recover only for damages done to that portion of the crop belonging to him, and could not recover damages for any portion belonging to the landlord. This contention is based upon the claim that plaintiff and the landlord were owners in common of the crops grown upon said land. By the terms of the lease made to plaintiff, he, as rental for the land, agreed to cut the alfalfa crops grown thereon, at his own cost, charge, and expense, and stack the same upon the said premises, and in due and proper time bale the same and deliver to the landlord an amount in tonnage equal to one-half of all alfalfa cut on said premises, which one-half should be set apart to the landlord. Clearly, the relation existing between the parties was that of landlord and tenant. The lease contains no provision indicating that the products were to be held in cotenancy, but were held and controlled by the tenant, one-half thereof, when baled, under the terms of the lease, to be set apart to and paid the landlord as compensation for the use of the land. *Coalinga, etc., Co. v. Associated Oil Co.*, 16 Cal. App. 361, 116 Pac. 1107; *Clarke & Cain v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Holt Manufacturing Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708. The record discloses no evidence that the crop had been divided as provided in the lease, or any portion thereof set apart to the landlord. Under these facts, there was no error in the instruction given. As said by the court in *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018, in discussing a like question:

"The agreement . . . being a lease, the title of the crops produced did not vest in the parties to it as tenants in common, but solely in Reeves, the tenant; and Hannan, the landlord, had no claim upon them until an actual division was made, and his share was turned over to him as a 'reditus' or rent."

The order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

SCOTT v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO
et al. (Civ. 1892.)

(District Court of Appeal, First District,
California. June 13, 1916.)

EXECUTORS AND ADMINISTRATORS vs. (22-3)—
APPOINTMENT—JURISDICTION OF COURT.

An order appointing a special administrator and purporting to be made in a formal proceeding initiated by a written application, is outside the court's jurisdiction, where no application was on file, notwithstanding the petitioners

for general letters had orally requested the appointment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 126, 127; Dec. Dig. ¶22(3).]

Certiorari proceedings by Clara W. Scott against the Superior Court of the City and County of San Francisco and others. Writ granted and the order sought to be reviewed, annulled.

W. M. Abbott, W. M. Cannon, and C. H. Wilson, all of San Francisco, for petitioner. Mastick & Partridge, of San Francisco, for respondents.

PER CURIAM. It seems to us that that part of the return of the judge of the superior court, reciting that all of the petitioners for general letters of administration requested that there be appointed a special administrator—and upon which particular reliance has been placed by the respondent as justifying the order sought to be reviewed in this proceeding—is quite immaterial, for the reason that the order which the court made and which the petitioner here is seeking to review expressly refers to another proceeding than an oral application for special letters of administration, to wit, to a formal proceeding in which a written application for letters of administration was filed, and that since no such written application for letters of administration was ever filed, and hence no such formal proceeding was before the court, the order of the court purporting to have been made in such formal proceeding must necessarily have been on the face of the record beyond the jurisdiction of the court. For that reason, and those appearing in the discussion of this matter before this court, the writ is granted, and the order sought to be reviewed is annulled.

TISCHHAUSER v. PRENTICE et al. (Civ. 1456.)

(District Court of Appeal, Second District, California. June 10, 1916. Rehearing Denied July 10, 1916. Rehearing Denied by Supreme Court Aug. 7, 1916.)

1. APPEAL AND ERROR ¶1011(1)—REVIEW—FINDING ON CONFLICTING EVIDENCE.

The trial court's finding of fact on a point as to which the evidence is conflicting is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988; Dec. Dig. ¶1011(1).]

2. BILLS AND NOTES ¶64—LIABILITY OF SURETIES—KNOWLEDGE OF HOLDER.

Where a note was delivered by one of the makers under apparently complete authority from all, the holder having no knowledge of the fact that the signatures of the two makers who did not deliver it, and who were sureties for the maker who did deliver it, were obtained from them by fraud practiced upon them by him, and that the note was delivered by them upon

a condition which was not performed, the sureties were liable on the note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 104; Dec. Dig. ¶64.]

3. BILLS AND NOTES ¶92(3)—CONSIDERATION—EXTENSION OF TIME FOR PAYMENT OF DEBT.

The act of plaintiff in granting an extension of time for payment of a debt presently due was valuable and sufficient consideration for a note executed to him.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 205; Dec. Dig. ¶92(3).]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by John Tischhauser against A. S. Prentice, W. J. Bryant, and Lorenzo D. Swartwout. There was judgment for plaintiff, and from an order denying their motion for new trial, defendants Bryant and Swartwout appeal. Order affirmed.

Johnstone Jones, Jacob A. Visel, and V. J. Cobb, all of Los Angeles, for appellants. Len Clalborne and Ben Goodrich, both of Los Angeles, for respondent.

CONREY, P. J. The defendants W. J. Bryant and Lorenzo D. Swartwout appeal from an order denying their motion for a new trial. The judgment is founded upon a note for \$623, payable to the plaintiff and signed by the defendants, Prentice, Bryant, and Swartwout. As stated by counsel for appellants, their chief contentions are that they signed the note and delivered the same to their co-obligor Prentice on a condition which was not performed; that the consideration for the note was illegal; and that their signatures were obtained by fraud exercised by defendant Prentice in procuring such signatures. At the trial appellants amended their answer, and thereby alleged that at the time of accepting the note the plaintiff had full knowledge of the circumstances attending their execution of the note, and knew that the defendants signed said note merely as sureties thereon, and agreed to deal with them in the capacity of sureties and not as principals. But it was admitted at the trial that the note was delivered to plaintiff without knowledge on his part that its delivery was contrary to any instructions given by appellants to Prentice, and their counsel state in their final brief that the law of suretyship and the fact that appellants were sureties "are almost foreign to this case."

[1] The facts are that prior to the execution of this note the defendant Prentice was in debt to plaintiff in the sum of \$623, which is the principal sum named in the note. The plaintiff was pressing for payment, and at the same time a criminal action against Prentice was pending in the police court of the city of Los Angeles, under complaint charging Prentice with having obtained money by false pretenses, and the plaintiff, John Tischhauser, was the complaining witness in

that action. Appellants by their answer in this action alleged that the note in suit was delivered to plaintiff and accepted by him in consideration of his desisting from further prosecution of Prentice on said criminal charge. There is some evidence in the record tending to support this defense, but there is also substantial evidence to the contrary, and the charge was flatly denied by the plaintiff. Therefore the court's finding of fact is conclusive, and appellants, in further urging illegality of consideration as a ground for sustaining their appeal, are contending in vain against established facts.

[2] The second defense contained in the answer of appellants was that they signed the note and gave the same to Prentice upon condition that he should obtain the signatures of Alec and Annie Odett to the note before delivering it to the plaintiff, and should not deliver the note unless those signatures were obtained, but that in fact the note was delivered in violation of the said condition. Appellants' theory is that the contract sued upon is incomplete, and not the obligation which they intended to make; that they as sureties intended to bind themselves jointly with two other sureties, the Odetts, but not otherwise, and that without those names it is not their note. The evidence shows that Prentice falsely stated to Bryant that the Odetts had promised to sign the note with him, and shows that Bryant signed with the understanding that the note was not to be used without those signatures; and it also appears that Swartwout in signing the note relied upon the fact that Bryant was his cosurety. The difficulty with this defense is that these facts were not made known to Tischhauser before he accepted the note. Prentice (called as a witness for the defendants) testified that he did not tell Mr. Tischhauser anything about the circumstances under which he had obtained the note from Bryant. In support of their contention that the surety was not liable because the delivery was on a condition which was not performed, appellants refer to *Ayres v. Milroy*, 53 Mo. 516, 14 Am. Rep. 465, and several other cases. *Ayres v. Milroy* contains language which apparently supports this contention, but we find that decision later discussed in *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, and justified solely on the ground that *Ayres* was apprised of the condition on which the surety was to be bound. The decision in *State v. Potter* then proceeds with a discussion of numerous decisions, including a majority of those cited in appellants' brief herein, and shows that in a majority, if not all, of them there were circumstances sufficient to put the obligee upon notice of the incompleteness of the bond or note. The court then holds that where the surety who defends the action had invested the principal with an apparent authority to deliver the

bond and there was nothing on the face of the bond or in any of the attending circumstances to apprise the obligee, who accepted it, that there was any secret agreement which should preclude the acceptance of the bond, the surety alone is at fault, and his liability will be enforced. The court declares that such a case furnishes an opportune application of the language of Lord Holt in *Hern v. Nichols*, 1 Salk. 289, that, "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."

[3] The claim by appellants that their signatures were obtained by fraud practiced upon them by Prentice is subject to the same infirmity as their claim that the note was delivered upon a condition which was not performed. Knowledge of the facts was not brought home to the plaintiff. The note was received and accepted according to its form as a note executed by the defendants, and was delivered by one of the makers under apparently complete authority from all. By accepting the note plaintiff granted an extension of time for payment of a debt presently due, and that was a valuable and sufficient consideration.

As there are no errors in the rulings of the court or in the conduct of the trial which substantially affect the merits of this case, a new trial was properly refused.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

HUNT v. GLASSELL. (Civ. 1980.)

(District Court of Appeal, Second District, California. June 7, 1916.)

1. LIMITATION OF ACTIONS §127(4) — COMMENCEMENT — AMENDMENTS — ACTION ON NOTE.

An amended complaint, which corrected the description of the note sued upon regarding its maturity and interest provisions, does not change the cause of action, and relates back, so far as the statute of limitations is concerned, to the filing of the original complaint.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 544; Dec. Dig. § 127(4); Pleading, Cent. Dig. § 688.]

2. PLEDGES §44 — INTEREST OF PLEDGOR — NOTE.

Where the payee pledged a note to secure a smaller amount and the maker subsequently paid the pledgee and got possession of the note, the payee retained a general interest in the note for the balance above the amount paid.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 103-107; Dec. Dig. § 44.]

3. PLEDGES §51 — ACTIONS — COMPLAINT — SUFFICIENCY OF OWNERSHIP ALLEGATIONS.

A complaint that the payee pledged a note to a creditor who sued both the maker and payee, which suit the maker settled by paying the pledgee's claim, was not demurrable because implying that the payee joined in the settlement and consented to the note's surrender to

the maker where it does not appear that the payee participated in the settlement.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 122-128; Dec. Dig. § 51.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by F. W. Hunt against Andrew Glassell. From a judgment sustaining a demurrer to his second amended complaint, plaintiff appeals. Reversed and remanded.

Murphey & Poplin, of Los Angeles, for appellant. J. E. Hannon, of Los Angeles, for respondent.

CONREY, P. J. By his original complaint in this action, filed on December 15, 1911, the plaintiff, as successor in right to Duquesne Brewing Company, a corporation, demanded judgment upon a certain promissory note for the sum of \$10,000, dated September 25, 1907, and payable one year after date. On June 8, 1913, the plaintiff filed an amended complaint setting forth a note of same date and amount as before and in like terms, except that it read "ten months after date" instead of one year after date, and omitted the provision for interest contained in the note set out in the original complaint. A demurrer to the amended complaint having been sustained, the plaintiff, on the 31st day of July, 1913, filed his second amended complaint, and therein alleged the execution of a note in the same terms as the note set out in the first amended complaint. The second amended complaint states facts showing that at the time of commencement of this action the plaintiff was unable to see the note or obtain a copy thereof and was obliged to rely upon his recollection of its terms, plaintiff having seen the note at about the date it was made; alleging also that there was but one \$10,000 note made by defendant to Duquesne Brewing Company of date September 25, 1907, and that the note sued on herein, as shown in the second amended complaint, is the same note sued on and by mistake incorrectly set out in the original complaint.

The second amended complaint further shows that during the year 1909 the Duquesne Brewing Company made and delivered to A. K. Martel a note for \$2,500, which note was afterwards sold by Martel to Fidelity Investment Company, a corporation; that when the \$2,500 note became due the Duquesne Brewing Company, in consideration of forbearance of the holder of that note, pledged to Fidelity Investment Company the Glassell note of \$10,000 as collateral security for said Martel note; that on June 24, 1909, the Fidelity Investment Company commenced an action on the \$10,000 note against Glassell and Duquesne Brewing Company, and Glassell as defendant in that action filed an answer and the case was set down for trial; that prior to any trial being had therein, and on or about May 10, 1910, "said defendant, Andrew Glassell, settled the said cause

of action by then and there paying to said plaintiff in said action about the sum of \$2,500"; that said payment was made as a payment on said \$10,000 note and to settle and pay all claim and demand that Fidelity Investment Company had in or to said \$10,000 note as security for the payment of said Martel note; that thereupon Fidelity Investment Company, plaintiff in that action, transferred and delivered to Andrew Glassell, defendant therein, both of said notes and ever since that time he has been in possession and control of the same; that Glassell at and prior to the time he made said settlement knew that said \$10,000 note made by him to Duquesne Brewing Company was held as collateral security for the Martel note and for no other purpose; and well knew that the only interest that Fidelity Investment Company had in the \$10,000 note was to the extent of \$2,500, with interest on said smaller sum; that the defendant Glassell received said note in trust for the Duquesne Brewing Company and has held the same in trust for the use and benefit of the Duquesne Brewing Company and its assigns ever since that time.

On October 5, 1909, Duquesne Brewing Company was adjudged a bankrupt. Thereafter, after proceedings duly had as recited in the second amended complaint herein, the trustee in bankruptcy of the said bankrupt's estate, duly authorized therefor, sold at public auction certain assets of the estate, including said \$10,000 note and the plaintiff, F. W. Hunt, became the purchaser thereof. That the sale having been duly approved and confirmed, the trustee assigned and transferred to plaintiff all right, title, and interest of the estate of Duquesne Brewing Company in and to said note. The plaintiff has demanded from defendant that defendant surrender possession to him of the note, and also has demanded payment of said note by defendant to the plaintiff, all of which has been refused.

The defendant demurred to the second amended complaint upon the grounds that it did not state facts sufficient to constitute a cause of action against the defendant, and upon the further ground that the cause of action as shown upon the face of the complaint appears to be barred by the provisions of section 337, Code of Civil Procedure. That demurrer having been sustained, judgment was entered in favor of the defendant, and this appeal is by the plaintiff from that judgment. The appeal is presented upon the judgment roll and a bill of exceptions.

[1] If the cause of action stated in the present complaint is a new and totally different cause of action from that stated in the original complaint, the amendment does not relate back to the beginning of the action so as to stop the running of the statute of limitations. *Lambert v. McKenzie*, 135 Cal. 100, 67 Pac. 6, is one of many decisions declaring the rule. But if the amendment be

one which merely corrects a defective or erroneous pleading of the same cause of action, the amendment will relate back to the filing of the original complaint. *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; *Union Lumber Co. v. J. W. Schouten & Co.*, 25 Cal. App. 80, 142 Pac. 910. The facts contained in the present record, and which in substance we have stated, are sufficient to show that in this action the plaintiff at all times has been seeking to recover judgment upon one and the same note, and that there has been no change in identity of the subject-matter constituting his cause of action. It follows that the second amended complaint was not subject to demurrer under the claim that it was barred by limitations.

[2] Appellant claims that according to the allegations of his complaint it is shown that the defendant, well knowing that Fidelity Investment Company held the Glassell note in its possession solely as a pledge securing the smaller note which we have called the Martel note, obtained possession of both notes by paying to the pledgee an amount not more than sufficient to satisfy the pledgee's interest therein; the amount so paid being only a fractional part of the indebtedness due from him to the pledgor of the larger note. If the settlement so made by Glassell was with the pledgee and under the circumstances to which we have referred, it must be that a balance remains due and unsatisfied on the Glassell note and that such balance is due to the plaintiff as successor to Duquesne Brewing Company. The pledged note was not property subject to sale by the pledgee; he had only the right to collect it when due. Civ. Code, § 3006. Under the circumstances here appearing, no transaction could take place between Glassell and the pledgee which would put Glassell into any better position with respect to the pledged note than that of Fidelity Investment Company which held it in pledge. The general property in the note still remained in the payee, Duquesne Brewing Company. *Cross v. Eureka Lake, etc., Canal Co.*, 73 Cal. 302, 306, 14 Pac. 885, 2 Am. St. Rep. 806; *Cushing v. Building Association*, 165 Cal. 731, 737, 134 Pac. 824.

[3] In support of his claim that the second amended complaint does not state a cause of action, respondent's counsel argues that the demurrer should be sustained because it is shown that the action commenced by Fidelity Investment Company was against the pledgor, Duquesne Brewing Company, as well as against Glassell; and that since it is alleged that after the answer had been filed by Glassell the defendant "settled the said cause of action by then and there paying to said plaintiff in said action about the sum of \$2,500," this is sufficient to raise the inference that the settlement was made with the pledgor as well as with the pledgee, and that the pledgor consented to the surrender of the note.

On examining the complaint we find it further alleged that the payment by Glassell was made as a payment on the Duquesne Brewing Company's note and to settle and pay all claim and demand that the pledgee had therein as security for the payment of the Martel note. It is not made to appear that Duquesne Brewing Company had appeared in the action or in any manner participated in the settlement. Indeed, the settlement was made after the adjudication of bankruptcy. The court should not by a strained construction attempt to supply the allegation of a fact not stated in a complaint in order to hold that the complaint does not state a cause of action. Assuming that we might give full effect to the rule supported by authorities cited by respondent, that a compromise made with the consent of the pledgor is binding upon him, and therefore upon subsequent assignees of the pledgor, we think that such rule is not properly applicable to the complaint now under consideration.

We are of the opinion that the demurrer to the second amended complaint in this action should be overruled, and for that reason the judgment is reversed, with directions to the court below to proceed accordingly.

We concur: JAMES, J.; SHAW, J.

PEOPLE v. COLLIS.* (Cr. 344.)

(District Court of Appeal, Third District, California, June 5, 1916. Rehearing Denied by Supreme Court Aug. 3, 1916.)

1. CRIMINAL LAW §300—ARRAIGNMENT—PLEA OF NOT GUILTY—EFFECT.

The plea of "not guilty" to a criminal charge admits of any defense which the facts justify except former jeopardy, acquittal, or conviction, so that defendant, to avail himself of intoxicated condition at time of offense, need not specially plead it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 684-686; Dec. Dig. § 300.]

2. CRIMINAL LAW §814(10)—INSTRUCTIONS—INTOXICATION.

Where defendant himself brought out the fact of his intoxication at the time of the offense, instructions as to effect of intoxication on responsibility for the crime are applicable, regardless of the motive with which such fact was shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1979, 1981; Dec. Dig. § 814(10).]

3. CRIMINAL LAW §761(12)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Instructions that the jury might consider that accused was intoxicated at the time in determining the purpose with which he committed the act, and that when a crime is committed by one in a fit of intoxication he cannot avail himself of his own vice, are not objectionable as invading the province of the jury by assuming that accused committed the crime, but are a mere abstract statement of principle, especially where the jury was instructed that it was exclusive judge of credibility of witnesses and

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

probative value of testimony, and that the defendant was presumed to be innocent, and that they must be convinced of his guilt to a moral certainty before they could convict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1757; Dec. Dig. § 761(12).]

4. CRIMINAL LAW § 761(12)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Although the only evidence connecting accused with the homicide tended to show that it was deliberate, wanton, and without provocation, where there was evidence that he was intoxicated at the time, verdict of guilty of manslaughter did not show the connecting evidence to have been disregarded, so as to indicate error in instructions, attacked as assuming that accused committed the homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1757; Dec. Dig. § 761(12).]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Henry Nan Collis was convicted of manslaughter and from the judgment and order denying new trial, he appeals. Affirmed.

John A. Wall, of Mariposa, L. J. Schino, of Merced, and B. S. Wilson, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

HART, J. The defendant was convicted of the crime of manslaughter under an information charging him with the crime of murder, and appeals to this court from the judgment of conviction and the order denying him a new trial.

The homicide occurred at a mining camp in Hunter's Valley, Mariposa county, on the 5th day of November, 1915. The victim of the tragedy, Thomas B. Lynn, and one William Thornton, a resident of Chowchilla, Madera county, were the joint owners of certain mines located in Hunter's Valley. The defendant was employed by them at said mines, and worked for them on a percentage basis. Thornton had not been at the mining camp for some five weeks prior to the date of the homicide, he having been ill during that period at his home in Chowchilla. On the 4th day of November, however, he put in an appearance at the camp. He, the defendant and the deceased were the only persons present at the time of the shooting. Thornton claimed to have seen the defendant shoot Lynn, and from his testimony, as given at the trial on behalf of the people, the following facts relative to the homicide are gleaned:

Upon arriving at the camp on the morning of the 4th of November, Thornton observed that Lynn and the defendant had been drinking heavily. He further discovered that there were not sufficient provisions in the house for their then present purposes, and thereupon proposed to the defendant that they (defendant and himself) go to Pleasant Valley and Jasper Point, in said county, and

at those places purchase groceries and such other articles as were then needed at the camp. The defendant agreed to this, and the two accordingly left the camp together for the places above named, one carrying a rifle and the other a shotgun with which they might kill any game which they might run across. On the way to those points the defendant told the witness of trouble he had had with the deceased. He said to Thornton that the deceased had annoyed him greatly in his (deceased's) talk on socialism, with which subject the latter appears to have been obsessed, and that he (defendant) "thought two or three times that he would have to kill him." The two finally arrived at Pleasant Valley, and Thornton, having purchased some supplies, which included four quart bottles of whisky, started on his return to the camp, accompanied by the defendant. Upon their arrival at the camp, they and the deceased and one James Young, who had called at the camp, proceeded to drink the liquor, with the result that all of them became more or less intoxicated, the defendant getting so drunk that by 12 or 1 o'clock he was required to take to his bed. Thornton, however, had previously gone to bed, and testified that, while in bed, and before the defendant had retired, he heard a heated argument going on between the latter and the deceased.

On the 5th day of November, the deceased arose quite early and went to Jasper Point, a distance of three miles from the camp, for the purpose of getting mail. He returned at about 8 o'clock in the morning, but later in the day again went to Jasper. In the meantime, the defendant remained at the camp and in his bed, being greatly under the influence of liquor.

The deceased returned to the camp from his second trip to Jasper at between the hours of 5 and 6 p. m. At this time, Thornton was sitting on a chair on the outside of the house and about 15 feet to the left of the front door of the house. The defendant, with no other clothing on but his shirt, suddenly appeared at the door and inquired, "Where is Lynn?" to which Thornton replied, "There he comes from Jasper," whereupon the defendant exclaimed, "I am going to shoot him." Immediately following the threat the defendant raised and aimed a gun at Lynn and fired. Lynn made a loud exclamation, and said to the defendant: "Happy, Happy [the defendant was familiarly known as and called "Happy"] don't shoot no more; you have hit me." Thornton sprang from his chair, and said, addressing the defendant, "What do you mean, Happy?" to which the latter rejoined, addressing Thornton, "You s—n of a b—h, I will shoot you." The defendant, who was still at the door and a little inside the house, then brought his weapon around as if to fire an-

other shot. Thornton started to get out of range, and had taken only a few steps when the gun was again discharged. "I would like to say that before that," testified Thornton, "I heard the shell hit the floor inside the house, so I knew the gun was loaded, so I beat it. I do not suppose I got over 60 yards until the gun went off the third time. I did not stop any more. I did not see any more than the first shot. The second and third shots I did not see. * * * I fell just as it went off the third time. I kept on. I thought I would go and have him arrested. I heard a voice singing over on the road. I went across the mountain and kept hollering for him, and he did not answer me." Upon reaching the road, Thornton met a gentleman named Williams, to whom he imparted information of the shooting, and requested him to go to a store near by and telephone for the sheriff or constable. The constable at Hornitos, in said county, was finally reached and apprised of the shooting, and, accompanied by two or three other persons, immediately started for the scene of the shooting, arriving there late at night. They found the dead body of the deceased lying on the ground a short distance from the point where he stood when shot, there being physical evidence that the body had been dragged from the one point to the other.

After their arrival at the camp and before the defendant was aware of their presence there, the constable and his party saw the defendant, leave the house and go to the spot where lay the body of Lynn, and, by the aid of a lighted match or a light otherwise produced, apparently view or look at the body. He was heard at this time to say, speaking to a dog which was with him and barking: "Show me, show me Thornton. I am going to kill the s—n of a b—h." The defendant was later arrested and positively denied, as he did at the trial, shooting Lynn or knowing by whom he was shot.

An inquest held by the coroner of the county into the cause of the death of Lynn developed that death had been produced by gunshot wounds. One of the bullets "entered the right chest 6¼ inches from the shoulder, 2¼ inches from the center of the chest, and came out 10 inches from the top of the left shoulder, and 5 inches to the left of the spinal column, the center of the back." Another bullet entered the left thigh 10 inches from the center of the knee cap and came out 2 inches below where it entered.

There is, as will later be perceived, no just ground for a serious claim that the verdict is devoid of sufficient support. Indeed, since the evidence upon its face is by no means improbable, there exists no ground for the support of such a claim.

The theory of the defense at the trial was that Thornton and not the defendant committed the crime. There was an attempt at sustaining that theory, and, it may be added,

a few circumstances presented which might well be regarded as tending to support it. But the jury did not accept that theory, evidently being convinced that Thornton's version of the homicide was true. The verdict, upon the record as presented before us, is final and conclusive upon this court.

[1, 2] It is claimed, however, that the court committed prejudicial error by the giving of the following instructions:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in that condition, but, whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of time, the jury may take into consideration the fact that *the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.*

"It is a well-settled rule that drunkenness is no excuse for crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, *for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime.* Such evidence can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution."

The above instructions were based upon, and the first substantially in, the language of section 22 of the Penal Code.

It is contended: (1) That instructions upon intoxication are wholly inapplicable to this case, since (so it is claimed) the defendant's condition for sobriety or inebriety on the occasion and at the time of the shooting was only incidentally brought into the case, and not for the purpose of mitigating the offense or reducing the crime to the lesser degree or grade thereof or of acquitting the accused; (2) that the instructions trespassed upon the domain of fact, in that they in effect declared that the defendant committed the act of killing the deceased. The objections thus urged against the instructions are untenable.

The argument in support of the first of the propositions above stated appears to be based upon the theory that the plea of "not guilty" interposed by the defendant to the information limited the defense to the sole question whether the defendant actually committed the act of destroying the life of Lynn, and that, to have warranted proof of the intoxicated condition of the defendant, at the time of the homicide, it was necessary to set that fact up by way of a special plea. This, we say, seems to be the theory of the argument, or, at any rate, is the necessary effect thereof. Of course, there is absolutely no basis in law for any such notion. The plea of "not guilty" to a criminal charge admits of any defense which the facts justify, except those of once in jeopardy and former acquittal or conviction. Self-defense, the plea of insanity or the plea that the accused

was not guilty of any connection whatever with the commission of the crime may be introduced under the general plea of "not guilty."

That the instructions were applicable to the case at bar, we think the record clearly and unquestionably shows. Counsel for the defendant themselves brought out the fact of the defendant's intoxicated condition on the occasion and at the time of the homicide. They brought out that fact, not only by and through the defendant himself, by questions directly propounded to him and addressed to that subject, but also by and through the witness Young, who testified on behalf of the defendant. What their special motive or purpose was in proving the fact it is not material to inquire or necessary to ascertain. The fact remains that they did introduce proof that the defendant was greatly under the influence of intoxicating liquor at the time of the homicide, and therefore the instructions complained of and the principle therein announced were peculiarly applicable to the case and most properly given to the jury.

[3] The second ground of objection to the instructions arises from the language thereof which we have put in italics. By that language, it is claimed, as above stated, that the court invaded the function committed by the Constitution exclusively to the jury, in that it involved an instruction upon a question of fact, and virtually said to the jury that the defendant committed the crime charged in the information. But the instructions are not reasonably susceptible of the construction so given them, and are therefore not obnoxious to the objection to which they would be amenable were that construction maintainable.

The instructions, as only a cursory examination of them will readily attest, merely involve a statement in abstract form or in a general way of the rule as to the drunkenness of one charged with the commission of a crime at the time of the commission thereof, as it is laid down by section 22 of the Penal Code, *supra*. They, in other words, only abstractly declare what the rule of law is upon the satisfactory proof of facts of an indicated nature. Nowhere therein is it declared that the facts to which the instructions would be pertinent were proved, nor do they directly refer to the accused or intimate that he committed the crime charged.

Instructions based upon said section of the Penal Code have often been given in language substantially, if not precisely, the same as that in which the challenged instructions are framed, and have been uniformly approved by the higher courts. Indeed, we are not able to perceive how the rule could be stated intelligently in materially different language. Nor can we understand how the jury, in view of the other instructions read

to them, could have obtained such a conception of the meaning of the instructions as counsel's construction of them would give to them. The jury must be assumed to have been composed of men of good common sense, and that they must have fully and clearly understood the duty resting upon them from the instructions which, in plain and unmistakable language, told them that they were the sole and exclusive judges of the credibility of the witnesses and the effect and probative value of the testimony, that a defendant was at all times and until a verdict was reached to be presumed to be guiltless of the crime charged or of any crime, or degree of crime, therein involved, and that a verdict of conviction would be justified only after they were convinced from the evidence to a moral certainty and beyond all reasonable doubt of the defendant's guilt. Surely, with the law as thus stated before them, the jury could not have understood the instructions on intoxication as involving a statement by the court that the defendant had committed the crime charged or the act of slaying the deceased.

[4] Counsel say that the verdict demonstrates that Thornton's testimony was discredited and, indeed, wholly disregarded by the jury, and that therefore the defendant probably would not have been convicted but for the instructions given. The argument is that Thornton's was the only testimony presented in the case tending in the slightest measure to connect the defendant with the commission of the crime; that it showed the killing to have been deliberate, wanton, and without cause or provocation; that, if true and believed, the testimony warranted no other verdict than that of murder of the first degree. The argument, in its application to the instant case, is wholly destitute of force or merit. As shown, there was evidence of the intoxicated condition of the accused at the time the homicide was committed. The jury could therefore have consistently believed the story of Thornton in its entirety, and at the same time, under the instructions complained of here and the evidence addressed to the intoxicated condition of the defendant, have justly concluded that the verdict reached and returned by them was the proper one. Indeed, inasmuch as there was no other evidence than Thornton's testimony tending in any degree whatever to establish the defendant's guilt, we may properly assume that the jury believed Thornton, and would have found the accused guilty of one of the degrees of the higher offense but for the instructions here challenged.

There are no other points presented in the case.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; ELLISON, Judge, pro tem.

POOR v. W. P. FULLER & CO. (Civ. 1821.)
(District Court of Appeal, First District, California. June 3, 1916.)

1. MASTER AND SERVANT ⇨258(17)—NEGLECT—PLEADING.

The complaint alleging that defendant negligently directed plaintiff to work at a place or with an appliance not safe, by implication, and sufficiently alleges defendant knew of the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 832; Dec. Dig. ⇨258(17).]

2. PLEADING ⇨204(3)—GENERAL DEMURRER.

A count as a whole, on at least one ground of negligence, stating sufficient facts, is good against a general demurrer, though insufficient on another ground attempted to be set up.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486, 487; Dec. Dig. ⇨204(3).]

3. APPEAL AND ERROR ⇨1052(2)—HARMLESS ERROR—RULINGS ON EVIDENCE.

Overruling objection to question calling for opinion was harmless where the answer was not open to construction of giving the cause of the accident other than clearly shown to be witness' theory by his answer to another question free from objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4172; Dec. Dig. ⇨1052(2); Eminent Domain, Cent. Dig. § 810.]

4. MASTER AND SERVANT ⇨267(1)—INJURY—EVIDENCE—IMMEDIATE SURROUNDINGS.

Description of the immediate surroundings of the place is admissible in a servant's action for injury from being put at work at an insecure chute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 909; Dec. Dig. ⇨267(1).]

5. MASTER AND SERVANT ⇨270(4)—INJURY TO SERVANT—EVIDENCE—CONDITION OF PLACE—BEFORE AND AFTER ACCIDENT.

Evidence of the condition of the place where plaintiff was injured within a reasonable time before or after the accident is admissible to show its condition at the time of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 916, 917; Dec. Dig. ⇨270(4).]

6. APPEAL AND ERROR ⇨1033(5)—INVITED ERROR.

Defendant cannot complain of inconsistency in instructions arising from the giving, at its request, of an instruction too favorable to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. ⇨1033(5); Trial, Cent. Dig. § 587.]

7. TRIAL ⇨236(2)—INSTRUCTIONS—CREDIBILITY.

The requested instruction, that a witness false in any part of his testimony is to be distrusted in the remainder, while conforming to Code Civ. Proc. § 2061, subd. 3, is not a complete exposition of the law, omitting the essential elements of willfulness and materiality.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 532; Dec. Dig. ⇨236(2).]

8. APPEAL AND ERROR ⇨1064(1)—HARMLESS ERROR—INSTRUCTIONS.

Giving or refusing the instruction as to distrusting a witness false in one part of his testimony, unless injury is shown, is not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⇨1064(1); Trial, Cent. Dig. § 475.]

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Frank H. Poor against W. P. Fuller & Co. From an adverse judgment and order, defendant appeals. Affirmed.

Lillenthal, McKinstry & Raymond, of San Francisco, for appellant. John D. Willard, John W. Coleberd, and Gilbert D. Ferrell, all of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial, in an action for personal injuries.

The injuries to plaintiff for which damages are sought to be recovered were caused, it is alleged, by his being, through the negligence of the defendant, hit on the back of the left hand by a large box falling from a wooden chute which ran from the second to the first floor of defendant's warehouse, while the plaintiff was standing at the foot of the chute catching boxes as they descended thereon. The complaint is in two counts. The theory of the first count is that the wooden chute described in the complaint was an unsafe and insecure appliance with which to do the work to which plaintiff was assigned. It is alleged that the defendant negligently and without due or any care for the safety of the plaintiff did place and maintain a certain wooden chute in an unsafe and insecure position dangerous to the life, body, and limbs of plaintiff, in failing to secure or fasten in any manner the chute to any thing or object, or to make it stable or stationary in its position; that the defendant caused another of its employes, one Bergmann, to work on the second floor of said warehouse at the upper end of said chute, and there to place heavy wooden boxes in and upon said chute, and send said boxes rapidly down said chute to the first floor of said warehouse toward the place where plaintiff was working, which said Bergmann carelessly and negligently and without due or any care for the safety of plaintiff then and there did; that plaintiff was, while so employed by defendant, negligently and without any care for the safety of plaintiff, ordered and directed to take a place and position near the lower end of said chute, and there to work and receive and remove from said chute the heavy wood boxes sent down said chute, which said plaintiff then and there proceeded to do. Then the complaint alleges that while one of said boxes was descending, the chute shifted from its position, and caused the box to be deflected from the chute in such a way that it fell upon and struck with great force the hand of the plaintiff, inflicting the injuries upon and damaging the plaintiff in the manner and in the sum set forth and demanded in the complaint.

The second count of the complaint sets forth by reference all the allegations of the first count, and adds an allegation to the effect that while the box was sliding down the chute and after the chute had slipped from its position said Bergmann took hold of and moved the chute, thereby causing the said box to suddenly change the course of its motion and to be diverted and deflected from the chute in such a way that it fell upon the plaintiff and caused the injuries complained of.

[1] There is no merit in the defendant's first point that the general demurrer to the first count should have been sustained for the reason that the complaint does not allege "directly or by implication that the defendant, the employer, knew or ought to have known of the alleged defects." The complaint, as we have seen, alleges that the defendant negligently and carelessly and without due care directed the plaintiff to work at a place or with an appliance which was not safe. The defendant could not have been negligent or careless in the respects indicated in the complaint, unless it knew, or with the exercise of reasonable diligence should have known, of the defects of the place assigned to the plaintiff to work. Hence it follows that the complaint, at least by implication, alleges that the defendant had knowledge of the dangerous character of the place in which the plaintiff was directed to work.

In the case of *Indianapolis Southern R. Co. v. Wall*, 54 Ind. App. 43, 101 N. E. 680, 4 N. C. C. A. 532, it is held that:

In an action to recover for injuries alleged to have been received through defendant's negligence in suddenly starting its train as plaintiff was boarding it, it is not necessary that the complaint allege that defendant failed to stop its train a reasonable length of time to permit plaintiff to board it safely, nor that defendant knew that plaintiff was attempting to board its train when it started it. The allegation that the train was negligently started while plaintiff was boarding is sufficient, and will permit of proof of the reasonableness of the length of the stop, and of defendant's knowledge that plaintiff was attempting to board the train and that defendant negligently started the train while he was attempting to board it.

See, also, *Chicago & I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; *Leland v. Chehalis Lumber Co.*, 68 Wash. 632, 123 Pac. 1086; *Smith v. Buttner*, 90 Cal. 95, 100, 27 Pac. 29; *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561, 47 Pac. 452; *Pigeon v. W. P. Fuller & Co.*, 156 Cal. 691, 105 Pac. 976; 26 Cyc. 1144; *Alexander v. Central Lumber & Mill Co.*, 104 Cal. 532, 33 Pac. 411.

[2] Referring to the second point, apparently it was the theory of the plaintiff, as disclosed in this count, that the injury may have been caused by the act of Bergmann in moving the chute after it had shifted from its original position and while the box which hit plaintiff's hand was descending the chute; but it is not alleged that that act of Berg-

mann was negligently done; and for that reason the defendant asserts that the second count fails to state facts sufficient to constitute a cause of action, and that therefore the general demurrer thereto should have been sustained.

We think not. If this count was based solely on the alleged act of Bergmann in moving the chute, it may be that this count of the complaint would be deficient in the respect claimed; but as we have seen, this count embraces all the allegations of the first, the allegations of which as to negligence we have already set forth. Hence it is clear that the second count as a whole upon at least one ground states sufficient facts, and was proof against the general demurrer. *Hough v. Grant's Pass Power Co.*, 41 Or. 531, 69 Pac. 655; *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135.

[3] Over the objection of the defendant the plaintiff was permitted to answer the question: "What, in your opinion, caused the box to fly off the chute and fall * * * on July 1, 1912?" The question doubtless called for the opinion of the witness, but it was not objected to upon that ground, nor did the witness in answering it give his opinion, but testified to a fact, for he replied, "The chute slipped and the box fell onto the step." The next question also called for an opinion, and it was objected to on that ground. The question was: "What caused the chute to slip and shift on that occasion?" And the witness answered, "The dropping of the cases onto the chute." If it appeared from this answer that the shifting of the chute came about from the manner in which the boxes were dropped into it, it might perhaps be said that an error of some little prejudice to the defendant had been committed; but the answer does not carry with it any such implication; and the answer to the next question makes it clear that the witness' idea was that the accident was not caused in that way, for he speaks of the box that hit him as having been placed or laid upon the chute, and not as having been violently thrown thereupon. His theory was, as shown by his examination, in response to a question free from objection, that the chute was in bad condition, and that the box which struck him, while rapidly descending, caused the chute to slip, and was precipitated therefrom.

[4] No error was committed by the court in permitting the plaintiff to describe the immediate surroundings of the place where he was put to work. Such evidence we think was admissible under a liberal construction of the issues framed by the pleadings; and it appears that the defendant must have so understood the pleading according to some of the instructions to the jury proposed by it.

[5] The plaintiff was also allowed over objection to testify that on a prior occasion the chute had shifted, and that about 15 min-

utes after the accident he observed the legs of the chute to be in bad condition. Questions eliciting this testimony were objected to, but it is clear that evidence of the condition of the place where plaintiff was injured within a reasonable time before or after the accident is admissible for the purpose of showing its condition at the time of the injury. 29 Cyc. 607, 614.

[6] The court gave a number of instructions at the request of the plaintiff to the effect that it was the duty of the employer to furnish his employes with a reasonably safe place to work, and with reasonably suitable and safe structures and appliances with which to do the assigned work. As before intimated, we think that under the allegations of the complaint and under the evidence introduced, such instructions were properly given; and this is tacitly at least conceded by two instructions given at the request of the defendant. Upon the latter's request the court upon this subject also gave the following instruction:

"Under the pleadings in this case you cannot base your verdict in any degree upon any claim of plaintiff that the place in which he was working was unsafe or improper."

This instruction was erroneous, and was in conflict with other instructions on the same subject; but as it was given at the request of the defendant and was more favorable to it than it was entitled to have given, it would seem to follow that the defendant has no good ground of complaint. *Dennison v. Chapman*, 106 Cal. 447, 39 Pac. 61; *McNamara v. MacDonough*, 102 Cal. 575, 36 Pac. 941; *People v. Hower*, 151 Cal. 638, 91 Pac. 507.

[7] The court refused to give the following instruction:

"You are instructed that if you consider that any witness has been false in any part of his testimony, that witness is to be distrusted in the remainder of his testimony."

While this proposed instruction conforms to the language of subdivision 3 of section 2061 of the Code of Civil Procedure, still it is not, as has been held, a complete exposition of the law, and to be understood it requires construction and amplification. It omits two essential elements, viz., the willfulness of the false testimony given and its materiality. In *People v. Plyler*, 121 Cal. 160, at page 163, 53 Pac. 553, at page 554, the court say:

"Defendant proposed the following instruction: 'If any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence.' This instruction was modified by the court and thus given: 'A witness who has willfully sworn falsely in one part of his testimony is to be distrusted in others.' As given, this instruction closely approximates to the language of subdivision 3 of section 2061 of the Code of Civil Procedure. The subdivision is but a brief paraphrase of the terms maxim, 'Falsus in uno, falsus in omnibus.' The Code provision, like the Latin maxim, is not a complete exposition

of the law. Well understood by jurists, it would be misleading to the nonprofessional mind. It requires construction and amplification. This it has received. *People v. Sprague*, 53 Cal. 491, 494; *People v. Soto*, 59 Cal. 368. The proposed instruction is an accurate exposition of its meaning, and should have been given. The charge delivered by the court omits the very important element that the willful false testimony must be upon a material matter."

[8] Moreover, it is settled law that the giving or refusing to give this instruction, unless injury is shown, does not constitute prejudicial error. *People v. Russell*, 19 Cal. App. 750, 127 Pac. 829; *Medlin v. Spazier*, 23 Cal. App. 242, 245, 137 Pac. 1078. In the last case, speaking of a similar proposed instruction, the court said:

"Such instruction, however, belongs to that class of instructions which are said to pertain to mere commonplace matters that jurors are presumed to know about and act upon in the absence of being instructed thereon. Hence, if not prejudicial to defendant's case, neither the giving nor refusal of them will be held to be a ground for reversal."

There are other assigned errors; but a careful examination of the record discloses that appellant's contentions with respect to them are without substantial merit, and that the case was fairly tried.

Judgment and order affirmed.

STEINBRONER v. STEINBRONER.

(Civ. 1459.)

(District Court of Appeal, Second District, California. June 7, 1916.)

DIVORCE—§327—OPERATION—FOREIGN DIVORCE—CONCLUSIVENESS.

A divorce decree of a foreign state may be collaterally attacked upon the ground that the court lacked jurisdiction because the plaintiff was not then residing within the foreign state, notwithstanding the necessary jurisdictional facts are recited in the record.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 831-834; Dec. Dig. §327.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Divorce suit by Catherine Steinbronner against George P. Steinbronner. From a decree for plaintiff, and order granting plaintiff alimony pendente lite, defendant appeals. Affirmed.

John Munro and Fay R. Robertson, both of Los Angeles, for appellant. Joseph Scott and A. G. Ritter, both of Los Angeles, for respondent.

SHAW, J. Action for divorce. Judgment went for plaintiff, from which, and an order of court granting plaintiff alimony pendente lite, defendant appeals.

As disclosed by the record and argument in appellant's brief, the only ground upon which he based his defense to the action was a decree of the court of common pleas of the commonwealth of Pennsylvania, together with an exemplified copy of the record

therein, all of which were duly presented at the trial, showing that at a time antedating the commencement of this action, the bonds of matrimony theretofore contracted between plaintiff and defendant, as alleged herein, had been dissolved and a divorce granted him from said plaintiff by said decree so rendered by the common pleas court of Crawford county, Pa.

As to this defense, however, the court found that, under the laws of Pennsylvania, existing at the time, it was necessary in order to vest the court with jurisdiction to entertain an action for divorce, that the applicant therefor be at the time of commencing the suit a bona fide resident of such state, as well as such resident for a period of one year immediately preceding the bringing of such action; that defendant herein, who was plaintiff in the action so instituted in the Pennsylvania court, was at the time of the institution thereof, and for more than a year immediately preceding its commencement had been, a resident of the state of California, in which state defendant also resided. No attack is made upon this finding; indeed, we understand the facts so found to be conceded by appellant. As a conclusion of law, the court found that the decree so rendered and entered by the common pleas court of Pennsylvania, granting defendant a decree of divorce from plaintiff, was null and void for want of jurisdiction.

Appellant's sole contention is that, since the judgment rendered by the court of common pleas was regular on its face, it was not subject to collateral attack. In support of this claim he cites numerous authorities to the effect that:

"A divorce by a court having jurisdiction, valid and conclusive in state where rendered, is conclusive everywhere, and a finding of residence by the state court is prima facie proof and sufficient until overcome to support the jurisdiction." *Cheever v. Wilson*, 9 Wall. 123, 19 L. Ed. 604.

Undoubtedly this is true, provided the court has, as stated in the text, jurisdiction; but that is the very question here involved and as to which, as said, the decree presented is "prima facie proof and sufficient until overcome to support the jurisdiction." Since the evidence is not brought up, we must assume that it was ample to support the finding made by the court that there was a want of jurisdiction in the court rendering the decree, and this overcomes the prima facie showing made by its presentation. Mr. Black, in his work on Judgments, § 822, says:

"In America it is generally held, and indeed almost universally, that as a proceeding in divorce is intended to affect the status of the parties, and is therefore essentially *in rem*, the judgment pronounced, whether in a foreign country or in a sister state, by a court having *lawful jurisdiction* of the cause, and in the absence of fraud, is valid and binding everywhere and in all subsequent controversies, provided the applicant was *bona fide domiciled within the territorial jurisdiction* of the court, although the

other party, being a nonresident, was notified only by advertisement or some other species of constructive service [*italics are ours*]."

—the theory being that the marriage relation is a status transitory in its nature and attached to the person of each of the contracting parties, so that a court having jurisdiction over the one may dissolve it as to both, notwithstanding the other is beyond such jurisdiction. In *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70, quoting from the syllabus, it is said:

"An action for divorce is to some extent a proceeding *in rem*, and, where jurisdiction over the person of the defendant is not obtained, a court can deal with such status only by the fact that the plaintiff is in good faith domiciled within its territory, and thereby entitled to invoke this jurisdiction."

And, further:

"A decree of divorce, when pleaded in a court of another state, may be attacked for want of jurisdiction in the court which rendered it, and where the action in which it was rendered was *ex parte*, and it is clearly proven that the plaintiff was not at the time a bona fide resident of the state in which it was brought, such decree will be held void."

The case of *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, is authority for the statement that the jurisdiction of a court of a foreign state to render a judgment is always open to collateral attack in a proceeding in another state, and that:

"The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction."

To the same effect is *Hall v. Lanning*, 91 U. S. 100, 23 L. Ed. 271, where it is said:

"The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry; and that, in this respect, the court of another state is to be regarded as a foreign court. * * * The record of such a judgment does not estop the parties from demanding such an inquiry."

In the case of *In re James*, 99 Cal. 374, 33 Pac. 1122, 87 Am. St. Rep. 60, the Supreme Court, in discussing the question, says:

"We agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed, did not exist; and this is true although the record sought to be impeached may recite the existence of such jurisdictional facts."

Appellant has cited numerous authorities holding that a domestic judgment cannot be attacked collaterally in the courts of the state rendering the judgment; and also authorities like the text cited from *Cheever v. Wilson*, supra, to the effect that where the court having jurisdiction renders a valid and conclusive judgment, its action is conclusive everywhere. But these authorities have no bearing upon the question here presented. Both plaintiff and defendant were residents of this state at the time when and for more than one year immediately prior to defendant instituting the suit in Pennsylvania, wherein he obtained the judgment interposed

as a bar to plaintiff's action. As the status which he sought to have destroyed attached to the person of the contracting parties, neither of whom was within the jurisdiction of the Pennsylvania court, it must follow that such court had no jurisdiction of either the person of the litigants or of the subject-matter of the action; and hence the purported decree interposed as a bar to this plaintiff's action was a nullity.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

COLM v. FRANCIS et al. (Civ. 1519.)

(District Court of Appeal, Third District, California. June 14, 1916. Rehearing Denied by Supreme Court Aug. 10, 1916.)

1. SPECIFIC PERFORMANCE §114(1) — COMPLAINT—SUFFICIENCY.

In suit for specific performance of contract for lease of land, complaint showing that the party bound to give a lease had contracted to sell to another, who was in possession adverse to plaintiff, is not demurrable as indefinite, though it does not set out the contract of sale.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356, 366, 367, 370; Dec. Dig. §114(1).]

2. SPECIFIC PERFORMANCE §59—RIGHT TO RELIEF—PERFORMANCE OF CONDITIONS.

The obligee under contract to lease land if oil was discovered and on consummation of patent proceedings may have specific performance when final receipt issues, though no patent has been granted.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. §59.]

3. PUBLIC LANDS §110—FINAL RECEIPT—NECESSITY OF PATENT.

Issuance of receiver's final receipt constitutes a conveyance by the government of the equitable title to the land, and until issuance of patent the government merely holds legal title as trustee for the holder of the receipt, although in case of fraud, it might still refuse to issue patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 306, 309; Dec. Dig. §110.]

4. PLEADING §216(1)—DEMURRER—SCOPE OF INQUIRY.

On hearing on demurrer, nothing debors the pleading itself can be considered, and the court cannot determine whether its allegations are true, nor does Code Civ. Proc. § 1875, subd. 3, authorizing judicial notice of executive acts, permit the court on demurrer to notice judicially as against allegation in complaint, that no final receipt ever issued from the land office for the land in controversy.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535, 536, 539; Dec. Dig. §216(1).]

5. SPECIFIC PERFORMANCE §114(1)—PLEADING—DEMURRER—INTEREST OF PARTIES.

Complaint for specific performance of contract to lease land, which alleges that the obligor has made a contract for sale to another and put him in possession is not demurrable as showing no interest in the obligor, since it shows her to be still the legal owner.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356, 366, 367, 370; Dec. Dig. §114(1).]

6. SPECIFIC PERFORMANCE §114(2)—RIGHT TO RELIEF—CONSIDERATION.

By Civ. Code, § 3391, adequacy of consideration for a contract, specific performance of which is sought, must be pleaded and proved.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357-361; Dec. Dig. §114(2).]

7. SPECIFIC PERFORMANCE §114(2)—RIGHT TO RELIEF—CONSIDERATION.

Complaint for specific performance of contract for lease alleging that plaintiff as consideration therefor was to develop the petroleum deposits, do all work and pay defendant one-eighth the proceeds, shows sufficient consideration under Civ. Code, § 3391.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357-361; Dec. Dig. §114(2).]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by W. W. Colm against Mary F. Francis and the West Virginia Oil Company. Judgment for defendant Francis on plaintiff's refusal to plead further after demurrer to the complaint was sustained, and plaintiff appeals. Reversed, with directions.

T. N. Harvey, of Bakersfield, for appellant. Matthew S. Platz, and George E. Whitaker, both of Bakersfield, for respondent.

HART, J. This is a suit for the specific performance of a certain contract for a lease, or, more accurately speaking, to compel the defendant Mary F. Francis to execute a lease of certain land to the plaintiff in accordance with the terms of a certain written agreement to be hereafter more specifically referred to.

The said defendant (respondent herein) demurred to the complaint on general and special grounds. The demurrer was sustained and, the plaintiff refusing or failing to amend, judgment was thereupon entered against him and in favor of the respondent. This appeal is brought here by the plaintiff from said judgment.

The case as made by the complaint is this: That one P. J. O'Brien and one F. P. Francis, both residents of Kern county, each claimed, adversely to the other, to be the owner and holder of the possessory title to certain government lands in Kern county, "under and by virtue of certain mineral locations and mesne conveyances of the same"; said lands being described in the complaint as the N. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 6, township 11 N. of range 23 W., San Bernardino meridian; that said O'Brien and Francis, on the 10th day of September, 1908, entered into a certain written agreement, which was filed for record in the office of the county recorder of Kern county on the 19th day of October, 1908, and which agreement, in substance, recited and covenanted as follows: That one Edward Fox was desirous and willing to exploit said northeast quarter and develop the mineral deposits supposed to be contained therein, consisting of crude petroleum, "for

and in consideration of his receiving a deed of grant, bargain, and sale to the northeast and southwest quarters of said northeast quarter," in accordance with the terms of a certain agreement entered into between said P. J. O'Brien and said Edward Fox on the 26th day of July, 1908; that "whereas, it is deemed advisable and to the best interests of the parties hereto that an amicable adjustment be made of the conflicting claims of said parties to the lands in question and hereinabove described and that litigation be avoided." Then follows a covenant whereby Francis was to receive, from the land allotted to O'Brien in each of the quarter sections named, 35 acres, and was to have the first claim or selection of 35 acres in either the one or the other of said sections, and O'Brien was, after such selection by Francis, to have the right to exercise his selection of the 45 acres in the other quarter section, in each case the selection to embrace one solid piece or parcel of land; that, after the execution of the said agreement, and on the 16th day of November, 1908, the said Francis, as party of the first part, entered into an agreement in writing with the said Edward Fox, as party of the second part, which agreement was filed for record in the office of the county recorder of Kern county, on the 21st day of January, 1909. In said agreement, which is set out in the complaint in *hæc verba*, it was recited, covenanted, and agreed: That, whereas, said O'Brien and Francis are owners as tenants in common of the said northeast quarter of said section 6, and that "development work for oil upon said land is now being carried on and performed by the party of the second part; that, upon the discovery of oil in paying quantities, by reason of said development work, patent proceedings are to be instituted by said Francis and O'Brien for the purpose of procuring a United States patent to the land hereinabove described"; that by the said agreement between Francis and O'Brien, there were to be conveyed to and vested in the former, "upon the consummation of the patent proceedings above referred to," 35 acres of said quarter section, that "it is not yet determined out of what particular portion of said northeast quarter of said section 6 the said 35 acres so to be conveyed to and vested in said Francis are to be taken or segregated"; that, "for and in consideration of the said development work, performed and to be performed by the said party of the second part upon and for the benefit of said northeast quarter of said section 6 hereinabove described and for other good and sufficient considerations moving from the party of the second part to the party of the first part, the party of the first part hereby agrees, that when said 35 acres of land so to be conveyed to and title vested in him as aforesaid, is segregated from the remaining portion of said northeast quarter of section 6, and conveyed to and vested in him,

he will execute and deliver to said party of the second part an indenture of lease of said 35 acres of land, which said indenture of lease shall embody, among others, the following provisions, to wit: That the said party of the first part, as lessor, shall lease, demise, and let unto the said party of the second part, as lessee, the said 35 acres of land, being a portion of said northeast quarter of said section 6, hereinbefore referred to, together with the exclusive right to mine, dig, excavate, bore, and drill for and otherwise to collect, develop, and obtain petroleum oil, natural gas, naphtha, and other hydrocarbon and kindred substances, and also water, and the right to sever and remove said substances from said lands, also to construct, maintain, and use over and upon said land, roads, pipe lines, telephone lines, storage tanks, engines, machinery, and other structures."

Subsequent to the making of the foregoing agreement, the said F. P. Francis died, his estate was administered upon by his widow, Mary F. Francis, the respondent herein, and, by a decree of the superior court of the county of Kern, sitting in probate, made and entered on the 13th day of July, 1910, said estate, including the interest of her deceased husband in and to the agreement of September 10, 1908, between the said deceased and the said O'Brien, concerning the land described in the complaint, was distributed to the said Mary F. Francis.

It is further alleged that subsequent to the making of the agreement between the said Fox and the said Frank P. Francis, and after the death of the latter, the said Fox discovered crude petroleum in large and paying quantities in and upon the said northeast quarter of the said section 6; that upon the said discovery of crude petroleum oil, application for a United States patent to said northeast quarter was made by said P. J. O'Brien, "and after proceedings had and taken in the United States Land Office at Los Angeles, Cal., the receiver's final receipt on said application for a patent was duly issued to said P. J. O'Brien for said northeast quarter of section 6; that, at or about the time of the issuance of said receiver's final receipt above referred to, the said P. J. O'Brien conveyed to the said defendant Mary F. Francis, as successor in interest of the estate of the said F. P. Francis, deceased, in accordance with the terms of the agreement made by him with said Francis," 35.14 acres of the land described in the complaint, said 35 acres and fraction of an acre being specifically described in the complaint.

On the 2d day of July, 1909, the said Edward Fox by an instrument in writing transferred and assigned all his right, title, and interest in and to said agreement of November 16, 1908, between himself and the said Frank P. Francis, to one Lewis Hicks, the said transfer having been, on the 6th day of July,

1908, recorded in the office of the county recorder of Kern county; and, on the 28th day of June, 1912, Hicks, by an instrument in writing, transferred and conveyed the said agreement and all rights thereunder to the plaintiff and appellant herein.

It is charged that, after the estate of F. P. Francis, deceased, was distributed to the defendant Mary F. Francis, and subsequent to the issuance of the United States receiver's final receipt and the conveyance by the said P. J. O'Brien to said Mary F. Francis of the 35 acres of land above mentioned, "and notwithstanding the existence of said agreement of lease, which has never been canceled, vacated, or set aside, and of which agreement of lease the said defendant Mary F. Francis had actual as well as constructive knowledge at all times herein mentioned, the said defendant Mary F. Francis entered into a contract of sale with one E. S. Good, by which the said defendant Mary F. Francis agreed to sell to the said E. S. Good the above-mentioned and described land for the purpose of drilling and operating the same for the production of oil therefrom"; that, in accordance with said agreement to sell, the said defendant placed the said Good in possession of said land; that said Good has assigned and transferred all his title and interest in and to said agreement to sell to the defendant West Virginia Oil Company, which company "has at all times since said assignment been in the occupancy and possession of said described land and claiming some right, title, and interest in said land, but plaintiff alleges that the same is without right or merit and is subject and subordinate to plaintiff's rights in said lease and said described land."

The plaintiff states that, on or about the 26th day of September, 1912, he made a demand on the respondent for a lease of said 35 acres in accordance with the terms of the written agreement of November 16, 1908, but that she has ever since failed and refused and still fails and refuses to execute an agreement of lease to the plaintiff; that plaintiff has at all times since the assignment of the said agreement to him been ready and willing "and is now ready and willing to perform all of the terms and conditions of said lease to be by him performed as lessee."

[1] The statement of the alleged special grounds of demurrer, so far as the first specification is concerned, is wanting in clearness. While the first and second specifications declare that the complaint is ambiguous and unintelligible, and that the court has no jurisdiction over the subject-matter of the action, they in fact involve objections to the complaint on general rather than special grounds. More explicitly speaking, the necessary legal effect of the demurrer in those particulars is that the complaint is insufficient in the statement of a cause of action because it discloses that the lease was to be

executed only when the patent to the land described in the complaint was issued to O'Brien and after he had conveyed to Francis the particular 35 acres of land which their agreement of September 10, 1908, called for, and that it does not appear from the complaint that either a patent or the receiver's final receipt on the application of a patent to said land had been issued to O'Brien or to any other person, or that the land had been segregated and the parcel to which Francis was entitled conveyed to him by O'Brien in pursuance of the terms of said agreement.

The averment relative to the alleged contract by the defendant to sell the land to the said E. S. Good, as well as those relative to the alleged transfer of the said agreement to sell to the defendant West Virginia Oil Company are also challenged as being enveloped in ambiguity and characterized by unintelligibility. The complaint, in the particular referred to, is not amenable to the objection thus made. It is true that the agreement to sell was not set out in full in the complaint, as counsel for the respondent seem to think ought to have been done. But it was within the rights of the plaintiff to plead said contract in a manner consistent with the dictates of his own judgment, so long as he made it clearly to appear in his complaint that such a contract had been made and that under it claims were made to the property in question adverse to his alleged rights therein. And the complaint does clearly show that such a contract had been made, was still in existence, and that under it the West Virginia Oil Company claims an interest in the premises in dispute adversely to the plaintiff's claim of interest in said property under the contract for a lease.

[2, 3] The most important points urged here, however, are that the complaint does not state a cause of action for the relief herein sought because it fails to disclose that the conditions upon which the lease was to be made and delivered to Fox or his assignees had taken place or been complied with and because further it fails to show an adequate consideration either for the contract for a lease or for the lease itself. It is further contended that the defendant Mary F. Francis is not a real party in interest. These contentions are without legal force, and the demurrer was therefore erroneously sustained.

The theory of the respondent is that, under the terms of the contract between Francis and Fox, the latter could acquire no right to the lease until a patent to the land in question had actually been issued by the government to O'Brien. But there is no language in the contract between Francis and Fox which requires that instrument to be construed to mean that, as a condition precedent to the execution of the lease or to the right of Fox to compel the execution of the lease, a patent must have actually been issued to and received by O'Brien to the lands

described in the complaint. The contract itself makes no express reference to a patent. The language of the preamble to the contract, viz.: That the 35 acres were to be conveyed to and vested in said Francis "upon the consummation of the patent proceedings" does not say, nor do we believe it may reasonably be held to have been intended to say, that the actual issuance of a patent by the government should have taken place as a condition to the execution of the lease. Indeed, the "consummation of the patent proceedings" by the applicant could have gone no further than establishing his right to a patent—he could not himself, quite obviously, issue the patent. All that the contract called for, so far as concerned Fox's right to a lease from Francis, was that the latter should acquire title to the 35 acres of land selected by him, and that he did acquire a title to 35 acres of land, which were selected and segregated from the northeast quarter of section 6, and conveyed to the successor in interest to his estate, the complaint very clearly discloses. That pleading, as has been shown, alleges that, upon the discovery of crude petroleum oil on the northeast quarter of section 6, due proceedings were had in the United States Land Office for the acquirement of a patent to said land, and thereupon the receiver's final receipt entitling the applicant to a patent "was duly issued to the said P. J. O'Brien for said northeast quarter of said section 6," and that "at the time of the issuance of said receiver's final receipt" O'Brien conveyed to the respondent, as the successor in interest in the estate of her deceased husband 35 acres out of the said northeast quarter.

The issuance to O'Brien of the receiver's final receipt constituted a conveyance to him by the government of the equitable title to the land. Until the patent was issued, the government was, of course, the holder of the legal title, but it held it as a mere trustee for O'Brien and no longer had a proprietary or, indeed, any interest whatever in the land itself. The discharge of its trust lay in the mere ministerial act of its officers charged with that duty in issuing the patent—the mere evidence of O'Brien's ownership in fee of the land. O'Brien's title, so far as dominion over it was concerned, became complete when he received the final certificate of the receiver.

The foregoing views are sustained by the decisions of the courts as well as by the adjudications of the land department of the government.

In *Barney v. Dolph*, 97 U. S. 652, 656 (24 L. Ed. 1063), it is said:

"When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. * * * The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty."

In a case before the Interior Department (*Aspen Consol. Gold Min. Co. v. Williams*, 27 Land Dec. 16) Secretary Bliss said:

"Where an entry and final certificate are obtained by compliance with the public land laws the right of the entryman or purchaser to a patent is complete, and his right or title will not be impaired by any delay in issuing the patent, and that when issued the patent will relate back to the date of the entry or purchase and give effect thereto from that time."

See, also, *Carroll v. Safford*, 8 How. 441, 461, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 218, 220, 18 L. Ed. 339; *Stark v. Starr*, 6 Wall. 402, 418, 18 L. Ed. 925; *Amador Medean Gold Min. Co. v. South Hill Gold Min. Co. (C. C.)* 13 Sawyer, 523, 36 Fed. 668.

Again, in *Harkrader v. Goldstein*, 31 Land Dec. 93, Acting Secretary Ryan said:

"Having complied with all the terms and conditions necessary to obtaining title, and the officers of the government whose duty it was to act in the premises, in the first instance, having accepted his proof and issued final certificate of entry thereon, the townsite entryman, and those for whom he was trustee, had, upon the face of the record, acquired a vested interest in the land, and, under the law, had become *prima facie* the equitable owners thereof and entitled to a patent."

See, also, *Kern Oil Co. v. Clarke*, 30 Decs. Interior Department, 500; *Skinner v. Fisher*, 40 Id. 112; *In re S. P. R. Co.*, 32 Id. 51, 64; *Wirth v. Branson*, 98 U. S. 118, 121, 25 L. Ed. 86; *Simmons v. Wagner*, 101 U. S. 260, 261, 25 L. Ed. 910.

It is true that the government has it within its power to refuse, for sufficient reasons—for instance, for fraud in the procurement of the final certificate—to issue a patent after the final certificate therefor has been issued, but, in the absence of a showing that some reason exists for the withholding of or refusal to issue a patent, it cannot be assumed that the government has the legal right to do so, nor that, a final certificate for the land having been issued, the issuance of the patent will not follow in due course.

Thus it will be observed that O'Brien, having acquired an equitable title to the northeast quarter of section 6, conveyed to Mrs. Francis, as the successor in interest to her deceased husband, a similar title to 35 acres carved out of said quarter section, in accordance with the terms of the contract between O'Brien and her husband. The contract between Francis and Fox does not call for any particular kind of title—that is, it does not provide, as one of the conditions upon which Fox would be entitled to a lease of Francis' 35 acres, that the latter should first have vested in him a legal title to the land. It merely provides that title to the land shall be vested in him—a title which, whether legal or equitable, or both, would vest in him full dominion over the land so conveyed, with the power and right to dispose of it as he pleased. And, as by the receiver's final certificate and O'Brien's conveyance, such a title

was vested in Francis or in his successor in interest, it follows, of course, that one of the several conditions upon which Fox was entitled to the lease under his contract with Francis had been complied with.

The construction thus given the contract for a lease harmonizes with the practical construction to which the parties themselves subjected the contract between O'Brien and Francis. Upon the issuance of the receiver's final receipt to O'Brien, Mrs. Francis, in the exercise of her right under said contract to a first selection of 35 acres out of the northeast quarter, selected and had set off to her said 35 acres and O'Brien conveyed the same to her and she accepted the conveyance—all this, in pursuance of said contract between O'Brien and Francis, the language of which, so far as that particular part of it was concerned, was followed by the contract for the lease.

[4] Counsel for the respondent have filed with the papers in this case (not contained in the transcript on appeal) a certified statement by the registrar of the United States Land Office at Los Angeles, dated June 9, 1913, in which that officer declares that as a matter of fact no final certificate has ever been issued out of said office for the said quarter section, and in effect makes the singularly novel proposition that, in determining whether the complaint is wanting in the statement of a cause of action because no title of any character to said land has vested in Francis or O'Brien, this court may by virtue of the provisions of section 1875, subdivision 3, of the Code of Civil Procedure, take judicial notice of the fact that no final certificate has ever been issued out of said land office for a patent to said land, and to aid it the court may inspect or examine the said certified statement of the registrar. The proposition is so obviously unsound that it would seem that no notice should be given to it. However, counsel make the point and the obvious reply is that the rule referred to is one of evidence and not of pleading. It is only the statement of a proposition plainly within the realm of commonplaces to say that, in passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue. That is always the ultimate question to be determined by the evidence upon a trial of the questions of fact. Obviously, the complaint, when appropriately challenged, whether for want of sufficient facts or for an insufficient or infartificial statement of the facts, must stand or fall by its own force. Nothing dehors the pleading itself can be considered to determine whether it is obnoxious to objections made against it as a pleading.

[5] It is next contended that the complaint shows that the defendant Mary F. Francis,

previously to the commencement of this action, had transferred her right, title, and interest in and to the premises in question to one Good, that she now has no interest in the property to which the lease relates, that she is not the real party in interest, and that, as to her, specific performance of the contract for a lease is impossible. The complaint does not state that Mrs. Francis had disposed of or sold the land in question. It alleges that she entered into a contract with said Good whereby she agreed to sell to him the 35 acres, and that Good transferred said contract and his right to purchase thereunder to the defendant West Virginia Oil Company. No sale of the property by virtue of the terms of said contract had been consummated, so far as the complaint shows. Mrs. Francis, being still the owner of the property, is, of course, legally capable of executing the lease. It was manifestly proper to make the defendant West Virginia Oil Company a party defendant, since it claimed some interest in the property by reason of the contract for the sale of the land.

[6, 7] The last point made is that the contract for the lease is not supported by a consideration, and that the consideration moving to Francis for the execution of the lease is not shown by the complaint to be adequate.

The rule that adequacy of consideration for a contract whose terms are sought to be enforced through a decree of a court of equity must be pleaded and proved is not only expressly declared by our Code (Civ. Code § 3391), but is so firmly settled by the authorities that it is unnecessary to cite any upon that proposition. And we think it is made very clear by the complaint in the case at bar that that rule, so far as pleading is concerned, has been fully complied with both as to the contract which constitutes the basis of this action and the proposed lease. The contract for the lease recites that:

"For and in consideration of the said development work performed and to be performed by the said party of the second part upon and for the benefit of said northeast quarter of said section hereinabove described and for other good and sufficient considerations moving from the party of the second part," etc.

Thus it will be noted that one of the considerations for the contract of lease was "development work" already performed by Fox, and this itself was a consideration sufficient to support said contract. As to the lease itself, the contract provides that the lessee shall do all the work of drilling wells, furnish all the labor and materials and machinery and erect structures and such other appurtenances as may be necessary for the production of oil in paying quantities, pay all taxes on all the personal property on the premises, including the machinery and structures referred to, and pay to the lessor, "as rent or royalty for said lands, one-eighth of all the proceeds of oil or other substances which may be produced or saved from the

premises, and from the wells therein, less the amount consumed in production"; that the royalty so due and to be paid to the lessor by the lessee shall be paid in products or cash at the option of the lessor, the latter to furnish the lessee with a monthly statement showing production of oil and other substances from the land. We cannot say that this does not constitute a fair, just, and reasonable consideration. At any rate, on the face of the complaint it appears to be adequate and equitable.

The judgment is reversed, with directions to the court below to allow the respondent such time within which to answer the complaint as to it may appear reasonable.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

TUBBS v. STONE & WEBSTER CONST. CO. et al. (Civ. 1506.)

(District Court of Appeal, Third District, California. June 13, 1916. Rehearing Denied by Supreme Court Aug. 10, 1916.)

1. MASTER AND SERVANT §236(39)—INJURIES TO SERVANTS—JURY QUESTION—MASTER'S ORDER AS NEGLIGENCE.

Where employes, after emptying their wheelbarrows, ordinarily continued around an elevated circular runway to the refilling point, an order that plaintiff return the way he came, which resulted in his falling off the runway while passing another employé, held to make the employer's negligence a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1040-1042; Dec. Dig. §236(39).]

2. MASTER AND SERVANT §289(6)—INJURIES TO SERVANT—JURY QUESTION—CONTRIBUTORY NEGLIGENCE—MISTAKE OF JUDGMENT.

The employé's contributory negligence in stepping to the runway's edge to allow passage room for another employé with a wheelbarrow was a jury question, where the situation suddenly developed and was new to plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1095; Dec. Dig. §289(6).]

3. MASTER AND SERVANT §222(2)—INJURIES TO SERVANT—ASSUMPTION OF RISK—COMPLIANCE WITH COMMANDS.

An employé does not assume a risk created by his foreman's order unless he appreciated the danger of obeying it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649; Dec. Dig. §222(2).]

4. MASTER AND SERVANT §238(16)—INJURIES TO SERVANT—JURY QUESTION—ASSUMPTION OF RISK—COMPLIANCE WITH ORDER.

Whether plaintiff assumed the risk was a jury question, where it was not clear that he realized the danger in obeying the foreman's order until he saw the other employé with his wheelbarrow approaching.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1086; Dec. Dig. §238(16).]

5. NEGLIGENCE §101—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EMPLOYERS' LIABILITY ACT.

Under Employers' Liability Act (St. 1911, p. 796), recovery is not barred, where the em-

ployé's contributory negligence is slight and the employer's negligence is comparatively gross, but the damages may be reduced.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. §101; Damages, Cent. Dig. § 371; Master and Servant, Cent. Dig. §§ 665, 672.]

6. MASTER AND SERVANT §203(3)—INJURIES TO SERVANT—ASSUMPTION OF RISK—EMPLOYERS' LIABILITY ACT.

Employers' Liability Act 1911, eliminating the defense that the employé "assumed the risk of the hazard complained of," includes both the ordinary and extraordinary risks of employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 543; Dec. Dig. §203(3).]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by George W. Tubbs against the Stone & Webster Construction Company and Jack Brown. Judgment of nonsuit, and plaintiff appeals. Reversed and remanded.

M. K. Harris, L. B. Hayhurst, and George Cosgrave, all of Fresno, for appellant. Barnard & Watters, of Fresno, and James A. Watt, of San Francisco, for respondents.

ELLISON, Judge pro tem. Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by him while in the employ of the corporation defendant. At the close of the testimony introduced on behalf of the plaintiff the defendants moved the court for a judgment of nonsuit, which motion was granted. From the judgment that followed this appeal is prosecuted.

The record shows that, in September, 1913, the defendant corporation was engaged in the construction of a concrete wall as part of a power house in Fresno county, and had in its employ, engaged in said work, a number of men, including the plaintiff. At the time of the accident to the plaintiff the wall had been built up to a height of about 40 feet. Below it on the ground level there was a cement floor. Around the inside of the wall was a plank runway 4 feet wide supported by scaffolding. The runway had no railing or anything else on its side as a protection, to those working upon it. It was of rectangular shape. The work of filling the molds with cement in constructing the wall was being done as follows: At one corner of the runway was a hopper into which the cement was placed by means of a hoist that brought it up from the ground. On the runway some 18 men were working, each with a wheelbarrow. The wheelbarrows were 30 inches wide, and weighed 75 pounds when empty and 250 pounds when loaded with cement. Each man would place his wheelbarrow under the spout of the hopper, and it would be filled by pulling a lever and letting the cement run into it. Then it would be moved to the place on the wall where needed and be emptied into the molds or forms, after which it would be

pushed in the same direction it had been moving and around the runway until it again came to the hopper. In this work the men with their wheelbarrows formed a continuous procession. The plaintiff was employed to wheel one of these wheelbarrows, and had been at work about one hour and a half when the accident occurred. The plaintiff testified:

"Well, I was wheeling concrete, you know, when we would empty our wheelbarrow we would go around back to the chute and fill up again; and Brown, when I brought a wheelbarrow around, he said, 'Turn around and go back; you are losing too much time going on around.' Q. Where was Brown at that time? A. He was right about here (indicating). Right about opposite to me when he spoke to me. Q. The point you are speaking of is where you were dumping the concrete, I believe? A. Yes, sir. Q. What else did he say to you? A. I don't know exactly what he said; he said, 'Turn around and go back; you are losing too damn much time going around this way.' Q. What did you do then? A. I just set down my wheelbarrow and started back with it. Q. Had you already emptied your wheelbarrow at that time? A. Yes, sir; I had just emptied my wheelbarrow when he told me to go around, turn around and go back. When I started back I saw another wheelbarrow coming from the dumper here, and so I knew I couldn't pass him, you know; so I pulled my wheelbarrow around and straightened up to allow him room to pass, and I don't know what happened after that; I was struck, and I went down, and I don't know just exactly — Q. How far down did you go? A. I should judge about 35 or 40 feet. Q. Did you strike on the way down? A. I must have. I was cut up underneath the jaw, and the whole side of my face was cut up, and this leg was broken. Q. Which leg broken? A. Left one, half way to the knee. Q. Mr. Tubbs, at the time that you turned back, do you know whether the runway there was wide enough so that another wheelbarrow could pass you? A. I thought it was wide enough by the other man being careful, because there was room enough if he had been careful. Q. Had you been wheeling before that time, using a wheelbarrow on this runway? A. Not on that runway; no, sir."

On cross-examination he testified:

"Q. Was there any man following you with a load? A. Well, yes there was another man following me; but I didn't know he was following me. Q. You didn't know he was following you? A. No, until I turned around and Brown told me to start back, and I took my wheelbarrow like this (indicating) and started back, and as I started back I saw this other fellow coming; and I thought, after I pulled my wheelbarrow up like that (indicating), there would be room for him to pass, and there would have been room if he had been careful. I don't know exactly, but I was about 15 feet from the loading point. Q. In starting back how many steps had you taken before you fell? A. I took two or three steps I believe as near as I can say. Q. How near did you approach the man coming in the opposite direction? A. I don't know exactly how near I was to him. I see him coming, and I pulled up that way just to allow him room to pass. There would have been room enough if he had been careful. Q. You said this morning in answer to your counsel that you knew you couldn't pass him, did you not? A. I was going along with the wheelbarrow that way (indicating). I knew I could not have done it that way (indicating). I pulled up the wheelbarrow to allow him to pass. Q. You knew you couldn't pass him on that narrow walk, did you? A. Yes, sir. Q. The two wheelbarrows were wider than the walk, were they not? A. Yes, sir. Q. You saw it was dangerous, didn't

you? A. Yes, sir. Q. And you knew that it was dangerous, did you not? A. Well, it wouldn't have been dangerous if he had been careful. Q. How close would you have to stand to the edge in order to allow him to pass with a loaded wheelbarrow? A. I would have to stand right on the edge. Q. And you say that there was a sheer fall there of 40 feet or thereabouts? A. Yes, sir. Q. But you knew it was there? A. Yes, sir. Q. How near did you approach him before you fell? A. Oh, about, I don't know, about 8 or 9 feet, maybe 10. I don't know how far I saw him coming, and I knew I could not pass him. Q. He was still 8 or 9 feet from you when you fell? A. Yes, sir."

The defendants' motion for a nonsuit was made upon the grounds: (1) That the evidence failed to prove the negligence alleged in the complaint; (2) that the evidence shows without conflict that the accident occurred by reason of the plaintiff's negligence in—

"voluntarily, carelessly, and negligently and unnecessarily approaching too near to the outer side of the runway; (3) that the danger of drawing to one side of the runway and attempting to permit another person to pass with a loaded wheelbarrow in the position he was, and the danger of his attempting to return towards the point of loading in the same direction in which he had come, was so obvious and so apparent that to do so was to assume the risk of the accident occurring necessarily involved; that the danger of falling by attempting to draw near to the side of the runway with his wheelbarrow to permit another to pass with a loaded wheelbarrow was obviously so dangerous that any person in possession of his faculties could not be justified in doing so, even at the command of his employer."

We rely in this motion upon the testimony of the plaintiff himself and upon the law as declared by the Supreme Court in the case of Hall v. Clark, 163 Cal. 392, 125 Pac. 1047.

[1] Upon the first ground of the motion little need be said. That the defendant corporation owed a duty to the plaintiff, not to order him to return with his wheelbarrow in the direction from which others with loaded wheelbarrows were approaching upon a narrow runway 40 feet high, unprotected by a railing, is too obvious to need discussion. We do not understand that the defendant seriously contends that defendant was not guilty of negligence in giving to the plaintiff the order it did.

The statements, contained in the motion, of conduct of the plaintiff claimed to justify a nonsuit were twofold: (1) That he was guilty of contributory negligence causing the accident; and (2) that he assumed the risks involved in trying to obey the orders he had received. These two defenses, while often considered together without much attempt to distinguish them, involve different rules and principles, and, while both may and often do coexist in the same case, yet they are not the same. A person may undertake to do a very dangerous thing and yet do it in a very careful manner. The difference between the two defenses is very clearly stated in the case of Choctaw, etc., R. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244; 4 L. R. A. (N. S.) 837,

7 Ann. Cas. 430, from which we make the following excerpts:

"The defense of contributory negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable even though the defendant has been guilty of negligence. * * * It applies when the defendant is asking damages for an injury which would not have happened but for his own carelessness. On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid. * * * In other words, the defense of assumed risk rests on the fact that the servant voluntarily, or at least without physical coercion, exposed himself to the danger, and thus assumed the risk thereof. Having done this of his own accord, he has no right, if an injury results, to call on another to compensate him therefor, whether he was guilty of carelessness or not. * * * In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service and when it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them, and, if he negligently fails to do so, he will still be held to have assumed them. * * * But the servant is not presumed to know of risks and dangers caused by negligence of the master after he enters the service, which change the conditions of the service. If he is injured by such negligence he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger. Where the condition of the service is thus altered, and the servant is brought face to face with a danger of that kind not ordinarily incident to the work, then, as before stated, new questions are presented. The plea of the master that the servant assumed the risk is met in such a case by the answer that the danger arose from the master's own negligence, which is not one of the risks assumed by the servant. This being so, the master, to make good his defense of assumed risk, must go further and show that the servant voluntarily subjected himself to the new danger with full knowledge and appreciation thereof; for such risk constitutes an addition to those ordinarily incident to the service, and there is no presumption that he had knowledge of it, or assumed it. * * * But plaintiff in this case exposed himself to the danger in obedience to an order of the foreman. As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work."

[2] Considering the alleged contributory negligence of the plaintiff as distinguished from assumption of risk: He had been ordered to turn back with his wheelbarrow on the plank runway, and obeyed. After he had turned and started back he noticed another wheelbarrow coming towards him, and discovered for the first time that the two could not pass if both were rolled along in the ordinary manner. He was thus confronted with a new and unexpected situation and danger. Thinking quickly and without much time for deliberation, he decided that by stepping towards the edge of the runway and

placing his wheelbarrow in an upright position, the other could pass him with safety. He accordingly adopted this course of action, and, either by being struck by the wheelbarrow or by losing his balance (the record is not clear as to which) he fell and was injured. Whether under the circumstances it was negligence for him to move to the edge to let the other wheelbarrow pass and whether in doing so he acted carelessly were questions that the jury should have been permitted to pass upon. The evidence and all the attending circumstances, with all the inferences that might be drawn therefrom, did not present such a case as to make his negligence a pure question of law. He was only required to do what was reasonable under existing circumstances. The case was undoubtedly one where the reasonableness of the effort to escape injury after the discovery of the danger was a question for the jury to be determined by them in view of all the circumstances shown by the evidence.

"If the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice under this disturbing influence, although if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault; and of such case it is said: 'Even if, in bewilderment, he runs directly into the danger which he fears, he is not at fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person.'" *Antonian v. S. P. Co.*, 9 Cal. App. 728, 100 Pac. 882.

[3, 4] As to assumption of risk: The risk he incurred in turning back and trying to pass another wheelbarrow was not one of the ordinary risks of his employment but, in the language of the decision quoted from, it was a "risk caused by the negligence of the master after he entered the service and which changed the condition of the service," and, as said in the same case:

"As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work."

We think the plaintiff's evidence does not make it clearly appear that when he entered upon the performance of the new order, given him by the foreman, he knew and appreciated the danger involved in obedience. His testimony is fairly susceptible of the construction that not until he has started back with his wheelbarrow, and not until he saw the other wheelbarrow approaching him, did he know or realize that the two wheelbarrows could not be wheeled by each other with safety. Up to this point, then, he had not assumed the risk incident to changed conditions of his work. Not knowing at that time that the two wheelbarrows could not pass, he did not "know and appreciate the danger of obeying the order he had received."

"The servant's dependent and inferior position is to be taken into consideration; and, if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not obviously so dangerous that no man of ordinary prudence would have obeyed." *Shearman & Redfield on Neg.* (6th Ed.) § 207h. "When ordered into a place of danger the servant will not be chargeable with having assumed the risk, unless so glaring that no prudent man would have encountered it, if he acts with reasonable prudence in its execution." *Shearman & Redfield on Neg.* (6th Ed.) § 207h, notes. "But the present case comes under a limitation to that doctrine, to the effect that, if the danger is not so absolute, or imminent, that injury must almost necessarily result from obedience to the order, and the servant obeys the order and is injured, the master will not be allowed to defend, on the ground that the servant ought not to have obeyed the order." *Choctaw, etc., R. R. Co. v. Jones*, 4 L. R. A. (N. S.) 858, note.

The conclusions we have reached on this branch of the case are not at all in conflict with the decision in *Hall v. Clark*, 163 Cal. 392, 125 Pac. 1047, but are in harmony with it. The two cases are readily differentiated. In that case the plaintiff could know and appreciate the dangers incident to obeying the order as soon as it was made. The situation was visible, apparent, and known. In this case the danger was not known or appreciated until the risk had been well entered upon. In that case the plaintiff, with full knowledge of all the facts, did a manifestly dangerous act. In this case the plaintiff, after being placed in a dangerous position, before he knew it was dangerous, moved to one side to let the other man pass, believing it was a safe thing to do if the other man was careful, as he testifies, and we are not prepared to say that a jury would or ought to have found that the act was one no ordinarily prudent man would have attempted under the circumstances.

[5] Thus far the case has been considered without reference to the provisions of the act of 1911 (Stats. 1911, p. 796), known as the Employers' Liability Act. That act deals with both contributory negligence and assumption of risk as defenses to actions of this kind, but gives a different effect to each. Contributory negligence by that act is made a conditional defense. Assumption of the risk of the hazard is denied all efficacy as a defense. Under that act contributory negligence does not bar a recovery where it is slight and that of the employer is gross in comparison, but the damages may be diminished by reason of such contributory negligence.

So in this case, if the jury had found that the plaintiff was negligent in trying to pass the wheelbarrow in the manner he did, they could not then have given a verdict in favor of the defendant for that reason, unless they also found that his negligence was more than slight as compared to the negligence of the defendant. A case might arise when great

negligence on the part of a plaintiff would be considered slight when compared with the negligence of the defendant. So, even if, in this case, the plaintiff was guilty of negligence contributory to the injury, still it was for the jury to compare it with the negligence of the defendant and, if found to be slight in comparison, give a verdict for him with a reduction of amount on account thereof, but not give a verdict for the defendant unless the plaintiff's negligence was found to be more than slight in comparison with the defendant's negligence.

The plaintiff testified that to permit the other man to pass him would not be dangerous if the other was careful. If the jury believed this statement, they would have been justified under the circumstances in finding that the plaintiff was not guilty of negligence, or, if he was, that it was only slight as compared with defendant's.

[8] The Employers' Liability Act provides:

"It shall not be a defense (1) That the employé, either expressly or impliedly, assumed the risk of the hazard complained of."

This would seem to dispose of the claim that plaintiff cannot recover because he assumed the risk of the hazard. It is to be noted that this act was not in force when the cause of action arose in *Hall v. Clark*, 163 Cal. 392, 125 Pac. 1047, and in the decision that feature is incidentally referred to. See page 395. The act does not use the expression "risk of the employment" but "risk of the hazard complained of," and this is broad enough to include both the ordinary and extraordinary risks of an employment.

"But even if it be said that the station as used by Crabbe was in an unsafe condition, and that he knew it, this amounts to no more than a declaration that Crabbe assumed the risk of a known hazard. But this fact, by the very terms of the Employers' Liability Act, no longer affords the employer a defense." *Crabbe v. Mammoth etc., Co.*, 163 Cal. 500, 143 Pac. 714.

Our conclusion is that the jury should have been permitted to pass upon the case. The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

BUTTS et al. v. ROTHSCHILD BROS. HAT CO. (No. 7505.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR — 1236 — LIABILITIES ON BOND — JUDGMENT.

In a case appealed to the Supreme Court where supersedeas bond has been given staying execution, and the judgment here is against the appellant, this court by virtue of the provisions of chapter 249, *Sess. Laws 1915*, will enter judgment against the sureties on such bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4784; Dec. Dig. — 1236.]

Commissioners' Opinion, Division No. 3. Error from District Court, Coal County; R. M. Rainey, Judge.

Action between J. W. Butts, Jr., and another and the Rothschild Brothers Hat Company. From the judgment, Butts and another bring error. Motion for judgment against sureties on supersedeas bond. Sustained.

George Trice, of Coalgate, for plaintiffs in error. Fooshee & Brunson, of Coalgate, for defendant in error.

BLEAKMORE, C. On appeal to this court from a judgment of the district court of Coal county, supersedeas bond was filed, executed by the plaintiffs in error as principals, and E. R. Bunch and R. A. Arnold as sureties, to stay said judgment. On July 11, 1916, there was judgment of this court against appellants; and motion has been filed herein for judgment against the sureties on such supersedeas bond. By virtue of the provisions of chapter 249, Sess. Laws 1915, as construed in *Long v. Lang* (not yet officially reported), 152 Pac. 1078, the motion is sustained.

Judgment is therefore entered in this court against E. R. Bunch and S. A. Arnold, in the sum of \$199.47, together with interest thereon at the rate of 6 per cent. per annum from the 29th day of September, 1914, and all costs of the action.

PER CURIAM. Adopted in whole.

AARON et al. v. AMERICAN NAT. BANK.
(No. 7375.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐305—**ASSIGNMENTS OF ERROR—RULING ON MOTION FOR NEW TRIAL.**

Errors occurring during the trial cannot be considered by the Supreme Court unless the ruling of the trial court on the motion for a new trial is assigned as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1759-1764; Dec. Dig. ⇐305.]

Commissioners' Opinion, Division No. 2. Error from District Court, Osage County; R. H. Hudson, Judge.

Action by the American National Bank against W. H. Aaron and another on a promissory note. Judgment for plaintiff, and defendants bring error. Dismissed.

Templeton & Tillman, of Pawhuska, for plaintiffs in error. Robert Stuart and A. M. Widdows, both of Pawhuska, for defendant in error.

BRUNSON, C. This court has repeatedly held that errors occurring during the trial cannot be considered unless motion for a new trial has been made by the complaining party, and acted upon by the trial court, and its ruling assigned as error in the Supreme Court. *Avery v. Hays*, 44 Okl. 71, 144 Pac. 624; *Kee v. Park et al.*, 32 Okl. 302, 122 Pac. 712; *Stinchcomb v. Myers*, 28 Okl. 597, 115

Pac. 602; *St. Louis & S. F. R. R. Co. v. Leake et al.*, 84 Okl. 77, 128 Pac. 1125. The plaintiffs in error, defendants below, have not assigned as error the ruling of the court upon the motion for a new trial, and therefore we cannot consider the errors alleged to have occurred during the trial. The only errors complained of are those occurring upon the trial. The appeal is therefore dismissed.

PER CURIAM. Adopted in whole.

WESTERN SILO CO. v. KELLEY.
(No. 7271.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐773(5)—**BRIEFS—REVERSAL FOR FAILURE OF APPELLEE TO FILE BRIEFS.**

Where plaintiff in error has completed its record and filed its appeal in this court and has served and filed a brief in compliance with the rules of this court, and defendant in error has neither filed a brief nor offered any excuse for his failure to do so, this court is not required to search the record to find some theory upon which the judgment may be affirmed, and where the brief filed by plaintiff in error appears reasonably to sustain the assignments of error, the court may reverse the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3110; Dec. Dig. ⇐773(5).]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action by the Western Silo Company, a corporation, against J. E. Kelley. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Leopold & Cochran, of Muskogee, for plaintiff in error. Crump, Bailey & Crump, of Muskogee, for defendant in error.

RUMMONS, C. The plaintiff in error in this case duly perfected its appeal by filing its petition in error with case-made thereto attached, in this court, on April 1, 1915, and thereafter, on April 5, 1916, in accordance with the rules of this court, duly filed and served its brief. Defendant in error, however, has served and filed no brief, and has neither requested additional time to file brief or offered any excuse for his failure to file a brief. The record and the brief of plaintiff in error reasonably sustain the assignments of error made by plaintiff in error. In this state of the case it is not incumbent upon us to search the record for grounds upon which to affirm the judgment, but we may, under the rules of this court, reverse the judgment of the court below and remand the cause.

The judgment of the trial court should therefore be reversed, and this cause remanded for a new trial.

PER CURIAM. Adopted in whole.

INSURANCE CO. OF NORTH AMERICA
v. COCHRAN et al. (No. 6307.)

(Supreme Court of Oklahoma. June 20, 1916.)

(Syllabus by the Court.)

1. INSURANCE ⇨540—PROOFS OF LOSS—SUFFICIENCY.

Substantial compliance with the requirements of proof of loss is sufficient. *Held*, in this cause, that the proof of loss under the circumstances was a substantial compliance with the requirements of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1338; Dec. Dig. ⇨540.]

2. INSURANCE ⇨560(1)—PROOFS OF LOSS—WAIVER.

Where the petition alleges the making of proper proof of loss and the evidence discloses that proof of loss, though defective, was accepted and retained by the company and no complaint made of the defects or notice given the insured, *Held* such defects waived, and further proof unnecessary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1393; Dec. Dig. ⇨560(1).]

3. APPEAL AND ERROR ⇨1054(1)—REVIEW—PREJUDICIAL EFFECT OF ERROR—BURDEN OF PROOF.

Where error is predicated upon the introduction of incompetent evidence, it must appear that the trial judge relied upon such incompetent evidence before the cause will be reversed; and where the conclusions of fact and of law fairly show that such evidence was not considered, its admission will be held not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4185; Dec. Dig. ⇨1054(1).]

4. APPEAL AND ERROR ⇨187(2)—PRESENTING QUESTIONS IN TRIAL COURT—PARTIES.

The right of a trustee of a bankrupt estate to be made a party plaintiff, without objection or exception, so far as the record discloses, cannot be urged in the Supreme Court for the first time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1185; Dec. Dig. ⇨187(2); Parties, Cent. Dig. §§ 167, 172, 173.]

5. APPEAL AND ERROR ⇨1009(7)—REVIEW—SUCCESSIVE APPEALS—LAW OF THE CASE.

Where questions of law upon a state of facts have been settled upon a former appeal, and are based, in substance, upon the same evidence when again presented, the decision on the former appeal is the law of the case, and binding upon this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4376; Dec. Dig. ⇨1009(7).]

Commissioners' Opinion, Division No. 5. Error from District Court, Rogers County; Frank Ertell, Special Judge.

Action by William Taylor and A. G. Cochran, trustee in bankruptcy, against the Insurance Company of North America. Judgment for plaintiffs, and defendant brings error. Affirmed.

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiff in error. Dennis H. Wilson, of Vinita, for defendants in error.

CLAY, C. Upon a rehearing of this cause the original opinion, with some modifications

in the language and reasoning thereof, is adhered to.

This is an appeal from the district court of Rogers county, Okl., wherein A. G. Cochran, trustee in bankruptcy, and William Taylor, were plaintiffs, defendants in error here, and the Insurance Company of North America was defendant, plaintiff in error here, and for convenience they will be referred to as in the court below, plaintiffs and defendant, respectively.

On January 23, 1905, William Taylor filed his petition in said court to recover on a policy of insurance issued by the defendant in the sum of \$2,240, covering 560 tons of hay, and alleging that he paid the sum of \$120 premium therefor; that a copy of said policy is not attached to the petition, for the reason that the same was in the possession of the defendant; that on the 9th day of October, 1904, said hay was totally destroyed by fire; that due notice was given, and proof of loss made on November 12, 1904. The defendant answered: First, by a general denial; second, by admitting the ownership of the hay, admitting the contract of insurance in the amount and upon the consideration set forth in the petition, but denied the amount and value of the hay; denied plaintiff performed the conditions the contract imposed upon him; alleged a cancellation of the policy and nonliability by reason of such cancellation, and tendered back the unearned premium paid by plaintiff, and pleaded the other conditions of the policy; also alleged that the property was incumbered by a mortgage; denied that notice and proof of loss was made in the time and manner prescribed; and alleged that the time therefor had not been extended, and admitted the possession of the policy. The case was tried to the court. Plaintiffs introduced their evidence and rested. The defendant demurred to the evidence, and the demurrer was overruled. The defendant elected to stand on its demurrer, and thereupon judgment was entered for plaintiff for the amount sued for.

[1] Defendant's first assignment of error complains of the action of the trial court in admitting, over objection, plaintiff's purported proof of loss. The objection to the introduction of this evidence was that:

"It is incompetent, irrelevant, and immaterial, not in compliance with the terms of the policy, and not a substantial proof of loss."

This objection was overruled and exception saved, and proof of loss admitted. This proof of loss was in the words and figures following:

"Rec'd 1 Feb. 05. Hardy ss.—A

"Claremore, I. T., Nov. 12, 1904.

"Philadelphia, Pa.

"The following is a complete list and the value of the property lost and destroyed by fire October 9th 1904, belonging to William Taylor, Claremore, Indian Territory, and covered by policy number 161 in your company, dated August 17, 1904. Five hundred sixty (560)

tons of hay, baled, worth \$4.00 per ton baled, and in barn, worth \$2240.00. The above hay was insured by your company, and at the time was valued at \$4.00 and estimated to contain 560 tons of hay. I hereby demand a settlement of this claim under the policy above named."

This proof of loss was signed and sworn to by the insured. The trial court found the proof of loss to be a substantial compliance with the conditions of the policy, and we think, under the peculiar facts in the case, this holding must be sustained.

[2] The defendant's allegation that the proof of loss did not correspond with the conditions of the policy failed to point out the particulars in which it was not sufficient, and no proof was offered on this subject. The defendant having the policy in its possession, the burden of showing its conditions was upon it. The evidence clearly shows that no objection was made to the proof of loss offered, but that upon reasonable notice of loss the defendant denied all liability upon the ground that the policy was not in force at the time of the fire because of its prior cancellation. To hold the policy in its possession, claim cancellation, and yet insist upon a strict compliance with its terms upon the part of the insured to furnish proof of loss would be placing an unwarranted burden upon the insured. Mr. Beach in his work on Insurance, vol. 2, § 1240, says:

"An insurer who denies liability, claims cancellation, is estopped to object to the want of preliminary proof of loss and cannot retain the policy belonging to the person insured and in case of loss insist that he be governed by the terms thereof as to the proof of loss."

By retaining, without objection, the proof of loss the defendant failed to perform a duty, which it owed to the plaintiff, of notifying him of the defects therein, and thereby will be held to have accepted the proof of loss as sufficient. In the case of *Arkansas Insurance Company v. Cox*, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808, Mr. Justice Hayes says:

"If the proofs of loss * * * were defective, and not in compliance with the policy, and not satisfactory to defendant, defendant should have notified plaintiff of such facts within a reasonable time and pointed out to him the specific defects, in order that plaintiff might remedy the same, and, having failed to do so, the defendant waived its right to have the proofs of loss submitted in the exact form and manner prescribed by the policy. *Joyce on Insurance*, vol. 4, § 3362; *Hanover Ins. Co. v. Lewis*, 28 Fla. 209, 10 South. 297; 16 Ency. of Law, p. 959."

In the case of *Pacific Mutual Insurance Co. v. O'Neill*, 36 Okl. 792, 130 Pac. 270, Mr. Justice Sharp says:

"As to the sufficiency of the proofs of death, the defendant company by accepting and retaining those furnished, even though they were not in the form required by the terms of the policy, waived any objection thereto. *St. Paul F. & M. Ins. Co. v. Mittendorf*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651; *Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808; *Cooley's Briefs on the Law of Ins.* 3544; *Bliss on Life Ins.* § 268."

Defendant in its second assignment of error complains of the action of the trial court in admitting, over objection, evidence tending to prove a waiver of the proof of loss because a waiver was not pleaded. The answer to this is that the court found, not a waiver, but a proof of loss in substantial compliance with the terms of the policy; and, in view of the fact that the defendant must be held to have accepted the proof offered as a full compliance by not objecting to it, we think the court's ruling is correct. In *Lone Creek Bldg. Ass'n v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366, the court says:

"It is elementary law that the proof must correspond to the allegations, and there is no reason why this rule, found by long experience to be necessary to the orderly administration of justice, should not apply in actions on insurance policies, as in all other cases. It imposes no hardship upon the plaintiff, and is but even-handed justice to the defendant. A waiver of a mere defect in a proof of loss as furnished may, however, be shown without pleading it, because an omission to notify the assured of such defect promptly and specifically estops the company from claiming that the proof furnished does not comply with the provisions of the policy, and it is therefore deemed to be due proof of loss, and sustains an allegation of performance. But where no attempt whatever is made to comply with the provisions of the policy in that regard, but reliance is had entirely upon a waiver of performance, the waiver must be pleaded before it can be proved."

In fact, the weight of authority supports this doctrine, and very few, if any, cases hold it necessary to plead a waiver of mere defects in the proof of loss. The evidence objected to in this case only tends to show that proof of loss was made. No objection to the nature of the proof, or the particular defect, was ever pointed out by the defendant, but the proof was retained and payment refused upon the ground of cancellation of the policy. In *Zielke v. London Ins. Corp.*, 64 Wis. 442, 25 N. W. 436, it is said:

"We do not understand that such evidence tended merely to prove a complete waiver of any proofs of loss, but rather to prove the making of the proofs of loss required by the policy, in such manner and form as required by the company at the time, as a compliance with the condition of the policy in that respect, and if it showed any waiver, it was as to the mere form of the written proofs and their authentication."

Also see *Ency. Evidence*, vol. 7, p. 569; *Arkansas Ins. Co. v. Cox*, supra; *Titus v. Glenn Falls Ins. Co.*, 81 N. Y. 410; *First Nat. Bank v. Am. Ins. Co.*, 58 Minn. 492, 60 N. W. 345. In *Home Insurance Company v. Ballard*, 32 Okl. 723, 124 Pac. 316, the court holds:

"As to the defense of plaintiff's failure to make proof of loss and to cause appraisal to be made, the record shows that he made proof of loss, sent same to the company, and that the company refused payment, * * * refused to adjust same, and denied any liability whatever therefor. Under this state of facts plaintiff should not be denied his remedy at law."

When a plaintiff makes out a prima facie case, the burden is upon the defendant to prove the breach of the conditions relied upon. 19 Ency. 936.

The authorities cited by plaintiff in error to the effect that waiver, or estoppel, when relied upon by the insured to excuse a failure to perform conditions precedent, such as giving notice or making preliminary proofs of loss, must be pleaded by plaintiff, are in accord with the weight of authority, where the code pleading prevails. What we hold is that when, under allegations of performance, defective proofs are furnished, and evidence offered that such proofs were retained by the company without objection or pointing out the defects therein, and upon reasonable notice of loss liability is denied upon other grounds than the failure to make proof of loss, the admission of such testimony, over the objection of the defendant that waiver was not pleaded, is not error. *Ins. Co. v. Dierks*, 43 Neb. 478, 61 N. W. 740.

[3] Defendant's third, fourth, and fifth assignments of error will be treated together, as they involve the same questions. The errors complained of in these assignments of error are: That the court, over defendant's objection, permitted the testimony of J. Len Comer, given upon a former trial, to be read in evidence, and permitted counsel for plaintiff to testify that he had heard the witness testify in the former trial, and that the testimony read was in the same language as given by said witness in the former trial, and that the cross-examination of said witness did not materially change the facts as proven by his testimony in chief. This cause was tried to the court without the intervention of a jury, and judgment rendered upon demurrer to the evidence, the defendant having elected to stand upon the demurrer. Thereafter the judge filed his conclusions of fact and law, which have the effect of a general verdict. Before a cause will be reversed for the admission of incompetent evidence, where it is tried to the court and conclusions of fact and law filed, which are brought up in the record, it must appear to this court that the trial judge relied upon such incompetent evidence in reaching his conclusions; and, in determining what, if any, weight was given to such evidence, the conclusion of fact and law will be examined. If, by excluding such testimony, there still remains sufficient evidence to sustain the judgment, the cause will not be reversed on account of the admission of such testimony. Especially is this true where, by demurrer to the evidence, the defendant has admitted the truth of the competent evidence in the record. In this cause it is apparent that the trial judge's conclusions would have been the same had the testimony complained of been excluded, as the testimony of the insured, William Taylor, was admitted to be true by the demurrer, and the evidence complained of was not materially different from that of the insured. In the case of *Kennedy v. Pawnee Trust Co.*, 34 Okl. 140, 128 Pac. 549, Mr. Justice Sharp says:

"The court will not reverse for the admission of incompetent evidence, unless it appears" the trial court "relied upon such incompetent evidence." *Funk v. Hendricks*, 24 Okl. 837 [105 Pac. 352]; *Mullen v. Thaxton* [24 Okl. 643] 104 Pac. 359.

Defendant presents, under its sixth assignment of error, the alleged error of the court in permitting the witness Godfrey, president of the First National Bank, to testify that said bank had no mortgage on the hay insured. This could not have been prejudicial error, under the ruling announced in the foregoing paragraph, as the trial court found from the evidence that the hay described in the policy was at no time covered by the mortgage in question, and was neither an addition or increase to that mentioned in the mortgage. Again, this testimony, having been elicited on the part of the defendant by its cross-examination, was in effect withdrawn in so far as it was prejudicial to plaintiff, by its demurrer. *Clement, Fire Ins. Co.*, vol. 3, p. 194; *Hartford v. Landfare*, 63 Neb. 559, 88 N. W. 779; *Great Western v. Sparks*, 38 Okl. 395, 182 Pac. 1092, 49 L. R. A. (N. S.) 724; *Western Reciprocal Underwriters v. Coon*, 38 Okl. 453, 184 Pac. 22.

Defendant urges that error was committed by the trial court in admitting, over its objection, plaintiff's Exhibit B, the same being a letter dated November 16, 1904, addressed to Wm. T. Taylor, Claremore, and signed by defendant's vice president, E. S. Elliott, which reads as follows:

"Your favor of the 12th inst. in reference to loss under policy 181, has been forwarded by us to our general agent for the western states, J. F. Downing, of Erie, Penna., for his kind attention."

The facts and circumstances, Taylor's testimony that he had mailed proof of loss to defendant, the proof offered in evidence, having been sworn to November 12, 1904, and having been in defendant's possession, as shown by the notation on same, the testimony of the insured that it was from the company, the date of the exhibit, and its contents, all support the reasonable conclusion that it was the company's letter in answer to Taylor's of the 12th day of November, forwarding proof of loss. We are of the opinion that the court properly overruled defendant's objection to the evidence. *Greenleaf on Evid.* (18th Ed.) § 575c; *Norwegian Plow Co. v. Munger*, 52 Kan. 371, 85 Pac. 11; *Bloom v. State Ins. Co.*, 94 Iowa, 859, 62 N. W. 810.

Defendant's eighth assignment is treated under four subdivisions, viz.: (1) That proof of loss was not furnished in time; (2) that the policy was canceled prior to the fire; (3) that the property insured was mortgaged; (4) that there was no evidence to show that the trustee was authorized to intervene.

[5] Propositions 1 and 3 have already been disposed of. No. 2, that the policy had been canceled, cannot be maintained, for the reason that Mr. Justice Williams, on a former

appeal of this case, settled this question against defendant after an exhaustive research of authorities. *Taylor v. Ins. Co. of North Am.*, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906.

The evidence in this case is substantially the same as on the former appeal, and that decision is the law of this case and binding on this court.

[4] Proposition No. 4 having been settled by the trial court and no objections and exceptions having been taken and preserved in the record, it comes too late when raised for the first time in the Supreme Court. Section 4995, H. D. Code; *Anderson v. Ferguson*, 12 Okl. 307, 71 Pac. 225.

We have examined the evidence and conclusions of the trial court, have considered in detail the defendant's assignments of error, and we find no error for which this cause should be reversed, and we therefore recommend that the judgment of the trial court be affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. BARTON.
(No. 6058.)

(Supreme Court of Oklahoma. June 6, 1916.)

(Syllabus by the Court.)

1. RAILROADS \Leftrightarrow 829—OPERATION—ACCIDENT AT CROSSING—PROXIMATE CAUSE OF INJURY.

Negligence cannot be based upon the failure of those in charge of a train to ring the bell and sound the whistle, where the plaintiff pleads and proves that, while in a position of safety, he knew the train was approaching.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1026; Dec. Dig. \Leftrightarrow 329.]

2. EVIDENCE \Leftrightarrow 492—COMPETENCY—KNOWLEDGE OF FACTS.

Where a witness testified that he did not observe or know the speed of the train at the time of the injury, but when urged by counsel testified that in his judgment it was traveling 15 miles an hour or more, *held*, that the witness, not having observed or knowing the speed of such train, was not qualified to testify with regard thereto.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2270; Dec. Dig. \Leftrightarrow 492.]

3. RAILROADS \Leftrightarrow 316(4), 350(11)—OPERATION—ACCIDENTS AT CROSSINGS—SPEED—QUESTION OF FACT.

Where, in the limits of a town, the speed of a train is not regulated by ordinance, a railway company may run its trains at any rate of speed consistent with the safety of such trains and persons rightfully on its premises, but this privilege does not give to such company the right to run into a station at an excessive rate of speed in utter disregard of the safety of persons rightfully upon its premises; such speed must be regulated with due regard for the safety of the public. *Held*, that whether there was excessive speed, and, if so, whether under the facts and circumstances of the case such speed constituted negligence, is a question of fact to be determined by the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1012, 1164½; Dec. Dig. \Leftrightarrow 318(4), 350(11).]

4. RAILROADS \Leftrightarrow 346(7)—OPERATION—ACCIDENTS AT CROSSINGS—BURDEN OF PROOF.

Whether the excessive speed of a train is the proximate cause of an injury is never presumed, but must be established by the evidence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1123; Dec. Dig. \Leftrightarrow 346(7).]

5. RAILROADS \Leftrightarrow 348(6)—OPERATION—ACCIDENTS AT CROSSINGS—EVIDENCE.

Evidence examined, and *held* insufficient to support the doctrine of the last clear chance.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1144, 1149; Dec. Dig. \Leftrightarrow 348(6).]

6. NEGLIGENCE \Leftrightarrow 136(26)—ACTIONS—QUESTION FOR COURT OR JURY—CONSTITUTIONAL PROVISION.

Section 6, art. 28 (Williams') Constitution, providing that the defense of contributory negligence shall in all cases whatsoever be a question of fact, and shall, at all times, be left to the jury, does not take from the courts the right to ascertain whether the three necessary elements of primary negligence exist, viz.: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 236, 333; Dec. Dig. \Leftrightarrow 136(26).]

For other definitions, see *Words and Phrases*, First and Second Series, *Negligence*.]

(Additional Syllabus by Editorial Staff.)

7. NEGLIGENCE \Leftrightarrow 65—"CONTRIBUTORY NEGLIGENCE"—DEFINITION.

"Contributory negligence" is an act or omission on the part of the plaintiff amounting to want of ordinary care which, concurring or co-operating with the negligent act of defendant, is the proximate cause of the injury complained of, and necessarily presupposes negligence on the part of the defendant.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 83, 94; Dec. Dig. \Leftrightarrow 65.]

For other definitions, see *Words and Phrases*, First and Second Series, *Contributory Negligence*.]

Commissioners' Opinion, Division No. 3. Error from District Court, Texas County; *Frank Mathews, Judge*.

Action by J. P. Barton against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, and J. G. Gamble, of Des Moines, Iowa, for plaintiff in error. J. S. Harris, Philip J. Breslin, and John L. Gleason, all of Guymon, for defendant in error.

RITTENHOUSE, C. This action was brought to recover damages for personal injuries received through the alleged negligence of the Chicago, Rock Island & Pacific Railway Company on October 14, 1912, at the station of Tyrone, Okl. The cause was submitted to a jury and resulted in a judgment in favor of plaintiff for \$1,500. The acts of negligence relied upon for recovery are numerous, but the questions necessary for a determination of the controversy are: Was

there any evidence offered reasonably tending to prove that the defendant was guilty of negligence? If guilty of such negligence, was it the proximate cause of the injury?

[1] It is first alleged that the defendant company caused its train to be run from the whistling post, which was about 180 rods southeast of the depot platform, into the station of Tyrone without causing any whistle to be blown, or bell to be rung, and without giving any warning to the plaintiff of the approach of said train. It is admitted by plaintiff in his petition and also in his evidence that he was standing on the platform, waiting for the arrival of this particular train in order to deliver a package to the mail clerk; that, while so standing on said platform, the engine whistled, whereupon he immediately turned towards the southwest and there observed the train; that he then went a distance of 20 feet into the waiting room, procured the package to be delivered, walked out of the room in a northeasterly direction for the purpose of reaching a point about 50 feet northeast of said waiting room, where the mail car usually stopped; that from the time plaintiff heard said whistle and saw the train, to the time he reached the track and was injured, not more than 15 seconds elapsed. It is apparent, therefore, that the plaintiff knew of the approach of the train within 15 seconds before he was injured, and, knowing of such fact, negligence could not be based upon the failure of the engineer to sound the whistle or ring the bell in order to warn the plaintiff of the approach of said train.

In the case of *M., K. & T. Ry. Co. v. Gilbreath*, 154 Pac. 539, Chief Justice Kane, in discussing a similar question, said:

"It seems to us in such circumstances that negligence cannot be based upon the failure of the engineer to ring the bell or sound the whistle to warn the trackman of the approach of his train when it was obvious to him that they had knowledge of this fact."

[2] It is next alleged as an act of negligence that defendant company caused said train to be run into the station of Tyrone at a rate of speed in excess of 15 miles per hour, without slowing down or slacking the speed of said train, which rate of speed was greatly in excess of the usual speed with which said train usually pulled into said station, which it is alleged was 7 miles per hour. The evidence supporting the contention that the train was traveling at an excessive rate of speed, to wit, 15 miles per hour, was given by Tom Davis, who testified as follows:

"Q. Did you observe the speed of the train as it came upon the plaintiff that day? A. No, sir: I did not, not particularly. Q. Did you notice it generally, what distance, the rate of speed? A. I couldn't state. Q. How fast was the train going? In your judgment, how fast was the train running when you observed it? A. I don't know. My judgment would be— I don't know. Q. Answer. A. My judgment

would be that the train was going some place close to 15 miles per hour; maybe more."

To all these questions and answers the defendant objected. The witness had disqualified himself to testify as to the speed of the train. He did not observe at what particular speed the train was traveling, nor could he state the rate of speed; that in his judgment he did not know at what rate of speed the train was running at the time of the injury; and finally, after an unusual amount of exertion on the part of counsel for plaintiff, he testified that in his judgment "the train was going some place close to 15 miles per hour, maybe more." This is the only evidence in the record supporting the theory that the train was traveling 15 miles per hour, and this should have been excluded; the answer showing that it was merely a guess on the part of the witness, he having previously admitted that he did not observe the speed of the train. There was evidence by the enginemen that the train was traveling between 10 and 12 miles an hour as it approached the station, and that it was gradually reducing in speed, until it stopped; whether the train was traveling at an excessive rate of speed when it hit the plaintiff is not shown.

[3] There is no contention that the speed of the train was regulated by ordinance, and, in the absence of such regulation, defendant might run its trains at any rate of speed consistent with the safety of such trains, and persons rightfully upon its premises; but the privilege of running its trains at such rate of speed does not give to a railway company the right to run into a station at excessive speed in utter disregard of the safety of persons rightfully upon its premises, but the speed must be regulated with due regard for the safety of the public. Where there is evidence of excessive speed, it is for the jury to say whether, under all the facts and circumstances of the case, such speed constituted negligence. *Shearman & Redfield on the Law of Negligence* (6th Ed.) 460; 33 Cyc. 901; *Struck v. Chicago, M. & St. P. Ry. Co.*, 58 Minn. 298, 59 N. W. 1022; *Thompson v. New York Cent. & H. R. R. Co.*, 110 N. Y. 686, 17 N. E. 690; *Custer v. Baltimore & O. R. Co.*, 206 Pa. 529, 55 Atl. 1130; *Hickey v. New York Cent. & H. R. R. Co.*, 8 App. Div. 123, 40 N. Y. Supp. 484; *Philadelphia & Reading R. Co. v. Long and Wife*, 75 Pa. 257.

[4] The fact that the defendant may have run its train into this station at a speed of 15 miles per hour, which was in excess of its customary speed and an accident followed, does not of itself render defendant liable for such injury, unless the speed was either the proximate cause of the injury, or contributed toward it; and whether same was the proximate cause, or contributed toward it, is not to be presumed, but must be established by the evidence. *Shearman & Redfield on the Law of Negligence* (6th Ed.) 27; *Hays*

v. Michigan Cent. R. R., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; Pennsylvania R. Co. v. Hensell, 70 Ind. 569, 36 Am. Rep. 188.

The remaining question for determination under this assignment of error is whether or not the running of the train at an alleged excessive speed was the proximate cause of, or contributed to, the injury of plaintiff. Plaintiff had seen the coming of this train, and according to his own admissions, after having observed its approach, left the platform and went into the waiting room for the purpose of procuring certain packages which he intended delivering to the mail clerk, and immediately pushed his way through the crowd to the point where he was injured; this, as he states, all occurring in the space of 15 seconds. Under these circumstances, we are asked to say that the speed of the train was the proximate cause of the injury or contributed thereto. This we cannot do. From the instant plaintiff observed the approach of the train until his injury he was in constant motion, his purpose being to meet the mail car upon its arrival at the usual stopping place; to accomplish which he rapidly proceeded diagonally, through the crowd of people, across the platform to the point where he was struck. The evidence is that he was not standing near, or walking parallel with, the track; and that the engineer did not see him, and did not and could not have known of his danger in time to have stopped the train and avoided the injury, regardless of the rate of speed at which the train ran into the station. It is established by the uncontroverted evidence that, had the train been proceeding at a less rate of speed than that shown by the evidence, still the engineer was powerless to have prevented the injury.

[5] It is further urged that the plaintiff was in a place of peril, and that defendant knew of such peril in time to have avoided injuring him. We have heretofore shown that the injury followed immediately upon the plaintiff reaching a position of peril. Those in charge of the train had the right to assume that the plaintiff, when in a place of safety, would so remain, and would do nothing to place himself in a perilous position. To sustain an action upon plaintiff's theory it is necessary to show that the party injured was in a place of peril, and that the persons in charge of the train knew he was in such peril in time to have avoided his injury. The evidence in support of this contention is as follows: Mr. G. E. Walker, the engineer, testified, in substance, that he was in charge of the engine that struck the plaintiff; that the whistle was blown at the whistling post, about a half mile from the station; that the bell was rung about the same time; that his first information that some one was in danger was when the fireman shouted; that he had applied the air

ed; that after a service application of the air the application in the emergency does no good, but he did apply the emergency.

"I did not see Mr. Barton before the train struck him. After I heard Mr. Massey shout, there was nothing I could do to stop the engine that I did not do. * * *"

J. T. Massey, the fireman, testified as follows:

"When I first saw Mr. Barton that morning he stepped out from behind that little side window and started toward the train. I was sitting in the window (on the engine) and began to holler at him. The engine was just west of the depot. The service application of the air had been made before that. I don't know how long it was after I saw Mr. Barton's danger before we struck him. I sat where I could see on that high bench, and I noticed a man come out, and then he stopped and hesitated and reached over like that—I don't know, probably 10 or 12 seconds or some such matter as that. I done just what occurred to me to do. I hollered at him to keep him from being hit. There was nothing else I could do. I had no occasion to shout to him unless I thought he was going to get hurt. I saw the truck. I saw the man reach for—I don't know what he reached for—paper, or something on the truck. In reaching for this package, he didn't stop, but staggered towards the train as though he was dizzy, or something."

This evidence does not bring the case within the doctrine of last clear chance, as announced in *A., T. & S. F. Ry. Co. v. Baker*, 21 Okl. 51, 95 Pac. 433, 16 L. R. A. (N. S.) 825; *Clark v. St. L. & S. F. R. Co.*, 24 Okl. 764, 108 Pac. 361; *Oklahoma City Ry. Co. v. Barkett*, 30 Okl. 28, 118 Pac. 850.

[8, 7] There are several acts of negligence alleged which are not supported by the evidence, and therefore should not have been submitted to the jury: (1) The failure of the company to have a line or other contrivance on the depot platform to indicate the clearance of the train; (2) failure of the company to have a bell on the engine; and (3) failure of the company to maintain a lookout. It was also alleged as negligence that the company had placed a truck in a position on the platform so that the northeast end of said truck was about 18 inches from the inner rail of the track, and the southwest end was about 5 feet from such rail. There was no evidence that the truck was hit by the train, or that the plaintiff's injury was caused by the truck striking him. The truck was not moved, but remained stationary until after the injury. Wherein the position of this truck constituted negligence, or was the proximate cause of the injury, or contributed thereto, is not shown.

Plaintiff insists that, since the Constitution (section 6, art. 23, Williams' Con.) provides that the defense of contributory negligence shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury; that the courts have not the right to inquire as to whether or not the negligence was the proximate cause of the injury, as this would require a determination of whether the party injured was guilty of contributory negligence. Contributory negli-

gence is an act or omission on the part of the plaintiff, amounting to want of ordinary care, which, concurring or co-operating with the negligent act of defendant, is the proximate cause of the injury complained of, and necessarily presupposes negligence on the part of the defendant. In *Scott v. Seaboard Air Line R. R. Co.*, 67 S. C. 136, 45 S. E. 129, it is said:

"The best definition of contributory negligence we have seen is the following, from 7 Enc. Law, 371 (2d Ed.): 'Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.' It is thus seen that contributory negligence by a plaintiff can never exist except when the injury has resulted from the negligence of defendant as a concurring proximate cause." *Louisville, etc., R. Co. v. Sights*, 121 Ky. 203, 89 S. W. 132, 28 Ky. Law Rep. 186; *Jones v. Charleston, etc., R. Co.*, 61 S. C. 556, 39 S. E. 758; *Simms v. S. C. R. Co.*, 26 S. C. 490, 2 S. E. 486.

If therefore contributory negligence can never exist except where the injury resulted from the primary negligence of the defendant as a concurring proximate cause, then it becomes the duty of the court to first ascertain if the facts, as disclosed by the evidence, constitute primary negligence; if the essential elements of such negligence are not established, the defense of contributory negligence does not exist and would not be a question of fact for the jury under section 6, *supra*.

Whether the facts in a given case constitute primary negligence, where the injuries are not willful and intentional, must depend upon whether the three essential elements of negligence are shown, *viz.*: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure.

The cause should therefore be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

CHERRY v. CITY STATE BANK et al.
(No. 5832.)

(Supreme Court of Oklahoma. June 30, 1916.)

(Syllabus by the Court.)

CONTRACTS ¶181—CONSIDERATION—LEGALITY.

Where the owners of property located in a certain territory within a town, and parties engaged in business in said territory, enter into a contract with the owner of a lot in said territory, by which they agree to pay not to exceed the maximum amount of rental stated in said contract so long as the building to be erected on the lot is occupied by a United States post office, not to exceed a period of 10 years, the petition showing that in pursuance of said contract, a building was erected and a contract was

entered into between the owner of the lot and the United States for the location of a post office on that lot for the period of 10 years at the nominal rent of \$1 per annum, and petition showing that no improper or undue means were to be used, or were used, in securing the location of the post office, the contract was a binding obligation, and was not void as against public policy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 594-607; Dec. Dig. ¶181.]

Commissioners' Opinion, Division No. 6. Error from District Court, Greer County; G. A. Brown, Judge.

Action by G. P. Cherry against the City State Bank and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with instructions.

B. L. Tinsinger, E. M. Stewart, Thacker & Thacker, all of Mangum, and Warren K. Snyder, of Oklahoma City, for plaintiff in error. Keaton, Wells & Johnston, of Oklahoma City, and Percy Powers, of Mangum, for defendants in error.

DUDLEY, C. On the 7th day of October, 1909, H. Mathewson, C. P. Hamilton, Jackson & Wilson, W. H. Harris, C. P. Patterson, W. L. Patterson, W. H. Dickey, G. B. Townsend, Lee Hawkins, W. M. Burgess & Co., B. R. Davis, W. M. Franks, McKinney, Auld & Co., Geo. E. Clark, F. S. Gentry, Gentry & Harris, J. W. Lovett, Jackson Gro. Co., Arthur Cooke, Boam & Claunch, City State Bank, C. P. Hard, H. Byars, and R. P. Wright, all of Greer county, Okl., entered into a contract with G. W. Boyd, by the terms of which they agreed to pay to the order of G. W. Boyd, on the first day of each term of 12 months of anticipated occupancy by the United States post office in the city of Mangum, Greer county, Okl., of the portion of the following described real property and premises situated in said Greer county, Okl., to wit: Lot 7 in block 12 of the town of Mangum, the full amount of the rental value of the property and premises so occupied for each such term of 12 months not to exceed 10 such terms; provided, the amount to be so paid for each such term shall be whatever amount the said G. W. Boyd shall name prior to the commencement of the first term, not to exceed \$1,500 for each such term; provided, further, this obligation shall be null and void unless the United States post office so commences to use and occupy said property and premises within 12 months from the date hereof; and provided, further, that the consideration for this obligation is the anticipated action of the said G. W. Boyd in providing for the said use and occupancy and in permitting such use and occupancy of such property and premises for said post office purposes; and provided, further, those of the obligors herein who, at this time, own no real estate within said city and south of a straight line from the center of the county

court house square within said city, to the east and west exterior boundaries of said city, shall not be bound by this obligation unless on the first day of each such term they occupy for business purposes some building or portion thereof within said city and south of said line, but this provision inures only to the benefit of each individual so owning no real property and occupying no building for business purposes within said city south of said line on the first day of each term for which he claims the benefit and exemption thereof, and he must give the holder of this obligation notice of his claim of such exemption in writing not later than the first day of the term for which he claims.

On the 2d day of December, 1912, plaintiff in error, who was the plaintiff in the court below, filed his petition against the defendants to recover the sum of \$1,500, alleged to be due on said contract for the year commencing May 15, 1912. The petition alleges the execution of the contract, and states that on October 7, 1909, the date of the execution thereof, that the United States of America, through its proper officers and agents, had determined that the space then and theretofore, at a merely nominal rental price, occupied and used by it at and in said city of Mangum for post office purposes was inadequate for post office purposes, and that the United States of America had, in accord with the facts and with due regard to the proper purposes and uses for such post office, properly and correctly ascertained and determined that lot 7 in block 12, in the town of Mangum, was a convenient and suitable place for a building for the occupancy and use of it with its post office, and that said G. W. Boyd owned and possessed said lot 7 at that time, and that it was vacant; that there was no available building at any other place ready for the occupancy of a post office in the city, and that it was at that time the only suitably located vacant lot owned by any one able and willing to construct a suitable building for post office purposes, and that on October 7, 1909, a lawful and proper proposal was made by the defendant, without any purpose of, or fact, affecting or influencing the location of the post office within said city, and in entire good faith on the part of himself and the defendants, the said G. W. Boyd accepted from defendants a written contract, which has already been set out, and that G. W. Boyd owned no property near said lot 7, and was never interested in the location of the post office on said lot 7, except by reason of the contract entered into by him with the defendants on October 7, 1909, and that said G. W. Boyd made and entered into a preliminary contract with the United States of America in respect to post office quarters to be provided by him on said lot in accord with said contract, of October 7, 1909, and immediately thereafter commenced the construction and erection of a large brick build-

ing on said lot for the occupancy and use of the United States, to the extent of the space desired by it, for said post office purposes, and completed said building on May 14, 1910, at a cost of \$10,000, and that on the completion of the building the United States of America entered into the occupancy and use of the same, paying therefor \$1 per annum, payable quarterly, and that on May 14, 1910, and before the United States had commenced to occupy and use the building as a post office, the said G. W. Boyd duly notified defendants that he would, under and by virtue of said contract of October 7, 1909, charge them the sum of \$1,500 per annum as the rent rate for the use and occupancy of the space in said building by the United States for post office purposes for the term of 10 years commencing on the commencement of such occupancy and use, and that within a reasonable time the defendants to pay the first of his annual installment of \$1,500, and that within a reasonable time after the same became due pay the greater part of the second of his annual installments of \$1,500; that on April 1, 1912, George W. Boyd and his wife conveyed said lot 7, with all improvements thereon and appurtenances thereunto belonging, to the plaintiff, G. P. Cherry, subject to the lease of the United States of America, giving an assignment and transfer of the contract of October 7, 1909, and that plaintiff immediately, at the instance and request of the United States of America, executed and delivered to it his formal acknowledgment of the existence and validity of the said lease which had been entered into by the United States of America and George W. Boyd, and that until after May 15, 1912, plaintiff did not have any knowledge or notice that the defendants, or either of them, were unwilling to be bound by said contract of October 7, 1909, and until long after May 15, 1912, they and each of them did not claim to be in any way not bound to pay said rent of \$1,500 per annum in accordance with the terms of said contract, and that there is now unpaid and past due and owing to the plaintiff, under and in accord with the terms of said contract, and by reason of the other facts hereinbefore alleged, the sum of \$1,500 for rent for the space in said building on lot 7, for the year commencing May 15, 1912; and that payment has been demanded of defendants, but has been refused. Set out in the petition is a copy of the contract between Boyd and the defendants, copy of the preliminary contract between Boyd and the United States of America, copy of the final contract entered into between Boyd and the United States of America, and copy of the assignment of the contract by Boyd to Cherry.

On the 7th of January, 1913, demurrer was filed by defendants to plaintiff's petition, which demurrer was by the court, on the 18th day of August, sustained. Plaintiff elected to stand on his pleading, and judg-

ment was entered dismissing the action and taxing the cost against the plaintiff.

It is not contended that the petition does not state a cause of action as against a general demurrer if the contract is valid. The question is, Was the contract void as being against public policy? The petition shows that Boyd was the owner of lot 7 in block 12, in the town of Mangum, and that he was induced by the contract entered into with him by the defendants to erect a building and lease it to the United States for a post office at the nominal rate of \$1 per annum. The contract shows that the parties who obligated themselves to pay the rent on the building to Boyd expected to be benefited by reason of the post office being located on that particular lot, as they had a clause in the contract providing that those of the obligors who own no real estate within the city, and south of a straight line from the center of the courthouse square within said city, to the east and west exterior boundaries of said city, should not be bound by the obligation, unless, on the first day of each such term for which the building was leased for post office purposes, they occupy for business purposes some building or portion thereof within the city, and south of said line.

The petition shows that Boyd had no interest in the post office being located on his lot, except to secure a tenant at a fair rental; that he had no other property near said lot which could be, in any way, benefited by the location of the post office. The petition not only does not show that any improper or undue means were to be used, or were used, in securing the location of the post office, or that Boyd was to secure the location of the post office, but, on the contrary, shows the absence of any improper or undue means to obtain the location of the post office; or any means whatever to have the post office located on said lot, except to enter into a contract at a nominal rent.

In the recent case of J. W. Davis, J. S. Hastings, and C. A. Thompson v. Board of County Commissioners of Choctaw County, Okl., 158 Pac. 294, not yet officially reported, opinion delivered by Mr. Justice Sharp, where the county commissioners of Choctaw county accepted from Davis, Hastings, and Thompson their bond, conditioned that if the courthouse about to be erected in said county should be located on a certain block in the county seat, they would pay the county the excess cost thereof over and above the sum of \$3,000, but not to exceed the sum of \$15,000, and the commissioners, relying thereon, acquired title to said block by purchase and condemnation proceedings, at a total cost of \$10,391.05, and thereupon instituted action against the makers of said bond to recover \$2,391.05, the amount alleged to be due thereon, it was held that the bond was a valid obligation, and not violative of public

policy, there being no charge that the county commissioners were improperly influenced, or that the public welfare was made subordinate to personal considerations or private gain, or that the location was made in disregard of the public interests, and in said opinion the cases of *Fearnley v. De Mainville*, 5 Colo. App. 441, 89 Pac. 73; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532, relied on by plaintiff in error in this case, were cited with approval. Justice Sharp said in the opinion:

"Contracts between public officials and private parties which subordinate the public welfare for personal benefit, or which are against the public good, are open to attack; but, where they involve nothing inconsistent with good morals and sound policy, no good reason is seen why they may not be made—not, at least, in cases such as that at bar. It is not uncommon for individuals peculiarly benefited to unite with municipalities in making public improvements, building highways, digging drains and ditches, building bridges and providing sites for school-houses and other public buildings. Many public institutions in this state have been located as the result, partly at least, of local donations. See the acts of the Legislature locating the state reformatory at Granite; the Eastern Hospital for Insane at Vinita; Industrial School for Girls at Chickasha. In fact, the seat of government and the permanent capitol of the state was located in Oklahoma City as a result of a free site for the capitol building and executive mansion, certain cash donations, and 650 acres of land (including site for capitol and executive mansion). See Laws 1913, c. 264."

There was nothing inconsistent in the contract sued upon with good morals and good policy. Whatever profit was reaped by the contract with Boyd for the post office at a merely nominal rent was received, not by an officer, but by the United States, and the benefit under said contract was received by the public. There is nothing of a corrupt nature in the contract, and when the defendants entered into the contract to pay Boyd the rent on his building as long as it was used and occupied as a post office, the contract shows that there was sufficient consideration for its execution, as none of the obligors were to be held bound, except those who owned property within a certain territory at that time, and those who did not own property in that territory, who each year were engaged in business within said described territory.

We think the contract by which Boyd was induced to erect the building at an expense of \$10,000 and entered into a lease contract with the United States of America, said building to be used as a post office at the nominal rent of \$1 per annum, is valid and enforceable, and that it was error for the lower court to sustain the demurrer.

It is therefore recommended that the cause be reversed, and remanded to the district court of Greer county, Okl., with instructions to overrule the demurrer.

PER CURIAM. Adopted in whole.

MIDLAND VALLEY R. CO. v. OGDEN.
(No. 7051.)

(Supreme Court of Oklahoma. March 28, 1916.
Rehearing Denied July 25, 1916.)

(Syllabus by the Court.)

1. TRIAL. \S 156(3)—TAKING QUESTION FROM JURY—DEMURRER—DETERMINATION.

A demurrer to the evidence admits the existence of all the facts which the evidence tends to establish, and all reasonable inferences of fact favorable to the demurree.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 356; Dec. Dig. \S 156(3).]

2. MASTER AND SERVANT. \S 286(15)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

The erection and maintenance by a railway company of a temporary water plug, or other obstruction in such proximity to its track as to endanger the lives of its operatives while engaged in the performance of the usual and necessary duties of their employment, may, if injury result therefrom, be regarded as actionable negligence. Whether or not such obstruction is in fact so negligently placed and maintained is always a question to be determined by the jury from the evidence under proper instructions of the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1022; Dec. Dig. \S 286(15).]

3. APPEAL AND ERROR. \S 1170(7, 9)—REVIEW—HARMLESS ERROR.

By virtue of section 6005, R. L. 1910, no judgment shall be set aside on the ground of misdirection of the jury, or the improper admission or rejection of evidence, unless in the opinion of the Supreme Court, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a violation of a constitutional or statutory right of the complainant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4066, 4543; Dec. Dig. \S 1170(7, 9).]

Commissioners' Opinion, Division No. 8. Error from District Court, Muskogee County; Farrar L. McCain, Judge.

Action by Della Ogden, administratrix of the estate of M. R. Ogden, deceased, against the Midland Valley Railroad Company. Judgment for plaintiff for \$8,000, and defendant brings error. Affirmed.

O. E. Swan, of Muskogee, for plaintiff in error. Thos. F. Crosby and W. J. Crump, both of Muskogee, for defendant in error.

BLEAKMORE, C. This case presents error from the superior court of Muskogee county. Della Ogden, administratrix of the estate of M. R. Ogden, deceased, sued the Midland Valley Railway Company for damages on account of the death of her intestate, alleged to have been caused by the negligence of defendant. It is set forth in the petition:

That deceased at the time of his death, and for some time prior thereto, was employed by the defendant as a brakeman on its freight trains; "that said defendant sent M. R. Ogden on said run for the second time, said run being from Muskogee, Okla., to Ft. Smith, Ark., as a brakeman on a freight train of said defendant

company, same being engaged in interstate commerce as aforesaid; that on the 21st day of December, 1911, at about 5 o'clock in the morning, being dark and before daylight, said deceased, M. R. Ogden, while in the proper and ordinary discharge of his duties as such brakeman, and while attempting to come off the top of a box car in front of the caboose by the light of a lantern, and while descending a ladder on said box car, for the purpose of reaching and going upon a coal or flat car in front of same, and while said freight train was running at a rapid rate of speed and was passing near mile post No. 43, about three miles from Keota, and, while passing water station and pipe erected and maintained by said defendant railway company, said pipe being in close and dangerous proximity to passing trains and so dangerously close as to be within 14 or 15 inches of passing cars, and too close to permit workmen and employees of said defendant whose duties required them to pass up and down the sides of the freight cars from passing with safety and on account of the nearness of said water pipe so erected and maintained by defendant, deceased, while in the discharge of his duties as brakeman as above described, on the 21st day of December, 1911, was hit and struck by said water pipe so erected and maintained by this defendant, and hurled from said ladder and car, and crushed, mangled, and killed, through the negligence, carelessness, and fault of the defendant company, and without any fault or negligence on his part."

It appears from the evidence that Ogden, the deceased, received the injury causing his death before daylight on the morning of his second trip over defendant's line from Muskogee to Ft. Smith, his former run having also been in the nighttime; that shortly before his injury he left the caboose going forward over the tops of the cars, a lighted lantern in his hand, toward his position as head brakeman. He was last seen by another brakeman as he sat down near the corner of a box car where the "grabiron" is located, leaning forward to grasp such iron which led to a ladder down which he might have climbed to reach a tank car immediately ahead. At this instant the attention of his fellow brakeman was momentarily diverted, and when he again looked deceased was gone, there appearing instead a flash of light and also fire, as from a pipe, near the top of the car. The brakes were almost immediately applied; the train stopped and backed to the water station, where Ogden was found, some 20 or 30 feet from the water plug or standpipe, with an injury to his head, alive but unconscious. He was taken on the train to Ft. Smith, where, as a result of such injury, he died on the following day. About 9 o'clock on the morning of Ogden's injury, there was found on said water plug some skin and hair. The standpipe was a temporary one, having been erected a few months before the occurrences in question, when the regular water tank near by failed to furnish an adequate supply. It was not in use, and had been ordered taken down soon thereafter, but was later re-erected in order that a photograph showing it and the surroundings might be taken. Such photograph was introduced in evidence, and is a

part of the record. The evidence is conflicting as to the exact distance this water pipe was situated from the rail, one witness, a former employé of defendant in charge of the same at the time of the injury, testifying that, in his opinion, it was 38 inches from the rail, while the employé who erected the pipe stated that on a level with the track it was 4 feet 7 inches from the rail, and at the height of a box car it leaned 4 or 5 inches further away from the rail. The testimony was also somewhat conflicting as to the distance from the rail such a water pipe might properly be constructed and maintained with reasonable safety to employés whose duties in passing the same on moving trains required the use by them of ladders on the sides of cars projecting beyond the rails. While the evidence is that the ordinary box car extends out over the rails from 18 to 24 inches, there is no testimony as to how far the particular car upon which deceased was riding extended beyond the rails. The general superintendent of defendant, who had been engaged in the railway service more than 46 years, testified:

"My duties require me to familiarize myself with the kind of structures beside railroad tracks. A structure out at about the height of an ordinary box car, say from 5 feet to 5 feet 2 from the outside of the rail is a safe clearance."

Other witnesses for defendant stated that such a structure at the height of an ordinary box car, placed from 4 feet 10 inches to 5 feet 1 inch from the rail, would be at a safe distance. The superintendent and other witnesses further testified that such a structure, close enough to the track to strike a man coming down the ladder of a car, is unsafe.

[1] It will be observed that the negligence charged against defendant is the erection and maintenance of the water pipe in dangerous proximity to its track. Whether defendant was guilty of negligence in the erection and maintenance of the particular water pipe with which deceased is alleged to have come in contact in the performance of his duties as brakeman, causing his death, was a question of fact to be determined by the jury; and whether the injuries from which he died were thus received was also one of fact to be so determined. It is urged by defendant that the evidence is insufficient to establish negligence on its part in this regard, or to show that deceased met his death by being struck by the water pipe, and therefore there was reversible error in overruling its demurrer to the evidence. In the light of the record, we do not conceive this contention of defendant tenable. The rule is that:

"A demurrer to the evidence admits all facts proven, admits the existence of the facts of which there is evidence tending to prove, and all the reasonable inferences which may be drawn from the evidence. The question on demurrer is: Does the evidence, considering only that which is favorable to the demurree and

yielding to him the full benefit of the reasonable inferences which it supplies and furnishes, entitle him to recover?" *Crow v. Crow*, 40 Okl. 455, 139 Pac. 122.

[2] We are of opinion that the jury, under the facts and circumstances in this case, might rationally have determined that the evidence was sufficient to exclude any reasonable hypothesis other than that advanced by plaintiff as to the manner in which deceased received the injury causing his death, viz., by being struck by the water pipe of defendant, and that the jury were justified from such evidence in concluding that defendant was guilty of negligence in constructing and maintaining its water pipe in such proximity to its track as to endanger the lives of its employés, and particularly the deceased.

We are of opinion that the maintenance by a railway company of a temporary water plug, or other obstruction, in such proximity to its track as to endanger the lives of its operatives engaged in the performance of the usual and necessary duties of their employment, may, if injury result therefrom, be regarded in law as actionable negligence. The question of whether or not such an obstruction was in fact so negligently placed and maintained is always one to be determined by the jury from the evidence, under proper instructions from the court.

J. R. Roden, a witness for defendant, testified relative to the standpipe, as follows:

"Q. Have you ever ridden by that pipe? A. Yes, sir. Q. Where? A. Well, several instances I have rode by there. Q. Where were you? A. Well, I rode by there on the side of a car; ordinarily I was on the top of the car or in the caboose, of course. Q. Did you ever ride by there on the side of a box car? A. Yes, sir; I have. Q. Did you notice the standpipe as you passed there? A. Oh, yes; it was noticeable, yes, sir. Q. Did it clear you? A. Yes, sir. Q. From your experience as a railroad man, did that pipe in its location afford a sufficient clearance for a man on the side of a box car? A. Well, it did ordinarily. I don't know how far, though, it cleared on the side of a car; yes. Q. Cleared you? A. Yes, sir; it cleared me. Q. You were standing on the side of a car? A. On the side of a car; yes, sir."

On cross-examination, he further testified:

"Q. I will ask you if you did not make the statement in the presence of me and Mrs. Ogden, in my office, some time in January or February, 1912, after being perfectly familiar with the location of this pipe, and that it would not clear a man on the side of a box car? A. No, sir; no such statement as that."

There was no objection to the introduction of this evidence. Later, the plaintiff, Della Ogden, testified:

"Q. Do you remember any conversation that you had with Mr. Roden? A. Why, I remember a conversation that I had with Mr. Roden in your office and in your presence. Q. Can you state the substance of it? A. Yes; we were talking about the standpipe, and Mr. Crosby and I asked him if it was in a safe condition, and he said, 'No, it was not'; that he would not risk his life on the side of a car at all to go past there; that it was in a dangerous condition."

[3] Relative to this testimony, the defendant requested the court to charge the jury as follows:

"The court instructs the jury that in this case the plaintiff has introduced evidence which may tend to prove that the witness Roden at another time made a statement concerning the proximity of the standpipe which is contradictory to that made by him upon the stand in this case. You are instructed that the evidence of such contradictory statement has been allowed to be introduced solely for the purpose of impeachment, and that said proof cannot, if believed by the jury, be used by the jury as tending to establish the facts alleged to have been stated in such prior contradictory statement. The court instructs the jury, therefore, that proof of said inconsistent and contradictory statement does not tend, in the slightest degree, to establish the truth of the matter alleged to have been stated in said prior contradictory statement."

The refusal to give such instruction is assigned as error. While it may be conceded that the testimony of Mrs. Ogden as to the contradictory statement of Roden was competent only for the purpose of impeaching his credibility as a witness, and not as substantive evidence tending to establish the truth of the subject-matter of such statement, and it would have been proper for the court, by appropriate instructions, to have limited its probative qualities and effect to discrediting him as a witness, yet we cannot say that the jury considered it otherwise; or, if so, that such consideration resulted in a verdict different from that which would probably have been reached in the absence of such evidence, and thus prejudicially affected the rights of defendant. Even if such testimony was regarded by the jury as substantive evidence, it was only cumulative. Section 6005, R. L. 1910, provides that no judgment shall be set aside on the ground of misdirection of the jury, or the improper admission or rejection of evidence, unless in the opinion of the Supreme Court, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a violation of a constitutional or statutory right of the aggrieved party. *St. Louis & S. F. R. Co. v. Hart*, 146 Pac. 436.

The court refused to instruct the jury at the request of defendant that the verdict herein should be unanimous, but, on the contrary, charged the jury as follows:

"You are instructed that nine or more of your number may reach a verdict. If your verdict is unanimous, it will be signed by your foreman. If it is not unanimous, the jurors agreeing to the verdict will each sign the verdict returned."

The contention of defendant that there was error in this regard has been adversely determined by this court in *St. Louis & S. F. R. Co. v. Brown*, 144 Pac. 1075 (not yet officially reported). The question, however, is not subject to review in this proceeding, and error cannot properly be predicated thereon, for the reason that the verdict was, in fact, unanimous.

There are other assignments of error which have been considered, but to which specific reference is not thought necessary. The judgment is for \$8,000. The amount is not excessive.

From an examination of the entire record, we are satisfied that substantial justice has been done between the parties, and that there was no error in the proceedings below, prejudicially affecting the substantial rights of defendant.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

SMITH v. WHITLOW et al. (No. 6092.)
(Supreme Court of Oklahoma. June 27, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773(5)—BRIEFS—EFFECT OF FAILURE TO FILE—REVERSAL.

Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief, in compliance with the rules of this court, and defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained; and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the plaintiff in error, or the rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3110; Dec. Dig. \S 773(5).]

Commissioners' Opinion, Division No. 4. Error from District Court, Carter County; S. H. Russell, Judge.

Action by C. R. Smith against Paul Whitlow and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded for new trial.

Potterf & Walker, of Ardmore, for plaintiff in error.

DAVIS, C. The petition in error, with the case-made attached, was duly filed in this court on the 27th day of February, A. D. 1914. The plaintiff in error filed his brief on August 7, 1914, but up to this date the defendant in error has not filed any brief or motions of any kind or offered any excuse for such failure. It is a well-established rule of this court that when the brief of the plaintiff in error reasonably appears to support the assignments of error, the court will not search the record to ascertain some possible theory on which the case may be affirmed, but if the assignments of error appear to be reasonably supported by the record, the case will be reversed. *Butler v. McSpadden*, 25 Okl. 465, 107 Pac. 170; *Dievert et al., School Board of District No. 79, v. Rainey et al.*, 41 Okl. 31, 136 Pac. 1086. Upon an examination of the record in this case we are of the opinion that the assignments of error herein are reasonably supported by said record.

We, therefore, invoke and apply said rule in this cause.

The judgment of the lower court is reversed, and the cause remanded to the district court of Carter county, Okl., with instructions to set said judgment aside and to set aside the order of court overruling the plaintiff's motion for a new trial, and to enter an order sustaining the same, and to grant a new trial in said cause, and for such further proceedings as may be proper under the law.

PER CURIAM. Adopted in whole.

MONING DRY GOODS CO. v. WISEMAN
et al. (No. 6146.)

(Supreme Court of Oklahoma. June 20, 1916.
Rehearing Denied July 25, 1916.)

(Syllabus by the Court.)

1. PARTNERSHIP § 55—PRIMA FACIE PROOF.

The plaintiff, having put in evidence a written agreement of partnership between the defendants, made out a prima facie case of partnership against them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 75, 78, 79, 81; Dec. Dig. § 55.]

2. PARTNERSHIP § 55—PRIMA FACIE PROOF.

A prima facie case of partnership is made out against persons associated in a particular business by evidence that they share in its profits, pursuant to an agreement between them, by evidence that they have described themselves as partners in any writing, or by evidence that they are the common proprietors of the business conducted for their mutual profit.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 75, 78, 79, 81; Dec. Dig. § 55.]

3. PARTNERSHIP § 44—ACTION AGAINST PARTNERS—BURDEN OF PROOF.

Where one denies that he is a member of a partnership, the burden is upon the party alleging the partnership, and this is a question of fact for determination by the jury.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 61-63; Dec. Dig. § 44.]

4. PARTNERSHIP § 218(3)—ACTION AGAINST PARTNERS—QUESTIONS FOR JURY.

The questions of partnership, when it began, when it ceased, if it did cease, whether or not it was in existence at the time these goods were purchased, whether the goods were purchased by the partnership, whether or not the partnership is liable for the payment of same, whether, if the partnership had ceased to exist before the purchase of the goods, the plaintiff had knowledge thereof under sections 4462 and 4463, Rev. Laws Okl. 1910, are all questions of fact for the jury to find and determine in the light of all the facts and circumstances in evidence before them touching such matters and things.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 427; Dec. Dig. § 218(3).]

5. PARTNERSHIP § 218(3)—ACTION AGAINST PARTNERS—DIRECTION OF VERDICT.

When the question whether a partnership exists is a matter of doubt, to be decided by inferences to be drawn from all the evidence, it is one of fact for the jury; and the court should not nonsuit or direct the jury to find a verdict for the plaintiff or defendant.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 427; Dec. Dig. § 218(3).]

6. PARTNERSHIP § 44, 259—DISSOLUTION—PRESUMPTION OF CONTINUANCE.

Where it is shown that a partnership at one time existed, it will be presumed to continue, in the absence of testimony to the contrary. A presumption of partnership arises from the use of a name such as is commonly employed when a partnership exists.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 61-63, 599; Dec. Dig. § 44, 259.]

Commissioners' Opinion, Division No. 4. Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Action by the Moning Dry Goods Company against E. S. Wiseman and J. L. Jordan. Judgment in favor of plaintiff and against the defendant E. S. Wiseman, and in favor of the defendant J. L. Jordan, and against the plaintiff, and plaintiff brings error. Affirmed as to judgment against defendant Wiseman, and reversed and remanded as to judgment against plaintiff and in favor of defendant Jordan.

N. C. Peters, of San Bernardino, Cal., and R. Y. Prigmore, of Ft. Worth, Tex., for plaintiff in error. A. Eddleman and J. C. Graham, both of Marietta, and Guy Green, of Waurika, for defendants in error.

DAVIS, O. The parties will be designated herein as in the court below. This is an action by plaintiff, the Moning Dry Goods Company, against defendants, E. S. Wiseman and J. L. Jordan, as partners under the firm name and style of E. S. Wiseman & Co.

Plaintiff in its amended petition alleges:

"That on or about November 17, 1911, defendants, E. S. Wiseman and J. L. Jordan, were partners under the firm name of E. S. Wiseman & Co., and at that time E. S. Wiseman, as a member of said firm, entered into an agreement for the purchase of certain goods from plaintiff."

That the goods were purchased by E. S. Wiseman as a member of said partnership for and on behalf of the partnership and delivered by plaintiff to said partnership at Waurika, Okl.

Defendant Jordan answered by a general denial, and specially denied under oath that at any time alleged in plaintiff's petition or at any other time a partnership existed between the defendants, Wiseman and Jordan, under the firm name of E. S. Wiseman & Co., or any other name.

After the plaintiff in error had introduced his evidence and rested, defendant Wiseman, having withdrawn his answer, defendant Jordan demurred to plaintiff's evidence. The court sustained his demurrer.

Plaintiff in error assigns four errors: First, that the court erred in overruling plaintiff's motion for new trial; second, that the court erred in sustaining defendants' demurrer to plaintiff's evidence; third, that the court erred in rendering judgment in favor of defendant Jordan; and, fourth, that the court erred in refusing to admit in evidence cer-

tain portions of the depositions of William Moning.

We are of the opinion that all four of these assignments of error are well taken, and that the action of the trial court as complained of therein constitutes reversible error.

"Exhibit B.

"The Jordan Company, Bonded Abstracters, Real Estate, Loans, Abstracts, Insurance, Collections.

"References: First National Bank; First State Bank.

"\$4,422.33 Marietta, Okl., Nov. 15th, 1911.

Your stock as per inventory..... \$2,250 00
E. S. Wiseman, cash..... \$1,500 00
Loss and gain to-be-equally owned..... \$2,172 33

Total assets..... \$5,923 33

"Partnership is to be equally and to run for a term of three years unless terminated by mutual consent; when terminated, if division of goods should be desired, J. L. Jordan to accept back any goods then on hand which may have been put into said business by him.

"E. S. Wiseman to draw from said firm as salary for managing said business the sum of \$75.00 per month.

"E. S. Wiseman to have option of buying the interest of said J. L. Jordan for the sum of \$2,250.00 at any time during the first six months from above date, paying for same in the following manner: \$250.00 cash at the time of transfer and \$50.00 per month thereafter until the sum of \$2,000.00 together with interest is paid, said above deferred payments are to draw interest at the rate of 8 per cent. per annum, from date, until paid.

"[Signed] E. S. Wiseman.

"[Signed] J. L. Jordan."

[1-3] This Exhibit B was offered in evidence before the jury at the trial, and was admitted in evidence by the court without objection, and read to the jury. This made out a prima facie case of partnership against the defendants. The defendant Jordan having denied in his verified answer that he is or was a member of the partnership, the burden is upon the party alleging the partnership, in this case the plaintiff, to prove it, and this is a question of fact for determination by the jury under proper instructions from the court. Strickler v. Gitchee, 14 Okl. 523, 78 Pac. 94.

The following letter was offered by the plaintiff and admitted in evidence:

"Exhibit C.

"W. N. Moore, Manager. B. B. Morton, Asst. Mgr.

"Metropolitan Hotel,

"European Plan.

"Ft. Worth, Texas.

"Geo. T. Stillman, Proprietor.

"Dec. 2, 1911.

"J. L. Jordan, Marietta, Okl.—Dear Jesse: My wife met me here as I had expected and we went on to Dallas, where she bought her millinery goods (and I have paid cash for same).

"I had all yesterday with Moning Dry Goods Co. and bought about \$1,310 worth of goods and went back to Dallas and had all of her stuff shipped out and stopped off here on my way back home to see if the Moning bill had been shipped and they had held the goods up because our trade had been changed.

"I told them of the change which we had and also of our prospects of getting Joe W. in with me and in fact of all our changes (except I did not

tell them of the change of name of firm), and when I ret. here this afternoon and went up there they had withheld shipment wanting to know from you whether or not you would agree to let the goods go forward—and in the future—or at such time as you & I might agree the debt could be changed—Now Jesse, I wish to say that if you are willing to let this shipment come on through in name of E. S. Wiseman & Co., the name which we had agreed on—I will take care of the account—I would expect to pay them \$300 or \$400 cash and then keep monthly payments up. Now, you do just as you please, for not one cent is going to be bought and charged to E. S. W. Co. without your consent, in fact all bills bought to-day and paid for in Dallas were bought in name of E. S. Wiseman. Moning has been trying to get you by phone (even calling Okl. City) and I have to get ready to go home on 9:00 train. So you do as you like—if you don't care to take this chance just let me know (not them) but I will run it through as we understood—I will be at home to-night and will open the store tomorrow having bought some real good bargains in Dallas—some good ones and all paid for.

"Yours,

"Ed."

And the following telegram in answer thereto, and in answer to a phone message from Wiseman to Jordan, was offered by the plaintiff and admitted in evidence as Exhibit D:

"Exhibit D.

"The Western Union Telegraph Company,
Incorporated.

"25,000 offices in America Cable service to all the world.

"Theo. N. Vall, President.

"Belvidere Brooks, General Manager.

Receiver's No.	Time Filed	Check
4	S.J	13 pd

"Send the following message subject to the terms on back hereof, which are hereby agreed to.

"Dated, Marietta, Okla. 12/5/1911

"To To E. S. Wiseman, Waurika, Okla.

"Go ahead as outlined in your letter use your best judgment do not exceed limit is phoned.

"Jesse L. Jordan."

This telegram was then mailed to the plaintiff by the defendant Wiseman, and then, and not until then, did the plaintiff ship the goods, wares, and merchandise bought by Wiseman for the partnership.

[4] The questions of partnership, when it began, when it ceased, if it did cease, whether or not it was in existence at the time these goods were purchased, whether the goods were purchased by the partnership, whether or not the partnership is liable for the payment of same, whether, if the partnership had ceased to exist before the purchase of the goods, the plaintiff had knowledge thereof under sections 4462 and 4463, Rev. Laws of Oklahoma 1910, are all questions of fact for the jury to find and determine in the light of all the facts and circumstances in evidence before them touching such matters and things.

[5, 6] "When the question whether a partnership exists is a matter of doubt, to be decided by inferences to be drawn from all the evidence, it is one of fact for the jury; and the court should not nonsuit or direct the jury to find a verdict for the plaintiff or defendant.

"Where it is shown that a partnership at one time existed, it will be presumed to continue, in the absence of testimony to the contrary. * * *

"Books, papers, accounts, and similar writings are admissible to show a partnership between persons who are described or referred to therein as partners. * * *

"Parties who have admitted that they are in partnership, either by express statements or by conduct, will be held to that admission.

"A prima facie case of partnership is made out against persons associated in a particular business by evidence that they share in its profits, pursuant to an agreement between them, by evidence that they have described themselves as partners in any writing, or by evidence that they are the common proprietors of the business conducted for their mutual profit.

"A presumption of partnership arises from the use of a name such as is commonly employed when a partnership exists."

Cobb v. Martin et al., 32 Okl. 588, 123 Pac. 422, and numerous authorities cited therein.

For the reasons stated, the action of the trial court in rendering judgment in favor of plaintiff and against the defendant Wiseman will be affirmed, and the action of the trial court in rendering judgment in favor of the defendant Jordan and against the plaintiff will be reversed, and the cause remanded, and a new trial ordered as between the plaintiff and the defendant Jordan, in accordance with the law as set forth in this opinion.

PER CURIAM. Adopted in whole.

BRUCE v. McINTOSH et al. (No. 3533.)
(Supreme Court of Oklahoma. Jan. 19, 1915.
On Rehearing, May 23, 1916.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION § 30 — PERSONS ENTITLED — SEPARATED PARENTS — "CARE."

The word "care," as used in subdivision 3 § 1, c. 35, p. 549, Sess. Laws 1909 (Section 8418, Rev. Laws 1910), in respect to descent of the estate of a deceased minor having no inheritable kin except parents who are not living together, requires that the parent in whose behalf sole heirship is claimed must be shown to have borne practically the entire burden of parental duty, including maintenance and such other expenses as such duty requires, toward such minor at the time of such minor's death and during substantially the full period of such separation.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 84-90; Dec. Dig. § 80.]

For other definitions, see Words and Phrases, First and Second Series, Care.]

2. DESCENT AND DISTRIBUTION § 30 — PERSONS ENTITLED — SEPARATED PARENTS.

Where the parents of a deceased minor had been separated one or two years at the time of the death of such minor, the parent who has had the entire burden of parental duty, including

maintenance as well as custody and personal attention of such minor, during the full period of such separation, takes all the estate of such minor, under subdivision 3, § 1, c. 35, p. 549, Sess. Laws 1909 (section 8418, Rev. Laws 1910).

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 84-90; Dec. Dig. § 80.]

3. APPEAL AND ERROR § 1002—CONFLICTING EVIDENCE—NUMBER OF WITNESSES.

A judgment, supported by the testimony of a single witness, will be sustained, notwithstanding several other witnesses testify to the contrary on a material point, as this court will not weigh evidence against conflicting evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3987; Dec. Dig. § 1002.]

Commissioners' Opinion, Division No. 1.
Error from District Court, Hughes County;
John Caruthers, Judge.

Action by John L. Bruce, for partition of real estate, against Rosa McIntosh or Starr and Lee A. Voorhees; cross-petition by Voorhees claiming title to all of same. Judgment for defendant, and plaintiff brings error. Affirmed.

Mann, Rogers & Harris, of Holdenville, for plaintiff in error. William M. Matthews and Ralph H. Ellison, both of Okmulgee, for defendants in error.

THACKER, C. Plaintiff in error was plaintiff and defendant in error was defendant in the trial court. In October, 1909, Nathaniel McIntosh, "a new-born Creek Indian, enrolled as No. 1131," at the age of five years, died intestate and seised and possessed of the following described allotted land in Hughes county, Okl., to wit:

"The southeast quarter of the southwest quarter of the southeast quarter and the east half of the southeast quarter, all in section one (1) township nine (9) north, range thirteen (13) east."

[1] Greeley McIntosh, his father, and Rosa McIntosh, his mother, survived his death; and, he having died unmarried and without issue, they would admittedly have taken in equal shares all his estate but for the fact that they were not living together at the time of his death, nor during the period of one or two years next prior thereto; and the question as to the exclusive "care" of such minor during that period and at the time of his death is in controversy. Subdivision 3, § 1, ch. 35, Sess. Laws 1909 (section 8418, Rev. Laws 1910), which the parties concede to be controlling, at page 549, reads:

"If there be no issue, nor husband nor wife, nor father nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation; if the deceased, being a minor, leave no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor."

[2] We think the word "care," as used in this section of the statute, requires that the parent in whose behalf its discriminatory

and exclusive benefit is asserted must be shown to have borne practically the entire burden of parental duty towards the minor, including maintenance and such other expenses as such duty requires, at the time of the minor's death and during substantially the full period of such separation of parents, to be entitled to such exclusive inheritance. *Kelly v. Jefferis*, 3 Pennewill, 286, 50 Atl. 215; *Christy v. Pulliam*, 17 Ill. 59.

[3] The plaintiff, under a conveyance from Greeley McIntosh, sues for a partition to him of one-half undivided interest in this land; and the defendant, under a conveyance of all the land from Rosa McIntosh, denies plaintiff's claim of right, and asks that his title to all the land be quieted against the plaintiff, etc., upon the ground of such separation and Rosa McIntosh's "care" of the minor at the time of its death and during such period of parental separation. The judgment was for the defendant; and, there being evidence reasonably tending to support the same, in that all the evidence shows such separation and Rosa McIntosh testifies unequivocally to such exclusive care of the minor, notwithstanding Greeley McIntosh and several other witnesses contradict her in respect to whether Greeley McIntosh contributed to the support of the minor during the period of such separation, the judgment should be affirmed. See *Board of County Com'rs of Woodward Co. v. Thyfault*, 43 Okl. 82, 141 Pac. 409; *Alfred v. St. Louis, I. M. & S. Ry. Co.*, 42 Okl. 4, 140 Pac. 415; *Elwell v. Purcell*, 42 Okl. 467, 140 Pac. 412.

On Rehearing.

COLLIER, C. Upon an examination of the record, we are of the opinion that the original opinion handed down in this cause is correct, and therefore recommend that said opinion of Commissioner THACKER be reaffirmed as the opinion in this case.

PER CURIAM. Adopted in whole.

INLAND COMPRESS CO. v. SIMMONS. (No. 7560.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. WAREHOUSEMEN §24(7)—LIMITATION OF LIABILITY—VALIDITY.

A contract, executed by a compress company in this state, which seeks to relieve from liability the company for loss by damage, fire, flood, or other agencies, unless caused by the willful act or gross negligence of the company, is against the public policy of the state, and therefore void.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. § 48; Dec. Dig. §24(7).]

2. WAREHOUSEMEN §24(1). — LIABILITY — CARE REQUIRED.

A cotton compress in this state is a bailee for hire, and under the statute must exercise

at least ordinary care for the preservation of property intrusted to it.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 11, 48; Dec. Dig. §24(1).]

Commissioners' Opinion, Division No. 3. Error from County Court, Bryan County; J. L. Rappolee, Judge.

Action by J. E. Simmons against the Inland Compress Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Utterback & MacDonald, of Durant, for plaintiff in error. Hayes & McIntosh, of Durant, for defendant in error.

HOOKER, C. On the 7th of February, 1914, J. E. Simmons filed suit in the county court of Bryan county, against the Inland Compress Company, and alleged that on the — day of December, 1913, he delivered to it 10 bales of cotton to be stored and compressed, and that he paid to said defendant 50 cents a bale for storage, the defendant company being at that time in the compress and storage business of cotton, and that in addition to its compress business it would receive from the owners of cotton the same for storage the same as warehousemen, and would charge for said care and storage the sum of 50 cents per bale; that said defendant had a considerable space covered with concrete, and a large part of a block, upon which it stored cotton upon the ground; that after he left his cotton with the defendant for storage he saw that the same was being damaged by water which accumulated on the concrete floor, and he took some 2x4's and put the same under the cotton, so that the water would run under the bales and pass off, and that thereafter the defendant, its agents and employes removed said cotton from said 2x4's and placed the same where loose cotton accumulated, and under the eaves of the house, so that the rain would run from the house onto the cotton, and the loose cotton that had accumulated around the bales caused the water to stand, and the bales of cotton absorbed the dampness therefrom; and that by reason thereof 600 pounds of his cotton was damaged, which was of the reasonable value of \$75.72, and that in addition thereto, it was necessary before he could sell said bales of cotton to remove a part from each bale at an expense of \$2.50 per bale. It is further claimed that said loss and damage was caused by the negligence and want of care on the part of the company in failing to keep said cotton in a reasonably safe place and removing the same from the 2x4's upon which the plaintiff had placed it and putting the cotton under the eaves of the house. To this petition the defendant filed a general denial. Upon the trial of this cause it developed: That on the 5th day of September, 1913, the plaintiff, J. E. Simmons, purchased on the streets of Du-

rant, Okl., 10 bales of cotton, and delivered the same to the defendant, which said defendant was, at the time, engaged in the compress business, and received cotton and stored the same on its yards for the purpose of compressing. That when said cotton was delivered to said defendant it issued its customary compress tickets, which tickets are in the following form:

"Inland Compress Company.

"Durant, Okl. 9/6/13.

"One bale cotton, for account of J. E. Simmons, will be delivered to the holder hereof on return of this receipt and payment of all charges. Not responsible for loss by damage, fire, flood or other agencies, unless caused by the willful act or gross negligence of this company. "J. E. Wimsatt, Supt."

That the said J. E. Simmons turned the said tickets to the bank, and that the bank paid the purchase price of the cotton. That he saw the cotton was being damaged by the rain, in that, it was so placed upon the platform that the water from the roof of the building was thrown upon it, and that he made a complaint to the superintendent of the company, but that said cotton was not moved, and thereafter the plaintiff below placed some 2x4's under the cotton, so that the water could pass freely thereunder, but that the defendant removed the same, and as the result thereof plaintiff's cotton was damaged as prayed for in the petition.

[1, 2] About the only question presented by this appeal is whether the cotton tickets executed by the company and delivered to the plaintiff at the time the cotton was delivered by him to the company (copy of which is shown above) is a legal contract and enforceable in the courts of this state, it being contended by the plaintiff in error that the cotton tickets did constitute a contract, and that under the terms of the contract it is not liable for loss by damage, fire, flood, or other agencies unless by the willful act or gross negligence. The facts in the instant case show that the plaintiff in error received this cotton for the purpose of compressing the same, for which it received compensation, and that the storage of the cotton was an incident of the business in which it was engaged of compressing the same. This court, in the case of *Vogel & Son v. Braudrick*, 25 Okl. 259, 105 Pac. 197, said:

"Where the keeper of a cotton yard received 10 cents for weighing each bale and 15 cents for hauling the same to the railway station for shipment, and it was the custom of said keeper to keep said cotton in said yard between the time of weighing it and hauling it for shipment, such keeping, being a necessary incident of the business in which the keeper makes a profit, constitutes him a bailee for hire, although he may not have received any compensation for the actual storage."

In the case of *Union Compress Co. v. Nunnally*, 67 Ark. 284, 54 S. W. 872, the Supreme Court of that state said:

"A compress company is liable for want of care in keeping cotton stored with it for compression if it expected either to charge stor-

age for the cotton or to get compensation for keeping same in the way of charges for compression.

"When a bailment is reciprocally beneficial to each party, the bailee is answerable for want of ordinary care." *St. Louis S. W. Ry. Co. v. Henson*, 61 Ark. 302, 32 S. W. 1079; 8 Am. & Eng. Enc. Law, p. 746.

Also the Supreme Court of Pennsylvania, in the case of *Woodruff v. Painter*, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786, said:

"A bailment is for hire, although no hire is paid, when it is a necessary incident of a business in which the bailee makes a profit."

Applying the rule laid down in these cases to the evidence in the instant case, we are of the opinion that the plaintiff in error was a bailee for hire of the cotton in question, and, as such, was subject to the same responsibility and duties; and, for the failure to exercise that degree of care of the property in its possession that the law requires of a bailee for hire, it is responsible for whatever damages that said property suffers as the proximate result caused by the failure of the company to exercise such care. That being true, it must have been the duty of the compress company in this case to have exercised reasonable care in the storing of the property of the defendant in error, and for its failure so to do it must be held liable, unless the provision of the cotton tickets, which sought to limit its liability to injuries caused by the willful act or gross negligence of the company, should prevail. Section 1109 of the Revised Laws of 1910 provides:

"A bailee for hire must use at least ordinary care for the preservation of the thing bailed."

The writers on bailments seem to agree that the parties to a bailment contract may regulate the responsibilities of the bailee by special contract, but it is also universally agreed that the terms which public policy and legislation of the state impose are not to be overleaped by contractual relations, and, if so, the contract will be disregarded and declared void, and the bailee held in the same manner and to the same extent as if such contract never existed.

The public policy of a state must be determined by reference to its Constitution, the acts of its Legislature, and the judicial decisions of its courts. It is universally agreed and acceded to in this state that common carriers, on account of the relation that they occupy towards the public and the duty that they owe to the public generally, are prohibited by law from contracting against their own negligence. The reason for this requirement is apparent, and it would seem that the same cause which prohibits contracts of this character from being made by a common carrier would likewise prohibit contracts of like nature from being made by other enterprises which serve the public, and which conduct and carry on such a large and important part of the public business, which

business is so essential to the commercial life of the people of the state. The Legislature of this state, by the provision of our statute above quoted, has provided that a bailee for hire must use at least ordinary care for the preservation of the thing bailed, and while this provision of the statute may be considered as a declaration of the general law on the subject of bailment, yet it also indicates the fixed, definite, and declared policy of the state with reference to the degree of care that all bailees for hire must use towards property intrusted to its care.

In this state cotton occupies such an important relation to the business life of the people of the state, and cotton compresses perform such an important duty to the general public, that it may be said that courts take judicial knowledge of the fact that compresses are in their nature, or rather in a sense, quasi public institutions. In fact the business of compressing cotton, by reason of its nature, the extent and the necessity therefor, is such that the public must use it, and it is of such public consequence, and affects the community at large to such an extent, that it is a public business, and as such should not be permitted to relieve itself from liability by contracts of the kind involved here. It will not suffice to say that this contract was a voluntary contract, and that the defendant in error was compelled to have his cotton compressed, for the same objection could be urged with the relation of the public to the railroads, the express companies and to other public utilities. It is said in volume 6, *Corpus Juris*, p. 1112, § 44:

"The parties to a bailment may diminish the liability of the bailee by special contract, the principle being that the bailee may impose whatever terms he chooses if he gives the bailor notice that there are special terms and the means of knowing what they are; and, if the bailor chooses to make the bailment, he is bound by them, provided the contract is not in violation of law or of public policy, and that it stops short of protection in case of fraud or negligence of the bailee."

While it cannot be contended that the plaintiff in error is a public warehouseman within the provisions of our statute, yet, as a circumstance indicating the public policy of this state, it might not be amiss to notice section 8302 of the Revised Laws of 1909, which prohibits public warehousemen from inserting in the receipt any language limiting or modifying the liability or responsibility as imposed by the law of the state. Third volume, *Enc. of Law* (2d Ed.) p. 750, states the rule as follows:

"To what extent a bailee may limit his liability by special contract is not clear. It has been said by good authority that the bailee might contract not to be liable for any degree of negligence not amounting to gross neglect, for, the latter being regarded as equivalent of fraud, the law will not tolerate such an indecency, as that a man may contract to be safely dishonest. But negligence in any degree being a wrong, the distinction is not apparent, and the better doctrine supported by authority would seem to

be that a bailee cannot stipulate against liability for his own negligence." *Lancaster County Nat. Bank v. Smith*, 62 Pa. 47.

In the case of *Pilson v. Tip Top Auto Co.*, reported in 67 Or. 528, 136 Pac. 642, the Supreme Court of Oregon had under consideration the question of the liability of a bailee for hire, and there stated the rule to be:

"It is the better rule that a bailee for hire cannot by contract so limit his responsibility to the bailor as not to be liable for his own negligence or the negligence of his agents and servants." *Railroad Co. v. Lockwood*, 17 Wall. (84 U. S.) 357, 21 L. Ed. 627; *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 128, 25 N. E. 869; *Pittsburgh, etc., Ry. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Camp v. H. & N. Y. S. Co.*, 43 Conn. 333; *Davis v. C. M. & S. P. R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935; *Lancaster County Nat. Bank v. Smith*, supra; *Memphis & C., R. I. & P. Co. v. Jones*, 2 Head (Tenn.) 517; 3 Am. Eng. Enc. of Law (2d Ed.) 750.

We conclude that it would be against public policy in this state to permit the defendant in this case as a bailee for hire to contract in such manner as to relieve it of any responsibility for its own negligence, and that, the provision of the receipt issued to the plaintiff in error attempting to relieve the company from any liability on account of damage, the result of its negligence is void as against public policy. Therefore the court did not err in instructing the jury to the effect that such provision of the contract would not protect the defendant against its own negligence.

The judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

WARNER v. PAGE. (No. 6999.)
(Supreme Court of Oklahoma. June 27, 1916.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE ¶57—OPTIONS—MINING LEASE.

Where a lease for oil and gas provides, among other things, that the lessee shall begin operations within six months, and, upon failure to do so, shall pay annually \$500 into a certain bank, or to the lessor direct, and that failure to commence operations or to pay shall render the lease null and void, held, that such lease was a mere option, preventing the lessor, after receiving the delay money, from leasing to another for the period of one year from the date of such payment, and that such contract, being an option on the part of the lessee to terminate the lease at any time, deprived such lessee of the right of specific performance, at least until he had performed the contract or placed himself in such position that he might be compelled to perform.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 178; Dec. Dig. ¶57.]

2. CONTRACTS ¶172—CONSTRUCTION—OPTIONS.

When contracts are optional in respect to one party, they are strictly construed in favor

of the party that is bound and against the party that is not bound.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 758-761; Dec. Dig. ¶172.]

3. CONTRACTS ¶235 — PERFORMANCE — PAYMENT—SUFFICIENCY—UNSIGNED CHECK.

Where a contract provides for the deposit of delay money in a certain bank, sending to such bank an unsigned check before the due date of such delay money, or sending to the lessor or owner of the lease several days after delay money was due a check payable to the owner, is not such compliance with the contract as to require the lessor to accept such check.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1101-1116; Dec. Dig. ¶235.]

4. CONTRACTS ¶316(1) — PERFORMANCE — WAIVER.

Where a contract provides that delay money shall be deposited in a certain bank or paid to the lessor, and an unsigned check is sent to said bank and returned to the lessee by such bank with directions to make it payable to the owner of the land and properly sign the same, and such direction is given several days before the due date of the delay money for extending option, and the lessee sends a check to such bank properly signed and payable to the owner of the land, *held*, the owner of the land is not estopped upon his refusal to accept such check from declaring the lease at an end, especially where the lessee has pleaded performance of the contract and has not pleaded waiver or estoppel.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1382; Dec. Dig. ¶316(1).]

Commissioners' Opinion, Division No. 5. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by Charles Page against E. S. Warner and Al Brown. Judgment for plaintiff, and defendant Warner brings error. Reversed and remanded.

Charles F. Runyan, of Muskogee, for plaintiff in error. Poe, Hindman & Lundy, of Tulsa, for defendant in error.

CLAY, C. For convenience the parties herein will be referred to as they appeared in the trial court, plaintiff and defendant, respectively. This was an action brought by Charles Page, plaintiff, against E. S. Warner and Al Brown in the superior court of Tulsa county, Okl., on the 28th day of August, 1913, and finally transferred to the district court of Tulsa county, where it was finally determined.

Plaintiff in his petition alleges that defendant was the owner in fee of a certain tract of land in said county consisting of 35.27 acres; that on July 22, 1912, W. D. Elmer, the then owner, leased said premises to him for a period of 15 years, which lease was duly recorded, by virtue of which, prior to this action, he went into peaceable possession; that plaintiff had fully performed all the conditions in the lease contract and on the 19th day of July, 1913, had paid the \$500 commutation money provided for by said lease, and prior to any notice of change in ownership; that said money was accepted in lieu of drilling operations; that on the 20th day of July, 1913, said Warner sent him written notice declaring said lease null and void and that plaintiff had not

received any notice of change of ownership as provided for in the lease, and tendered into court the \$500 commutation money; that one Al Brown subsequently took possession of said land for the purpose of developing the same for oil and gas under a lease from the said Warner; that said lands were underlaid with oil and gas, and defendants are about to remove the same; that plaintiff has no plain, speedy, and adequate remedy at law, and asks that defendant be restrained. Upon this verified petition and certain affidavits, the superior court granted a temporary restraining order.

The defendant, Al Brown, disclaimed any interest; defendant Warner admitted the execution of the lease set up in plaintiff's petition between plaintiff and W. D. Elmer; that Elmer had conveyed to Warner the lands, and denied that plaintiff had performed the conditions of the lease, denied the payment of the rentals due July 22, 1913, or that the same had been credited to the account of said W. D. Elmer for delay of drilling operations, alleging that on the 24th day of July he sent a written notice declaring the lease null and void; alleging that Brown went upon the lands in August, 1913, and held a leasehold interest in the same from defendant; alleging that plaintiff had full notice of the change of ownership of the premises prior to July 22, 1913; that by reason of the failure to perform the conditions of the lease by the plaintiff, and the failure to pay commutation money as provided for by the lease on July 22, 1913, the same became null and void. Defendant further prayed for dissolution of the temporary order and that plaintiff's lease be canceled. Upon trial judgment was rendered for the plaintiff, and, from an order overruling a motion for a new trial, the case is brought here for review.

The evidence in this case shows that the plaintiff, on July 22, 1912, entered into a lease contract with W. D. Elmer, the then owner of the lands, to explore said lands for oil and gas, which lease was to run for 15 years, or as much longer as oil and gas was found in paying quantities. The conditions of said lease material to this inquiry are as follows:

"First. The party of the second part agrees to commence operations on said premises within six months from this date, or thereafter pay first party an annual rental of \$500 in advance for further delay until operations are commenced; said rental to be deposited to the credit of the party of the first part in the Muskogee National Bank of Muskogee, Okl., or to be paid direct to said first party; and a failure to commence said operations, or to pay said rentals, shall render this lease null and void, and neither party herein shall be held to any accrued liability or to any damages, or be held liable upon any stipulations herein contained; second party agrees to complete two wells within one year, provided the first one is a producer, along the bank of the river."

"Eleventh. It is further agreed that in the event the party of the first part, his heirs, administrators, or assigns, shall sell the lands, or

the royalty or rental interest under this lease, or the party of the first part shall die, the party of the second part, as aforesaid, shall continue to pay the said rentals or royalties by deposit to the credit of the said party of the first part as aforesaid, until notified in writing by the party so purchasing or inheriting said lands. * * *

Defendants at the time of the bringing of the action for injunction were in possession of the land and had drilled a well to the approximate depth of 750 feet. Prior to July 22, 1913, plaintiff had made no attempt to drill upon said land and made no attempt until the last week of July of said year. On the 22d day of July, 1913, there was due as commutation money the sum of \$500, and on the 19th day of said month the plaintiff's agent mailed to the Muskogee National Bank, to be deposited to the credit of the owner of said land as commutation money, an unsigned check for \$500; that immediately upon receipt of said check on the 19th or 20th of said month the bank called defendant Warner, who directed that the check be returned and be made payable to him, as he was the owner of the land. The bank returned the check on the 23d day of said month; that on the 25th of said month plaintiff's agent returned the check properly signed to said bank and made payable to the said Warner; Warner refuse to accept the check because the time for the payment of said money had expired, and directed the bank to return the check to the plaintiff and notify him of the defendant's refusal to accept it. Warner further testified that on the 25th or 26th of said month he notified plaintiff that he elected to cancel the lease for the nonpayment of the commutation money and the failure of plaintiff to comply with the terms of the lease; that plaintiff, on the said 25th or 26th day of said month, leased the said land to Al Brown; that the original consideration was \$1,000, \$500 cash and \$500 to be paid; that he received only \$500. There was some slight conflict between the assistant cashier and the defendant, and in the letter to the defendant returning the unsigned check the cashier, among other things, said:

"Wish to state that Mr. E. S. Warner is the owner of this land and he wishes us to have you make check payable to him. Also make proper changes in your voucher."

[1] Defendant's first two assignments of error are that the lease was void because it was unilateral and will not be enforced in equity, and specific performance will not be decreed, and that the lease lapsed and became null and void for failure to pay rentals. We will treat the two assignments together.

It seems to be a well-settled doctrine established by the Supreme Court of this state that an oil and gas lease passes no title, but merely the right to explore for oil and gas under the terms of the contract. In the case of Frank Oil Co. v. Belleview Co. et al., 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487, the court said:

"Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant not of the oil that is in the ground, but of such a part as the grantee may find, and passes nothing except the right to explore for the same under the terms of such contract."

See, also, Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451.

The provisions in the lease, particularly paragraph 1 of the conditions above quoted, do not obligate the lessee to pay rent for delay in commencing to drill for oil and gas; they only amount to an option to lessee to explore for oil and gas and merely have the effect of preventing the landowner from leasing the premises to another during the time the commutation money has been paid for a particular period. If the lessee does not pay in advance at or before the expiration of said period, then the lease is at an end and the forfeiture may be declared by the lessor. It is so held in Deming Investment Co. v. Lanham, 36 Okl. 773, 130 Pac. 280, 44 L. R. A. (N. S.) 50. In the case of Kolachny v. Galbreath, supra, it is held by Mr. Justice Williams:

"Equity will not decree that one party perform a contract which the other party may refuse to carry out. After relief by decree granted to such party he might refuse to proceed further. A court of equity will not do a vain and useless thing by rendering a decree settling the rights of parties which one of them at will may set aside."

Plaintiff urges that this is not a suit for specific performance, but in the last above quoted case, on page 781, it is said:

"This contract is sought to be enforced negatively by a cancellation of the oil and gas lease held by Galbreath and others, defendants in error herein, and an injunction restraining them from developing this land for oil and gas and to permit plaintiff to operate under his lease. This amounts to a specific performance in equity. Fowler Utilities Co. v. Gray, 163 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344.

Plaintiff contends that an option to purchase or lease may be specifically enforced upon notice of acceptance within the life of the option, and cites 36 Cyc. 625, 626, and Schnuettgen v. Frank, 213 Fed. 440, 130 C. C. A. 76. The authorities, we think, cited by plaintiff, and a number of others to the same effect, are options to purchase real estate and are distinguishable from the case at bar. This is not an option to purchase; it is merely an option to pay a certain amount of money and prevent a forfeiture of the lease. In the case of Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144, the court says:

"Cases of this character are distinguishable from a line of cases in this and other states which hold that an option contract for the sale of real estate is valid, and may be specifically enforced after the party holding such option has, within the time specified, elected to purchase and pays or tenders the purchase price. Such payment or tender supplies the element of mutuality, and neither party can thereafter recede from the contract. Such contracts have

been frequently upheld and enforced in this state. * * * While the power of revocation reserved in this lease has the effect of depriving appellant of equitable remedies, in the nature of a specific performance, still the contract is not void for want of mutuality. The reservation of the right to cancel is not an infirmity which renders the contract void ab initio, but it deprives the party for whose benefit it is made, of relief in equity in the nature of a specific performance."

[2] The plaintiff ought not to be decreed specific performance until he has performed the contract or placed himself in a position where he might be compelled to perform it. It seems to be well settled in this jurisdiction that a different rule of construction obtains with reference to the option of oil and gas leases from that of options to purchase, or ordinary leases. The reason given for this difference is the danger of loss to the owner from draining of his oil away by the wells sunk on the surrounding land, and they are usually construed most strictly against the lessee and in favor of the lessor, and especially so where, as in this case, the lessee may delay performance indefinitely. The annual payments are mere stipulations for delay in performance and the contract ought not to be enforced in equity. *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428; *Kolachny v. Galbreath et al.*, supra; *Superior Oil & Gas Co. v. Mehlin*, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942.

[3] The evidence in this case does not warrant the finding that the money which should have been paid on the 22d of July, 1913, for delay in performance, was in fact paid. The mailing of an unsigned check to the bank three or four days before the sum was due, and thereafter mailing a check properly signed to the same bank four or five days after the amount was due, and which check was refused by defendant, would not constitute payment under the terms of the contract, which were that "said rentals be deposited to the credit of the party of the first part at Muskogee National Bank of Muskogee, Okl., or to be paid direct to the first party, and a failure to commence such operations, or to pay said rental, shall render this lease null and void."

[4] We have carefully examined the evidence and do not believe that the defendant said or did anything that constituted a waiver or estoppel such as to preclude him from setting up his forfeiture of the lease. We think the case of *Brown v. Wilson*, 160 Pac. 94, not yet officially reported, is decisive of this question, where Mr. Justice Turner in the opinion used this language:

"This for the reason that, as said lessees stood on their lease in the trial court and denied a forfeiture and there prevailed upon the theory that the lease was not forfeited, if indeed it was forfeited at all, they will not be permitted to change front in this court and for the first time urge that, under the facts, they should be relieved from the forfeiture, if any occurred. Having failed there to plead in con-

fession and avoidance in virtue of the statute invoked and there put in issue the question of whether or not they had made full compensation to the other party, as required by statute, and whether their breach of duty was or was not 'grossly negligent,' we can give them no relief here, especially in view of the fact that the rights of the second lessees have intervened and had intervened at the time of the rendition of the judgment complained of. Besides, as stated in *Dill v. Frazee*, 160 Ind. 53 [79 N. E. 971]: 'There is little or no reason for the interference of a court of equity to prevent a forfeiture before operations have begun, where the operator has signed away his opportunity under the contract.'"

It therefore follows that the judgment in this cause should be reversed and remanded to the trial court for such action as may be in conformity with the views herein expressed, and we so recommend.

PER CURIAM. Adopted in whole.

OKLAHOMA CITY NAT. BANK et al. v. EZZARD. (No. 6832.)

(Supreme Court of Oklahoma. June 13, 1916. Rehearing Denied July 25, 1916.)

(Syllabus by the Court.)

1. BANKS AND BANKING ⇐281—NATIONAL BANKS—LIQUIDATION—ACTIONS.

Where a national bank is placed in voluntary liquidation and a liquidating agent appointed, the corporate existence of the bank continues until the duties of the liquidating agent have been performed and the affairs and business of the bank completely settled, and during this time the bank is capable of suing and being sued in its corporate capacity, and creditors have the right to enforce their claims against the bank or determine the validity thereof by suit in the proper court.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 1075-1079; Dec. Dig. ⇐281.]

2. PROCESS ⇐19—COUNTY TO WHICH ISSUED.

Where an action is rightfully commenced in any county, summons may issue to any other county and be there served upon one or more of the defendants.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 15; Dec. Dig. ⇐19.]

3. GUARANTY ⇐7(2)—REQUISITES—NOTICE TO GUARANTOR.

Where a guaranty is made in response to an offer by the guarantee, its delivery to the guarantee completes the contract, and notice of its acceptance by the guarantee and of an intention to act thereunder is not necessary.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 9; Dec. Dig. ⇐7(2).]

4. BANKS AND BANKING ⇐261(8)—NATIONAL BANKS—LIABILITIES.

A national bank which, in pursuance of an agreement with its debtor that he will apply the proceeds of a loan upon his indebtedness to the bank, guarantees the payment of said loan at maturity is liable to the lender for the amount received by it in the execution of its agreement, even though such guaranty be beyond its powers under the National Banking Act (Act Cong. June 3, 1864, c. 106, 13 Stat. 99).

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 996, 997; Dec. Dig. ⇐261(3).]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Mollie Ezzard against the Oklahoma City National Bank and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Wilson & Tomerlin, of Oklahoma City, for plaintiffs in error. Harvy R. Winn and Asp, Snyder, Owen & Lybrand, all of Oklahoma City, for defendant in error.

HARDY, J. Mollie Ezzard, as plaintiff, commenced this action against the Oklahoma City National Bank and Don Lacy, its liquidating agent, to recover the sum of \$2,000, with 10 per cent. interest thereon and 10 per cent. attorney's fees, which had been loaned by her to I. M. Holcomb, and which it was alleged the bank by its contract of guaranty had agreed to take up at maturity if not paid by him. Summons was served upon the president of the bank in Oklahoma county, and upon the liquidating agent in Carter county. The bank filed motion to quash the summons and service thereof for the reason that said bank had been, by vote of its directors, placed in voluntary liquidation, with a duly appointed liquidating agent, and for that reason service of summons could not be had upon it in its corporate capacity, but should be had upon its liquidating agent. Defendant Lacy filed motion to quash summons and service upon him, for the reason that service could not be had upon him in Carter county. Both motions were overruled, and error is urged upon the order of the court made thereon.

[1, 2] The mere fact that the directors had voted to place the bank in voluntary liquidation, and that a liquidating agent had been appointed, did not terminate the corporate existence of the bank. The powers and duties of the liquidating agent under the law were to take charge of the assets of the bank, to wind up its business, pay its liabilities, and, if necessary, enforce the liability of its stockholders for all its "contracts, debts and agreements," and the existence of the corporation continues during this time and until the duties of its liquidating agent have been performed and its affairs and business completely settled, and pending final settlement of these matters the bank is capable of suing and being sued in its corporate capacity, and creditors have the right to enforce their claims against the bank or determine the validity thereof by suit in the proper court. *Chemical National Bank v. Hartford Dep. Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 505. Summons was properly served upon the bank in Oklahoma county; and, the court in which suit was filed having acquired jurisdiction of the cause, summons might properly issue to Carter county and be there served on defendant Lacy. Section 4706, Rev. Laws 1910.

[3] It is urged that the alleged guaranty

is at most an offer unaccepted, without consideration recited, to guarantee the payment of Holcomb's note in the event of his default, and, because plaintiff gave the bank no notice of her acceptance of the offer, thereby there was no meeting of the minds, and the offer is not binding upon the bank, and in support of this contention counsel cite section 1031, Rev. Laws 1910, which declares that a mere offer of guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor, and also cite the case of *Smith v. Thesmann*, 20 Okl. 123, 93 Pac. 977, 15 Ann. Cas. 1161, and authorities from other jurisdictions to the same effect. The record discloses the fact, which is undisputed, that Holcomb, learning that plaintiff had some money which she was willing to loan, sought to borrow same, and was told by plaintiff she would loan him the money if the bank would guarantee to take it up at the end of the time in the event he did not. Holcomb communicated this offer to the bank, and O. H. Everest, vice president of the bank, apparently after consultation with the board of directors, wrote the letter of guaranty upon which plaintiff commenced this action, and delivered same to Holcomb, which was by Holcomb delivered to plaintiff and the loan consummated and the money paid to the bank. Upon this state of facts the statute and the authorities cited do not apply, but a different rule would govern. Where a person applies to another for a loan, and is told by that person the loan will be made upon condition that said loan be guaranteed by a third person, and the offer is communicated to such third person, who thereupon executes a guaranty of the debt, which is delivered to the guarantee and the loan made upon the strength thereof, no notice of acceptance is necessary, and the guarantor cannot escape liability because of the want of such notice, for the execution of the guaranty by him was an acceptance upon his part of an offer to make the loan upon the execution of the guaranty by him, and under these circumstances there is a complete meeting of the minds of the parties. *Childs, Sur. & Guar.*, p. 29; *Brandt, Sur. & Guar.* (3d Ed.) § 213; *Pingrey, Sur. & Guar.* § 348; *Davis v. Wells Fargo & Co.*, 104 U. S. 159, 26 L. Ed. 686.

[4] In addition to the reasons stated, the purpose of Holcomb in making the loan was to obtain money to apply on his indebtedness at the bank. It appears that the bank would only extend his indebtedness for 90 days at a time, while he could procure the loan for a year. When the money was received it is undisputed that a portion thereof was paid to the bank in pursuance of a previous agreement, and applied on Holcomb's indebtedness, and it was to enable Holcomb to procure the money with which to reduce the amount owing by him to the bank that said

guaranty was executed. There was thus a valuable consideration moving to the bank which was sufficient to uphold said guaranty if otherwise legal.

The contract of guaranty is said to be ultra vires and not binding upon the bank or its liquidating agent. The trial court does not appear to have rendered judgment upon the contract, but upon the liability implied by law from the circumstances of the transaction. While plaintiff sued upon the contract, she also prayed judgment upon the liability imposed by law in the event said contract was held to be illegal. Instead of rendering judgment for the amount of the note with 10 per cent. interest and 10 per cent. attorney's fees, according to its terms, as he would be authorized to do in the event judgment was rendered upon the contract of guaranty, the court rendered judgment for \$2,000, the amount of the loan, with 6 per cent. interest thereon from March 28, 1911, the date of said loan. Plaintiff moved for judgment for the amount due on the note according to its terms, notwithstanding the verdict, which motion was overruled. In view of these facts, a discussion of the question urged becomes unimportant.

It is admitted that the bank received \$1,000 of the sum borrowed from plaintiff, and in effect conceded that judgment might properly go against defendants for that amount, but it is urged that the court erred in directing a verdict for plaintiff in the sum of \$2,000 because there was no competent evidence to show that the bank received this amount. The witness Holcomb testified that plaintiff gave him a check for the amount loaned, which he took to the American National Bank and cashed and then took the money to the defendant bank and paid said entire sum to said bank to be applied on his indebtedness. His evidence to this effect is direct and positive, and the statement repeated. The bank introduced its note teller, who testified that a credit of \$1,000 was applied on certain notes owing by Holcomb, and that a new note was executed for the balance. C. H. Everest, vice president of the bank, testified that whatever amount was paid by Holcomb was paid to him, and by him turned over to the note teller; that he did not know whether Holcomb had paid any other amount than had been credited upon the books; that he had searched the records of the bank and was unable to find any record of any other sum which had been applied on Holcomb's indebtedness. Upon this testimony the court submitted to the jury the question as to how much of said sum was received by the bank to be applied on its indebtedness, and directed a verdict for plaintiff in the sum of \$2,000. The jury answered that the bank had received the sum of \$2,000. Defendants complain of the action of the court in submitting this special interrogatory to the jury in connection with an instruction to return a verdict for plain-

tiff in the sum of \$2,000, and in refusing to give certain special instructions requested.

There was practically no dispute in the evidence. The bank held certain collateral as security for Holcomb's indebtedness, and agreed with him that this collateral would be released and delivered to plaintiff, and the bank would guarantee the loan and the proceeds thereof should be applied on his indebtedness. With this understanding the collateral was released, the guaranty executed, and both delivered to plaintiff, and the money secured and paid to the bank. Everest does not deny that the sum of \$2,000 was paid to be applied on Holcomb's indebtedness, and the court was justified in directing a verdict for plaintiff in the sum of \$2,000, and would have committed no error had he not submitted said special interrogatory to the jury. That the bank, under the circumstances, was liable does not seem to admit of any question. In *Crowder State Bank v. Aetna Powder Co., et al.*, 41 Okl. 394, 138 Pac. 392, the cashier of the bank had agreed to hold the amount of a certain bill out of the funds due the debtor when received by the bank, and in an action against the bank, liability was denied on the ground that the acts of the cashier were ultra vires, and, in affirming the judgment for plaintiff, this court said:

"Where a cashier of a bank makes a contract which is beyond his power and authority, but the bank by reason thereof secures a benefit or a beneficial effect, it will not thereafter be heard to urge nonliability thereunder on the plea of ultra vires." *Shawnee National Bank v. Purcell Wholesale Gro. Co.*, 34 Okl. 34, 124 Pac. 603, 41 L. R. A. (N. S.) 494.

Conceding, for the purpose of this case, that the contract of guaranty was beyond the power of the bank to make, yet, when it induced plaintiff to part with her money on the faith of its promise to repay the same in the event of Holcomb's default, a sense of right and natural justice requires that it be not permitted to receive and retain the fruits of its illegal agreement and at the same time escape liability for the amount received by it. If the contract be unlawful, it is not inherently immoral, and in such cases, while refusing to permit an action upon the unlawful contract, the law will, in consonance with sound legal principles, seek to do justice between the parties by permitting a recovery of that which has been obtained upon the faith of the unlawful contract. It would be a reproach upon the law and its administration if no relief could be had under such circumstances. In *Citizens' Cent. Nat. Bank v. Appleton, Receiver*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443, the Cooper Exchange National Bank had loaned to one Samuels, upon the written guaranty of the Central National Bank, \$12,000. The Central National Bank had guaranteed the payment of said sum at maturity. Previous to the execution of the loan Samuels, being indebted to the Central National

Bank, had agreed with them to procure this loan and pay \$10,000 on his indebtedness. The question of the authority of the bank to execute the contract of guaranty was presented, but, waiving it aside, the court held the bank liable, and affirmed the judgment. The syllabus of this case is as follows:

"A national bank which, in pursuance of a previous agreement with its debtor that he will devote to the discharge of his indebtedness a part of the proceeds of a loan to be obtained by him from another bank, requests the making of such loan, and guarantees its payment at maturity, must account to the lending bank for the sum which it receives for its own use in the execution of the agreement, even though such guaranty is beyond its powers under the national banking statute."

The facts in that case were very similar to the facts in the case at bar; and, under the rule there stated it is clear that, when the bank, in pursuance of its agreement with Holcomb that he would devote the proceeds of the loan to the discharge of his indebtedness, agreed to guarantee the payment of said loan at maturity, it must respond to the plaintiff for the amount received by it in the execution of its agreement of guaranty, irrespective of the right to execute such agreement.

The judgment of the trial court is therefore affirmed. All the Justices concur.

SCOTT v. ABRAHAM (two cases).
(No. 7359.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD §107—APPOINTMENT—SALE OF LAND—COLLATERAL ATTACK—GROUNDS.

A judgment of a county court appointing a guardian, and thereafter ordering a sale of the minors' land, both the judgment and the proceedings leading up to it being regular upon their face, is not subject to collateral attack in an action of ejectment by the minors to recover the land, upon the ground that the minors at the time the guardian was appointed were not residents of the county in which the guardian was so appointed.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 392, 393; Dec. Dig. § 107.]

2. GUARDIAN AND WARD §108—SALES OF PROPERTY—RIGHTS OF PURCHASER.

A purchaser at a guardian's sale, all the proceedings relating thereto being regular upon their face, may not be ousted by this title by reason of fraud of the guardian inducing such sale, where the purchaser did not participate in or have knowledge of such fraud.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 369, 395-398; Dec. Dig. § 108.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Creek County; Wade S. Stanfield, Judge.

Actions by Daisy Scott, by her next friend, against Joe Abraham, and by George Washington Scott, by his next friend, against the same defendant, in ejectment and to cancel

certain deeds. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. Morris Harrison, of Sapulpa, and R. C. Allen, of Muskogee, for plaintiffs in error. W. O. Beall and W. L. Cheatham, both of Bristow, and R. B. Thompson, of Sapulpa, for defendant in error.

BURFORD, C. Two suits were instituted in the district court of Creek county by Daisy Scott and George Washington Scott, by their next friend, against Joe Abraham, to recover certain tracts of land, and to have the deeds thereto by one Charlie Scott, executed while acting as their guardian, set aside. The petitions were practically identical, and the causes were consolidated in the trial court and here. The petitions alleged in substance that these minors were children of Alec Scott, a member of the Creek Nation, and his wife, a noncitizen; that Alec Scott had murdered his wife, and had been sentenced to life imprisonment at the federal penitentiary at Leavenworth, Kan., where subsequently he died; that both father and mother were residents of what is now Creek county, Okl., and that the children were residents of Creek county, except that during a portion of their life they had removed with a relative to the state of Durango, Mex. It is alleged that they had never at any time been residents of Haskell county, Okl.; that one Charlie Scott had procured himself to be appointed their guardian in the county court of Haskell county, Okl., and that this appointment was fraudulently procured by the said Charlie Scott, and the defendant, Joe Abraham; that thereafter the lands of these minors were sold, and the defendant, Joe Abraham, became the purchaser, and that the deeds executed by Charlie Scott, as guardian, to Joe Abraham were, by reason of the premises, void. The defendant admitted possession of and claim to the lands in question, but denied any fraud on his part, and alleged that the proceedings in the county court of Haskell county were regular upon their face, and that his title was good. Upon these pleadings the cause was tried to a jury, who returned a verdict in favor of the defendant. After motion for new trial was filed and overruled, the plaintiffs bring the cause here for review.

The questions involved in the specifications of error may be fully considered under two subdivisions of one proposition, to wit: Was the judgment of the county court of Haskell county subject to attack in this action (1) for lack of jurisdiction; (2) under the allegations of fraud as set out in the petition?

[1] Upon the first proposition defendant in error urges that the instant suit constitutes a collateral attack upon the judgment of the county court, and that as such it cannot be maintained upon the allegations of

the petition. Although this court has many times followed the broad rule laid down in *Southern Pine Lumber Co. v. Ward*, 16 Okl. 131, 85 Pac. 459, to the effect that "the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by any party claiming the benefit of such proceedings" (*Earl v. Earl*, 149 Pac. 1179; *In re Moore's Guardianship*, 152 Pac. 378; *Jefferson v. Gallagher*, 150 Pac. 1070; *Sharp v. Sharp* [No. 7334, not yet officially reported] 161 Pac. —),¹ yet the rule is subject to the limitation that where it was necessary for the court rendering the judgment to pass upon a matter of fact in order to determine its own jurisdiction, its determination of that matter of fact is ordinarily impervious to attack in any collateral proceeding involving such judgment. In the instant case the proceedings of the county court of Haskell county, are conceded to be regular upon their face, the petition for the appointment of a guardian alleged that the residence of the minors was in Haskell county. It was necessary for the county court of that county to determine their residence as a matter of fact as a prerequisite to exercising jurisdiction. Having done so the determination of the court may not be collaterally attacked upon the ground that the finding upon which jurisdiction was based was untrue. These principles, and that the instant case constitutes a collateral attack upon the judgment of the county court, are firmly established by the decisions of this court in *Baker v. Cureton*, 150 Pac. 1090, and *Hathaway v. Hoffman*, 153 Pac. 184. In the latter case it was said:

"Where, in an action of ejectment joined with one to clear title, plaintiffs, in order to prove title in themselves, assailed the validity of the record in the county court appointing for them a guardian, who, as such, pursuant to an order of the court, had subsequently sold and conveyed the land in controversy to defendant's grantee, held, that such was a collateral attack, and that the record, being one of a court of general jurisdiction as to probate matters, could not be impeached by evidence aliunde."

And again:

"The record of the county court of Atoka county being silent as to the factum of the residence of the minors at the time said appointment was made, and the court being one of general jurisdiction as to matters probate, the trial court did right in passing on the motion to direct a verdict, to lay out of the case said evidence as to the residence of the minors, at the time the appointment was made and to hold, as he did, in effect, that such was a collateral attack on the record of that court, which, importing as it does absolute verity, was not subject to be impeached by evidence aliunde."

We therefore conclude that the judgment of the county court of Haskell county was not subject to attack in this action upon the ground that the minors were not residents of Haskell county at the time their guardian was appointed.

[2] Now as to the question of fraud here involved. It is settled in this court that in this sort of an action, where fraud of certain kinds is properly alleged and proved, the judgment of another court, relied upon in the action on trial, may for the purposes of that action be set aside or disregarded, and this whether such an attack be properly designated as a direct or collateral attack. *Continental Gin Co. v. De Bord*, 34 Okl. 66, 123 Pac. 159; *Brown et al. v. Trent*, 36 Okl. 239, 128 Pac. 895; *Sockey v. Winstock*, 43 Okl. 758, 144 Pac. 372; *Elrod v. Adair*, 153 Pac. 660. As was said in the latter case, "Under either doctrine it is a permissible attack."

But nevertheless the allegations of error here made in this regard cannot be sustained. In the first place it is doubtful if the petition sufficiently alleged fraud in procuring this judgment. After alleging the appointment of Charlie Scott as guardian, it is alleged:

"This appointment was fraudulently procured by and through said Charlie Scott and defendant Joe Abraham with the intention of cheating and defrauding this minor out of her property."

The above is the only allegation of fraud in the petition. It states a conclusion rather than any facts from which fraud could even be inferred. The only other facts alleged relating to the procurement of the appointment of Charlie Scott as guardian are to the effect that the minors were not residents of Haskell county at the time of his appointment. We have already seen that the determination of the county court upon this point cannot be here called in question. If we go further and say that since the petition alleged nonresidence of the minors in Haskell county, the finding of the county court that they did live there, which finding is conclusively presumed (*Hathaway v. Hoffman*, supra), must have been based upon perjured testimony, still the issue was not triable in this case, for it is fraud or perjury aliunde the record, which may be inquired into and not perjury involved in the matter actually determined (*Brown v. Trent*, supra; *McElrod v. Adair*, supra). Were it not so there would be no end of litigation, since in every case where there was a conflict of evidence the unsuccessful party would immediately sue to set aside the judgment on the ground that his adversary gave perjured testimony. The rule has had some apparent limitations in this court (*El Reno Mut. Ins. Co. v. Sutton*, 41 Okl. 297, 137 Pac. 700, 50 L. R. A. [N. S.] 1064), but a careful examination will reveal that the distinctions made were upon the facts rather than the rule of law. In the case last cited it is said:

"Nor will relief be granted in equity, unless the fraud complained of is extrinsic to the matter tried in the primary suit." And: "The fraud in our opinion was extrinsic and collateral acts not involving the merits of the case

¹ Second application for rehearing pending.

as shown by the pleadings, and which was not an issue inquired about in the original case."

Finally, if it could be conceded that fraud was sufficiently alleged and proven, still the plaintiff in error is met by the fact that this question was submitted to the jury upon conflicting testimony, and they found against the fraud. This court is in no better position to determine this question than the trial court and the jury. It is urged that the question was not properly submitted because the trial court instructed the jury to the effect that even if fraud were committed they must find that Abraham participated in it, or had knowledge thereof, before they could annul his title. *Arnold v. Joines*, 150 Pac. 180, is cited in support. We there held that purchasers of property at a judicial sale were privies to the judgment authorizing the sale and concluded by it, but this is far from saying that even privies are bound to know of a fraud perpetrated in obtaining a judgment, when they had no participation in such fraud. However strongly the doctrine of caveat emptor may be applied to purchasers at judicial sales, we think it does not extend to charging the purchaser, regardless of his participation therein, with the results of fraud in obtaining the judgment upon which the sale is based. Fraud, not shared by the purchaser, never renders a judicial sale void, as distinguished from voidable.

The proceedings in the county court are conceded to be regular upon their face; yet it is sought to charge Abraham, who, under the verdict of the jury, knew nothing of any fraud, with a loss of the property purchased at a judicial sale, because the guardian acted fraudulently. Such is not the law. *Arnold v. Joines*, supra, is itself authority for the proposition that it is purchasers at void, and not voidable, sales who lose their right to the property acquired by the sale. The rule is well stated, and the authorities collated, by Mr. Freeman in his work on Void Judicial Sales:

"It is a general rule that one who purchases at a judicial, probate, or execution sale, cannot be deprived of his title by secret frauds or irregularities, in which he did not participate, and of which he had no notice. Hence an administrator's sale cannot be avoided by showing that he procured his license to sell by fraud and misrepresentation, in the absence of any necessity, and with the design of sacrificing the interest intrusted to his case. Nor can an innocent purchaser be injuriously affected by proof of any mistake, error, or fraud of an administrator or guardian in conducting a sale."

We conclude that there was no error in instructing the jury that Abraham must have participated in any fraud in leading up to the sale before his title thereunder could be avoided.

It is strongly urged that these minors have been deprived of their property without any return. The record tends to show payment of a purchase price of \$2,300. The guardian or his bondsmen should be responsible for a

proper accounting therefor. However this may be, our holding here is not conclusive of any rights the minors may have, but simply that relief cannot be afforded in this action. As was said in *Sockey v. Winstock*, 43 Okl. 758, 144 Pac. 372, supra:

"A failure to adhere to established rules of procedure, when based upon sound principles and reason, in an attempt to correct injustice in individual cases, would be to weaken and eventually destroy one of the most important means through which justice is distributed to all the people."

Judgment affirmed.

PER CURIAM. Adopted in whole.

O. K. TRANSFER & STORAGE CO. v. NEILL et al. (No. 7374.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. EVIDENCE \Leftrightarrow 411—DOCUMENTARY EVIDENCE—PAROL EVIDENCE.

Where an oral contract is partially reduced to writing, and the writing evidencing it is not a complete and final statement of the entire transaction, parol evidence not inconsistent with such written contract is admissible to show the full agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. \Leftrightarrow 411.]

2. CARRIERS \Leftrightarrow 180(6)—TRANSFER COMPANY—DEVIATION.

Where a transfer company agreed to ship the goods of plaintiff over a certain route, and took from plaintiff a shipping order limiting the liability of the transfer company, and thereafter the transfer company shipped the goods over a different route to that specified by the shipper, in consequence of which they were burned: *held*, that the transfer company was liable for the value of the goods less the amount recovered from the railroad company, without regard to the limitation of liability in the shipping order.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 826; Dec. Dig. \Leftrightarrow 180(6).]

3. EVIDENCE \Leftrightarrow 489—OPINION EVIDENCE—EXPERT TESTIMONY.

A witness is not required to be an expert to prove the reasonable or market value of goods, such as ordinary wearing apparel and household furniture, where it is apparent from the facts proved that the value of the articles is within the knowledge of persons of ordinary intelligence and experience.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2274; Dec. Dig. \Leftrightarrow 489.]

4. DAMAGES \Leftrightarrow 105—MEASURE—HOUSEHOLD GOODS.

In an action for loss of household goods and wearing apparel, which have no fixed market value, the measure of damages is the value of the goods to the owner; not a fanciful value which such owner might place upon them, but such reasonable value as they had to him, considering the nature and condition of the goods and the purposes for which they were adopted. *St. L. & S. F. R. Co. v. Dunham*, 36 Okl. 724, 129 Pac. 862.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 268-271; Dec. Dig. \Leftrightarrow 105.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by Mrs. H. A. Neill against the O. K. Transfer & Storage Company, and the St. Louis & San Francisco Railroad Company, for loss of certain household goods. From a judgment for the plaintiff against the defendants, the Transfer Company appeals. **Affirmed.**

Warren K. Snyder, of Oklahoma City, for plaintiff in error. Wright & Blinn, of Oklahoma City, for defendant in error Mrs. H. A. Neill. R. A. Kilienschmidt, of Oklahoma City, for Ry. Co.

BURFORD, C. The record in this case discloses that Mrs. Neill, who had formerly lived in Oklahoma City, but who was at the time living in Des Moines, Iowa, directed her friend, Mrs. Hughes, then residing in Oklahoma City, to have Mrs. Neill's household goods crated, shipped, and forwarded to her at Des Moines, over the line of the Rock Island railroad. Pursuant to such instructions Mrs. Hughes called upon the O. K. Transfer & Storage Company and asked them to ship the goods. There is conflict in the evidence as to whether or not she directed them to ship the goods over the Rock Island road, but that question was submitted to the jury, and there being ample evidence to sustain their finding we, for the purposes of the case, assume that she did give such specific shipping directions. The transfer company packed and shipped the goods over the line of defendant, St. L. & S. F. R. Co., at Miami, Okl., and while on the line of road of that company, they were destroyed by fire. Prior to the shipment, the transfer company had obtained from Mrs. Hughes what was denominated a "shipping order and release," the material parts of which are as follows:

"Shipping Order and Release.

"11-6-1913.

"O. K. Transfer & Storage Co., City:

"Please forward lot of household goods from Oklahoma City to Des Moines, Iowa. In consideration of the reduced rate made for the shipment of my household goods, it is understood and agreed that O. K. Transfer & Storage Company acts only as agent for the shipper and is not responsible for damage or loss beyond the amount which may be collected from the railroad companies over whose lines said goods are forwarded. Desiring to receive the benefit of the reduced rate, I release goods to the value of ten (\$10.00) per cwt., in case of loss or damage and subject to other printed conditions of the regular bill of lading issued by the railroad company via whose lines goods are forwarded. It is expressly agreed that O. K. Transfer & Storage Company will not be held responsible for loss or damages of goods by fire or otherwise in excess of ten dollars (\$10.00) per cwt. valuation while in its care, or in cars being loaded or unloaded, or in warehouses awaiting shipment or delivery. It is further expressly agreed that O. K. Transfer & Storage Company is hereby authorized to forward the household goods referred to in this shipping order at released valuation of ten (\$10.00) per cwt."

The goods were forwarded over the line of the Frisco, in a car with other household goods going to Des Moines. The transfer

company signed a bill of lading which fixed the value of the goods, and took the reduced rate offered by the carrier, in consideration of which its liability was limited to \$10 per hundredweight. After the destruction of the goods, the plaintiff brought suit against the transfer company and the railroad company, alleging the loss of goods and seeking to recover their value, alleged to be \$2,314.55. The transfer company denied the specific direction and set up its shipping order heretofore set out. The railroad company pleaded its bill of lading, and at the trial in effect offered to confess judgment for \$10 per hundredweight for the goods, amounting to something over \$300. The court instructed the jury to return a verdict against the railroad company for this account and no other, and submitted the cause to the jury as between the plaintiff and the transfer company, upon the theory, as set out in the instruction, that if the plaintiff's agent had given specific directions as to the route to be used, and the transfer company had forwarded the goods over some other road, the transfer company would be liable for the difference between their value and the amount recovered from the railroad company, but that if the agent did not give special directions, the shipping order executed by Mrs. Hughes was a complete defense on behalf of the transfer company.

Upon these issues the jury returned a verdict in favor of the plaintiff and against the transfer company in the sum of \$1,026.57, with interest and costs. Numerous errors are alleged, but we think they may be properly determined upon the various questions of law hereinafter considered.

[1] First. Was evidence admissible to establish the direction given by Mrs. Hughes as to the shipment of the goods? An examination of the shipping order and release convinces that it was not intended to cover the entire contract. Such being the case, parol evidence was admissible, not to vary the terms of the contract already made, but to prove what the contract actually was.

In the recent case of *Smith v. Bond*, 155 Pac. 1116, not yet officially reported, this court said:

"Where an oral contract is partially reduced to writing, and the writing evidencing it is not a complete and final statement of the entire transaction, parol evidence not inconsistent with such written contract is admissible to show the full agreement."

In the case at bar we think, as in *Smith v. Bond*, supra, that the shipping order and release was only an incident to the entire contract and did not attempt to define the whole contract, and that therefore parol evidence was admissible to prove the remaining terms of the contract.

[2] The question then arises as to the effect of the shipping order and release given to the transfer company. It is exceedingly doubtful to our minds whether or not this

release was ever intended to cover a case of this nature. However that may be, it is clear that it cannot operate to limit the liability of the transfer company in this case, for the reason that it was based upon the stipulation and condition of the contract, which it is true was oral, that the goods should be shipped over the Rock Island railroad. When the transfer company violated its duty as agent and sent the goods over the Frisco, its contract became entirely inapplicable, and the stipulations thereof could not limit its liability for its wrongful act as agent.

The principles supporting this doctrine have been many times enunciated in the English and American courts. The liability is placed upon various grounds. The most widely adopted and perhaps the soundest is that laid down in *McKahan v. Express Co.*, 209 Mass. 270, 95 N. E. 785, 35 L. R. A. (N. S.) 1046, Ann. Cas. 1912B, 612, where, speaking of the effect of a deviation by a carrier from the route specified by the shipper, the court said:

"The effect of a deviation is to do away with the express contract altogether, at least at the election of the shipper. In other words, the breach of the express contract of shipment (which takes place when there is a deviation from route or departure from mode, method, or manner of transportation) is such a breach on the part of the carrier that the shipper can rescind the express contract of shipment."

This case was one in which the carrier had taken a bill of lading, based upon a reduced rate, and which limited its liability to a certain value; and the court held that when the carrier deviated from the route prescribed therein, it lost the benefit of the stipulations of the bill of lading. In the notes to the case as reported in L. R. A. and Ann. Cas., many authorities upon the subject are collected.

In *Lynch v. N. Y. Central & H. R. Co.*, 89 Misc. Rep. 472, 153 N. Y. Supp. 633, the court said:

"This contract, however, is not in force because of a deviation from the agreed route. * * * The deviation there destroyed the entire contract. * * * The carrier, having broken in a material part one of the covenants of an expressed contract to be performed on its part, cannot in reason or justice call upon a shipper to perform his covenants contained in the same contract. It is elementary that a party to a contract cannot repudiate burdensome covenants therein and at the same time enforce beneficial ones."

In *Merrick v. Webster*, 3 Mich. 268, a transportation company contracted to forward goods "by sail on the lake" all the dangers of the sea being assumed by the shipper. Instead the transportation company forwarded the goods by steam. The court said:

"The plaintiffs below, by the terms of the contract, took upon themselves the dangers of the sea, upon the condition that they were transported 'by sail on the lake,' and upon no other condition did they assume the risk."

It was there held that, the carrier having sent the goods by steam, as a result of which

they were lost, it was liable. See, also, *Hand v. Baynes*, 4 Whart. (Pa.) 204, 38 Am. Dec. 54; *Philadelphia & R. R. Co. v. Beck*, 125 Pa. 620, 17 Atl. 505, 11 Am. St. Rep. 924; *Saxon Mills v. N. Y., N. H. & H. R. Co.*, 214 Mass. 383, 101 N. E. 1075; *Brown & Haygood Co. v. Pa. Co.*, 63 Minn. 546, 65 N. W. 961; *Balian v. Joly & Co.*, 6 Times, L. R. 345; *Thorley v. Orchis S. S. Co.*, 1 K. B. 660 (1907) 7 Amer. & Eng. Ann. Cas. 281; *Kish v. Taylor* (1911) 1 K. B. 625; *Internationale, etc., v. McAndrews & Co.* (1909) 2 K. B. 360.

Some of the American cases have gone upon the ground that the contract is not done away with altogether by deviation from route, but that it must be shown that the loss was a result of the deviation. These cases in our judgment are not in accord with the weight or reason of authority, but whether they may be sound or unsound is for the purposes of this case immaterial, since it is apparent that the loss occurred upon the line of the Frisco, and was the direct result of the deviation from route.

So far we have considered cases applicable to carriers. The principles therein enunciated, however, are clearly applicable to the case at bar. Furthermore, the courts of this country have frequently held that where a warehouseman or bailee deviates from the conditions of his contract whereby the goods or their value are lost, he is liable. *Graves v. Smith*, 14 Wis. 5, 80 Am. Dec. 762; *Howell v. Morlan*, 78 Ill. 162; *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188; *Jeffersonville R. Co. v. White*, 69 Ky. 251; *Greenall v. Hersum*, 220 Mass. 278, 107 N. E. 941; *Cerkel v. Waterman*, 63 Cal. 34. We are of the opinion, therefore, that the plaintiff's release could not affect its liability for failing to ship the goods by the route directed.

Error is also assigned upon the admission of certain testimony. The plaintiff in giving her deposition testified from a list of the lost goods attached to the petition. It was afterwards established at the trial that this list had been made by Mrs. Hughes at about the time the goods were shipped, and she testified positively that every article, except one and it was waived by the plaintiff, was actually delivered to the transfer company. Under these circumstances, we think it was not error to allow the witness to refer to the list in giving her testimony. *Elwell v. Purcell*, 42 Okl. 1, 140 Pac. 412. This list was a part of the petition, and we think its use by the witness was proper. *Friar v. Caswell*, 79 Wash. 470, 140 Pac. 564. At the trial the list was offered. The court excluded the one article which Mrs. Hughes could not identify, and the value of the articles printed on the list, which it appeared had been put there by Mrs. Neill. Under the circumstances we think the introduction of the list could not have harmed the plaintiff, as Mrs. Hughes had already testified, item by item, that the goods contained in it, with the exception of

the one waived, had been by her actually delivered by the transfer company, and there was no contradiction of her testimony. The amounts written on the list were excluded, and so far as the list of articles was concerned its admission could not prejudice the plaintiff in error.

[3] Complaint is also made as to the competency of the witnesses who testified. It is not necessary to have experts to testify to the value of household goods and wearing apparel, if the witnesses are reasonably familiar with the goods concerning which they are testifying. The testimony is not essentially different from that in *Rogers v. O. K. Bus & Baggage Co.*, 148 Pac. 837, not yet officially reported, and for the rejection of which that case was reversed. The testimony complained of in relation to the cost of the articles was elicited by the plaintiff on cross-examination. In any event it has been held that cost might be an item in determining the value of articles, depreciation being also considered. *Filson v. Territory*, 11 Okl. 351, 67 Pac. 473; *Burgess v. Felix*, 42 Okl. 193, 140 Pac. 1180.

[4] Error is also alleged upon the court's instruction upon the measure of damages, and upon certain questions allowed to be asked the witnesses in relation to the value of the goods. Both the instructions and the questions are very close to the language in *St. L. & S. F. R. Co. v. Dunham*, 36 Okl. 724, 129 Pac. 862, and were apparently based upon that case. It was there said:

"In an action against a carrier for loss of household goods and wearing apparel, which have no fixed market value, the measure of damage is the value of the goods to the owner; not any fanciful value which he might place upon them, but such reasonable value as from the nature and condition of the goods and the purpose to which they were adapted and used they had to him."

We see no reason to repudiate the doctrine of this case and upon its authority the instructions are approved.

Finally it is claimed that the judgment against the railway company was a bar to a judgment against this plaintiff. We think not. In *G. N. Ry. Co. v. O'Connor*, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703, the Supreme Court considered a case in which a forwarder, such as the plaintiff in error, had shipped goods at reduced rates in carload lots. The suit was against the carrier, and the Supreme Court of the United States held that the plaintiff was limited in her recovery to the declared value, saying:

"Plaintiff contended, however, that she had expected her goods to be transported as a separate consignment. But the transfer company had been intrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier was not bound by her private instructions or limitations on the authority of the transfer company, whether it be treat-

ed as agent or forwarder. If there was any undervaluation, wrongful classification, or violation of her instructions, resulting in damage, the plaintiff has her remedy against the company."

This decision is sufficient authority both for the limitation of recovery against the railway company, and for the recovery of the value of the goods above that amount from the plaintiff in error.

Finding no error in the record, the judgment is affirmed.

PER CURIAM. Adopted in whole.

CRICKETT et al. v. HARDIN. (No. 7478.)
(Supreme Court of Oklahoma. June 27, 1916.)

(Syllabus by the Court.)

1. MARRIAGE §38—INDIANS—VALIDITY.

The purpose and effect of the provision of section 38 of an act of Congress approved May 2, 1890 (Act May 2, 1890, c. 182, 26 Stat. 81), was to validate all prior marriages of the members of the Five Civilized Tribes, contracted in good faith according to either the express law or the customs of the tribe, which for want of formality as to solemnization, registration, etc., might otherwise have been deemed invalid, and to legitimize and render the issue of such marriages capable of taking property and other rights by inheritance.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 110; Dec. Dig. §38.]

2. MARRIAGE §40(1)—INDIANS—PRESUMPTIONS—VALIDITY.

In all cases involving the validity of a marriage, contracted either according to the common law, or conformably to Indian custom, the courts of this state, recognizing the good of the parties, their children, and society, as the question of paramount importance, will alike indulge that presumption, generally accepted as one of the strongest known to the law, favoring innocence, good faith and matrimonial intention, to sustain the marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 58; Dec. Dig. §40(1).]

Commissioners' Opinion, Division No. 3. Appeal from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by Charles Crickett and others against Oliver C. Hardin. There was judgment for defendant, plaintiffs appeal. Reversed and remanded.

J. H. Jarman, of Sallisaw, for plaintiffs in error. Curtis & Pitchford, of Sallisaw, for defendant in error.

BLEAKMORE, C. This suit was commenced in the district court of Sequoyah county, on October 30, 1913, by the plaintiff in error, to cancel certain deeds as clouds upon, and to quiet the title to, the lands described therein. The parties appear, and are referred to here as in the court below. The lands in question were allotted to one Mary Gann, a full-blood member of the Cherokee Tribe of Indians, who died intestate and without issue in 1903. Both plaintiffs and defendant deraign title through the heirs

of said allottee, the plaintiffs claiming under Charles Crickett and Lucy Porter, the alleged brother and sister of the half blood, and defendant through Cornelius Secondi, her maternal uncle, the only brother of her mother, Chigona. The principal, if not the sole, question involved, for a determination by the trial court, and presented here for review, is the legitimacy of the allottee. The plaintiff Jim Porter is the surviving husband of Lucy Porter, who is alleged to have been a half-sister of the allottee. However, it was admitted upon the trial that Lucy Porter was a child of Josiah Crickett and a woman called Salzey, to whom he was not married, and with whom he had never lived as his wife; and all rights claimed through Lucy Porter have been abandoned. The father of the allottee was one Josiah Crickett and her mother, Chigona. Subsequently to his alleged relations with Salzey, Josiah, for 2 years, beginning in 1881, lived and cohabited with Chigona, during which period the allottee, Mary Gann, was born to them.

In regard to the relationship between Josiah and Chigona, evidence was introduced on behalf of plaintiff, in substance, as follows:

Ellis Chuculate, 64 years old, testified that he knew Josiah Crickett and Chigona, who lived together as man and wife for about 2 years in a house on his land, within a quarter of a mile from his home, where their child, Mary Gann, was born; that he visited them and considered them man and wife, and they were so recognized in that community; that they separated some four months after the birth of the child, Chigona leaving, the cause of the separation, as stated by Josiah, being that Chigona was a poor housekeeper; that after such separation and the death of Chigona, Josiah lived with Susan Big Feather, by whom he had a child, the plaintiff, Charles Crickett.

Eliza Chuculate, wife of Ellis Chuculate, who resided some 3 miles distant at the time, testified that she knew Josiah and Chigona when they were living together, and visited at their house, and saw the child, Mary, there when she was several months old. She was asked and answered the following question:

"Q. Don't you know it was generally talked in the community there and understood that they had just taken up together; that there had never been any marriage ceremony, according to the Cherokee law? A. That they were living together as man and wife was my knowledge of the case. Q. You don't know when they went together, or how they got together? A. When I knew them in that relation, they were together, living together."

Dan Chuculate testified that Josiah and Chigona lived together for two years on the Ellis Chuculate farm, and had one child, Mary, and were recognized in that community as husband and wife; that after Chigona's death Josiah was married at his house to Susie Big Feather, the ceremony being performed by a Cherokee preacher.

George Coldridge, who lived some 15 miles away, testified that he knew Josiah and Chigona lived together as husband and wife on the Ellis Chuculate place; that he visited in that community and went to their house; that they were living there when the child, Mary, was born; that the baby was about six months old when Chigona left.

Steve Simmons testified that he knew Josiah and Chigona, and that on one occasion, upon the invitation of Josiah to go home with him, he spent the night with them on the Ellis Chuculate farm.

Susie Scrapper, formerly Susie Big Feather, testified that she was the widow of Josiah Crickett; that after Chigona's death she was married to him by a preacher; that of said marriage there were born to her two children, the plaintiff, Charles Crickett, and another who died in infancy; that her husband, Josiah, told her that Chigona had been his wife, and that Mary was their child.

Opposed to this evidence is the testimony of a number of witnesses as to circumstances by which it was attempted to be shown that Josiah and Chigona had not lived together as man and wife, and as to rumors to the effect that the allottee was the illegitimate child of Chigona and one Newt Fry. None of these witnesses, however, lived in the immediate vicinity, and none of them could state that Josiah and Chigona did not, in fact, live together as man and wife on the Ellis Chuculate farm.

John L. Strongston, 70 years old, who had been clerk of the District, Circuit, and Cherokee Courts, sheriff, interpreter, and Secretary of the Cherokee Nation, testified relative to the marriage customs of the Cherokees at the time Josiah and Chigona lived together, as follows:

"A. The Cherokees, the full-blood class of Cherokees, as a general thing, with very few exceptions, in their instituting the marriage relations, just simply, as I understand, got together and married without judge, jury, clerk, minister, or anybody else. That was the way they married. This applies only to the full-blood class, to the full-blood class particularly. I will admit it, for the sake of argument, that that system entered into, or was practiced to a certain extent among the mixed class, but not generally. * * * Q. In other words, among the full bloods they had a custom of just meeting up with each other, and if the relationship was congenial they went on to living together? A. Well, this meeting up with one another, I suppose they got together some way or other, but it wasn't through the regular matrimonial channel, as we understand it. Q. They disregarded the law of the land so far as the public acts of the Cherokee Council was concerned? A. Well, they didn't comply with the requirements of the law, and they didn't marry by judge or clerk or minister. They just took up together, as the saying was."

Certain written laws of the Cherokee Nation relating to marriages were introduced, by which it was provided that marriages may be solemnized by a judge, clerk of the district court, or an ordained minister of the gospel, and, further:

"Any marriage contracted in writing in the presence of two or more attending witnesses, who shall sign the certificate of marriage contract shall be lawful."

By such laws it was also required of the parties to a marriage contracted in the presence of witnesses, and of persons solemnizing other marriages, to report the same for registration to the clerk of the district, whose duty it was at once to make a record thereof.

There was also introduced in evidence a decision of the Supreme Court of the Cherokee Nation, rendered November 17, 1880, construing and declaring the effect of such law in the case of *Teehee v. Teehee*, wherein it was said:

"The evidence in the case shows that plaintiff and Cather Teehee, deceased, lived together and cohabited for a period of several years, and it is argued that such living together and cohabiting constituted marriage between the parties according to the customs of the Cherokee people. Whatever may have been the custom among the Cherokees, the law of 1875, regulating marriage, like all other general laws, applies to all classes of Cherokee citizens, and suspends and annuls customs. Cohabitation for any period does not, under the laws of the Cherokee Nation, constitute marriage."

The trial court made the following, among other, findings:

"I find from the proof that Josiah Crickett and Chigona Secondi, known as Rachel, did assume a cohabital relation, which relation was indefinite as to length of time, ranging probably from 1 to 2 years; that during this relation between Josiah and Chigona, Mary was born, Mary afterwards married Tom Gann. At the time of the death of Mary she left surviving her, her uncle Cornelius Secondi."

"I find that Chigona had died before 1890, and before the laws of Congress were extended over the Cherokees; that is, prior to the act of 1898. It might be that if this relation existed after 1898, a common-law marriage would be recognized. But prior to 1898 the Cherokee Nation was a quasi independent nation or country, and was permitted to have its own government, and to enact and execute its own laws, and I take it that we are bound by the decisions of the Supreme Court of the Cherokee Nation construing their own laws, when that nation was exercising all the rights of government."

To our minds it is clearly and conclusively established by the evidence that Josiah Crickett and Chigona, full-blood Cherokee Indians, assumed and maintained the marital relation according to the tribal custom universally prevailing among members of their class in that nation at the time; their status as man and wife was recognized by their neighbors and acquaintances, and during the period they so lived together their child, Mary, the allottee, was born.

[1] By sec. 38 of an act of Congress approved May 2, 1890 (26 Stat. 81), it is provided:

"That all marriages heretofore contracted under the laws or tribal customs of any Indian Nation now located in the Indian Territory are hereby declared valid, and the issue of such marriages shall be deemed legitimate and entitled to all inheritances of property or other rights, the same as in the case of the issue of other forms of lawful marriage."

The obvious purpose and effect of this provision was to validate all prior marriages of members of the Five Civilized Tribes, contracted in good faith, according to either the express law or the customs of the tribe, which for want of formality as to solemnization, registration, etc., might otherwise have been deemed invalid, and to legitimize and render the issue of such marriages capable of taking property and other rights by inheritance.

[2] In this and other jurisdictions where common-law marriages are recognized as valid, the doctrine announced in 1 Bishop on Marriage, Divorce, and Separation, § 956, prevails, viz:

"It being for the highest good of the parties, for the children, and of the community that all intercourse between sexes in form matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all probabilities and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce."

While the common law had not been put in force or extended in its operation by congressional enactment so as to affect the domestic relations of members of the Five Civilized Tribes at the time Josiah Crickett and Chigona lived together, and "it is common knowledge of which the court should take judicial notice that the domestic relations of the Indians of this country have never been regulated by the common law of England, and that that law is not adapted to the habits, customs, and manners of Indians (Davison v. Gibson, 56 Fed. 443, 5 C. C. A. 543), it would, indeed, be passing strange should courts in this enlightened age, in considering the validity of marriage contracts made conformably to Indian, tribal custom, although not in strict compliance with the written tribal law, refuse to indulge that presumption, generally accepted as one of the strongest known to the law, favoring the innocence, good faith, and matrimonial intention of the parties, and thus destroy Indian marriages and stigmatize their issue as illegitimate, while recognizing and applying such presumption to sustain common-law marriages of whites, founded on similar relations. Recognizing, regardless of race, that the good of the parties, their children, and society, is the question of paramount importance in all such cases, this court has applied alike the salutary doctrine announced in Bishop on Marriage, Divorce, and Separation, *supra*, to all forms of marriage in fact contracted.

In the well-considered case of *Chancey v. Whinnery* (not yet officially reported) 147 Pac. 1036, where in the validity of an Indian custom marriage was involved, it was said by Mr. Justice Sharp, speaking for the court:

"The authorities, with very general accord, are to the effect that, when a marriage in fact has been shown, the law raises a presumption that it is valid casting the burden on him who questions it to establish its invalidity. This is one of the strongest presumptions known

to the law. * * * Measured by the rule laid down, plaintiff failed in his proof. Every inditement of law is in favor of matrimony. The law is so positive in requiring a party who asserts the illegality of a marriage to take the burden of proving it that such requirement is enforced even though it involve the proving a negative. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a presumption of its legality, not only casting the burden of proof on the party objecting, but requiring him throughout and in every particular plainly to make the fact appear, against the constant pressure of this presumption, that it is illegal and void."

The judgment should be reversed, and the cause remanded, with directions to the trial court to render judgment in conformity to the views herein expressed.

PER CURIAM. Adopted in whole.

LISLE et al. v. ANDERSON. (No. 4785.)
(Supreme Court of Oklahoma. Jan. 24, 1916.
Rehearing Denied July 25, 1916.)

(Syllabus by the Court.)

1. NEGLIGENCE \S 110 — PLEADING — COMPLAINT.

In every case involving actionable negligence, there are of necessity three constituent elements to its existence: First, the existence of a duty on the part of the person complained against to protect the complainant from the injury of which he complains; second, the failure of the defendant to perform that duty; third, injury to the plaintiff resulting from such failure of the defendant; and when a petition affirmatively shows these three elements, it is good as against a demurrer.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 177, 178; Dec. Dig. \S 110.]

2. TRIAL \S 139(1)—TAKING CASE FROM JURY — DEMURRER TO EVIDENCE.

Where the evidence is sufficient to reasonably tend to support the allegations of a petition that states a cause of action, a demurrer to such evidence should be overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341; Dec. Dig. \S 139(1).]

3. NEGLIGENCE \S 2—ORDINARY AND REASONABLE CARE.

Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises; and, if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 3, 4; Dec. Dig. \S 2.]

4. NEGLIGENCE \S 55 — SCHOOL BUILDING — INDEPENDENT CONTRACTOR.

Where the defendants had a contract with a school board to erect a school building complete save a heating and ventilating system, and the company for whom the plaintiff was working had a contract with the said school board for installing the said heating and ventilating system, and the defendants and the company for whom the plaintiff was working were each at the same

time carrying out their respective contracts with the school board, and the defendants, under and by virtue of the terms of their contract, were to furnish and install joists in the attic of said school building, upon which a tank that was to be a part of the heating and ventilating system was to be placed by the plaintiff, and the defendants knew that this was one of the purposes for which the said joists were to be used, and after the defendants had selected and installed the said joists in said attic, but before said defendants had fully completed their contract with said school board and turned the building over to the school board, the plaintiff, in installing the said tank, went upon said joists, and one of the joists broke, and as a result thereof the plaintiff fell and was injured, held, that if the defendants knew, or by the exercise of ordinary care could have known, that the plaintiff might be reasonably expected to go upon the joists in installing the tank, the defendant owed the plaintiff the duty to exercise ordinary care in the selection of said joists, although the relation of master and servant did not exist.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 68; Dec. Dig. \S 55.]

5. SUNDAY \S 26(1) — INJURIES RECEIVED WHILE VIOLATING SUNDAY LAW.

The fact that the plaintiff was injured on Sunday, while at work in violation of the Sunday law of the state of Oklahoma, is not a bar to a recovery.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. \S 59, 63; Dec. Dig. \S 26(1).]

6. JUDGMENT \S 570(11)—CONCLUSIVENESS — FINALITY — ORDER SUSTAINING DEMURRER.

When a demurrer to the plaintiff's petition is sustained and the court, by its order duly entered upon the record, allows the plaintiff a certain time in which to make his election as to whether or not he will stand upon the sufficiency of his petition, and the plaintiff, before the expiration of the time in which he is required to make such election, files a motion to dismiss the cause without prejudice, and the court sustains the motion and makes an order dismissing the cause without prejudice, the order sustaining the demurrer is not such a final adjudication as will defeat another action between the same parties in another court on the same facts as set out in the petition to which the demurrer was sustained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1039; Dec. Dig. \S 570(11).]

7. RELEASE \S 7, 37—COVENANT NOT TO SUE.

An instrument, executed to a joint tortfeasor in the following language: "I do agree and covenant that I shall never institute or prosecute any suit on account of my said injuries against said * * * L * * * and * * * K, or either of them," etc.—is merely a covenant not to sue, and not a release, and will not operate to discharge another joint tortfeasor from liability.

[Ed. Note.—For other cases, see Release, Cent. Dig. \S 7, 63, 71; Dec. Dig. \S 7, 37.]

8. DAMAGES \S 216(7) — INSTRUCTIONS — PERSONAL INJURIES—FUTURE PAIN AND LOSS OF FUTURE WAGES.

Instruction as to measure of damages upheld on authority of Midland Valley Railroad Co. v. Hilliard, 143 Pac. 1001, and authorities therein cited.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 552; Dec. Dig. \S 216(7).]

Commissioners' Opinion, Division No. 6. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by E. N. Anderson against E. M.

Lisle and C. M. Dunning, doing business as E. M. Lisle & Co., to recover damages for personal injury. Judgment for plaintiff, and defendants bring error. Affirmed.

Everest & Campbell, of Oklahoma City, for plaintiffs in error. Ames, Chambers, Lowe & Richardson, of Oklahoma City, and Hogsett & Boyle, of Kansas City, Mo., for defendant in error.

BROWN, C. The plaintiffs in error will be hereinafter called the defendants, and the defendant in error will be hereinafter called the plaintiff, in accord with their respective titles in the trial court.

The school district at Mountain View, Okl., on the 14th day of July, 1909, entered into two contracts, one for the construction of a school building and one for the installation of a heating and ventilating system in said building. The defendants had the contract for the construction of said building, and were to furnish all material and do all the work necessary to a complete structure, in accordance with certain plans and specifications, save the installation of the said heating and ventilating system. Lewis & Kitchens had the contract to install the heating and ventilating system, in accordance with certain plans and specifications. It was required by the plans and specifications for the building that a certain tank, which was a part of the heating and ventilating system to be installed by the said Lewis & Kitchens, was to be supported by the joists in the attic of the said building, and these joists were to be furnished and placed in said building by the defendants, and the defendants knew that the same were to be used as a support for said tank. The joists were made of pine lumber, size 2x6 and 12 or 14 feet in length, and were placed 16 inches apart from center to center, and extended north and south from one wall to another. Said joists were of size and length, and placed the distance apart, as called for by the plans and specifications. The plaintiff was superintendent for Lewis & Kitchens, and had charge of installing the heating and ventilating system. After the defendants had finished their work in the attic where this tank was to be placed, but before they had fully completed the building and delivered it to the owner, the plaintiff went into the attic to place the tank, and, while placing the tank upon said joists, one of the joists broke, and the plaintiff fell some 12 or 15 feet and was considerably injured. The evidence tended to show that said joist broke by reason of being wind-shaken or worm-eaten. Plaintiff brought this action against the defendants to recover damages for the personal injuries received by the fall, basing his petition upon the above facts, with the allegation as to negligence as follows:

"* * * Defendants were careless and negligent in putting in place and maintaining said

weak, rotten, and defective joist, when they knew, or by the exercise of ordinary care could have known, of its condition; and when they knew the purpose said joist was intended to serve; and when they knew it would be necessary for this plaintiff and other workmen, while in and about their work, to walk over and upon and stand upon this and other joists; and when they knew that plaintiff and other workmen intended to work upon and about said joists; and when they knew, or by the exercise of reasonable care could have known that said joist was liable to break and injure this plaintiff or other workmen."

The plaintiff recovered judgment against the defendants for \$3,000. Defendants filed a motion for a new trial, and same was overruled and exceptions allowed, and the case is brought here to have the action of the trial court reviewed. We deem it unnecessary, at this time, to make a fuller statement of facts, as same will more fully appear, where they are necessary to be stated, in the discussion of the various assignments of error to be considered by the court.

[1] The first point urged by the defendants calls for a determination of the trial court's action in overruling a demurrer to the petition, a demurrer to the evidence, and refusing to direct a verdict in favor of the defendants.

The defendants claim that they owed the plaintiff no duty at the time he was injured, and that therefore there can be no liability. It is a familiar proposition that in every case involving actionable negligence, there are, of necessity, three constituent elements, to its existence: First, the existence of a duty on the part of the person complained against to protect the complainant from the injury of which he complains; second, the failure of the defendant to perform that duty; third, injury to the plaintiff resulting from such failure of the defendant. And it is only when these elements are brought together unitedly that actionable negligence is constituted. The absence of an affirmative showing of any one of these essential elements renders the petition bad, or the evidence insufficient. *Loehring v. Westlake Const. Co.*, 118 Mo. App. 163, 94 S. W. 747; *Faurot v. Oklahoma Wholesale Gro. Co.*, 21 Okl. 104, 95 Pac. 463, 17 L. R. A. (N. S.) 136; *Faris v. Hoberg*, 184 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *Texas Co. v. Collins*, 42 Okl. 374, 141 Pac. 783; *C. R. I. & P. Ry. Co. v. McIntire*, 29 Okl. 797, 119 Pac. 1008; *St. L. & S. F. R. Co. v. Lee*, 87 Okl. 545, 182 Pac. 1072, 46 L. R. A. (N. S.) 357.

[2] With these principles in mind we shall examine the facts of the case. The plaintiff was not in the employ of the defendants; there was no privity of contract existing. Therefore the relation of master and servant did not obtain. But the defendants had a contract with the school board to erect a building complete save the heating and ventilating system; the company for whom the plaintiff was working had the contract with the school board for installing the heating

and ventilating system. Both contractors were carrying out the terms of their contracts at the same time; the defendants were doing the general construction work, and the plaintiff, for his company, was installing the heating and ventilating system. The defendants, by the terms of their contract, were to furnish and place the joists in the attic, upon which the plaintiff's company was to place the tank. It was not only necessary that the joists be furnished and installed in order that the defendants might complete the building, but it was also necessary that they be furnished and installed in order that the tank of the heating and ventilating system be supported, and the defendants knew that this was one of the purposes for which the joists were to be used. Now did they owe the plaintiff any duty in the selection of the joists? In the case of *Delvin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, the defendant, who was a scaffold builder, was employed by a painter to construct a scaffold, and he defectively constructed it, and it gave way and killed a person who was in the employ of the painter, and the Supreme Court of New York held the defendant liable. In the case of *Loehring v. Westlake Const. Co.*, supra, the court had under consideration a proposition that involved the same principle that we have in the instant case, and the court in the course of the opinion said:

"* * * It is now well settled, in the law of negligence applicable to cases of this nature, that there are duties owing, the violation of which will constitute actionable negligence, in instances other than those arising out of privity of contract, and many such arising outside of the relation of master and servant, etc. The principle finds application in that class of cases where the injured party is rightfully on the premises, and is injured by the negligence of another under such circumstances as could reasonably have been foreseen, been contemplated, and the probable injury averted by ordinary care on the part of the person whose act caused the injury."

The Supreme Court of Illinois, in the case of *Flanagan v. Wills Bros. Co.*, 237 Ill. 82, 86 N. E. 609, 127 Am. St. Rep. 315, announced the following doctrine:

"One engaged in the construction of a building certainly owes to another engaged in the same work and exercising due care for his own safety the duty of exercising care to do his work in such a way as not to negligently injure the other."

See, also, *Heaven v. Pender*, 11 Q. B. D. 503-509; *Cameron v. Vandergriff*, 53 Ark. 381, 13 S. W. 1002; *Young v. Waters-Pierce Oil Co.*, 185 Mo. 634, 84 S. W. 929; *Appel v. Eaton & Prince Co.*, 97 Mo. App. 428, 71 S. W. 741; *Bill v. New York Expanded Metal Co.*, 60 App. Div. 470, 69 N. Y. Supp. 989; *Kitchen v. Riter-Conley Mfg. Co.*, 207 Pa. 558, 56 Atl. 1083; *Thompson on Neg.* vol. 1, § 688.

[3, 4] Thus it will be seen that the rule deducible from the authorities, supra, is that, whenever the circumstances attending the

situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises, and if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties. Hence the defendants, who knew that the joists were to be used to support the tank of the heating and ventilating system, and whose duty it was to select and install the same, if they knew, or by the exercise of ordinary care could have known, that the plaintiff might reasonably be expected to go upon the joists in installing the tank, owed the plaintiff the duty to exercise ordinary care in the selection of said joists, although the relation of master and servant did not exist.

[5] The plaintiff was injured on Sunday, and the court permitted the plaintiff to testify, over the objection of the defendants, to a conversation that he had with the defendants' foreman, to the effect that the foreman told him to go ahead and work on Sunday, and that he, the foreman, carried the key, etc. The fact that the plaintiff was working on Sunday, probably in violation of the Sunday laws of the state, was immaterial, and of course any evidence that was introduced merely to show the fact that the plaintiff was working on Sunday, or that he was advised to work on Sunday by the foreman, was immaterial, for if the injury occurred by reason of the defendants' failure to use ordinary care to see that the joists were reasonably suitable for the purpose intended, the injury was as liable to occur on Monday, or any other secular day, as it was on Sunday. *City of Kansas City v. Orr*, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783, and cases therein cited. However, the evidence complained of was admissible as tending to show that the defendants, who were the general contractors on the building, had not yet fully completed the same and turned it over to the owners thereof.

[6] The plaintiff first brought this action in the district court of Oklahoma county, and a demurrer was sustained to the petition; the order sustaining the demurrer being as follows:

"It is therefore ordered, adjudged, and decreed by the court that said demurrer and the same is hereby sustained, to which the plaintiff in open court duly excepted and still excepts. Thereupon, upon request of the plaintiff, said plaintiff is allowed 10 days in which to make his election whether or not he will stand upon the sufficiency of his amended petition."

Within 4 days after the demurrer was sustained the plaintiff filed a motion to dismiss the cause without prejudice, and the court

sustained the motion and made an order accordingly. The defendants urge that the court was without authority to dismiss the cause without prejudice, and that the order sustaining the demurrer was a final adjudication of the rights of the parties, and that the trial court erred in not permitting defendants to introduce in evidence the proceeding in the said district court to establish their plea of *res adjudicata*. The statutes of Oklahoma provide that the plaintiff may dismiss the cause without prejudice to future action—

"before the final submission of the case to the jury, or to the court when the trial is by the court." Section 5125, Rev. Laws Okla. 1910.

The Oklahoma statute touching this matter is identical with the Kansas statute. In the case of *Ashmead v. Ashmead*, 23 Kan. star page 263, the Supreme Court of Kansas, in discussing the rights of the plaintiff under the above statute, said:

"It will be conceded that, after the final submission of the case, the plaintiff had no right to a dismissal without prejudice. Up to that time she had such right, and could exercise it of her own option, without the consent of the defendant or the permission of the court. At that time her rights in that respect ceased. But has not the court the power in its discretion to permit a plaintiff, even after the final submission, to recall that submission, and dismiss without prejudice? It would be both strange and harsh if such power did not exist."

In the case of *Mason v. Ryus*, 26 Kan. 464, the court said:

"After a demurrer to plaintiff's evidence has been sustained, and before any judgment is in fact entered, the right of the plaintiff to dismiss his action without prejudice ceases; * * * but the court has a discretion to permit him to so dismiss. * * * The statutory right of the plaintiff to dismiss without prejudice may have ceased, but the discretionary power and control of the court over proceedings before it is not ended."

In *Schafer v. Weaver*, 20 Kan. 296, the court said:

"Where a demurrer to evidence is submitted to the court, the submission is only conditionally final. It is final upon the condition that the court shall sustain the demurrer, * * * or if the court in its discretion shall reopen the case for the admission of evidence, or for the dismissal of the action without prejudice, then the submission is not final, or at least the action of the court thereon is not final." (Italics are ours.)

In the instant case, the district court of Oklahoma county, at the time it made the order sustaining the demurrer to the petition, did not take final action in the case. It did not require the plaintiff at that time to elect as to whether or not he would stand upon the demurrer, and make the proper orders touching such election and finally disposing of this phase of the case; but it left the matter open for a period of 10 days, thus necessarily implying that in the future the court would make other orders touching this phase of the case and finally disposing of same; and, before the court finally disposed of it, the plaintiff obtained leave of the court to dismiss the cause without prejudice. We

think that under the holdings of the Kansas court, *supra*, it was at least in the discretion of the court to allow this action to be taken. Having given such permission, the ruling, until reversed, is conclusive in any collateral inquiry, and it must be held in such subsequent inquiry that there had been no final adjudication; nothing which prevents a further inquiry as to the rights of the parties growing out of the alleged facts. *Mason v. Ryus*, *supra*.

[7] After the injury plaintiff executed an instrument to Lewis & Kitchens, his employers, stating that for a certain consideration, naming it:

"I do agree and covenant that I shall never institute or prosecute any suit on account of my said injuries against said * * * L and * * * K, or either of them," etc.

—and the defendants complain at the action of the trial court in refusing to permit the said instrument to be introduced in evidence in support of their answer setting up a release; the defendants claiming that the instrument executed to Lewis & Kitchens was a release, and that therefore, under the doctrine that the release of one joint tort-feasor operates as a release of all, the said instrument was competent evidence to support their said answer. We see no error in this regard. The contention as to the instrument being a release is not tenable; there is no room whatever to doubt the meaning of the instrument; the intentions of the parties were clearly expressed therein. Under the light of all the authorities, it is a covenant not to sue Lewis & Kitchens; therefore it is not such an instrument as could operate to discharge the defendants from liability, though Lewis & Kitchens be joint tort-feasors with the defendants in the infliction of the injury upon the plaintiff. 84 Cyc. 1084, and cases cited. *Hawkins v. Railroad*, 182 Mo. App. 323, 170 S. W. 459; *McDonald v. Grocery Co.*, 184 Mo. App. 432, 171 S. W. 650; 24 Am. & Eng. Enc. of L. 293; *Matthey v. Gally*, 4 Cal. 62, 60 Am. Dec. 595; *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; *Chicago v. Smith*, 95 Ill. App. 335; *Bell v. Perry*, 43 Iowa, 368; *Arnett v. Mo. Pac. Ry. Co.*, 64 Mo. App. 368; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Spencer v. Williams*, 2 Vt. 209, 19 Am. Dec. 711; *Duck v. Mahen*, 2 Q. B. (1892) 511; *Texasarkana Teleph. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257.

[8] The defendants insist that that part of instruction No. 15, defining measure of damages, which allows a recovery for loss of future wages and for future pain and suffering, is erroneous, in that it does not require the jury to find from the evidence that such damages are "certain to result." We see no error in the instruction as given, and in support of this view we refer to the case of *Midland Valley R. R. Co. v. Hilliard*, 148 Pac. 1001, where this court upheld an instruction not

nearly so favorable to the defendant as the instruction in the instant case. The other instructions complained of, we believe, fairly state the law applicable to this case.

From a careful consideration of the whole case we are convinced that no error of sufficient magnitude to warrant a reversal was committed, and that therefore the judgment should be affirmed.

PER CURIAM. Adopted in whole.

CITY OF CHICKASHA et al. v. O'BRIEN
et al. (No. 6872.)

(Supreme Court of Oklahoma. Oct. 12, 1915.
On Rehearing, June 13, 1916.)

(Syllabus by the Court.)

1. TRIAL \S 370(2)—**RIGHT TO TRIAL BY JURY**
—**EQUITABLE CAUSES.**

In cases of purely equitable cognizance, the court may, of its own motion, call in a jury or, upon request of one of the parties, consent to one for the purpose of advising him upon questions of fact, and may submit to it any issue or issues he desires.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 881; Dec. Dig. \S 370(2).]

2. TRIAL \S 374(2) — **TRIAL BY COURT** — **SUBMISSION OF ISSUES TO JURY** — **EFFECT.**

When a jury trial is not a matter of right, and the court submits to the jury special questions of fact, the answers returned thereto are merely advisory, and the court may decide for itself all questions of fact and the law of the case, notwithstanding the findings of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 884; Dec. Dig. \S 374(2).]

3. APPEAL AND ERROR \S 1065 — **TRIAL BY COURT** — **INSTRUCTIONS.**

In equitable actions when findings of fact are made by the court, the instructions to the jury are wholly immaterial, and error cannot be predicated thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4219; Dec. Dig. \S 1065.]

4. MUNICIPAL CORPORATIONS \S 513(5) — **PUBLIC IMPROVEMENTS** — **ASSESSMENTS** — **BONDS.**

Under section 644, Rev. Laws 1910, an action to enjoin assessments levied to pay certain bonds issued under the paving act, and to cancel said bonds on the ground that the work was not performed according to contract, owing to fraud upon the part of the contractor and city officials, where the city acquired jurisdiction by proper proceedings, to make the improvements, cannot be maintained after the expiration of 60 days from the passage of the ordinance making the final assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1190, 1202; Dec. Dig. \S 513(5).]

On Rehearing.

5. CONSTITUTIONAL LAW \S 171, 308 — **MUNICIPAL CORPORATIONS** \S 407(1) — **ASSESSMENTS** — **OBLIGATION OF CONTRACT** — **DUE PROCESS OF LAW.**

Section 644, Revised Laws of 1910, is not unconstitutional, and does not impair the obligations of contracts nor deprive persons of their property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 506, 925; Dec. Dig. \S 171, 308; Municipal Corporations, Cent. Dig. \S 1003; Dec. Dig. \S 407(1).]

Error from District Court, Grady County; J. T. Johnson, Judge.

Action by Dennis O'Brien and others against the City of Chickasha and others. Judgment for plaintiffs, and defendants bring error. Reversed and suit dismissed.

Harry Hammerly, City. Atty., of Chickasha, and M. D. Libby, of El Reno, for plaintiffs in error. Stuart, Cruce & Cruce, of Oklahoma City, and Pond, Melton & Melton, of Chickasha, for defendants in error.

HARDY, J. Defendants in error brought suit in the district court of Grady county to cancel certain improvement bonds, and assessments levied to pay the same, and to enjoin the collection of said assessments, and for other equitable relief. Issues were joined, and at the trial, upon the request of the plaintiffs, a jury was impaneled, and the court submitted 17 special interrogatories to the jury, and gave them certain instructions, and the jury returned answers to said interrogatories, and thereafter, upon consideration of the evidence, the interrogatories, and answers by the jury, the court made independent special findings of fact, and adopted and incorporated into said findings the verdict of the jury, and thereupon rendered judgment declaring the contract under which the improvements were made to be void, and enjoined the collection of the assessments that had been levied to pay the bonds which had been issued. Plaintiffs in error complain of the action of the court in impaneling the jury, and in submitting such interrogatories, and also complain of the instructions given.

[1] This being an equity case, the court was authorized upon its own motion to call in a jury, or consent to one upon the request of either party, and submit to it any issue or issues of fact which he desired for the purpose of being advised by the jury upon such questions of fact so submitted. Barnes v. Lynch, 9 Okl. 191, 59 Pac. 995; McCoy v. McCoy, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146; Watson v. Borah et al., 37 Okl. 357, 132 Pac. 347; Oklahoma Trust Co. v. Stein et al., 39 Okl. 756, 136 Pac. 746.

[2] The answers of the jury to the interrogatories are advisory merely, and the court may adopt or reject them, as it sees fit, for in such case it is the duty of the court to consider all the record and weigh the evidence, and then determine whether the findings of the jury would be adopted as the findings of the court. Tobin v. O'Briener, 16 Okl. 500, 85 Pac. 1121; Wah-tah-noh-zhe et al. v. Moore, 36 Okl. 631, 129 Pac. 877; Okl. Trust Co. v. Stein, supra.

[3] Error cannot be predicated upon the charge of the court to the jury in such case, because, notwithstanding the instructions may be erroneous, it was the duty of the court to review the record and make his own findings, and, where it appears that the court

has discharged this duty, the case will not be reversed for error in the instructions given to the jury. *Apache State Bank v. Daniels*, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520; *Wah-tah-noh-she et al. v. Moore*, supra; *Watson v. Borah et al.*, supra. And though it be that the interrogatories submit mixed questions of law and fact to the jury, still this could not prejudice the parties where the court, upon a review of the record, either adopts the findings of the jury as his own or rejects the verdict and makes other findings.

[4] It is urged by plaintiffs in error that this action is barred by section 644, Rev. Laws 1910, while defendants in error insist that the limitation applicable hereto is found in the third subdivision of section 4657, Id. Section 644 is as follows:

"No suit shall be sustained to set aside any such assessment, or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessment, or installment thereof, or interest or penalty thereon, or issuing such bonds, or providing for their payment, as herein authorized, or contesting the validity thereof on any ground, or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in cases requiring such resolution and its publication, and to give the notice of the hearing on the return of the appraisers, unless such suit shall be commenced not more than 60 days after the passage of the ordinance making such final assessment. * * *

The third subdivision of section 4657 provides that action shall be brought:

"Third. Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

The plaintiffs in the court below sought to enjoin the collection of the assessments and to cancel the bonds involved, upon the ground of fraud upon the part of the contractor and the city officials in the performance of the work under the contract, occurring more than 60 days after the passage of the assessing ordinance and the issuance of the bonds, and say that by reason thereof this statute applies, and not section 644. It is readily seen that subdivision three of section 4657 is a general statute of limitations, while section 644 is a special statute applying to that class of causes involved in the present proceeding.

Defendants in error base their right to maintain this action upon section 4881, Rev. Laws 1910, which is as follows:

"An injunction may be granted to enjoin the enforcement of a void judgment, the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction. An injunction may be granted in the name

of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the Attorney General, upon information and belief, and no bond shall be required; but the county shall, in all other respects, be liable as other plaintiffs."

If this section and section 644 each are to be given full effect according to the ordinary meaning of their language, it might be said that there is an apparent conflict between the two. Such a conflict appeared to exist in the laws of the state of Kansas, and was considered by the Supreme Court of that state in *Lynch et al. v. City of Kansas City et al.*, 44 Kan. 452, 24 Pac. 973; and that court held the general statute was amended, "so far as restraining the collection of an assessment is concerned," by the statute of limitations contained in the paving law of that state, and also in the case of *Beebe et al. v. Doster*, 36 Kan. 666, 14 Pac. 150, held:

"Where in special cases a different limitation is prescribed by statute, the action shall be governed by such limitation."

So, applying the same rule here, the seeming conflict, if in fact there be any, between section 4881 and section 644 may be obviated by construing section 644, which is a special statute applying to this class of cases, as an amendment to section 4881, in so far as actions of the character mentioned in section 644 are involved.

There is no question made as to the regularity of the proceedings of the council prior to and including the passage of the final assessing ordinance, or the issuance of the bonds; the fraud complained of, as stated, being in the performance of the work.

The rule is well established in this state, that:

"When a city acquires jurisdiction by preliminary proceedings to pave certain of its streets, a property owner who sits by and sees such improvements made, with the knowledge that the city authorities intend to levy and collect a special tax against his property, and that those who do such work cannot be compensated in any other way, and there is no objection thereto until complete performance of the work has been made, cannot thereafter maintain an action to enjoin the collection of assessments against his property on the ground of alleged irregularity in the proceedings subsequent to the time that jurisdiction to perform said work had attached." *City of Perry v. Davis et al.*, 18 Okl. 458, 90 Pac. 865; *Sharum v. Muskogee*, 43 Okl. 22, 141 Pac. 22; *City of Norman v. Allen*, 147 Pac. 1002; *Norris v. City of Lawton*, 148 Pac. 126, and cases cited; *Kerker v. Bocher*, 20 Okl. 729, 95 Pac. 961; *Paulsen v. City of El Reno*, 22 Okl. 734, 98 Pac. 958; *Jenkins v. Oklahoma City et al.*, 27 Okl. 230, 111 Pac. 941; *Lonsinger v. Ponca City*, 27 Okl. 397, 112 Pac. 1006; *Weaver v. Chickasha*, 36 Okl. 226, 128 Pac. 805; *Shultz v. Ritterbusch*, 38 Okl. 478, 134 Pac. 961; *City of Muskogee v. Rambo et al.*, 40 Okl. 672, 138 Pac. 567; *Bartlesville v. Holm et al.*, 40 Okl. 467, 139 Pac. 273.

In *Morrow v. Barber Asphalt Co.*, 27 Okl. 248, 111 Pac. 198, it was held that this rule did not apply to bar an action by a lot owner to enjoin the collection of an assessment up-

on his property, when the proceedings upon which it is based are void. In the case at bar the city acquired jurisdiction of the proceedings in the proper way, and did everything that was required up to and including the making of the contract, the passage of the assessment ordinance, and the issuance of the bonds. The findings of the court show that these proceedings were regular in every particular; therefore the city acquired jurisdiction, and the contract was not void as found by the court; and in so finding the court committed error.

The question is then presented whether this statute would operate to bar an action by a property owner after the passage of the assessment ordinance, the issuance of the bonds, and the performance of the work, to enjoin the collection of said assessments and to cancel said bonds because of matters occurring more than 60 days after the date of the assessing ordinance. It appears from the record before us that the original improvement district No. 3 was subdivided into 15 separate districts, and that separate ordinances were passed upon different dates for the various districts so created. The bonds were issued before the performance of the work and were delivered to the contractor in installments, after the completion and approval of portions of the work, in accordance with section 638, Rev. Laws 1910.

By section 644, it is seen that no suit may be maintained on any ground except for the two reasons given, which two reasons were necessary to constitute due process of law; that is, that the city should acquire jurisdiction to make the contemplated improvements by the adoption and publication of the preliminary resolution, where same was required, and should acquire jurisdiction of the property owner by giving notice of the hearing on the return of the appraisers. This language is as broad and comprehensive as it could be made, and indicates an intention upon the part of the Legislature to cause any litigation involving the validity of the assessments, or seeking to enjoin the payment of the bonds, to be brought within the time limit. No exception is made for fraud occurring thereafter in the performance of the work, and, had the Legislature intended that such exception should be made, it would have been perfectly easy to say so; and the significant fact that the language used is as broad and comprehensive as it is, and that no exception is made, is to our minds conclusive evidence that none was intended.

A similar question arose in the case of *City of Topeka et al. v. Gage et al.*, 44 Kan. 87, 24 Pac. 82, and the Supreme Court of Kansas reached the conclusion which we have reached, and in the opinion used this language:

"The language of this statute is such as to leave little or no room for construction. Its provisions are plain, direct, and positive, and seem sufficiently broad to cut off all defenses not

asserted within the period of time named therein. It says no suit shall be brought, nor any defense allowed, after the expiration of 30 days from—what? From the time the amount due on each lot is ascertained. It not only declares that no suit shall be brought to set aside or enjoin the making of the assessments, but provides that no defense to the validity thereof shall be allowed after 30 days from the time the assessment is ascertained. However, the defendants, plaintiffs below, insist that at the time the contract was entered into between the city and Ramsey, two of the councilmen, representing the city, had a pecuniary interest in said contract, which rendered it null and void; that said fraud was concealed from and unknown to plaintiffs below until October 29, 1889, when Ramsey assigned said contract to the brick and paving company; and that, because of said concealment of the fraud, the statute of limitations did not commence to run until said 29th of October, a time within 30 days before the suit was commenced, and that therefore the suit is not barred by said statute. We hardly think this position is tenable. The Legislature has provided a special statute of limitations for these cases, and any fair construction of its provisions is against this position. It would have been easy for the Legislature to have so worded the statute as to have cut off all defenses except for fraud, and to have said that the statute should run as against fraud from the time of its discovery. This is done in the general statute of limitations, but there is nothing of the kind in this statute; and, as the Legislature was providing a special statute of limitations, different from the general statute, we must presume that they intended it to have the effect they said it should have, and cut off all defenses of whatever kind or character. This may be a harsh rule, but that fact does not furnish a reason why we should not construe the statute as it is, though it may furnish a reason why the Legislature should modify it."

In *Wahlgren v. City of Kansas City*, 42 Kan. 243, 21 Pac. 1068, the court said:

"The fixing of a time when a cause of action shall be barred, or in which actions may be brought, is in the discretion of the Legislature, and will be rarely disturbed by courts"

—and held that the limitation of the time in which actions can be brought under the provisions of section 1, c. 101, Sess. Laws 1887, then under consideration, was valid and constitutional.

Another reason, to our minds, why this is so is a consideration of all the provisions of chapter 10, art. 12, Rev. Laws 1910, providing for improvements of the character here involved. It is therein provided that, after the passage of the resolution of necessity and other proceedings have been had, up to the passage of the assessing ordinance, the property owner may, within 80 days from the date of such ordinance, pay his assessment in full without interest, but, should he fail to avail himself of this privilege, section 635 provides that, after the expiration of said period of 30 days from the passage of the assessing ordinance, negotiable coupon bonds in the aggregate amount of such assessment, bearing date 15 days after the passage of the assessing ordinance, shall be issued, of such denominations as the mayor and council shall determine, which bonds shall in no event become a liability of the city issuing same; and by section 639 it is required that

said bonds shall be designated as street improvement bonds and shall recite the street or streets or other public place for the improvement of which they have been issued, and that they are payable from the assessments which have been levied upon the lots and tracts of land benefited by said improvements. While the statute quoted says the bonds shall be negotiable, counsel for both parties seem to doubt whether said bonds are of this character because they are made payable out of the assessments levied upon the property in the improvement district, and are in no event a liability against the city. This would furnish strong reason for construing the statute as we do, in order to give stability and value to these securities. If the validity of said bonds might be litigated, or the levy and collection of said assessments enjoined after said 60-day period of limitation, it would practically destroy the market for this class of securities, and render it well-nigh impossible for improvements of this nature to be made. It is a common practice, as in the case at bar, for the bonds to be issued before the completion and approval of the work (and this practice seems to be authorized by sections 637, 638, Rev. Laws 1910), and to be delivered in installments to the contractor as the work progresses, in payment for such parts as may have been completed and approved, and the contractor in turn negotiates same in the markets of the country, in order to provide himself with funds to pay the current expenses of constructing the balance of the improvements. This, being authorized, would indicate a purpose on the part of the Legislature to cause litigation, if any there is to be, to be commenced before the expiration of said 60-day period, to avoid any uncertainty about the legality of said bonds that might affect their market value.

Section 644 is not unusual because it operates as an absolute bar to an action to set aside the assessment, or to contest the validity of the bonds upon grounds other than the two reasons therein mentioned. Similar provisions are found in the statutes of this state. The Attorney General is by law ex officio bond commissioner in the state, and by section 377, Rev. Laws 1910, his duties as such are defined, and he is required to examine and pass upon any security issued, and it is provided in said section that:

"Such security, when declared by the certificate of said bond commissioner to be issued in accordance with the forms of procedure so provided, shall be incontestable in any court in the state of Oklahoma, unless suit thereon shall be brought in a court having jurisdiction of the same within 30 days from the date of the approval thereof by the bond commissioner."

The purpose of this act was to give credit to the municipal securities of the state of Oklahoma; and, likewise, the similar provision in the paving act, which we are now considering, had for its purpose the giving

of credit to the securities issued under that act. Another example of this character of legislation is found in section 2999, Rev. Laws 1910, being a part of the drains and ditches act. Said act provides for the issuance of bonds payable out of funds raised by assessment; and by said section 2999 it is provided:

"The only defense that shall be offered against the validity of said bonds shall be forgery or fraud."

Here the limitation, while not as to time, goes to every defense as to the bonds except that of forgery or fraud, which is permitted by the terms of that section. Thus it is seen that the construction placed upon section 644 is not a strained or unusual one, but is in accord with the legislation above referred to.

Another reason why we have reached this conclusion is that by section 623, Rev. Laws 1910, the mayor and council are required by resolution to provide that the contractor shall execute to the city a good and sufficient bond in any amount to be stated in said resolution, conditioned for the full and faithful execution of the work and the performance of the contract, for the protection of the city and all property owners interested against any loss or damage, by reason of the negligence of the contractor or improper execution of the work, and shall also require a bond in an amount to be stated in said resolution, for the maintenance in good condition of such improvement for a period of not less than five years from the time of its completion. In pursuance of this section, the council did require of the contractor, and he did execute, a good and sufficient bond in the sum of \$128,000, as required by law conditioned for the full and faithful execution of the work and the performance of the contract on his part, and also executed to the city other bonds in the aggregate sum of more than \$75,000, for the maintenance in good condition of such improvement for a period of five years from the time of its completion, which bonds were approved and accepted by the city; and, at the time of the trial, the court found that the surety on said bonds was solvent.

We have already seen that one purpose of the Legislature in fixing a limit of 60 days within which actions must be brought, contesting the validity of the bonds or seeking to enjoin the collection of the assessments, was to give stability and value to securities of this character; and, while aiming to bring about this result, it also sought to give proper protection to the property owner by requiring of the contractor the performance and maintenance bonds.

Under the statute, as we construe it, the failure of the contractor to comply with the terms of his contract in the performance of the work is an irregularity that does not defeat the jurisdiction of the city to make

the improvement, and therefore could not be availed of in a suit for injunction. The rule in this regard is stated in Elliott, Roads and Streets (2d Ed.) 608 (3d Ed.) 772, as follows:

"Irregularities or errors not jurisdictional cannot ordinarily be made available in a suit for injunction. The question whether the work has been done according to contract is one to be determined by the local tribunal, or tried at law, and not in injunction proceedings. In a suit for injunction the question whether the ayes and nays were taken on the passage of the ordinance directing the improvement cannot be litigated. It may safely be affirmed without multiplying illustrations that, where nothing more than errors or irregularities in the proceedings appear, an injunction will not be awarded unless it is applied for before the work has been done, and even then the writ will not issue if the errors are not of a material character, nor will it issue if there is an adequate remedy at law." See authorities there cited.

In *Lyman v. City of Chicago et al.*, 211 Ill. 209, 71 N. E. 832, the rule is stated thus:

"It is fundamental that the aid of equity can only be invoked in the absence of an adequate legal remedy. Equity will interfere by injunction to prevent the collection of a special assessment only where the same is void or levied without authority of law, or the property assessed is exempt from taxation. A special assessment will not be enjoined because the improvement is not made in conformity with the provisions of the ordinance, the remedy being by mandamus."

In *McEnaney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540, the rule is stated as follows:

"Questions as to the manner in which the work was done under the contract and kindred questions cannot, it is manifest, be considered in a suit for injunction, for such questions do not go to the jurisdiction. Authorities cited in note 5, Elliott, Roads and Streets, p. 442. The settled rule, that only questions going to the jurisdiction can be considered in a suit for injunction, requires us to decline to consider or decide many of the questions which the appellants endeavor to present. * * * The improvement of a street at the cost of abutting lot owners will not be enjoined because the improvements were not made according to the contract awarded nor on the grade established by the civil engineer."

See, also, *Dixon v. Detroit*, 86 Mich. 520, 49 N. W. 630; *Callister v. Kochersperger*, 168 Ill. 338, 48 N. E. 156.

To the effect that, where a bond is given for the performance of a contract and a breach thereof occurs, the party injured has a remedy upon such bond, see the following cases: *Long Beach School Dist. v. Lutge et al.*, 129 Cal. 409, 62 Pac. 36; *Commissioners of Putnam County v. Krauss et al.*, 53 Ohio St. 628, 42 N. E. 831; *Chapman & Dewey Land Co. v. Wilson*, 91 Ark. 30, 120 S. W. 391.

The section of the statute under which this suit is brought, section 4881, as we have seen, only permits resort to this remedy where the tax, charge, or assessment sought to be enforced is illegal; and we have already determined that the city acquired jurisdiction in the regular way to levy the assessment and to issue the bonds, and that

the assessments are not void nor are the bonds issued invalid. In the cases cited by defendants in error none of them involves a statute similar to the one that we are considering here, and for that reason cannot control our conclusion.

Being of the opinion that the action is barred by section 644, it is unnecessary for us to consider the other questions presented, and the judgment is reversed and the cause dismissed. All the Justices concur.

On Rehearing.

[8] On petition for rehearing it is urged that, because of the construction given to section 644, Rev. Laws 1910, whereby it is made applicable to actions instituted more than 60 days after the passage of the assessment ordinance, where the cause of action is based upon the alleged fraud of the city officials and the contractor in the performance of the work occurring more than 60 days after the passage of said ordinance, the statute with this construction is unconstitutional and void in that it deprives them of their property without due process of law, and is also in conflict with the Constitution of the United States because it operates as an impairment of the obligation of contracts, and deprives the defendants in error of their property without due process of law.

For defendants in error to succeed in their contention, it must appear that the statute deprives them of some right guaranteed to them by the Constitution of the United States or of this state. If this were a mere matter of contract right or liability, there might be some merit in the contention of counsel; but the liability of the defendants in error to pay the assessments complained of does not arise out of contract, and is not a debt, but, on the contrary, such liability is imposed by the municipality in the exercise of the taxing power which has been delegated to it by the State. *Shultz v. Ritterbusch*, 88 Okl. 478, 134 Pac. 961.

The assessments which are complained of are enforced proportional contributions imposed upon the class of persons affected thereby, who are interested in the local improvement for the payment of which said assessments were levied, and who are assumed to be benefited by the construction of such improvements, to the extent of the assessments levied, which are imposed and collected as an equivalent for the benefit, actual or presumed, and to pay for the cost, of such improvements. Such assessments are justified upon the theory that the improvement enhances the value of abutting property and that it is reasonable and competent for the Legislature to require the costs thereof to be assessed against the property benefited thereby. *Alley v. Muskogee et al.*, 156 Pac. 315 (not yet officially reported). With this view of the nature of the burdens imposed by the assessments, there ought to be no

great difficulty in the determination of the question here urged. That the statutes under which the assessments were levied constitute due process of law and do not infringe upon the Constitution of this state or of the United States is now too well settled to need further argument. *Shultise v. Town of Taloga et al.*, 42 Okl. 65, 140 Pac. 1190; *Alley v. Muskogee*, supra; *Mellon Co. v. McCafferty et al.*, 38 Okl. 534, 135 Pac. 278; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 908.

The precise question under consideration is whether the construction placed upon section 644 offends against the Constitution in any of the respects mentioned. The ground upon which it is claimed said section must fall is that it deprives the property owner, against whose property the assessment is levied, of the right to restrain the collection of said assessment because of the fraudulent failure of the contractor to perform the work and construct the improvements, according to plans and specifications, where such default occurs more than 60 days after the passage of the final assessment ordinance. This is another way of saying that, because the anticipated benefits have not been realized, the levy of the assessments is illegal and can be restrained.

In *Goodholm & Sparrow Inv. Co. v. Cleveland Trin. Pav. Co.*, 150 Pac. 109, plaintiff sought to enjoin certain special assessments, on the ground that they were void because made before the improvements were completed, and interest on the amount of the assessment was imposed for the period between the date of the assessment and the time of the completion and acceptance of the work. The action was not commenced until more than 60 days after the passage of the ordinance making the final assessment, and thus there was squarely presented the question whether an assessment could be levied and made a lien against the property, for the payment of the cost of a local improvement before the actual construction thereof; and the authority of the city to do so was sustained by the court, and the relief sought was denied. In *Shultz v. Ritterbusch*, 38 Okl. 478, 134 Pac. 961, plaintiffs sought to enjoin certain special assessments, among other grounds, for the reason, "that the work and material were of a defective quality and that the work was left in an incomplete condition." The action was instituted more than 60 days after the passage of the assessing ordinance. Upon a consideration of the questions presented, it was there held in accordance with the previous decisions of this court that the plaintiff was confined to jurisdictional defects in assailing the proceedings sought to be enjoined.

The Supreme Court of the United States, in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, had under consideration the validity of an assessment levied by the city of

New Orleans for swamp drainage which was resisted in the state courts on the ground that the proceedings deprived the plaintiff of his property without due process of law, one of the grounds of complaint being that the assessments were to be made before the work should be done. In disposing of this contention, the court said:

"Can it be necessary to say that, if the work was one which the state had authority to do, and to pay for it by assessments on the property interested, on such questions of method and detail as these, the exercise of the power is not regulated or controlled by the Constitution of the United States? * * * As a question of wisdom—of judicious economy—it would seem better in this, as in other works which require the expenditure of large sums of money, to secure the means of payment before becoming involved in the enterprise; and, if this is not due process of law, it ought to be. * * * It is * * * said that part of the property of plaintiff * * * assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix the limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds."

In *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, it was contended that a statute, which authorized the deduction of anticipated benefits from damages sustained in the condemnation of land for public use, was invalid because such benefits might not be realized and there would, in such case, be a taking of the property for public use without just compensation. In denying this contention, the court said:

"Objection was made to that part of section 15, which provides that the assessment, when confirmed by the court, shall be a lien upon the land and be collected like other taxes, and be payable in five annual equal installments, with interest at the rate of 4 per cent. per annum from the date of the confirmation of the assessment by the court. But it is within the commonly exercised and undisputable power of the Legislature to make taxes of any kind, assessed upon real estate, payable forthwith, and an immediate lien thereon. In the * * * case of *Davidson v. New Orleans*, the objection that the assessment was actually made before, instead of after, the work was done, was held to be untenable; and Mr. Justice Miller, speaking for this court, said: 'As a question of wisdom—of judicious economy—it would seem better in this, as in other works which require the expenditure of large sums of money, to secure the means of payment before becoming involved in the enterprise.'"

The power of the Legislature to authorize the levy of assessments for local improvements, and to levy and collect same before beginning the work for which they are levied, has been considered and sustained in the following cases: *English v. Wilmington*, 2 Marv. (Del.) 90, 37 Atl. 158; *Rolph v. Fargo*, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646; *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Kingman et al.*, Petitioner, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417; *Adams*, Petitioner, 165 Mass. 497, 43 N. E. 632; *Weber v. Schergens*, 59 Mo. 389; *City of Austin v. Nalle*, 102 Tex. 536, 120 S. W. 996; *Ross v. Board*

of Supervisors, 128 Iowa, 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. It being consistent with due process of law to levy and collect such assessments before undertaking the construction of a public improvement, no reason can exist why the Legislature may not authorize the levy of such assessment before the completion of the work, and, instead of exacting payment of the entire sum before commencing the contemplated improvement, may not make said assessment a lien upon the property to be benefited thereby, and extend to the owner the option of paying the entire amount within 30 days after the passage of the assessing ordinance or in ten equal annual installments with interest thereon, as is done by the statute. When the power to levy and collect the total cost of such improvement in advance of the performance of the work is established, it follows, as a necessary corollary, that the right to levy and collect such assessment does not depend upon the performance of the work or upon the realization of the anticipated benefits, and therefore the property owner has no constitutional right to enjoin the collection of such assessment because the work was not done in a certain way, or because his property has not been benefited to the extent anticipated at the time the assessment was levied.

Having the power to levy and collect such assessment so as to provide the means of carrying out the proposed improvement before becoming involved therein, no constitutional obstacle exists in the way of securing such means by levying said assessments and issuing bonds payable therefrom, and to insure the value of such bonds, rendering them immune from attack after the expiration of 60 days, except upon jurisdictional grounds. In *Pullan v. Kinsinger*, 2 Abbott (U. S.) 94, Fed. Cas. No. 11463, the court held that section 19 of the Internal Revenue Act of July 13, 1866, c. 184, 14 Stat. 152, as amended March 2, 1867, c. 169, 14 Stat. 475, which provided that no suit to restrain the assessment or collection of any tax authorized shall be maintained in any court, was not unconstitutional and did not deprive the party of his property without due process of law. In *Scudder v. Mayor et al.*, 146 N. Y. 245, 40 N. E. 734, the Court of Appeals of New York held that under Consolidation Act (Laws 1882, c. 410) § 897, providing that no suit should be commenced, "for the vacation of any assessment under said statute or to remove a cloud upon title," and prescribing remedies in such cases, the collection of an illegal assessment would not be enjoined. In the opinion it was said:

"By the plaintiff's demand for judgment, they ask in so many words that the assessment in question shall be declared void, unlawful, and uncollectible, which is but another way of asking that the assessment shall be vacated. That portion of the relief is clearly not to be granted in the face of the section of the Consolidation Act above referred to."

In *Loomis v. City of Little Falls*, 176 N. Y. 31, 68 N. E. 105, the court had under consideration a provision of the city charter of the city of Little Falls, providing that no action shall be maintained by any person to set aside an assessment for a local improvement, unless commenced within 30 days after the delivery of the assessment roll and warrant to the city treasurer, and notice by him in the official newspaper of the receipt thereof. The relief sought was denied, and in the opinion it was said:

"It is therefore settled by authority that it was within the power of the Legislature to have provided by section 83 that no action should be brought to cancel, annul, or set aside any assessments made for land improvements. But it did not go so far, and, instead, limited the bringing of such an action to a period of 30 days after the delivery of the assessment roll and warrant to the city treasurer, and notice by him in the official newspapers of the city of receipt thereof, and conditioned, further, that within such 30 days he procure an injunction restraining the common council from issuing the assessment bonds. The reason for requiring the commencement of the action and the granting of an injunction is apparent. The fact that no action has been brought when such a statute exists assures the would-be purchaser of the bonds that he is not in danger of being subjected to litigation in the event of purchase, and hence the bonds are likely to sell at a higher price than when there is some uncertainty about it. But whether the reasons be adequate or not, the power of the Legislature to absolutely prohibit the bringing of such an action—which, as we have seen, is established—necessarily includes the power to prohibit the commencement of such an action unless specified conditions be complied with."

The power of the Legislature to provide that, after the expiration of a certain period, special assessments for the construction of local improvements shall not be enjoined or vacated is sustained by the following cases: In *re Bridgford et al.*, 65 Hun, 227, 20 N. Y. Supp. 281; *Mayer v. Mayor et al.*, 101 N. Y. 234, 4 N. E. 336; *Lennon v. Mayor, et al.*, 55 N. Y. 361; *McKone et al. v. City of Fargo*, 24 N. D. 53, 138 N. W. 967; *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 631. There is no right vested in the individual to reduce the amount of an assessment levied against his property because of failure of anticipated benefits by way of counterclaim or set-off. In *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266, the Supreme Court discusses the nature of taxes of this character, and the obligation of property owners, in the following language:

"A tax is an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden; and, whether taxation operates upon all within the state, or upon those of a given class or locality, its essential nature is the same. The power of segregation for taxing purposes has every-day illustration in the experiences of local communities, the members of which, by reason of their membership, or the owners of property within the bounds of the political subdivision, are compelled to bear the burdens both of the successes and of the failures of local administration. When local improvements may be deemed

to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case there is no requirement of the federal Constitution that for every payment there must be an equal benefit." (*Italics are ours.*)

And likewise the right to reduce an assessment by way of counterclaim has been denied in the following cases, wherein it has been held that, by reason of the origin, obligatory force, and nature of such special assessments, a property owner has no right to reduce the amount of his assessment because of the negligent performance of the work or for other cause, and that, if damages have been sustained by him, it is not a proper subject of set-off or counterclaim against the amount of his assessment, unless authorized by statute: *Indianapolis, etc., R. R. Co. v. State*, 105 Ind. 37, 4 N. E. 316; *Laverty v. State*, 109 Ind. 217, 9 N. E. 774; *Lux, etc., Stone Co. v. Donaldson*, 162 Ind. 48, 68 N. E. 1014; *Dawson et al. v. Hipskind et al.*, 173 Ind. 216, 89 N. E. 863; *Himmelmänn v. Spanagel*, 39 Cal. 389; *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303; *Pittsburgh v. Harrison*, 91 Pa. 206; *Burlington v. Palmer*, 67 Iowa, 681, 25 N. W. 877; *Whiting et al. v. Mayor*, 106 Mass. 89; *Mack et al. v. Cincinnati*, 7 Ohio Dec. (Reprint) 49. Here no such right is conferred by statute, but is expressly legislated against, and the authority of the Legislature so to do is clearly established by the authorities cited. By providing that no suit shall be maintained after the expiration of 60 days to set aside any such assessment, or to enjoin the making of such improvements or levying or collecting any such assessment or installment thereof, or interest or penalty thereon, or issuing such bonds or providing for their payment, or contesting the validity thereof on any account, or for any reason other than for jurisdictional matters, assurance is given would-be purchasers of such securities that an investment therein will be secure from litigation of the character enumerated after the time fixed by said section; and thereby the value of such bonds will be enhanced and protected in the hands of purchasers, and such provisions will permit the sale thereof in the markets of the country at a better price than otherwise could be made. The acts of the municipality in paving its streets is a work of a public character, and is the exercise of a governmental function, even though such work is paid for by the benefited property owners (*Norris v. City of Lawton*, 148 Pac. 123); and the method by which the funds are to be secured to carry on such work is an exercise of the power of taxation delegated to the municipality, and the burdens imposed by it, in the exercise of such delegated power, are such as must be borne by the property owners affected thereby, who must take the risk of the faithful performance of their duties by those who are intrusted with the construc-

tion of such improvement, and who must share in the successes and failures of all such undertakings.

To admit the right urged by defendants in error would seriously hamper a municipality in the performance of its duty to the public, and would impair the value of the bonds outstanding in this case, whose present owners and holders are unknown and who were not parties to this litigation, and thereby accomplish the very thing of which defendants in error complain; that is, deny said bondholders their day in court and deprive them of their property without due process of law. This would be the effect not only in the present case but also as to every bond of this character outstanding, by taking away from said bonds the immunity from attack given thereto by said section 644. An additional consequence to be avoided that would follow such a declaration, as pointed out in the original opinion, would be to render future issues of such bonds of uncertain value, for no argument is necessary to establish the proposition that, if the protection given by said section be taken away, it would be much more difficult to find a ready market for said securities.

The section does not undertake to deprive the property owner of any remedy he may have had to compel the performance of the work according to contract, or to prevent the misappropriation of such bonds or of the funds derived from the sale thereof, but only to deprive him of such remedies as are expressly enumerated in the statute, leaving to him such other remedies as he may have had, with the additional remedy upon the performance and maintenance bonds required by the statute.

The petition for rehearing is therefore denied. All the Justices concur.

BOARD OF COM'RS OF CUSTER COUNTY v. LAWTER. (No. 7212.)

(Supreme Court of Oklahoma. July 25, 1916.)

(*Syllabus by the Court.*)

JUDGES § 22(5)—COMPENSATION—STATUTORY PROVISION.

The salary of the judge of the superior court of Custer county was governed by section 28 of the General Fee and Salary Bill (Laws 1910, c. 69), which provides: "The judge of the superior court of each county shall receive as full compensation the following salary: In counties having a population of not to exceed 50,000 the sum of \$2,800 per annum; and in counties in excess of 50,000 population the sum of \$3,000 per annum."

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 80, 179; Dec. Dig. § 22(5).]

Error from District Court, Custer County; T. A. Edwards, Judge.

Action by J. W. Lawter against the Board of County Commissioners of the County of Custer. Judgment for plaintiff, and defendant brings error. Affirmed.

A. E. Darnell, of Arapaho, for plaintiff in error. Chas. T. Randolph, of Clinton, for defendant in error.

KANE, C. J. This was an action in mandamus, commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below. The petition alleges, in effect, and it was admitted by an agreed statement of facts, that the plaintiff was elected to the office of judge of the superior court of Custer county in November, 1910, and took his office and qualified in January, 1911, since which date he has been, and is now, the duly elected, qualified, and acting judge of said superior court. That the defendants are the board of county commissioners of Custer county; that Custer county has a population of not exceeding 50,000 population, and the salary fixed by the general fee and salary law, as compensation for the judges of the superior courts in such counties, is \$2,800 per year. That, during the time said plaintiff has been judge of said court, he has filed his claim each month for salary as judge of the superior court of Custer county, and the same has been paid in the sum of \$233.33, except for the month of December, 1914; that on January 4, 1915, relator filed his claim for \$233.33 for salary as superior judge for the month of December, 1914, which claim was duly presented to the board of county commissioners and was disallowed and rejected, and the defendants refused to order the said sum paid said plaintiff.

The cause was tried upon an agreed statement of facts substantially as above, and the trial court, after due consideration, ordered a peremptory writ of mandamus to be issued, as prayed for. We think the writ was properly issued. Section 11, c. 14, art. 7, Session Laws 1909, the general law creating the superior courts, provides:

"The judge of every such court shall be paid the same salary as the judge of the county court of his county received at the passage of this act, and in the same manner."

Custer county did not come within the purview of the general law creating superior courts and was therefore unaffected by it. Subsequently chapter 47, Session Laws 1910, was passed creating the superior court for Custer county to sit at Clinton, and section 7 of said act provides:

"The judge of such court shall be paid the same salary as the judge of the county court of Custer county at the passage of this act and in the same manner."

Subsequently, and at the same session, chapter 69, Session Laws 1910, known as the "General Fee and Salary Bill," was passed, section 28 of which provides:

"The judge of the superior court of each county shall receive as full compensation the following salary: In counties having a population of not to exceed 50,000 the sum of \$2,800 per annum; and in counties in excess of 50,000 population the sum of \$3,000 per annum."

It seems that these last acts were approved by the Governor in the order of their passage. The contention of counsel for plaintiff is:

"That Custer county had neither the required population nor a city of required size to come within the law creating superior courts in general in this state; and the act of 1910, which created the superior court of Custer county, was a special act and, as we contend, did not in any sense come within the general law creating the superior courts of the state of fixing the salaries of the judges thereof."

The question, whether the act creating the superior court for Custer county is special legislation, was decided adversely to the contention of counsel in *Leatherock et al. v. Lawter et al.*, 147 Pac. 324, wherein it was held that the superior court of Custer county was part and parcel of the general plan for the creation of superior courts throughout the state, and the act creating it, therefore, was general in its nature, as it affected the people as a whole throughout the state. If this is sound, it is difficult to understand why section 28 of the General Fee and Salary Bill, which admittedly fixed the salary of the other superior judges in this state, should not also fix the salary of the superior judge of Custer county. Custer county is a county having a population not to exceed 50,000 and no good reason occurs to us—and none has been advanced by counsel for plaintiff in error—why the judge of that court should not receive the same salary as the judges of the superior courts in all the other counties of the state having the same population. Counsel for plaintiff in error states the rule, that statutes * * * in *pari materia* should be construed together, applies with peculiar force to statutes passed at the same session of the Legislature. But this is not a provision of substantive law, but merely a rule for determining the legislative intent. As it is quite apparent from a consideration of the language of the various acts involved that the Legislature designed the general fee and salary bill to cover the whole subject-matter to which it relates, and to embrace the entire law on the subject of fees and salaries, there is no reason for resorting to the rule invoked, or any other canon of construction.

For the reason stated, the judgment of the court is affirmed. All the Justices concur.

DIMMITT v. McDOWELL (No. 6288.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

LIBEL AND SLANDER §15—CONSTRUCTION OF WORDS USED—ACTIONABLE WORDS.

Words used in an alleged libelous article are to be taken in their most natural and obvious sense, and when they are clear and unambiguous and expose a person to public hatred, contempt, ridicule, or obloquy, or tend to deprive a

person of public confidence, or injure him in his occupation, the article is libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 1; Dec. Dig. ¶15.]

Commissioners' Opinion, Division No. 3. Error from District Court, Blaine County; James A. Tolbert, Judge.

Action by Mrs. J. C. Dimmitt against C. S. McDowell. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Wm. O. Woolman, of Watonga, for defendant in error. A. L. Emery, R. C. Brown, and Seymour Foose, all of Watonga, for plaintiff in error.

RITTENHOUSE, C. This action was brought to recover damages in the sum of \$5,000, caused by an alleged false, malicious, libelous, and unprivileged publication in the Canadian Valley Record, a weekly newspaper published by the defendant, C. S. McDowell, who was editor, owner, and publisher of such publication. The article complained of is as follows:

"Robt. Hollis while threshing for the Haigler brothers had the misfortune to lose \$22 worth of groceries. Mrs. Dimmitt was doing the cooking and she prepared supper and put it on the table; she had to go home that evening so when the machine whistled she got in her buggy and started for home. And while the men were coming from the machine to the cook shack the groceries came up missing."

A demurrer was filed to the petition on two grounds: (1) That the petition did not state facts sufficient to constitute a cause of action; and (2) that the article set forth in plaintiff's petition declared upon is not libelous and is insufficient in law to warrant a recovery. This demurrer was sustained by the court.

It is argued that the article was not libelous per se, and, as no special damages were asked, that the petition did not state facts sufficient to constitute a cause of action, and in support thereof McKenney v. Carpenter, 42 Okl. 410, 141 Pac. 773, is cited. If the article is not libelous per se, then the authority relied on is controlling. The question here to be determined is whether the language used in the article under consideration and which is claimed to be libelous per se under section 2338, Comp. Laws 1909, is clear and unambiguous; and, if so, did it expose Mrs. Dimmitt to public hatred, contempt, ridicule, and obliquy, or tend to deprive her of public confidence, or to injure her in her occupation? It is a general rule, often announced in this state, that words used in an article claimed to be libelous must be given their natural and obvious meaning. Spencer v. Minnick, 41 Okl. 613, 139 Pac. 130; Hubbard v. Cowling, 36 Okl. 603, 129 Pac. 714. Now, what is the natural and obvious meaning of an article which states that a certain party was cooking for a threshing outfit; that after she had prepared supper, she had

to go home; that while the men were coming from the machine to the cook shack certain groceries came up missing? To our mind, the meaning and effect of this article is clear. It charges that Mrs. Dimmitt prepared supper, put it on the table, and that when the men started to the cook shack, she got in her buggy and took the groceries with her. It is true that the article is so written that it could be argued that Mrs. Dimmitt is not charged with theft; but no reasonable construction could be used other than that she was charged with that crime. The insinuation of theft is strong, and the natural and obvious meaning of the article to those who might read it is that Mrs. Dimmitt committed the crime of theft. It necessarily follows that the article is libelous per se, and the petition states a cause of action.

The cause should therefore be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

HILLIGOSS v. WEBB et al. (No. 6707.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶680(1)—RECORD — REVIEW.

The trial court sustained a general demurrer to the amended petition, and rendered judgment for costs against plaintiff. The record fails to show that either the order sustaining demurrer or the final judgment awarding costs was entered of record in the trial court. Held, that the record presents no question to this court for review under assignments of error predicated thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2880; Dec. Dig. ¶680(1).]

2. APPEAL AND ERROR ¶773(2)—BRIEFS—FAILURE TO FILE—ABANDONMENT.

Where plaintiff in error fails to file brief as required by rule 7 of this court (137 Pac. ix), and offers no excuse for his failure to so comply with such rule, the appeal will be deemed to have been abandoned, and will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 8108; Dec. Dig. ¶773(2).]

Commissioners' Opinion, Division No. 5. Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Action by S. M. Hilligoss, general agent, etc., against James E. Webb and another. Judgment for defendants, and plaintiff brings error. Dismissed.

C. F. Green, of Ada, for plaintiff in error. B. H. Epperson and Holt, Webb & Etnnis, all of Ada, for defendants in error.

CAMPBELL, C. [1] This action was commenced in the district court of Pontotoc county for the recovery of a personal judgment against defendants. A general demurrer was sustained to the amended petition, and plain-

tiff elected to stand upon his petition and a judgment was rendered against plaintiff for costs. This proceeding in error was commenced by filing in this court a petition in error, with case-made attached, to have the judgment of the trial court reviewed. The record fails to show that the order of the trial court sustaining the general demurrer to the amended petition was entered of record in the trial court; also the record fails to show that the judgment of the trial court for costs against the plaintiff was entered of record in the trial court. Under numerous decisions of this court, the record presents no question for review for the above reasons.

In *Graham v. Graham*, 157 Pac. 740 (not yet officially reported), it was held:

"A purported order of the trial court sustaining a demurrer to a petition is without force where the case-made fails to show affirmatively that such order was entered of record pursuant to sections 5143, 5324, Rev. Laws 1910."

[2] The petition in error with case-made attached was filed in this court on August 5, 1914, and this cause has been regularly assigned for submission and has been duly submitted, after notice to plaintiff in error. No brief has been filed as required by rule 7 of this court (137 Pac. ix), and no excuse offered by plaintiff in error for not having complied with such rule. It has been many times decided by this court under such condition that the appeal will be presumed to have been abandoned, and should be dismissed. *Conness v. Brown*, 44 Okl. 137, 143 Pac. 852.

For the reasons above suggested, the appeal is dismissed.

PER CURIAM. Adopted in whole.

LEDGERWOOD v. NEAL. (No. 7626.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 671(3) — ASSIGNMENTS OF ERROR — CASE-MADE NOT CONTAINING ALL THE EVIDENCE.

Assignments of error, which require an examination of the evidence, will not be considered, where the case-made does not state by way of averment that it contains all the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2889; Dec. Dig. \S 671(3).]

2. APPEAL AND ERROR \S 754(3)—ASSIGNMENT OF ERROR—DENIAL OF NEW TRIAL.

Errors alleged to have occurred during the progress of a trial cannot be considered by this court, unless the overruling of the motion for new trial is assigned as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3086; Dec. Dig. \S 754(3).]

Commissioners' Opinion, Division No. 4. Error from County Court, Kay County; Joshua L. Roberson, Judge.

Action by O. J. Neal, against G. C. Ledgerwood, for commission on sale of real estate. Judgment for plaintiff and defendant appeals. Dismissed.

J. E. Curran, of Blackwell, for plaintiff in error. Herman S. Gurley, of Blackwell, for defendant in error.

EDWARDS, C. The plaintiff sued in the county court of Kay county, Okl., to recover of the defendant an agent's commission for the sale of real estate. The case was tried to a jury, which returned a verdict for the plaintiff, upon which verdict the court rendered judgment. The defendant appeals.

[1] The case-made before us does not appear to have been filed in the county court of Kay county, the court in which the case was tried, but does appear to have been filed in the district court of Kay county, and bears such indorsement. The case-made does not contain a recital that it contains all the evidence introduced in the trial of the case. The petition in error does not assign as error the overruling of the motion for new trial.

[2] It is well settled that a case-made not filed with the papers in the case in the court below is a nullity, and cannot be considered in this court. *Abbott v. Rodgers*, 35 Okl. 189, 128 Pac. 908; *Peck v. Stephens*, 35 Okl. 468, 130 Pac. 276. This court take judicial knowledge that the clerk of the county court and the clerk of the district court is the same person with the official title of court clerk. Whether or not, in a case where a party desiring to appeal deposits a case-made with the proper officer, for filing in the proper court, and said case-made is by such officer filed in a different court, of which court such officer is also clerk, is a fatal error, we express no opinion. But, in any event, as the case-made does not contain a recital that it contains all of the evidence introduced in the court below, this court has repeatedly held that it could not review any question which required an examination of the evidence. And, as the petition in error does not assign the overruling of the motion for new trial as error, errors alleged to have occurred during the progress of the trial cannot be considered in this court. *Avery et al. v. Hays*, 44 Okl. 71, 144 Pac. 624; *Maddox v. Barrett*, 44 Okl. 101, 143 Pac. 673; *Nidiffer v. Nidiffer*, 44 Okl. 218, 144 Pac. 350. This also has been repeatedly held by this court. The appeal is dismissed.

PER CURIAM. Adopted in whole.

NATIONAL SURETY CO. v. HALEY et al.
(No. 4506.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY \S 117, 159, 161—EXCESSIVE PAYMENTS ON BUILDING CONTRACT—BURDEN OF PROOF—EVIDENCE.

Where a building contract made a part of the bond provided that "payments on the work shall be made from time to time as the work

progresses upon the architect's certificate that said amounts have become due and at no time until the completion will they be made to exceed 85 per cent. of the value of work finished and in place at the date of each; and where said payments did exceed 85 per cent. of the value of the work finished and in place at the date of each payment, assuming that a compliance with the stipulation was a condition precedent to a right to recover on the bond, *held*, in a suit by the obligee against the surety company, a surety for hire upon the bond, that a failure to perform it will not defeat a recovery thereon in toto, but only to the extent defendant has been injured by failure to perform; and that the burden is on the defendant to show the extent of his injury. Evidence examined, and *held*, further, no such injury appearing, that plaintiff was entitled to recover the whole amount of the penal sum of the bond.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 283-285, 428-435, 439-441; Dec. Dig. §§ 117, 159, 161.]

2. PRINCIPAL AND SURETY — 100(4)—BUILDING CONTRACT—CONSTRUCTION—CHANGES—“IF”—“AMOUNT OF MONEY INVOLVED”—“AGGREGATE.”

Where the building contract provided that changes in the plans and specifications might be made without limit or notice to the surety company, when agreed to in writing between the parties thereto, and the bond, for the faithful performance of the contract on the part of the contractor, executed by the surety company as surety upon express conditions therein declared to be precedent to any right of recovery thereon, among other things, provided: “That when the cost of said changes shall in the aggregate amount to a sum equal to 10 per cent. of the penal sum of this bond, no further changes or alterations shall be agreed upon by the principal and obligee until the consent of the company shall first be obtained thereto,” in a suit by the obligee against the principal and surety on the bond, contract and bond construed together as one instrument and *held*, that it seems the consent of the surety company to changes in the plans to cost in the aggregate in excess of 10 per cent. of the penal sum of the bond was a condition precedent to the right to make them; but, as the evidence discloses that the cost of the changes made did not, in the aggregate, equal said sum, plaintiff was entitled to recover.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 163; Dec. Dig. § 100(4).]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by W. P. Haley against George W. Binning and another. Judgment for plaintiff and defendant National Surety Company brings error. Affirmed.

Stuart, Cruce & Gilbert, of Oklahoma City, for plaintiff in error. Everest & Campbell, of Oklahoma City, for defendant in error W. P. Haley.

TURNER, J. On September 22, 1911, in the district court of Oklahoma county, W. P. Haley, defendant in error, sued Geo. W. Binning as principal and National Surety Company, plaintiff in error, as surety to recover on a bond dated December 18, 1909, given to secure the faithful performance of a contract, whereby Binning agreed to erect a building for plaintiff in Oklahoma City

within 90 days from the date thereof for \$21,500, according to certain plans and specifications made a part of the contract which was dated December 7, 1909, and made a part of the bond.

The breach of the bond was alleged to be that Binning had abandoned the contract, whereupon plaintiff was compelled to take charge of the building and complete the same at his own expense and at a loss of \$9,862.25, for which, after alleging a compliance with all conditions precedent to recover thereupon, he prayed judgment against Binning as principal and against the surety company for \$4,300, the full amount of the bond. For answer, the surety company, after general denial and a specific denial of the performance of conditions precedent to a right to recover, admitted the execution of the bond, and for further defense specifically alleged:

“That many material changes and alterations were made by plaintiff and the defendant Binning in the plans and specifications and in the erection of said building, which were made without the knowledge, consent or approval of this defendant, and that by reason of such changes having been made, without the knowledge, consent or approval of this defendant, the National Surety Company, and its obligation upon said surety bond was absolved and this defendant released from further responsibility thereon.”

Binning made default. On trial to the court, there was judgment for plaintiff and against Binning and the surety company as prayed, and, after motion for new trial was filed and overruled, the surety company brings the case here.

[2] As to the surety company, the judgment is neither contrary to the law or the evidence as contended. On this point the evidence discloses that the bond, after making the contract a part thereof, among other things, provides:

“Now, therefore, the condition of this instrument is such that if the said principal shall well and truly perform the terms and provisions of said contract on the part of said principal required to be performed, then this instrument shall be null and void, otherwise to be and remain in full force and effect: Provided, however, and this instrument is executed by the company as surety upon the following express conditions, which shall be precedent to the right of recovery hereunder. * * * The obligee shall, at the times and in the manner specified in said contract, perform all the covenants, matters and things required to be by the obligee performed; and if the obligee default in the performance of any matter or thing in this instrument, or in said contract agreed or required to be performed by the obligee, the company shall thereupon be relieved from all liability hereunder. * * * If any changes or alterations by the principal and obligee be made in the plans or specifications for the work mentioned in said contract, the obligee shall immediately so notify the company of such changes or alterations, giving a description thereof and stating the amount of money involved by such changes or alterations: Provided, however, that when the cost of said changes or alterations shall in the aggregate amount to a sum equal to 10 per cent. of the penal sum of this bond, no further changes or alterations

shall be agreed upon by the principal and obligee, until the consent of the company shall first be obtained thereto."

The evidence further discloses that on February 18, 1910, and while Binning was at work on the building, plaintiff sent by registered mail to the office of the surety company in New York an itemized list of changes from the original plans which, he wrote the company, had been agreed upon between him and Binning. Some of the 17 items in the list showed changes which added to the contract price \$509.58; others showed changes which reduced it \$309.40; and others which did not affect it at all. In the list was an item providing for piping gas to the front store room, for two openings for light, and to halls above first floor, "cost not yet ascertained." Another provided for wiring for three electric signs, "cost not yet ascertained"; but it seems the cost of both these items was furnished on a later list. On March 13, 1910, plaintiff sent to the surety company a similar list which, he wrote the company, had been agreed upon between him and Binning, containing 28 items, some of which added to the contract price \$40.18, and others which reduced it \$36. All of them provided for changes in the plans and specifications; the last item on the list provided for margins on floors of rooms of upper story to be stained, "cost not ascertained." The cost of this item also was furnished on a later list. On March 5, 1910, plaintiff and Binning entered into an agreement, supplemental to that of December 7th, consisting of 26 items, some of which added to the contract price \$452.16, and some deducted therefrom \$324.40, and some did not affect it at all, but all provided for changes in the plans and specifications. As defendant does not complain of want of notice of these changes, we presume the same was given. On April 3d Binning quit the contract, after receiving some \$18,000 of the contract price of \$21,500 for the building whereupon plaintiff, about June 1st, completed the same, as he had a right to do under the contract, at a cost of \$9,862.25 in excess of the contract price, after which he brought this suit; from all of which it is contended that, as the bond is in the penal sum of \$4,300, and the increased cost of the changes in the first list of items exceeded 10 per cent. of the penal sum of the bond, the consent of the company thereto as to such excess was not only a condition precedent to the right of plaintiff and Binning to agree to make them, but a condition precedent to plaintiff's right to recover on the bond; and that, as the evidence discloses such consent was never had before the changes were made, plaintiff cannot recover. This contention cannot be sustained.

Standing alone, the changes made were expressly authorized without the consent of any one, save the parties to the contract, by that part of the contract which provides:

"It is mutually understood by the parties hereto that any changes made in the plans and specifications for the foregoing building (shall be binding) if a mutual agreement is made in writing and witnessed (and), the amount of same may be added or deducted as the case may be (from the contract price) without in any wise affecting this instrument." (Words in parenthesis are ours.)

Which means that any changes when in writing, whether they cost in excess of 10 per cent. of the penal sum of the bond or not, may be made without notice to any one and shall be binding upon the parties to the contract without in any wise affecting "this instrument"—that is, the contract; and, since it is a part of the bond, without affecting the validity of the bond. Incorporated as it was in the bond, this stipulation became and was that of the surety company as well as that of the parties to the contract and evidenced the consent of the company thereto.

In *Woodruff v. Schultz et al.*, 155 Mich. 11, 118 N. W. 579, 16 Ann. Cas. 346, in the headnotes it is said:

"Alterations in a building contract, made by agreement between the principal contractor and the owner, whereby certain provisions of the contract are abrogated and other provisions substituted therefor, will operate to release a surety on the contractor's bond who has not assented thereto. * * *

Of course, where he has assented, the contrary rule applies and the surety will be bound. This case is ably annotated in volume 16, Ann. Cas. At page 348 the learned author states the rule to be:

"It is well settled that if the contract between the owner and the contractor permits alterations to be made in the work to be done, or if the bond itself permits the alterations, the surety will not be discharged by reason of a material alteration made without his express consent, where such alteration is one contemplated by the terms of the stipulation permitting alterations."

This note cites *American Surety Co. v. Scott et al.*, 18 Okl. 264, 90 Pac. 7. There it was held that where a surety company for a consideration enters into a bond for the faithful performance of a builder's contract, and the contract and bond contain a provision that changes may be made in the building at the option of the owner, that the making of such changes will not avoid the bond. See, also, *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256; *Young et al. v. Young et al.*, 21 Ind. App. 509, 52 N. E. 776; *Schreiber et al. v. Worm*, 164 Ind. 7, 72 N. E. 852; *Lumber Co. v. Surety Co.*, 124 Iowa, 617, 100 N. W. 556; *McLennan v. Wellington*, 48 Kan. 756, 30 Pac. 183; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 578; *Eureka Stone Co. v. First Christian Church*, 86 Ark. 212, 110 S. W. 1042; *United States v. Walsh et al.*, 115 Fed. 697, 52 C. C. A. 419; *McMullen et al. v. United States*, 167 Fed. 460, 93 C. C. A. 96.

And so, we repeat, the changes thus agreed upon might properly have been made pursu-

ant to the terms of the contract construed by itself. And still leaving the parties to the contract to make changes ad libitum and without notice, but in modification of said provision in the contract as to notice only, the bond further reads:

"If any changes * * * be made in the plans for the work mentioned in the contract, the obligee shall immediately so notify the company of such changes, * * * giving a description thereof and stating the amount of money involved by such changes."

Now, as "if" means "when" (*State ex rel. Haskell v. Houston*, 21 Okl. 782, 97 Pac. 982), and changes in the plans can be made as well by adding thereto as deducting therefrom (*Rule et al. v. Anderson*, 160 Mo. App. 347, 142 S. W. 358), this provision means that when the obligee and the principal in the bond agree to make additions to or deductions from the work prescribed by the plans, the obligee shall immediately so notify the company thereof, describing them, and stating the amount of money involved in such changes. And, so far, neither contract or bond places any limitations on the contracting parties as to the amount of the cost of such changes, but provides only for notice, describing the changes and stating the amount of money involved therein. And by "money involved," as used in that connection, the bond means the amount of money involved in both additions to and deductions from the contract price; as where a door is added at a cost of \$50 and another is left off at a cost of \$25, the "amount of money involved" means \$75. And so we say that, when Haley furnished the surety company the list of items of February 18, 1910, agreed on by him and Binning and so notified the company, he lived up to all conditions precedent to his right to recover thus far denominated in the bond. But the bond, prescribing further conditions precedent, reads:

"Provided, however, that when the cost of said changes * * * shall in the aggregate amount to a sum equal to 10 per cent. of the penal sum of the bond, no further changes shall be agreed upon by the principal and obligee, until the consent of the company shall first be obtained thereto."

Relying upon which it is contended that the cost of the changes agreed upon in the list of February 18th is in excess of 10 per cent. of the penal sum of the bond, and hence the consent of the company thereto, as to such excess, was a condition precedent to plaintiff's right to recover on the bond, and, as such consent was never had, plaintiff cannot recover. Assuming for the moment that the cost of said changes were in amount in excess of 10 per cent. of the penal sum of the bond, it seems that defendant's contention is correct.

Norwegian, etc., Congregation v. United States Fidelity & Guaranty Co., 81 Minn. 32, 83 N. W. 487, was a suit by the obligee against the principal and surety upon a

builder's bond, the conditions of which were substantially as here. It was alleged that the contractor failed to perform his contract in certain particulars. The cause was defended on the ground that certain changes and alterations had been made in the plans and specifications without proper consent, as here, and hence the surety was released from liability on the bond. At the close of the evidence the court directed a verdict for plaintiff, and the company appealed. The contract authorized changes as here. The bond, however, provided:

"But a departure from the terms of said contract as to the time and manner of payment of the contract price, and changes in the plans or specifications shall not discharge the surety on this bond, or reduce the liability of the surety. No change, however, shall be made in the plans or specifications which will increase the cost of the building more than \$300, without the consent of the surety company to such change."

Construing which the court said:

"Fairly construed, in connection with a provision in the contract which authorized changes and alterations in the plans and specifications, it is evident that no departure from the terms of the contract as to changes and alterations in the work without the consent of the defendant surety company released the latter, unless the cost of the structure was increased in a sum exceeding \$300 by reason of such changes and alterations. The language is that a departure from the terms of the contract as to changes and alterations shall not discharge the surety unless such changes and alterations increase the cost in a sum exceeding \$300."

But reversed the cause because the court refused to permit the surety company to prove that the increased cost of the changes made exceeded \$300. After reversal this cause was again tried on that issue alone and on appeal the court, in the same case reported in 83 Minn. 269, 86 N. W. 330, adhered to this construction of the contract and in the headnotes said:

"A provision in a surety bond to secure fulfillment of a contract to erect a church that alterations increasing the cost \$300 are allowed restricted permissible changes in the plans to that amount, and, if such changes increased the cost to a larger sum, such changes would constitute a departure from the contract, and would release the surety company; following previous decision of this case in 81 Minn. 32 [83 N. W. 487]."

Neuwirth v. Moydell, 188 Mo. App. 467, 174 S. W. 206, was a suit by an obligee against the principal and sureties on a builder's bond, as here. The defense urged was also substantially the same. Construing together both contract and bond, it was held that although the contract provided that alterations might be made in the contract by the parties thereto, the extent thereof which might be made without the consent of the sureties on the bond was limited by a condition in the bond that the contractor shall well and truly perform the contract and any alterations and additions to it, provided they do not exceed \$8 in extra costs. Concerning which the court said:

"The case concedes that defendants' sureties on the bond were in no wise notified with respect to the several changes and variations from the original specifications and plans of construction detailed in the contract, and such changes were made between the original parties to the building contract without their knowledge or consent. Because of this it is urged the sureties are discharged, and it is entirely clear that this argument must prevail. It is undoubted that there is no implied obligation on the part of the surety that he has undertaken more or other than that expressed in his contract, for it is only to the extent and in the manner and under the circumstances pointed out in the contract to which he has become a party that he is bound, and not further. Therefore, if the original parties to the contract make changes or alterations which go to vary and alter its terms through substituting other matters for those called for in the contract, so as to destroy its identity in the matter of performance, without the consent of the surety, he is thereby relieved and discharged from the secondary obligation undertaken on the ground that the identity of the contract on which he assumed to respond has been destroyed through the act of the original parties without consulting him. This doctrine is constantly applied in relief of the surety on builders' bonds, as will appear by reference to the following cases in point: See *Beers v. Wolf*, 118 Mo. 179, 22 S. W. 620; *Reissaus v. Whites*, 128 Mo. App. 136, 106 S. W. 603; *School District v. Green*, 134 Mo. App. 421, 427, 114 S. W. 578; *Utterson v. Elmore*, 154 Mo. App. 646, 136 S. W. 9."

But the changes evidenced by the list in controversy were not in excess of 10 per cent. of the penal sum of the bond. The list made changes in the plans and showed some items which added thereto and to the contract price \$509.58, and others which made omissions therefrom and deducted from the contract price \$309.40. The total of these two amounts was the "amount of money involved" in the changes; notice of which, in every instance, was required by the bond to be given the company. But, as it costs nothing to make changes in the plans omitting requirements in the contract, and, as it is only such changes as add thereto which cost, it is the cost of the latter, less the cost of the former, which goes to make up the "aggregate" cost of the changes in the list, to make which, when such cost exceeds 10 per cent. of the penal sum of the bond, the consent of the company is a condition precedent. We say it is the cost of the changes which add to the contract price, less those which deduct therefrom which goes to make up the "aggregate" cost of the changes, of which the company must have notice and consent thereto as a condition precedent to the right to make them; for if, for instance, a door to cost \$25 is left off the plans and another is agreed upon at a cost of \$50, the actual cost or "aggregate" cost of making the changes cannot be other than \$25. Or, if a window to cost \$10 is left off and tiling added to cost \$40, while the money involved by such changes is \$50, it is clear the "aggregate" cost of the changes is \$30. And so contract and bond construed together means that, when lists of changes are agreed on from time to time between the obligee and the

principal in the bond, although the "money involved by the changes" evidenced thereby may in any one or all the lists together exceed 10 per cent. of the penal sum of the bond, if the costs of the changes do not in the aggregate amount to a sum equal to 10 per cent. of the bond, while notice to the company of the changes is necessary, its consent to make them is not a condition precedent to the right so to do. By "aggregate" cost of the changes is meant their cost as a whole; i. e., their cost less the cost of deductions. For it is said in *Receiver v. Hayward*, 35 N. B. 453:

"In order to arrive at the aggregate value of the property of a deceased person under 59 Vict. c. 42, § 4, the Succession Duty Act of 1896, the debts owed by the estate should be deducted. The word 'aggregate' signifies no more than if the section had said 'the whole value.'"

Tested by this rule, neither in the list of February 18th, nor in the list of March 3d, nor the supplemental agreement of March 5th, nor in any other list to which our attention has been called, nor in them all together does it appear that the cost of the changes in the plans aggregate to exceed 10 per cent. of the penal sum of the bond. This for the reason that the aggregate cost of the changes in the list of February 18th was \$509.58, less \$309.40, or \$200.18; those in the list of March 3d \$40.18, less \$36, or \$4.18; those in the supplemental agreement of March 5th \$452.16, less \$324.40, or \$127.76; in all, or in the "aggregate," \$332.12—as near as we can figure it, being unaltered by counsel.

[1] We are therefore of opinion, assuming that the consent of the company thereto was a condition precedent to the right to make changes in the plans "when the cost of the changes * * * shall in the aggregate amount to a sum equal to 10 per cent. of this bond," that the changes made as evidenced by any one or all of the lists complained of did not aggregate that sum, and hence the judgment of the trial court is right, unless reversible upon other grounds. And counsel contend it is because, they say, that, as the bond provides:

"* * * If the obligee default in the performance of any matter or thing in this instrument, or in said contract agreed or required by the obligee to be performed, the company shall thereupon be released from all liability hereunder."

And the contract:

"Payments on the work shall be made from time to time as the work progresses upon the architect's certificate that said amounts have become due and at no time until the completion will they be made to exceed 85 per cent. of the value of work finished and in place at the date of each."

And as the facts are that those payments did exceed 85 per cent. value of the work finished and in place at the date of each payment, that defendant was released from liability upon the bond. Or, in other words, that a compliance with said stipulation in the contract was a condition precedent to the

right to recover on the bond. Assuming such to be a condition precedent, it does not follow that a failure to perform it will defeat a recovery on the bond in toto, but only to the extent defendant has been injured by a failure to perform.

In *School District No. 1 v. McCurley*, 92 Kan. 53, 142 Pac. 1077, the court said:

"A marked distinction is recognized by many of the courts as to the application of the rule as between contracts of an accommodation surety and the contract of a paid surety. As to the contracts of an accommodation surety made dependent upon a condition precedent, the courts all agree that the strict letter of the contract will be enforced; but, as to the contract of a paid surety, many of the courts, especially in the later decisions, inquire whether the surety was injured by the default of the condition, and, if so, they enforce it only to the extent of the injury. In *Hull v. Bonding Co.*, 86 Kan. 842, 120 Pac. 544, it is held that the rule that sureties are favorites of the law does not apply to corporations engaged in the business of furnishing bonds for profit."

In *American Surety Co. v. Scott & Co.*, 18 Okl. 265, 90 Pac. 7, in the syllabus it is said:

"Where in the builder's contract and bond provision is made that estimates shall be made by the architect on the first and fifteenth days of each month, and that payments shall be made to the contractors according to the estimate, less fifteen per cent., and where the owners, in order to accommodate the contractors in procuring material and labor, advance certain amounts between the periods, at which estimates are made, and where such amounts are taken into consideration and deducted from the amount due at the time of, and under the conditions of, the next estimate, and where such amounts so advanced are applied upon the labor, material, and freights, and where no loss accrues to the surety or contractors by reason of such advances, held, that such advances are not a violation of the contract and will not be held to avoid the conditions of the bond."

And in the body of the opinion:

"It is contended by counsel that this was a violation of the terms of the contract. No loss occurred, but, as a mere accommodation, to enable the contractors to proceed with the purchase of material and the employment of men, these advances were made. Certainly, no injury was caused thereby, and we cannot see how it can be construed into such a violation of the contract as would avoid the conditions of the bond."

And there is no evidence reasonably tending to prove that defendant was injured by a failure to perform said stipulation in the contract. Upon this point the evidence discloses that, whenever material was delivered on the ground for use in the building and before the work was finished and in place, the obligee would pay the bill for the material at a discount of 2 per cent., which he would divide with Binning; that the money so paid was taken into consideration and accounted for at the next estimate, and that this was done to accommodate Binning and to promote the work. The evidence further discloses that this was done from time to time as the work progressed, and that, when Binning quit, the construction work and material on the ground amounted to about three-

fourths of the total price of the building. But, as no attempt was made to prove how much material was thus paid for and left on the ground at the time Binning quit, we have no way of determining whether defendant was injured by this course of conduct or not. Counsel say such defendant was and from a mass of data invite us to say how and to what extent; but such it is impossible to do, and as the burden of proof was upon the defendant to establish the injury and such he has not done, this point is ruled by *American Surety Co. v. Scott & Co.*, supra.

Finding no error in the record, the judgment of the trial court is affirmed. All the Justices concur.

BOARD OF COM'RS OF MAYES COUNTY v. VANN. (No. 7859.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR 494 — RECORD — QUESTIONS PRESENTED FOR REVIEW—ENTRY OF JUDGMENT.

Where the case-made does not affirmatively show that the judgment appealed from has been entered in the journal of the court, this court is without jurisdiction to review the same.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2285, 2286; Dec. Dig. 494.]

2. APPEAL AND ERROR 641—RECORD—AU- THENTICATION—SEAL.

Failure of the clerk to attest the signature of the trial judge to his certificate as to the correctness of the case-made, with the seal of the court, deprives this court of jurisdiction to consider said case-made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2789, 2790; Dec. Dig. 641.]

Commissioners' Opinion, Division No. 1. Error from District Court, Mayes County; Preston S. Davis, Judge.

Action by Daniel W. Vann against the Board of County Commissioners of Mayes County, Okl. Judgment for plaintiff, and defendant brings error. Dismissed.

J. M. Hill, Co. Atty., of Pryor, for plaintiff in error.

RUMMONS, C. [1] The case-made in this case fails to affirmatively show that the judgment from which plaintiff in error appeals was entered upon the journal of the court. The case-made contains what appears to be a decree of the court, to which is attached a stipulation of the attorneys for the respective parties, agreeing that it is a true, correct, and exact copy of the decree, and that said decree was filed for record on the 10th day of September, 1915. It does not, however, appear where such decree was filed or that it was ever entered upon the journal of the court. This being the case there is nothing before this court for consideration. *Mobley v. Chicago, R. I. & P. Ry. Co.*, 44

Okl. 788, 145 Pac. 321; Schuck v. Moore, 150 Pac. 461; Dodder v. Washita Lumber Co., 151 Pac. 679; In re Garland, 153 Pac. 153.

[2] The certificate of the trial judge to the case-made is not attested by the seal of the court. We are therefore without jurisdiction to consider the case-made. Board of Commissioners v. State, 150 Pac. 455; Tarkenton v. Carpenter, 150 Pac. 482; Walker v. Walker, 154 Pac. 512. These fatal defects in the record deprive this court of jurisdiction to consider this appeal.

The appeal should therefore be dismissed.

ZAHN v. OBERT et al. (No. 7687.)
(Supreme Court of Oklahoma. June 27, 1916.)

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL §53—DEATH OF PARTY—SURVIVAL OF CAUSE OF ACTION.

This suit was for the recovery of money on an appeal bond, and the cause of action, under the statutes, survived and passed to the personal representatives of the deceased plaintiff.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 251, 252; Dec. Dig. §53.]

2. ABATEMENT AND REVIVAL §74(1), 75(1)—PROCEEDINGS FOR REVIVAL—ORDER—CONSENT AND NOTICE.

A careful examination of sections 5288, 5293, 5294, Rev. Laws Okl. 1910, noticing the phraseology and punctuation, clearly shows that no consent is necessary if the order to revive the action is made before the expiration of one year from the time the order might have been first made. If made with consent either before or after the expiration of one year from the time the order might have been first made, no notice, as required in section 5288, supra, is necessary. If made before the expiration of one year without consent, then the notice and service thereof required by section 5288, supra, become jurisdictional and mandatory. It cannot be made at all after the expiration of one year without consent.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 429, 441; Dec. Dig. §74(1), 75(1).]

3. ABATEMENT AND REVIVAL §75(1)—APPEAL AND ERROR §332—ORDER OF REVIVAL—AUTHORITY OF APPELLATE COURT.

The order of revivor in this cause, made by the trial court on September 7, 1915, within the year, but without consent, and without notice, is utterly null and absolutely void and the court below acted entirely without jurisdiction; and, there being no legal and proper revivor in the court below, where such revivor would of necessity have to be made for the reason that this action was pending in such court at the time of his death, no plaintiff in error is legally brought before this court in the proceedings in error, and more than six months, the time fixed by law in which to commence proceedings in error in this court, having elapsed, there is no judgment of the court below, and no revived cause of action brought up for this court to hear, consider, and determine. This action cannot be revived here, for the obvious reason that the plaintiff in error, plaintiff below, did not die while the action was pending in this court on appeal.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 441; Dec. Dig. §75(1); Appeal and Error, Cent. Dig. §§ 1842-1845; Dec. Dig. §332.]

4. APPEAL AND ERROR §185(1), 193(9)—PRESENTING QUESTIONS IN TRIAL COURT—NECESSITY—JURISDICTION.

Under section 4742, Rev. Laws Okl. 1910, objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action, is never waived. The want of jurisdiction in the trial court may be raised for the first time in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1168, 1170-1176, 1232-1236; Dec. Dig. §185(1), 193(9); Pleading, Cent. Dig. §§ 1355-1374.]

5. APPEAL AND ERROR §23—DISMISSAL—PROCEEDINGS.

A motion to dismiss proceedings in error, which raises a jurisdictional question, will be considered and determined, when the case is reached for final disposition, although the notice thereof required by rule 16 of the court (137 Pac. x) has never been given. And jurisdictional questions, both as to the trial court and the appellate court, will be raised by the appellate court on its own initiative, or sua sponte.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 99; Dec. Dig. §23.]

6. APPEAL AND ERROR §21—JURISDICTION—CONSENT OF PARTIES.

Parties cannot confer jurisdiction upon any court by agreement, and certainly can neither confer jurisdiction upon the Supreme Court by agreement nor by voluntarily coming into the case as an original action in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 88-97; Dec. Dig. §21.]

7. ABATEMENT AND REVIVAL §72(7)—PROCEEDINGS FOR REVIVAL—PARTIES.

Aside from a failure to give notice, the attempted revivor is void. The subject-matter of the action is personal property, and passes to the representatives of the deceased and not to his heirs. Section 5290, Rev. Laws Okl. 1910, provides: "Upon the death of the plaintiff in an action, it may be revived in the name of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in their names; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names." In this case, upon the death of the plaintiff, the right of action passed, not to his heirs, but to the administrator of his estate. The subject-matter of the action was a part of the personal estate, and subject to the payment of the debts of the deceased, if judgment be secured and satisfied. The attempted revival in the names of the heirs was therefore a nullity, and is of no consequence in the determination of the question in this case.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 386, 399, 400, 413; Dec. Dig. §72(7).]

8. PARTIES §95(1)—AMENDMENT—STATUTORY PROVISIONS.

Section 4768, Rev. Laws Okl. 1910, which provides that the title of a cause shall not be changed at any of its stages, means the title or caption of the answer or demurrer, or other paper filed in the cause after the petition, shall be like that of the petition, naming plaintiff first; whereas, before the Code, it was usual to name the party putting in the pleading first. This section does not conflict with section 4790, Rev. Laws Okl. 1910, which authorizes the court, in furtherance of justice, to amend any

pleading, etc., by adding to or striking out the name of any party, etc.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 160; Dec. Dig. ¶ 95(1); Pleading, Cent. Dig. § 611.]

Commissioners' Opinion, Division No. 4. Error from District Court, Caddo County; Cham Jones, Judge.

Action by Abe Zahn against M. Obert and another. Judgment for defendants, and plaintiff brings error. Motion of defendant B. W. Hammert to dismiss writ of error sustained.

See, also, 158 Pac. 351.

Blake, Boys & Shear, of Oklahoma City, and C. H. Carswell, of Anadarko, for plaintiff in error. A. J. Morris, of Anadarko, for defendants in error.

DAVIS, C. The motion to dismiss, omitting the caption and mere formal parts, reads as follows:

"Comes the defendant in error, B. W. Hammert, and moves the court to dismiss the petition in error herein for the following reasons, to wit: The judgment in the lower court was rendered March 8, 1915. The plaintiff below, who is the only plaintiff in error in this court, died July 14, 1915, as shown by a certified copy of the application for revivor, which is attached hereto, made part hereof, and marked 'Exhibit A' and the petition in error was not filed here until the 8th day of September, 1915. That said cause was never revived in the trial court, and no attempt was made in that court to revive it except on the 7th day of September, 1915, the day prior to the filing of the petition in error, certain parties made application to the district court to have said cause revived, which application is hereinabove referred to as 'Exhibit A' and on the same day, without any notice to the defendant in error, B. W. Hammert, and without his consent, a purported order was made by the judge of said district court, purporting to revive said action, a copy of which is attached hereto, made a part hereof, and marked 'Exhibit B' all of which is shown by the affidavit of A. J. Morris, which is attached hereto, made part hereof, and marked 'Exhibit C.' That more than six months has expired since the rendition of said judgment, and no parties have become plaintiffs in error in this court except the deceased, and this court therefore has no jurisdiction to review the judgment of the trial court for want of necessary parties plaintiff in error."

Exhibit A reads as follows:

"Comes now George G. Zahn, Norman Zahn, Abraham B. Zahn, Henry Zahn, and Beulah May London, née Zahn, and allege and represent to the court that heretofore, and by the consideration of the district court of Caddo county, state of Oklahoma, and on the 8th day of March, 1915, in a case therein pending, entitled Abe Zahn, Plaintiff, v. M. Obert and B. W. Hammert, Defendants, there was rendered a judgment against the said Abe Zahn, and in favor of B. W. Hammert, adjudging that in said action the said plaintiff, Abe Zahn, should not recover against the said B. W. Hammert, as prayed for in the petition of said plaintiff, and adjudging that the said B. W. Hammert recover his costs against the said Abe Zahn on his cause of action in said petition set out. The said George G. Zahn, Norman Zahn, Abraham B. Zahn, Henry Zahn, and Beulah May London, née Zahn, allege that heretofore, and on the 14th

day of July, 1915, the said Abe Zahn died intestate, and that no administrator has been appointed for his estate at the date of the filing hereof, and no administration had of said estate; that the said George G. Zahn, Norman Zahn, Abraham B. Zahn, Henry Zahn, and Beulah May London, née Zahn, are the children of the said Abe Zahn, born in lawful wedlock, and the heirs of the said Abe Zahn, and are entitled to proceed with said action to determination in favor of or against them. Wherefore the said George G. Zahn, Norman Zahn, Abraham B. Zahn, Henry Zahn, and Beulah May London, née Zahn, heirs of the said Abe Zahn, as aforesaid, pray that an order be made herein, reviving the said cause in the name of the said George G. Zahn, Norman Zahn, Abraham B. Zahn, Henry Zahn, Beulah May Zahn, successors in interest of the said Abe Zahn, deceased, and that the same proceed in favor of, or against them."

This supplemental petition and application for order of revivor, Exhibit A, was filed in the district court of Caddo county, Okla., on September 7, 1915, and on the same day the court granted the following order, Exhibit B:

"Now, on this 7th day of September, 1915, it appearing that heretofore, by the consideration of the district court of Caddo county, state of Oklahoma, and on the 8th day of March, 1915, in a cause therein pending, entitled Abe Zahn, Plaintiff, v. M. Obert and B. W. Hammert, Defendants, there was rendered a judgment against the said Abe Zahn, and in favor of B. W. Hammert, adjudging that in said action the said Abe Zahn should not recover against the said B. W. Hammert, as prayed for in the petition of said plaintiff, and adjudging that the said B. W. Hammert recover his costs against the said Abe Zahn on the cause of action in said petition set out; and it being made further to appear that heretofore, and about the 14th day of July, 1915, the said plaintiff, Abe Zahn, died intestate, and left as his heirs the said George G. Zahn, Norman Zahn, Abraham B. Zahn, Henry Zahn, and Beulah May London, née Zahn, children of the said Abe Zahn, born in lawful wedlock, and that by operation of law these plaintiffs succeeded to the rights of the said Abe Zahn, and prosecute this appeal in their own behalf; and that no will of the said Abe Zahn has been found, and, so far as known, none exists, and the said Abe Zahn did not dispose of his said rights in said action; that no administration has been had upon the estate of the said Abe Zahn; and that at the date of the filing hereof no administrator to his estate has been appointed: Now, therefore, it is by the court considered, ordered, and adjudged that the said action be revived in the name of the said George G. Zahn, Norman Zahn, Abraham B. Zahn, Henry Zahn, and Beulah May London, née Zahn, children and heirs of the said Abe Zahn, deceased, and that the same proceed to determination in favor of or against them, and for all proper relief; and that service hereof be made in the same time and manner provided for summons in civil action."

The affidavit mentioned, Exhibit C, reads as follows:

"State of Oklahoma, County of Caddo—ss.:

"A. J. Morris, being first duly sworn upon oath states that he is attorney for B. W. Hammert, and was such attorney for him in the case of Abe Zahn v. M. Obert and B. W. Hammert in the district court of Caddo county, Oklahoma, which was appealed to the Supreme Court and is cause No. 7637; that no notice was served upon the said B. W. Hammert or

his attorney of the application to revive said action, filed in the district court, and no notice was given to the said B. W. Hammert or his attorney of the purported order of revival made on September 7, 1915, and the said B. W. Hammert did not consent to such revival in person or by attorney. [Signed] A. J. Morris.

"Subscribed and sworn to before me this 27th day of April, 1916.

"[Signed] Guy R. Gillett, Court Clerk,
"[Seal.] By O. W. Smith, Deputy."

The case-made contains the supplemental petition and application for order of revivor, Exhibit A, supra, and the order of revivor, Exhibit B, supra, and the petition in error is brought in the names of George G. Zahn, Norman Zahn, Abraham B. Zahn, Henry Zahn, and Beulah May London, née Zahn, and recites the application for and order of revivor in the court below.

[1] This suit was for the recovery of money on an appeal bond, and the cause of action, under the statutes, survived and passed to the personal representatives of the deceased plaintiff.

[2] Plaintiffs in error do not contend that any notice of revivor was given defendants in error, or that said defendants in error consented thereto, but, on the contrary, contend that under the statutes, the revivor being made, within a year from the death of the plaintiff, Abe Zahn, neither notice nor consent was necessary. With this contention of plaintiffs in error we cannot agree in the light of our statutes touching these questions. Section 5288, Rev. Laws Okl. 1910, reads as follows:

"5288. If the order is made by the consent of the parties, the action shall forthwith stand revived; and, if not made by consent, notice of the application for such order shall be served in the same manner and returned at the same time as a summons, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor, the order shall be made."

Section 5293, Rev. Laws, supra, reads as follows:

"5293. An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successors, unless in one year from the time it could have been first made, except as otherwise provided by law."

And section 5294, Rev. Laws, supra, reads as follows:

"5294. An order to revive an action, in the names of the representatives or successor of a plaintiff, may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers have ceased in the meantime, the order of revivor, on both sides, may be made in the period limited in the last section: Provided, that where the death of a party is not known or for other unavoidable reasons the court may permit the revivor within a reasonable time thereafter."

A careful examination of these sections, noticing the phraseology and punctuation, clearly shows that no consent is necessary, if the order to revive the action is made before the expiration of one year from the time the

order might have been first made. If made with consent either before or after the expiration of one year from the time the order might have been first made, no notice as required in section 5288, supra, is necessary. If made before the expiration of one year without consent, then the notice and service thereof required by section 5288, supra, become jurisdictional and mandatory. It cannot be made at all after the expiration of one year without consent. Section 5288, supra, was a part of the Code of Civil Procedure of the state of Kansas, and was adopted from the Code of Civil Procedure of that state as found under section 4525, vol. 2, General Statutes of Kansas 1889, this section being section 428 of the General Statutes of Kansas of 1868, by the Legislature of Oklahoma Territory, and became effective in said territory on August 14, 1893. Section 5300, Rev. Laws Okl. 1910, reads as follows:

"5300. If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment."

And section 5312, Rev. Laws, supra, reads as follows:

"5312. Where notice of a motion is required, it must be in writing, and shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where and the day on which it will be heard, the nature and terms of the order or orders to be applied for; and if affidavits are to be used on the hearing, the notice shall state that fact, and it shall be served a reasonable time before the hearing."

These sections were also adopted from Kansas in the manner hereinbefore stated, section 5300 being section 4537, vol. 2, General Statutes of Kansas, 1889, and section 440 of the General Statutes of Kansas of 1868, and section 5312, supra, being section 4633, vol. 2, General Statutes of Kansas 1889, and section 534 of the General Statutes of Kansas of 1868. These sections of our statutes, supra, have been given a fixed and settled construction by the Supreme Court of the state of Kansas prior to their adoption here, and by this fixed and settled construction we are bound. *United States ex rel. v. C. O. & G. R. R. Co.*, 3 Okl. 404, 458, 41 Pac. 729; *Raymond v. Nix, Halsell & Co.*, 5 Okl. 656, 662, 49 Pac. 1110; *Barnes et al. v. Lynch et al.*, 9 Okl. 156, 170, 59 Pac. 995; *Cordray v. Cordray*, 19 Okl. 36, 91 Pac. 781; *Maas et al. v. Dunmyer*, 21 Okl. 434, 96 Pac. 591; *Pioneer Tel. & Tel. Co. v. City of Bartlesville*, 27 Okl. 214, 111 Pac. 207; *Spaulding et al. v. Polley*, 28 Okl. 764, 115 Pac. 864.

In an opinion by Chief Justice Horton, speaking for the Supreme Court of Kansas, 1882, we find the following:

"This was an action in the nature of ejectment by defendants in error (plaintiffs below) against plaintiffs in error (defendants below). Plaintiffs below rested their right for the recovery of the real estate in controversy upon a sheriff's deed executed to their grantor, Daniel B. Hadley, upon the 12th day of November, 1880. It appears from the recitation in said deed that the sale of the real estate was had

upon a purported revival of a judgment, entered April 10, 1880. The real question involved in the case is whether the order of revival was void. The judgment was rendered on the 18th day of March, 1872, for the sum of \$901.30, in an action then pending in the district court of Wyandotte county, wherein Alfred H. Sowers was the plaintiff and W. F. Schwartz and George Gruble were the defendants. This judgment became dormant. On February 24, 1880, the plaintiff in said judgment filed his motion to obtain an order to revive the judgment. As the mode of reviving the judgment is the same as that of reviving an action, and therefore must be made within a year after the judgment becomes dormant, unless consent is given, and as no consent was given in this case, it is clear that the order of revivor was erroneously made on the 10th of April, 1880. *Angell v. Martin*, 24 Kan. 224; *Halsey v. Van Vliet*, 27 Kan. 474. Was it a nullity? Section 428 of the Code prescribes that if the order is not made by consent, notice of the application for such order shall be served in the same manner and returned within the same time as a summons upon the party adverse to the one making the motion, and if sufficient cause be not shown against the revivor, the order shall be made. Where a notice is required, it must be in writing, and shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where and the day on which it will be heard, the nature and the terms of the order, or orders, to be applied for, and if affidavits are to be used on the hearing, the notice shall state that fact. Code, § 534. Instead of this notice, a summons in the ordinary form was issued, notifying W. F. Schwartz and George Gruble that they had been sued by Alfred H. Sowers, and that unless they answered by the 20th day of March, 1880, the petition of the plaintiff filed against them would be taken as true, and judgment rendered accordingly. This summons was personally served on George Gruble on the 26th day of February, 1880. The summons does not meet the requirements of the notice prescribed to be served before an order of revivor of a dormant judgment can be made, and as the judgment of March 13, 1872, was final in its character, the defendants therein were acquit and dismissed without day at the close of the term at which it was rendered. No further action could be taken in the case prejudicial to their interests without notice to them. If the plaintiff in that judgment desired to revive it, he must have pursued the course pointed out by the statute. The terms of a notice for the application of an order of revivor, to be served before the order shall be made are clearly set forth in the statute; and, although such notice is to be served in the same manner and returned within the same time as an ordinary summons, yet, to give the court jurisdiction, the notice must be in substantial compliance with the statute. As the summons issued in no way complied with the statute, it cannot be said that the notice was merely defective. A summons was issued, but no notice. *Lyon v. Vanatta*, 35 Iowa, 521; *Freeman on Judg.*, §§ 72, 117. As the order of the revivor of the judgment was made without notice, the court acted without jurisdiction, and such revivor was wholly void. Substantially, the revivor stands as made, without notice to or consent of the parties adverse thereto. As the order of revivor was void, the sale of the property in dispute upon the execution issued upon such order falls, and neither Daniel B. Hadley nor his grantees acquired any right of title or possession to the premises by virtue of the sheriff's sale made upon the execution issued upon said void order by revivor, or upon the sheriff's deed executed upon such sale. From the record, the Woods have no title under the sheriff's deed." *Mary Gruble v. R. H.*

Wood, 27 Kan. 535; *Guess v. Briggs*, 54 Kan. 32, 37 Pac. 121; *Wilson v. McCornack*, 10 Okl. 180, 61 Pac. 1068.

[3] Upon this authority the order of revivor in this cause, made by the trial court on September 7, 1915, within the year, but without consent, and without notice, is utterly null and absolutely void, and the court below acted entirely without jurisdiction, and, there being no legal and proper revivor in the court below, where such revivor would of necessity have to be made for the reason that this action was pending in such court at the death of the sole plaintiff, and not in the Supreme Court at the time of his death, no plaintiff in error is legally brought before this court in the proceedings in error, and more than six months, the time fixed by law in which to commence proceedings in error in this court, having elapsed, there is no judgment of the court below, and no revived cause of action brought up for this court to hear, consider, and determine. This action cannot be revived here, for the obvious reason that the plaintiff in error, plaintiff below, did not die while the action was pending in this court on appeal.

[4, 5] Under section 4742, Rev. Laws Okl. 1910, objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action, is never waived. The want of jurisdiction in the trial court may be raised for the first time in the appellate court. *In re Talley*, 4 Okl. Cr. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805; *Peters v. United States*, 2 Okl. 116, 33 Pac. 1031; *Parlin & Orrendorff Co. v. Schram*, 4 Okl. 651, 46 Pac. 490; *Raspberry v. State*, 4 Okl. Cr. 613, 103 Pac. 865; *New v. Collins*, 21 Okl. 430, 96 Pac. 607; *Cummings v. McDermid*, 4 Okl. 272, 44 Pac. 276; *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 891; *Gibbons v. Territory*, 5 Okl. Cr. 212, 115 Pac. 129; *Shapleigh Hardware Co. v. Brittain*, 2 Ind. T. 242, 48 S. W. 1069; *Ansley v. McLoud*, 5 Ind. T. 563, 82 S. W. 908; *Buckles v. State*, 5 Okl. Cr. 109, 113 Pac. 244.

"A motion to dismiss proceedings in error, which raises a jurisdictional question, will be considered and determined, when the case is reached for final disposition, although the notice thereof required by rule 16 of the court has never been given." *Marvel v. White*, 5 Okl. 736, 50 Pac. 87.

And jurisdictional questions, both as to the trial court and the appellate court, will be raised by the appellate court on its own initiative, or sua sponte. *V. J. Howard et al. v. Freeman Arkansas et al.*, No. 6648, 158 Pac. 437, not yet officially reported, and cases therein cited.

Counsel for plaintiffs in error make an extensive argument in their response to motion to dismiss appeal, the conclusion reached being as follows:

"Here the appealing party dies, and his heirs immediately step into his place, and, filing in their own behalf a petition in error, prosecute the appeal prepared for by their ancestor, and duly serve and bring into court the defendant.

All parties interested are here, and the defendant, being here, has no complaint to offer, except that he don't want to answer to the cause of action, but this is no ground for dismissal, except in his own mind."

[6] With this contention and conclusion we cannot agree. Parties cannot confer jurisdiction upon any court by agreement, and certainly can neither confer jurisdiction upon the Supreme Court by agreement nor by walking or waiting into the case voluntarily as an original action in the Supreme Court. *American Nat. Bank of McAlester et al. v. Mergenthaler Linotype Co.*, 31 Okl. 533, 122 Pac. 507; *Springfield Fire & Marine Ins. Co. v. Glish, Brook & Co.*, 28 Okl. 824, 102 Pac. 708.

There is nothing in the case of *Skillem et al. v. Jameson et al.*, 29 Okl. 84, 116 Pac. 193, that supports the contention and conclusion of counsel for plaintiffs in error, supra—nothing. The journal in the office of the clerk of the Supreme Court shows that the supplemental petition and application for revivor, filed in this cause by the so-called plaintiffs in error in this court, was, by order of the Supreme Court proper, on the 28th day of March, 1916, duly denied on the authority of the *Skillem-Jameson Case*, supra.

This supplemental petition, etc., supra, and petition of George G. Zahn, administrator of the estate of Abe Zahn, deceased, filed in this court September 8, 1915, which does not appear to have ever been acted on in this court, comes too late, and this action not having been revived in the court below before the statutory time for instituting proceedings in error had expired, as already held in this opinion, confer no jurisdiction upon this court to proceed, and must therefore each be denied.

[7] Aside from a failure to give notice, the attempted revivor is void. The subject-matter of the action is personal property, and passes to the representatives of the deceased and not to his heirs. Section 5290, Revised Laws Okl. 1910, provides:

"Upon the death of the plaintiff in an action, it may be revived in the name of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in their names; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names."

In *Glazier v. Heneybuss*, 19 Okl. 316, 91 Pac. 872, the Supreme Court said:

"In this case, upon the death of the plaintiff, the right of action passed, not to his heirs, but to the administratrix of his estate. The subject-matter of the action was a part of the personal estate, and subject to the payment of the debts of the deceased, if judgment be secured and satisfied. The attempted revival in the names of the heirs was therefore a nullity, and is of no consequence in the determination of the question in this case."

To the same effect is *McKay v. Watson*, 40 Okl. 354, 187 Pac. 1177; *Presbury v. Pickett*, 1 Kan. App. 631, 42 Pac. 405.

[8] Counsel for the so-called plaintiffs in error has a misconception of section 4768, Rev. Laws Okl. 1910, when he makes the following statement and construction thereof at page 4 of his response to motion to dismiss appeal:

"Our statute provides (section 4681, Harris) that 'Every action must be prosecuted in the name of the real parties at interest,' and that 'the title of a cause shall not be changed at any of its stages' (section 4768, Harris). It is therefore apparent that an appeal could only be prosecuted as done by the appellants, continuing the title the same as the petition in error shows who the parties at interest are, and that they prosecute the appeal. There is no pretense that Abe Zahn prosecuted the appeal. There is therefore no basis for the pretension of movant, and it is immaterial whose name is plaintiff in error. Movant, however, is in error in this, for the petition in error filed by the administrator on September 8, 1915, when he came into the proceeding, shows that the action had been revived in the name of the successors in interest, and he adds them to the caption in a way not to violate the statute above cited. All the petitions in error filed in this proceeding show distinctly who was prosecuting the proceeding."

Kansas adopted this section, 4768, supra, from the Code of Civil Procedure of Ohio by an act of the Fifth Territorial Legislature of February 11, 1859. It was section 116 of the Ohio Code. Prior to its adoption by Kansas, and as early as January, 1855, the superior court of Cincinnati, in the case of *Ansonia India Rubber Co. v. Wolf*, 1 Handy (Ohio) 236, had given it the following settled construction:

"Section 116 of the Code, which provides that 'the title of a cause shall not be changed in any of its stages,' means the title or caption of the answer or demurrer, or other paper filed in the cause after the petition, shall be like that of the petition, naming plaintiff first; whereas, before the Code, it was usual to name the party putting in the pleading first. Section 116 does not conflict with section 137, which authorizes the court, in furtherance of justice, to amend any pleading, etc., by adding to or striking out the name of any party," etc.

This we hold to be the proper construction to be placed on section 4768, supra, under the practice and procedure in our jurisdiction.

For the reasons herein set forth, the motion to dismiss will be sustained, and the appeal and proceedings in error dismissed.

PER CURIAM. Adopted in whole.

CLEVELAND NAT. BANK v. BICKEL et al.
(No. 7420.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

PRINCIPAL AND SURETY — 104(5) — DISCHARGE OF SURETY SIGNING AS PRINCIPAL — EXTENSION OF TIME.

One who signs a promissory note executed after the passage of the Negotiable Instruments Act (Rev. Laws 1910, §§ 4169-4175) as a principal, although in fact a surety and known to the payee to be such, is not discharged by the

granting of an extension of time for payment to the principal debtor without his consent.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 195; Dec. Dig. ¶494.]

Commissioners' Opinion, Division No. 2. Appeal from County Court, Pawnee County; Geo. E. Merritt, Judge.

Action by the Cleveland National Bank against A. F. Bickel and another. Judgment for plaintiffs against defendant Bickel, and judgment for defendant W. H. A. Williams, and the Bank appeals. Reversed as to defendant Williams, with directions to set aside judgment in his favor, and to render judgment for the bank against him.

Blake & Hazlett, of Cleveland, for plaintiff in error.

BURFORD, C. This was an action on a promissory note executed after the passage of the Negotiable Instruments Act in this state. The note was signed by A. F. Bickel and W. H. A. Williams as principals. There was nothing on the face of the note to indicate that either was a surety. Each defendant answered, setting up that the note had been paid by the taking of a subsequent note and mortgage from a party by the name of Wilson. Williams, in addition, answered that he was a surety on the note. At the trial the court, to whom the case was tried without the intervention of a jury, found that the note and mortgage was taken from Wilson, the third party, not in payment of the original obligation, but as collateral security thereto. He held, however, that the surety, Williams, was discharged. Apparently this holding was based upon the fact that the note taken from Wilson became due after the maturity of the original obligation which it was taken to secure, from which the court concluded that the time of payment of the original obligation was necessarily extended until the maturity of the collateral note, and that this extension having been made without Williams' consent operated to release him. Even under the old act this conclusion was wrong. See *Randolph on Commercial Paper* (2d Ed.) 961; *U. S. v. Hodge*, 6 How. 279, 12 L. Ed. 437; *Roberson v. Blewins*, 57 Kan. 50, 45 Pac. 63; *Watauga Bank v. Matson*, 99 Tenn. 390, 41 S. W. 1062; 7 Cyc. 894, and cases cited. There was no proof of any agreement to extend, except such as might be drawn from the due date of the collateral.

The controlling proposition in the case, however, seems to be that as Williams signed as principal, and regardless of whether or not he was actually a surety, or whether or not that fact was known to the payee, he could be discharged only in the manner provided in article 9 of the Negotiable Instruments Act, being sections 4169-4175, Rev. L. 1910. In the act the causes for which a prin-

cipal may be discharged are enumerated, but extension of time to a joint maker is not one of them. An extension of time to the maker not being enumerated as one of the causes which discharge a joint principal, the maxim "expressio unius exclusio alterius" applies, and such a plea cannot be sustained. This construction of these provisions of the act has apparently been uniform in all the cases which have considered them. These cases are collected in the notes to *Vanderford v. Farmers' & Mechanics' National Bank*, 105 Md. 164, 66 Atl. 47, as reported in 10 L. R. A. (N. S.) 129, and *Richards v. Market Exchange Bank*, 81 Ohio St. 848, 90 N. E. 1000, as reported in 26 L. R. A. (N. S.) 99. The trial court was therefore in error in discharging the defendant Williams, in view of his finding of fact that this Wilson note was taken as security rather than as payment.

The cause is reversed as to defendant Williams, with directions to the trial court to set aside his judgment in favor of the defendant Williams, and against the plaintiff bank, and to render judgment in favor of the Cleveland National Bank against W. H. A. Williams in the proper amount.

PER CURIAM. Adopted in whole.

ZIMMERMAN v. HOLMES. (No. 4882.)

(Supreme Court of Oklahoma. June 27, 1916.)

(Syllabus by the Court.)

1. DIVORCE ¶57—INDIANS—JURISDICTION—TRIBAL COURT.

Section 28 of the act of Congress of June 28, 1898 (30 Stat. 495, c. 517), abolishing the tribal courts of the Choctaw and Chickasaw Nations, being in conflict with section 29 of the Atoka Agreement, ratified by the voters of the Choctaw and Chickasaw Nations on August 24, 1898, never became effective, and the tribal courts in the Choctaw Nation had power to grant divorces until the passage of the act of April 28, 1904 (33 Stat. 573, c. 1824).

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 198, 199; Dec. Dig. ¶57.]

2. MARRIAGE ¶40(6)—PRESUMPTION OF VALIDITY—PRESUMPTION OF PRIOR DIVORCE.

Where a man and woman live together for a number of years, and hold themselves out to the public as man and wife, and have children, even though the testimony shows that one of them had a living husband or wife, in the absence of proof to the contrary, the law will presume that there has been a divorce, and that the second marriage was legal.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 64; Dec. Dig. ¶40(6).]

3. INDIANS ¶15(2)—LANDS—DEEDS.

Under section 22 of the act of Congress of April 26, 1906 (34 Stat. 137, c. 1876) in order to give validity to a deed executed by a husband who succeeded to the possession of his wife's allotment on her death by curtesy, he being a full-blood Indian, the same must have been approved by the Secretary of the Interior.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 39; Dec. Dig. ¶15(2).]

Commissioners' Opinion, Division No. 6. Error from District Court, Pontotoc County; A. H. Ferguson, Judge.

Action by Archibald Holmes against Andrew Zimmerman. Judgment for plaintiff, and defendant brings error. Affirmed.

B. C. King, Thomas P. Holt, and James E. Webb, all of Ada, for plaintiff in error. M. D. Deck, of Idabel, for defendant in error.

DUDLEY, C. This is an action in ejectment filed in the district court of Pontotoc county, Okla., by Archibald Holmes, defendant in error, as plaintiff, against the plaintiff in error, Andrew Zimmerman, as defendant.

The case was submitted to the court, a jury being waived by both parties. The court made findings of fact and conclusions of law, as follows:

"This is a suit brought by the plaintiff, Archibald Holmes, against the defendant, Andrew Zimmerman, in ejectment for the possession of certain lands described in the petition: W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of section 33, township 5 north, range 4 east, situated in Pontotoc county, state of Oklahoma. It is admitted by the plaintiff and the defendant that the lands in controversy were allotted to Lenie Jefferson during her lifetime; that Lenie Jefferson died March 3, 1907; that Lenie Jefferson was a full-blood Choctaw Indian and was enrolled as such. I find from the evidence that at the time of her death, Lenie Jefferson left surviving her two children. That the youngest, Philliston Holmes, died in about two weeks after the mother; that the other child, Mary Holmes, lived about a year after the death of her mother, and also died.

"It is contended by the plaintiff that he (Archibald Holmes) was the husband of Lenie Jefferson at the time of her death, and that he is the father of Philliston Holmes and Mary Holmes by the said Lenie Jefferson. The defendant denies that there was any legal marriage between the plaintiff, Archibald Holmes, and the deceased, Lenie Jefferson, and contends that Archibald Holmes had another wife prior to the time he took up with and lived with Lenie Jefferson, and that he was therefore never the husband of Lenie Jefferson. I find from the evidence that the plaintiff, Archibald Holmes, was the legal husband of the deceased allottee, Lenie Jefferson.

"The defendant further contends that as the plaintiff, Archibald Holmes, was not the husband of the said Lenie Jefferson, that upon the death of the said Mary Holmes, the last child of Lenie Jefferson, that the brothers of Lenie Jefferson became the owners of said lands. These brothers are Samuel Jefferson, and others and the defendant claims title from these brothers, as a deed that was properly approved by the county judge of McCurtain county after the act of Congress approved May 27, 1908. The defendant further claims title to said lands upon a deed executed by Archibald Holmes, dated May 29, 1907. It is admitted that Archibald Holmes is a full-blood Indian, and that at the time he executed the deed the same was not approved by the Secretary of the Interior and has never been so approved."

Findings of Law.

"I find that upon the death of Lenie Jefferson her husband, Archibald Holmes, became the owner of a life estate in said lands; that her two children, Philliston Holmes and Mary Holmes, inherited the fee to said lands; that upon the death of these children their father inherited the entire estate; that upon the death

of Philliston Holmes, his sister, Mary Holmes inherited his interest in the land; that Mary Holmes died after statehood; that under the laws of the state of Oklahoma her father, Archibald Holmes, inherited her interest in the lands; that he is now the owner of the entire interest in the land unless the deed executed by him in 1907, conveyed his life estate to the property from whom the defendant claims.

"I find that under the acts of Congress of May 29, 1907, it was necessary for a full-blood Indian in conveying an interest in inherited lands to have the same approved by the Secretary of the Interior; that unless the same was so approved the deed would be void and of no effect. I therefore find that the deed executed by Archibald Holmes to W. H. Walcott and A. J. Marsh from whom defendant claims on May 29, 1907, not having been approved by the Secretary of the Interior, is void and of no effect. As the defendant does not claim to have any subsequent title from Archibald Holmes—that is, that he does not claim any deed from Archibald Holmes since the death of Mary Holmes—the only interest he could claim would be the life estate, and the said deed is void; and I find that he has no interest whatsoever.

"I therefore find in favor of the plaintiff and direct a judgment be entered accordingly."

And rendered judgment for plaintiff, to reverse which judgment this proceeding in error was commenced.

There are only two questions necessary to be settled in order to determine this case: First, was Archibald Holmes the husband of Lenie Jefferson? Second, was it necessary for a deed to be approved by the Secretary of the Interior made by Archibald Holmes to the grantors of Andrew Zimmerman?

[1] The testimony of a number of the witnesses is that Archibald Holmes and Lenie Jefferson had been living together for a number of years and held themselves out to the world as husband and wife, and that they had two children. Archibald Holmes testified that he was married to Lenie Jefferson about four years before her death, which would have made them married some time in the spring of 1903; that he had been married before, and that he and his former wife were divorced by the Choctaw courts before his marriage to Lenie Jefferson. Counsel for plaintiff in error urged that the testimony shows that if a divorce was granted, that it was granted by the courts of the Choctaw Nation, and that in the year of 1903, or at any time subsequent to October 1, 1898, the Choctaw courts were abolished and had no power to grant divorces. To this contention, we cannot agree. The law which is relied on by plaintiff in error as abolishing the courts of the Choctaw Nation is section 28 of the act of June 28, 1898 (30 U. S. Statutes at Large, p. 495). Section 29 of the same act provided for the submission to the Choctaw Nation for their ratification or rejection, what is commonly known as the "Atoka Agreement," and in said section 29, authorizing said agreement to be submitted to the voters of the Choctaw-Chickasaw Nations, it was provided:

"That the votes cast in both said tribes or nations shall be forthwith returned duly certified by the precinct officers to the national secretaries of said tribes or nations, and shall be

presented by said * * * secretaries to a board of commissioners consisting of the principal chief and national secretary of the Choctaw Nation, the governor and national secretary of the Chickasaw Nation, and a member of the Commission to the Five Civilized Tribes, to be designated by the chairman of said commission; and said board shall meet without delay at Atoka, in the Indian Territory, and canvass and count said votes and make proclamation of the result; and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement."

And section 29 of the Atoka Agreement provides as follows:

"It is further agreed that the United States courts now existing, or that may hereafter be created, in the Indian Territory shall have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession, or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw Tribes; and of all persons charged with homicide, embezzlement, bribery, and embezzlement, breaches, or disturbances of the peace, and carrying weapons," covered by the territory of said tribe, that refers to the "citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw Nations charged with such crime shall be tried, and, if convicted, punished as though he were a citizen or officer of the United States, and sections 1638 to 1644, inclusive, entitled 'Embezzlement,' and sections 1711 to 1718, inclusive, entitled 'Bribery and Embezzlement,' of Mansfield's Digest of the Laws of Arkansas, are hereby extended over and put in force" to cover the Choctaw and Chickasaw Nations, and where necessary when "the same appears in said laws shall include all officers of the Choctaw and Chickasaw governments."

And section 29 of said Atoka Agreement further provides:

"It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal government so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the 4th day of March, 1898. This stipulation is made with the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change until the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a state to the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."

The Atoka Agreement was ratified by the voters of the Choctaw and Chickasaw Nations on the 24th day of August 1908. Therefore section 28 of the act of June 28, 1898, being in conflict with section 29 of the Atoka Agreement, never became the law, and the tribal courts continued by authority of the Atoka Agreement, with jurisdictions as modified by said agreement, until the passage of the act of April 28, 1904 (33 U. S. Statutes at Large, p. 573), which took away all the jurisdiction from the courts of the Choctaw and Chickasaw Nations.

[2] It is admitted by plaintiff in error that the divorce which Archibald Holmes claimed to have obtained from his wife, if granted

at all, was granted in the year 1908, and at this time the Choctaw courts had not been abolished and had jurisdiction to grant divorces. In re Poff's Guardianship, 7 Ind. T. 59, 103 S. W. 765; Hayes v. Barringer, 168 Fed. 221, 93 O. C. A. 507. The rule in this state is settled that where a man and woman live together for a number of years and have children, even though the testimony shows that either of them had a living husband or wife, in the absence of proof to the contrary, the law will presume that there has been a divorce, and that the second marriage was legal.

[3] Under the testimony in this case there is no error in the trial court's finding that Archibald Holmes and Lenie Jefferson were husband and wife at the time of Lenie Jefferson's death. This brings us to a consideration of the remaining question in this case. Was it necessary for the deed executed by Archibald Holmes to Marsh and Walcott, the grantors of the plaintiff in error (defendant in the court below), to be approved by the Secretary of the Interior in order to make it valid?

Section 22 of the act of Congress of April 26, 1906 (34 U. S. Statutes at Large, p. 137), provides as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

On the death of Lenie Jefferson in 1907, she left surviving her two children and her husband, Archibald Holmes. At that time the laws for the state of Arkansas, as set forth in Mansfield's Digest, and the common law of England, as far as applicable, was in force in the Indian Territory. On the death of Lenie Jefferson her husband, Archibald Holmes, succeeded to the possession of her allotment for his life by curtesy, and the fee passed to her two children. After the adoption of the Constitution of Arkansas of 1874, curtesy, as it existed at common law, was modified to the extent that curtesy initiate was abolished. See Neelly v. Lancaster, 47 Ark. 175, 1 S. W. 66, 58 Am. Rep. 752; Johnson v. Simpson, 40 Okl. 413, 139 Pac. 129. The husband took no interest in his wife's land during her lifetime, even when there was issue born alive and seisin by the wife. The Constitution of 1874 gave the wife full power to dispose of her real estate during

her lifetime, as though she were a "feme sole," and it was not necessary for her husband to join in a deed. She could also make a will devising all of her real estate away from her husband, so that at her death the husband would not have curtesy in the land of which she had been seised, and only in the case of intestacy, where there had been issue born alive, the husband succeeded to a life estate in his wife's land, known as curtesy. This is a freehold estate, and is in the nature of an estate by descent.

Webster's Unabridged Dictionary defines the word "heir" as:

"One who receives, inherits, or is entitled to succeed to the possession of any property after the death of its owner; one in whom the title of an estate vests on the death of the proprietor; one on whom the law bestows the title to property of another at the death of the latter."

The act of April 26, 1906, was passed by Congress for the purpose of protecting a class of people who, on account of the simplicity of their natures, and their unfamiliarity with business affairs, were deemed incapable of protecting themselves, and who, if left without any protecting legislation and without any supervision on the part of the representatives of the government or the courts, would be the easy prey of the mercenary schemer. There could be no reason why Congress would have intended to protect a full-blood Indian who might have inherited a fee-simple title to a twentieth or a fiftieth interest in an allotment, and require his deed to be approved in order to give it validity, and yet intend that a full-blood Indian who on the death of his wife succeeded to the possession of the entire allotment for his lifetime (oftentime being at an age when his expectancy would make his interest worth as much as half of an allotment) should have the right to convey this valuable estate to the first shrewd man who offered him any price which he would accept. It is well known that the average full-blood Indian, on account of his ignorance of business affairs, can often be induced to sign any paper on the payment of from \$10 to \$100.

At common law the husband was not the heir of his wife, and should we follow the technical definition of the word, we would be forced to hold that the word "heirs," as used in the act of April 26, 1906, did not include the husband, but it has been held in construing wills that the word "heirs" should be construed according to who was meant by the testator, and as was said by the Supreme Court of Washington, in the case of *D. R. Noble et al. v. City of Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, wherein they hold that under the statute giving the right of action to the heirs of any person, if the death of such person be caused by the negligence of another, that the word "heirs" as

used in that act, meant the widow and children.

"It is familiar law that interpretation may contract as well as expand the meaning of words used in a statute, when the harmony of the legal system so requires."

We believe it was the intention of Congress when this act was passed to require every interest which was succeeded to by any full-blood Indian on the death of an allottee to be approved by the Secretary of the Interior, in order to make it valid, and the word "heirs," as used in that act, was used in the sense of any full-blood Indian on whom the title of an allotment vested, or who succeeded to the possession of the same on the death of the allottee, and was not used in its technical sense. To hold otherwise would be contrary to the settled policy of the United States in legislating for the protection of the full-blood Indian.

On the death of the second child in 1908, which was after Oklahoma Territory and the Indian Territory had been admitted to statehood, Wilson's Revised and Annotated Statutes of the Territory of Oklahoma were in force, and under the law of descent and distribution, as set forth in said statutes, the father was the sole heir of said deceased child, and the deed, which the father had executed, conveying a life estate to Marsh and Walcott, never having been approved by the Secretary of the Interior, was void and of no effect, and said father, Archibald Holmes, was entitled to the possession of the land sued for.

We think that the findings of fact and conclusions of law of the trial judge were correct and, finding no error in the record, we recommend that the judgment of the trial court be affirmed.

PER CURIAM. Adopted in whole.

ETCHEN v. FERGUSON. (No. 7621.)
(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER — 217 — CONTRACTS—LIABILITY OF VENDOR.

A. entered into a contract with B. to deed him certain lots for factory purposes upon condition that he erect a building thereon, and a deed to that effect was made and placed in escrow. B. contracted with C. to do the woodwork and with D. to do the brickwork on said building. About the time the walls of the building had been completed to the second story and the window frames placed in the lower story, B. decamped, having failed to pay either C. or D. anything. A. settled with D. for the brickwork. *Held*, he did not thereby become bound to pay C. for the woodwork.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 432; Dec. Dig. — 217.]

2. FIXTURES — 9 — CONVERSION INTO REALTY — REQUISITES.

When a person affixes his property to the land of another without an agreement permit-

ting him to remove it, the thing affixed belongs to the owner of the land.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. ¶9.]

3. FIXTURES ¶7—MODE OF ANNEXATION—ACTUAL.

A thing is to be deemed affixed to land when it is "permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts, or screws."

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 7-13; Dec. Dig. ¶7.]

4. FIXTURES ¶35(2)—MODE OF ANNEXATION—ACTUAL.

Articles affixed to land in fact, although only slightly, are prima facie realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 73, 74; Dec. Dig. ¶35(2).]

5. TROVER AND CONVERSION ¶2—NATURE OF PROPERTY—PERSONAL PROPERTY.

A person cannot be guilty of conversion of real property.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 8-20; Dec. Dig. ¶2.]

Commissioners' Opinion, Division No. 4. Error from District Court, Nowata County; W. J. Campbell, Judge.

Action by George H. Ferguson against Charles A. Etchen. Judgment for plaintiff, and defendant brings error. Reversed, with instructions.

A. M. Etchen and W. E. Ziegler, both of Coffeyville, Kan., for plaintiff in error. Alvah C. Hough and W. D. Humphrey, both of Nowata, for defendant in error.

MATHEWS, C. The parties will be designated here as they appeared in the trial court. On the 16th day of February, 1912, the defendant entered into a written agreement with one Von Walters, to the effect that he would deed the said Von Walters certain real property owned by him located in South Coffeyville, Okl., upon condition and for the consideration that the said Von Walters would erect a two-story building thereon to be used by the said Von Walters for certain manufacturing purposes. Accordingly defendant executed a warranty deed to said property, and placed the same in escrow to be delivered to the said Von Walters upon the completion of said building as specified in said contract. The deed contained this clause:

"This deed is given for factory purposes and it is hereby agreed that a factory will be erected on the tract of land according to contract and operated for at least one year, shut-downs and unavoidable accidents excepted."

Immediately following the execution of the above-mentioned contract, the said Von Walters contracted with one Brewster to furnish the brickwork for said building, and with the plaintiff, Ferguson, to do the woodwork. The said Brewster and plaintiff, Ferguson, then commenced the construction of the building and the brick walls were completed up to the second story, and Ferguson had prepared 52 window frames and inserted 26

thereof in the lower story of said building, and had also placed one door frame therein, and had run a girder around the building for the lower floor, and had prepared and put in place the joists for the lower floor. At this point the said Von Walters decamped without having paid either the said Brewster or plaintiff, Ferguson, anything upon the contract, and the work on the building at once stopped. The plaintiff had purchased the lumber used in said building from a local lumber dealer on account, and the same was charged on the books of the lumber company to Von Walters, and at the time of the trial the same had not been paid for. The last item of material was furnished on June 15, 1912, and on June 21, 1912, the plaintiff, Ferguson, filed a lien claim against the said Von Walters on the lots upon which said uncompleted building was located for \$418.65, and therein the said Von Walters was named as owner of the lots. Notice thereof was served upon the defendant, Etchen. This action was to foreclose this lien. The jury returned a verdict for the sum of \$418.65, the amount sued for, and defendant brings error.

The trial court properly ruled against plaintiff's claim for a materialman's lien against the lots in controversy.

There are three paramount questions presented here each of which are closely connected, and all will be treated together, they being as follows: (1) Did defendant, after Von Walters defaulted in the payments due plaintiff and Brewster, in settling with Brewster for his claim against Von Walters and taking over the incomplete structure, thereby become liable to plaintiff for the labor and material furnished by plaintiff for said building; (2) was defendant guilty of conversion; and (3) if so, is he liable also for the material prepared but not actually incorporated in said building? We are constrained to answer each of the above propositions in the negative.

[1] The evidence introduced at the trial shows that the title to the lots upon which the building was being erected was in the defendant. While he had executed a deed thereto to Von Walters, yet the same was placed in escrow, and was not to be delivered until the building was fully completed. The plaintiff made no investigation as to the ownership of the lot before commencing work, but presumed that Von Walters had a deed to the same. After Von Walters left without paying either Brewster or plaintiff, defendant endeavored to make a settlement with each of the parties for their claim against the uncompleted building, and a settlement was effected with Brewster, but after much negotiating between plaintiff and defendant, they failed to agree on a settlement, the defendant testifying at the trial that he tried to settle with plaintiff, and at that

time was willing to allow him something for the material he had in the building, but that it was of no use to him, the defendant, and, further, that he was still willing to carry out his contract with Von Walters with the plaintiff, or any one else who was willing to assume it.

The trial occurred nearly three years after defendant settled with Brewster for his claim in the uncompleted building, and at that time nothing had been done to complete the building, and the only evidence of any kind to show that defendant was presuming to exercise any control thereof was plaintiff's testimony that at one time he went to the building for the purpose of taking the joists off, and defendant's brother told him to stop taking anything from the building; that it belonged to them.

Putting the most liberal interpretation in favor of plaintiff upon the conduct and acts of the defendant, we are unable to see how, in law or in equity, defendant could be bound thereby to pay plaintiff's claim against Von Walters. The defendant was not a party to the contract between plaintiff and Von Walters, and merely because he saw fit to settle with Brewster for his claim in the uncompleted building did not put him in Von Walters' shoes, and thereby obligate him to complete the building or to pay plaintiff the amount due him by Von Walters.

[2-4] While it is true the plaintiff might have had some equity in the incompleted building itself, and while the evidence wholly fails to show that the defendant had ever taken possession or control in any way of the said building, yet it appears to us that he had the legal right to do so. Title to the lot had never passed from him, and section 6590, Rev. Laws 1910, specifies that anything affixed to land becomes a part of the land, and section 6592 states that a thing is to be deemed affixed to land when it is "permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." *Western National Bank v. Gerson*, 27 Okl. 280, 117 Pac. 205; *Kilgore v. Lyle*, 30 Okl. 596, 120 Pac. 626. Articles affixed to land in fact, although only slightly, are *prima facie* realty. *Tolle v. Vandenburg*, 44 Okl. 780, 146 Pac. 212. It is provided by section 6749, Rev. Laws 1910, that when a person affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land. The title to the lots was in the defendant. There was no agreement between him and the plaintiff that he could remove the woodwork placed by him in the building, and, unless it be made to appear to the contrary, a matter about which the evidence is silent in the case at bar, it is presumed all of the woodwork became a part of the realty, and therefore defendant had a right to forbid plaintiff from removing it.

However, even that point is not involved in this case, because the evidence shows that he did afterwards remove and take into his possession all of said joists.

[5] Plaintiff's claim that defendant was guilty of conversion will not lie for two reasons: (1) A person cannot be guilty of conversion of real property, and therefore the defendant cannot be found guilty of converting any of the woodwork so attached to the building as to become a part of it; and (2) in order to be guilty of conversion of personal property one must be in possession of it. *Continental Gin Co. v. De Bord*, 34 Okl. 66, 123 Pac. 159. The evidence in this case shows that plaintiff had taken possession of the joists and window frames, with the exception of those placed in the building, and had stored the same, and in no event could defendant be held for converting plaintiff's property, while at the same time plaintiff had actual possession of the same. We do not think the case of *Sharp Lumber Co. v. Kansas Ice Co.*, 42 Okl. 689, 142 Pac. 1016, in point, because in that case the conversion occurred before the lumber and material was used in the construction of the building.

For the reasons given, we recommend that the judgment be reversed, with instruction to the trial court to proceed in accordance with this opinion.

PER CURIAM. Adopted in whole.

EUREKA FIRE HOSE MFG. CO. v. TOWN OF GRANITE. (No. 7336.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — 864(6) — INDEBTEDNESS—CONSTITUTIONAL LIMITATION.

Under section 26, art. 10, of the Constitution of the state of Oklahoma, a town council has no power, without an express vote of the people authorizing it, as provided for in said section of the Constitution, to create a present indebtedness to be paid out of the revenues of future years.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1834; Dec. Dig. § 864(6).]

Commissioners' Opinion, Division No. 2. Error from District Court, Greer County; G. A. Brown, Judge.

Action by the Eureka Fire Hose Manufacturing Company against the Town of Granite, to recover the sum of \$1,597.60 on a written contract. Judgment for defendant, and plaintiff brings error. Affirmed.

Carpenter & Mills, of Mangum, for plaintiff in error. B. F. Van Dyke, of Granite, for defendant in error.

BRUNSON, C. This action was begun by the plaintiff in error, a corporation, in Greer county, state of Oklahoma, defendant in error, for the purchase price of certain fire

hose equipment. The plaintiff in error based its claim upon a certain written contract made and entered into by and between said corporations on the 13th day of November, A. D. 1909. This suit was filed on the 6th day of April, A. D. 1912, and there was attached to the petition a copy of the written contract, which reads as follows:

"Contract and agreement made this 13th day of November, A. D. 1909, by and between the Eureka Fire Hose Manufacturing Company, of New Jersey, party of the first part, and corporation of the town of Granite, in the county of Greer and state of Oklahoma, party of the second part: Witnesseth, that the party of the first part hereby agrees to furnish the party of the second part in good order 1,500 feet of their Trumpet Double Jacket Brand of fire hose, coupled complete, two and one-half inches internal diameter, and capable of standing a pressure of 400 pounds per square inch when delivered, at 85c per foot. And the said party of the first part further warrants and agrees, that should any of said hose fail to give out within thirty-six months after date of purchase, from any cause due to defect in manufacture or material, to replace the same free of charge on return of such defective lengths. And the said party of the second part hereby agrees to accept the said hose if delivered in accordance with above specifications, and if not in accordance therewith, they hereby agree to notify the said party of the first part of any defect that may exist therein within ten days from date of delivery of said hose to them. If no notification be received within the period above stated, it shall be deemed and considered that said hose has been accepted by the party of the second part. And thereupon the said party of the second part hereby agrees to pay the said party of the first part for the said hose the sum of twelve hundred and seventy-five and no/100 dollars. Terms: One and two years, 1st 6 months without interest, then 6 per cent. per annum.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year above written. Eureka Fire Hose Manufacturing Co., by P. O. Herbert, Sr., Mgr. [Seal.] Per A. C. Hopper. [Seal.] Inc. Town of Granite, Oklahoma, by S. M. Alexander, Pres. [Seal.]

"Six Underwriters' play pipes; 2 shut-off nozzles at \$15.00 each; 1 doz. Tabor spanners; 2-500 ft. capacity Underwriters' reels at \$65.00 each, f. o. b. factory (2-3). B. F. Van Dyke. [Seal.] W. R. Veale. [Seal.]"

It is alleged: That there is due under this contract for the articles mentioned therein, principal and interest, the sum of \$1,597.60. That the plaintiff in error complied with this contract, and delivered each and every article therein mentioned to the defendant in error, and that the defendant in error accepted the same, made no objection or complaint to the company on account of defective material, and that the town of Granite, though often requested, has neglected and failed to pay the purchase price of said hose and other articles. That on the 19th day of December, A. D. 1912, the defendant in error filed its first amended answer to said petition, which said first amended answer denied: (1) Generally the allegations of plaintiff's petition, and pleaded especially that the contract sued on was entered into on behalf of defendant by persons unauthorized so to make and enter into said contract, for the reason that said contract was

not agreed and entered into at a regular session of the board of trustees of said town, as required by law and the ordinances of said town, nor was it entered into at any special meeting of the board of trustees of which any minutes were kept; that it was not attested by the clerk of said town, and for such reasons was ultra vires and void; (2) that said contract was an agreement for the purchase of certain property in excess of the \$500 limitation fixed by law, the purchase not having been authorized by a majority vote of the electors resident of said town; (3) that at the time the contract was entered into there were no funds of the incorporated town of Granite on hand in the treasury of said town or legally levied out of which any payment could have been made on said contract; (4) that the expenses of the incorporated town of Granite for the years 1910 and 1911 (during which years payments were to be made) consumed and exhausted its current revenue; (5) that no vote of the electors of said town had authorized the creation of said obligation or indebtedness, and that said contract is within the inhibitions contained in sections 28 and 27, article 10, of the Constitution of the state of Oklahoma, and is therefore null and void.

Thereafter, on the 17th day of August, A. D. 1914, the plaintiff in error filed its reply to this first amended answer, denying generally all of the matters and things therein contained. Upon the issues thus joined this case went to trial on the 17th day of August, A. D. 1914, to the court without a jury. When the plaintiff in error closed its evidence, the defendant in error filed a demurrer to the same, which was by the court overruled and exceptions saved. The defendant in error then offered its evidence, and at the close of its evidence the plaintiff in error filed a demurrer, which was by the court overruled and exceptions saved. The court then took the case under advisement and continued it until the 3d day of November, A. D. 1914, when judgment was rendered in favor of the defendant in error, and on the same day and at the same time the plaintiff in error filed a motion for a new trial, which was by the court heard and overruled, to which action of the court exceptions were saved, and time given in which to make, serve, and settle case-made, and the case is before us on appeal.

The defendant in error admitted that the copy of the contract attached to the plaintiff's petition was substantially a copy of the contract sued on; that the articles mentioned and described in said contract were received by the town of Granite; that they were never returned to the plaintiff in error, and were never paid for; that demand for payment had been made and refused; that there was no record made in the minutes of the town of Granite of any resolution authorizing the execution of the contract sued upon; that the party who was clerk of said town at the time of the execution of said contract could not

say whether said resolution was in fact ever passed; that he generally recorded anything that came up, and especially transactions like the one in question; and that he never knew anything about the contract of the kind sued upon. The town treasurer for the years 1909, 1910, and 1911 testified that during those years he was town treasurer; that no levy was made for the payment of any indebtedness to the plaintiff in error; and that there was no money in the town treasury to pay for the property on the date of entering into said contract.

It appears to us that the question involved here is, Does this contract fall within the inhibitions contained in section 26, art. 10, of the Constitution of the state of Oklahoma, which is as follows:

"No county, city, town, township, school district, or other political corporation, or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness: Provided, that any county, city, town, township, school district, or other political corporation, or subdivision of the state, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same."

It will be noted that the terms of payment under this contract are as follows:

"And thereupon the said party of the second part [the town of Granite] hereby agrees to pay the said party of the first part [Eureka Fire Hose Manufacturing Co.] for the said hose the sum of twelve hundred and seventy-five and no/100 dollars. Terms: One and two years, 1st 6 months without interest, then 6 per cent. per annum."

This contract was made and entered into on the 13th day of November, A. D. 1909; payments becoming due in 1910 and 1911.

There are four assignments of error, and are urged under three propositions, but we think that the only proposition that we need consider is whether or not this contract is a legal binding obligation against the town of Granite. At the time it was entered into the levy for that year had already been made, but the contract does not provide for payment out of the funds of the city during that year, but it does provide that payments shall be made in one and two years, which evidently means that they shall become due in November, 1910, and November, 1911, which would make these payments fall due after the levy for those years had been made, and the legality of this indebtedness is one of the issues the court must determine. It is

argued, however, that this is a debt of honor, and that it is conceded that the town and its citizens received the benefit of and full value for the indebtedness. If this court were authorized to inaugurate policies and to amend the Constitution to meet such contingencies, this argument might appeal to us with force. The framers of the Constitution, which Constitution the people have approved, thought it wise to place a limitation upon all the people and upon every political subdivision of the state, and if the municipality or any political subdivision of the state may, by its acts exceed the limitations placed upon it by the Constitution, create a debt in conflict with it, it would simply mean the destruction of this provision of the Constitution. Section 26, art. 10, supra, provides that:

"No county, * * * town, * * * or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose."

It will be seen that it is intended by this part of the Constitution that the town of Granite, as well as all other political corporations or subdivisions of the state, shall keep its running expenses and expenditures within the income and revenues provided for that year. There is no provision in this section of the Constitution permitting such a municipal corporation to tie up the revenues of the town for one or two years in advance, as was undertaken to be done by defendant in this contract. This section does provide that any county, city, town, township, school district, or other political corporation or subdivision of the state may become indebted by vote of the people of such county, city, town, township, school district, etc., but that before doing so, or at the time of doing so, they shall provide for the collection of an annual tax sufficient to pay the interest, on such indebtedness as it falls due, and also to contribute a sinking fund for the payment of the principal thereof within 25 years from the time of contracting the same. But there are no provisions in this section of the Constitution whereby the trustees of the town of Granite could become indebted in the manner attempted for one and two years to pay for the articles purchased. In *Re Town of Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978, it is said:

"One who deals with a municipality does so with notice of the limitations on it or its agents' powers. All are presumed to know the law, and those who contract with a municipality or furnish it supplies do so with such knowledge; and, if they go beyond the limitations imposed, they do so at their peril."

"It is plain that the intention of section 26, art. 10, of the Constitution is to require municipalities to carry on their corporate operations upon a cash basis. The revenues and income provided for each year must pay the expenditures of such year; and any debt or contract sought to be created in excess of such revenues

and income provided creates no liability against such municipality, unless it be authorized by a vote of three-fifths of the legal voters before or at the time of creating same, and comes within the limitations therein expressed."

Further on in the same opinion the court quotes with approval 28 Cyc. p. 1540, which states the rule as follows:

"'Pay as you go' expresses a municipal rule prevailing in some states that annual expenditures must be restricted to annual revenue, of which every person contracting with a municipal corporation must take notice at his peril."

Again on page 1560, Id.:

"A contract made by a municipality in excess of its debt limit, as fixed by the Constitution or by statute, is void, at least as to the excess; and every one dealing with a municipality is charged with notice of a limitation upon the amount of its indebtedness. Municipal indebtedness in excess of a constitutional limitation cannot be made good by ratification, since power to authorize originally is a condition precedent to the power to ratify subsequently. * * * A municipal contract, expenditure, or appropriation, invalid when made, may be cured by subsequent legislation, unless the invalidity result from a violation of a constitutional inhibition."

Upon a hearing of the issues in this case by the court the relief prayed for was denied, and we believe that the trial court's judgment was sound for the reason that at the time the contract was so entered into the board of trustees of the town of Granite was not authorized, and did not have the power, to say that the revenues for the years 1910 and 1911 should be applied to the payment of this contract. If they could contract the revenues for the years 1910 and 1911 away under this section of the Constitution, they could contract away the revenues for any number of years. In the case of Fairbanks-Morse Co. v. City of Geary, 157 Pac. 720, it is said:

"A debt which is in excess of the constitutional or statutory limit is void; and in no form can such debt be held valid upon any theory of quantum meruit, or equitable obligation. The absolute lack of power to contract such indebtedness bars every form of action and every legal device by which recovery is sought; nor will the courts aid the vendor to recover the property sold and delivered under such illegal contract."

In the body of this opinion the court approves the rule laid down in section 2174 of Gray's Limitation of the Taxing Power, as follows:

"A debt which is in excess of the constitutional limit is void; and in no form can such debt be held valid upon any theory of quantum meruit or equitable obligation. The absolute lack of power to contract the indebtedness bars every form of action and every legal device by which recovery is sought" (citing *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044; *Morton v. City of Nevada* [O. C.] 41 Fed. 582; *Brazoria County v. Youngstown Bridge Co.*, 80 Fed. 10, 25 C. O. A. 306; *City Water Supply Co. v. City of Ottumwa* [O. C.] 120 Fed. 309; *Swackhamer v. Hackettstown*, 37 N. J. Law, 191; *McGillivray v. Joint School District*, 112 Wis. 354, 88 N. W. 810, 58 L. R. A. 100, 88 Am. St. Rep. 969).

The plaintiff in error in its brief contends that that part of section 647 of the Compiled Laws of Oklahoma 1909, where it provides "that no real estate or personal property shall be bought or sold where the value of either said real or personal property contracted for at one purchase shall exceed five hundred dollars," applies to cities of the first class, but does not apply to incorporated towns. It is not necessary, under our view of the law applicable to this case, to pass upon this question.

From our view of the Constitution as applied to the facts here, we are forced to the conclusion that the board of trustees of the town of Granite had absolute lack of power to contract away the revenues for the years 1910 and 1911, and that this contract was void ab initio.

The learned trial court heard all the evidence and rendered judgment in favor of the defendant in error, and there is evidence in the record reasonably tending to support his finding and judgment.

Finding no error in the record, the judgment of the trial court is affirmed.

PER CURIAM. Adopted in whole.

BOARD OF COM'RS OF CREEK COUNTY et al. v. ALEXANDER, State Treasurer. (No. 7878.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. STATUTES \S 181(1), 206—CONSTRUCTION—PARI MATERIA.

It is a cardinal rule in the construction of statutes that the intention of the Legislature, when ascertained, must govern, and that to ascertain the intent all the various provisions of legislative enactments upon the particular subject should be construed together and given effect as a whole.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 259, 283; Dec. Dig. \S 181(1), 206.]

2. STATUTES \S 181(1)—CONSTRUCTION—REASON OF LAW.

When the language of a statute is dubious, the court, in construing it, will consider the reason and intent of the law to discover its scope and true meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 259; Dec. Dig. \S 181(1).]

3. STATUTES \S 225—CONSTRUCTION—PARI MATERIA.

Subsequent legislative enactments may be considered as an aid in the interpretation of prior legislation upon the same subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 302, 303; Dec. Dig. \S 225.]

4. STATUTES \S 225—CONSTRUCTION—PARI MATERIA.

When it is apparent that a strict interpretation of a particular statute, construed alone, would defeat the intention of the Legislature as shown by other legislative enactments, which relate to the same subject, and which have been enacted in pursuance of, and according to a

general purpose in accomplishing a particular result, such construction should not be adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.]

5. STATUTES § 220—CONSTRUCTION—DECLARATION OF LEGISLATIVE INTENT.

A joint resolution, duly passed by both branches of the Legislature, though not signed by the Governor, and thereby by section 11, art. 6, of the Constitution, not having the force of a law, and which resolution was declaratory of the purpose and intent of a former act of the same Legislature, passed at a prior session, may be considered by the court as an aid in construing and giving effect to said former act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 298; Dec. Dig. § 220.]

6. TAXATION § 909—DISTRIBUTION OF PROCEEDS—STATUTORY PROVISION.

Under section 4, subd. "a," art. 2, of the act of March 11, 1915 (Sess. Laws 1915, pp. 184, 185), providing for a direct and indirect system of taxation, construed in connection with both prior and subsequent legislation, in reference to the distribution of the gross production tax upon petroleum or other mineral oil or natural gas, and the joint resolution of the Legislature declaratory of its intent in the passage of said act, one-half of the tax collected under the provisions of said statute should be, by the state treasurer, distributed to the county treasurer of the county from whence the tax was collected, to be apportioned among the school districts of such county in aid of the common schools of said county, upon a per capita basis, as are other common school funds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1741; Dec. Dig. § 909.]

Original application for mandamus by the Board of County Commissioners of Creek County and another against W. L. Alexander, State Treasurer. Writ granted.

McDougal, Lytle & Allen and Pryor & Rockwood, all of Sapulpa, for plaintiffs. S. P. Freeling, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for defendant. Clarence Davis, of Sapulpa, for school district number 18, Creek County. Fred P. Branson, Co. Atty., and Glenn Alcorn and Francis Stewart, Asst. Co. Attys., all of Muskogee, amici curiæ.

SHARP, J. The present action involves primarily a construction of section 4, subd. "a," art. 2, of the act of March 11, 1915, levying and providing for the distribution of a gross production tax on petroleum or other mineral oil, and of natural gas. The petition charges that since the passage of said act, and up to and including September 30, 1915, the state auditor has collected from the different counties of the state paying a gross production tax large sums of money, a very considerable portion of which is now held in the depository of the treasurer of the state; that unless otherwise commanded by the mandate of this court, said officer will distribute and apportion the tax among all the counties from which any part or portion thereof was collected, in proportion to the school enumeration of such counties, whereas said state treasurer should pay over to the county treasurer of Creek county one-

half of the taxes paid the state auditor upon oil and gas produced in Creek county. The petition charges that up to September 30, 1915, the state auditor had collected from the different counties producing oil and gas and minerals upon which a gross production tax was collectible the respective sums set forth therein, and which petition also gives the school enumeration of said counties for the year 1915, said taxes and school enumeration being as follows:

County.	Tax Paid.	School Enumeration.
Creek	\$232,784.40	10,694
Tulsa	17,998.16	14,430
Washington	10,106.81	5,962
Nowata	7,447.86	4,589
Muskogee	2,389.89	18,593
Okmulgee	7,849.15	10,120
Okfuskee	19.42	8,397
Payne	289.37	9,092
Rogers	1,779.50	6,995
Wagoner	164.89	7,565
Carter	4,946.59	10,298
Kay	1,531.27	7,466
Kiowa	6.41	7,977
Marshall	16.14	5,669
Osage	13,202.19	7,085
Pawnee	4,118.99	5,459
Stephens	8.27	8,371
Jefferson	58.65	6,007
Ottawa	2,322.93	5,928
Craig	25.52	6,275
Pushmataha	24.54	4,909
Le Flore	23.98	12,988
Pontotoc	10.92	9,980
Lincoln	2.41	11,948

On the part of plaintiffs, as already indicated, it is claimed that one-half of the gross production tax paid on oil and gas produced in Creek county should by the state treasurer be paid to the county treasurer of Creek county, to be distributed in aid of the common schools of said county, upon a per capita basis as are other common school funds. Counsel for Muskogee county, who have been given permission to file a brief herein, in effect say that the gross production tax should be divided among the several counties contributing thereto, in proportion to the school enumeration of such counties. As between the contending forces, the Attorney General, who has filed a brief on the part of the defendant state treasurer, disclaims any purpose of taking part in the controversy. However, it is urged by the state's legal representative that, construing section 4, so as to apportion one-half of the tax among the different counties from which the tax is collected, in proportion to the school enumeration of such counties, as contended for by counsel appearing amici curiæ, said section cannot be sustained; hence the tax must be distributed under section 4b of the act, which provides that in case section 4 shall, for any reason, become ineffective, then at once shall the proceeds of all gross production tax collected under the provisions

of the act be paid into the general revenue fund of the state, and applied to the current expenses of the state government; any unexpended balance at the end of each fiscal year to be credited to the common school fund of the state, to be distributed as are other common school funds. The wide divergence of views, the importance of the question not only to Creek county, but to all other counties of the state, and a proper understanding and construction of section 4 and related sections of the act of 1915, make proper a reference to the history of the several acts of the Legislature, levying a gross production or mining production tax on asphalt or ores bearing zinc, lead, gold, silver, copper, or petroleum or other mineral oil, or of natural gas.

The first act providing for such tax passed and approved May 28, 1908 (Sess. Laws 1907-08, c. 71, pp. 640-645), as amended by the act of March 27, 1909 (Sess. Laws 1909, c. 38, art. 2, pp. 624-626), provided that all funds collected thereby should be paid into the state treasury and credited to the general revenue fund of the state, for the payment of the expenses of the state government. The act of March 10, 1910 (Sess. Laws 1910, c. 44, pp. 66-70), provided for the levy and collection of a gross revenue tax, and directed that all taxes levied and collected pursuant thereto should be paid into the state treasury and applied to the payment of the ordinary expenses of the state government. Section 4, subd. "a," art. 2, of the act of March 11, 1915 (Sess. Laws 1915, c. 107, pp. 184-185), provides that all gross production revenues collected under the provisions of said act should be paid into the state treasury, to be distributed as follows: (1) One-half to be credited to the general revenue fund of the state, and applied to the current expenses of the state government (and any unexpended balance at the close of each fiscal year shall be credited to the common school fund of the state, for distribution as are other common school funds); (2) the remaining one-half shall be by the state treasurer distributed to the county treasurer of the counties from whence the same was collected, in proportion to the school enumeration of such counties, and same shall be distributed in aid of the common schools of such counties upon a per capita basis as are other common school funds. Sections 1, 2, 3, and 4, subd. "a," art. 2, of said latter act were amended by an act of the Legislature passed at the extraordinary session of the Fifth Legislature and approved February 14, 1916 (Sess. Laws 1916, c. 39, pp. 102-110), whereby, among other changes, the tax on petroleum or other crude or mineral oil, or natural gas (less the royalty interest payable by the owner thereof), was raised to a sum equal to 8 per centum of the gross value of the production, and which tax, it was provided, should be distributed as follows: Two-thirds to be

paid to the state treasurer by the state auditor, to be credited to the general revenue fund of the state and applied to the current expenses of the state government; the remaining one-third to be paid to the county treasurer of the county from whence the oil or gas and other mineral was produced; one-half of the amount so paid to the county treasurer to be credited to the common school fund of the county in proportion to the school population of such county; the remaining one-half, so paid to the county treasurer, to be credited to a fund of such county known as the road and bridge fund.

The act of May 26, 1908, the amendatory act of March 27, 1909, and the act of March 10, 1910, each provided that the gross revenue tax therein levied should be in addition to the taxes levied and collected upon an ad valorem basis upon the mining, oil, or gas property subject to the production tax. The act of March 11, 1915, undertook to relieve the property or business subject to the gross revenue tax of any other form of taxation, by providing that the tax should be in lieu of any other method of taxing the same (with certain exceptions not here involved). The act of February 14, 1916, provides that the payment of the gross production tax imposed by the terms of the act should be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts, and other municipalities, upon any property rights attached to or inherent in the right to the minerals named in the act. Other exemptions not pertinent to the present case are provided for in said act. According to the acts of 1908, 1909, and 1910, the entire gross production tax was paid into the state treasury, and, according to the act of 1909, "credited to the general revenue fund of the state for the payment of the expenses of the state," while by the 1910 act the tax was to be "applied to the payment of the ordinary expenses of the state government."

The 1915 act evinces a radical departure from the earlier acts in this: The 1908 act levied a tax of one-half of 1 per centum of the gross receipts from the total production of petroleum or other mineral oil, or of natural gas, as did the amendatory act of 1909 and the act of 1910. In the 1915 act, when for the first time the property subject to the production tax was relieved of an ad valorem tax, the gross revenue tax was increased to 2 per centum of the gross value of the production of petroleum or other mineral oil, or natural gas; while under the 1916 act the tax was fixed at 8 per centum of the gross value of the production, less the royalty interest paid by the owner thereof. The 1915 act provided that one-half of the 2 per cent. tax should be credited to the general revenue fund of the state and applied to the current expenses of the state government, provision being made for any unexpended balance at the close of each fiscal year, the remaining

one-half to be by the state treasurer distributed to the county treasurer of the counties from whence the same was collected, in proportion to the school enumeration of such counties, to be distributed in aid of the common schools of such counties upon a per capita basis, as are other common school funds. The 1916 act provides that one-third of the 3 per cent. tax should be paid to the county treasurer, one-half to be credited to the common school funds of the county, and the remaining one-half to be credited to a fund of such county known as the road and bridge fund. Under said latter act the county from whence the oil and gas or other mineral was produced received from the state auditor the tax paid on production in that county.

[6] From the foregoing it will be seen that until the passage of the act, the construction if not the validity, of which is involved, the oil and gas industry, except perhaps oil and gas leases, contributed to the local municipalities, in theory at least, its just share of the burdens of taxation. From the table showing the tax paid by the several producing counties, and the school population thereof, it appears that during the period named Creek county paid a production tax of \$232,784.40, while Lincoln county paid a production tax of \$2.41. The school enumeration of Creek county for the year 1915 was 10,693, of Lincoln county, 11,948, so that if the tax is to be distributed among the different counties contributing thereto, in proportion to the school enumeration of such counties, then Lincoln county, whose production was a mere negligible quantity, would receive from the state treasurer a larger sum than would Creek county. According to the petition, the total tax paid into the state treasury up until September 30, 1915, was \$307,136.76; the total school enumeration of the counties involved, for the year 1915, was 206,797. Of this, in round numbers, Lincoln county had 6 per cent. of the total scholastic population, and would receive out of the gross production tax, according to the contention of counsel appearing amici curiæ, a total of \$9,214.10. Not only would Creek county receive less of said tax than Lincoln county, but by the act it is prevented from levying and collecting an ad valorem tax on not only the oil and gas produced, but the equipment and machinery in and around any well producing natural gas or petroleum or other mineral oil, and used in the actual operation of such producing well. At the same time, Lincoln county, relying not upon the production tax paid by it, but upon its school enumeration, in addition to the enforced tribute from Creek county, is authorized to collect an ad valorem tax on all the property subject to taxation in said county, except the unsubstantial amount from which its share of the gross production tax is paid. To distribute the taxes on hand among the several

counties of the state paying the gross production tax, according to the school enumeration of all the counties contributing thereto. Irrespective of the amount of the tax paid by the several counties, would be in effect to create of these counties a taxing district, and would exclude from participation in the benefits arising from such tax all other school children of the state. To so hold would be to wholly disregard all equitable principles in respect to the apportionment of the tax, especially in view of the fact that said tax is levied and collected in lieu of an ad valorem tax. It should be kept in mind that the county officers of Creek county are not complaining that one-half of the tax paid on oil or gas produced in said county shall be credited to the general revenue fund of the state and applied to the current expenses of the state government. It is of the wrongful construction of the latter half of section 4, by the state treasurer, and the attendant consequences, that complaint is made and relief invoked. The difficulty presented arises out of the interpretation of said section, or of the latter portion thereof, providing for the apportionment of one-half of the tax. It will first be observed that one-half of the tax shall be distributed, not as contemplated by section 3, art. 11, of the Constitution, providing for the apportionment of the interest and income of the permanent school fund, etc., "among and between the several common school districts of the state, in proportion to the school population of the several districts," but instead, shall be distributed by the state treasurer "to the county treasurer of the counties from whence the same was collected." Thus far the act is clear and unambiguous, the element of doubt and uncertainty being introduced by the clause immediately following: "In proportion to the school enumeration of such counties." Standing alone, the latter clause would indicate a purpose to apportion the tax collectively among the several counties from which it was collected, according to the school enumeration of such counties. The next clause, and a part of the same sentence, provides:

"And the same shall be distributed in aid of the common schools of such county upon a per capita basis as are other common school funds."

Construing the clause, "in proportion to the school enumeration of such counties," to have reference to the apportionment of the tax among the school districts of the county, and no difficulty will be encountered in making the statute to mean that one-half of the tax shall be paid back to the counties from whence the same was collected. Such, as we shall presently see, was the legislative intent. Any other construction, if section 4 is to be given effect, would be to take from the heavy producing counties, through the instrumentality of the state auditor, and to pay over to the smaller producing counties, through the state treasurer, taxes paid by

the former, for the support of the public schools of the latter. From this conclusion there is no escape whatever. A further effect would be to make of the counties of the state, upon which a mining production tax was paid, a taxing district from which all other counties in the state would be excluded. Distribution of the tax would depend, not upon the amount of the tax paid by a particular county, but upon the ratio that the school enumeration of such county bore to the total school enumeration of the taxing district. A conclusion so oppressive and inequitable should be avoided if the same can be done without doing violence to the wording of the statute. The language used does not convince us that there was a purpose on the part of the Legislature to depart from the well-beaten paths commonly traveled for the distribution of school taxes among the respective counties from whence the tax was collected. Had the Legislature the power to create of the producing counties a taxing district (which we do not decide), and desired to do so, we entertain no doubt but that its members would have readily found suitable language in which to have made such purpose clear.

[1-4] In construing statutes, where a construction is made necessary, it is a familiar rule that acts in *pari materia* should be construed together, so as to harmonize and give effect to their various provisions. *Diggs v. Lobsitz*, 4 Okl. 232, 43 Pac. 1069; *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okl. 631, 53 Pac. 946; *Hughes v. Territory*, 8 Okl. 28, 53 Pac. 708; *Wright v. Jacobs*, 12 Okl. 138, 146, 70 Pac. 193; *Groom v. Wright*, 30 Okl. 652, 121 Pac. 215; *Beaty v. State ex rel. Lee*, 35 Okl. 677, 130 Pac. 956; *Ratliff v. Fleener*, 43 Okl. 653, 143 Pac. 1051. This is especially the case where the acts are passed at the same session, or, though at different sessions, by the same body. It is to be presumed in such case that the different acts were imbued by the same spirit, and actuated by the same policy; and hence they should be construed each in the light of the other. Within less than one year of the passage and approval of the statute in question, the Fifth Legislature, the membership of which was the same as that of the regular 1915 session (except where vacancies occurred, caused by death or resignation), at an extraordinary session, passed the act of February 14, 1916, giving to the counties from whence the oil or gas or other mineral was produced, one-third of the tax collected therefrom. Both acts treat of the same general subject-matter, *i. e.*, the levy, collection, and apportionment of a gross production tax. The latter act was a part of the general scheme of taxation, and both included a very considerable portion of the taxable wealth of the state; and the statutes in relation thereto should be construed, if possible, so as to make the plan or system consistent in all of its parts, and uniform in its operation, unless, of course, a

contrary purpose is manifest. *Harris v. State*, 96 Tenn. 496, 34 S. W. 1017; *Board of Supervisors v. People*, 49 Ill. App. 369; *MacVeagh v. Royston*, 71 Ill. App. 617 (affirmed in 172 Ill. 515, 50 N. E. 153); *Conn v. Board of Commissioners*, 151 Ind. 517, 51 N. E. 1062; *Cincinnati v. Connor*, 55 Ohio St. 82, 44 N. E. 582. As said by the Supreme Court of Massachusetts:

"Where statutes are parts of a general system relating to the same class of subjects, and rest upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish." *Sheldon v. Boston & A. R. R. Co.*, 172 Mass. 180, 51 N. E. 1078.

In *Tiger v. Western Investment Co.*, 221 U. S. 309, 31 Sup. Ct. 584, 55 L. Ed. 738, it is said:

"When several acts of Congress are passed, touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject" (citing *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724).

Statutes upon cognate subjects may be referred to, though not strictly in *pari materia*. *Smith v. People*, 47 N. Y. 330; *Whitcomb v. Rood*, 20 Vt. 49; *Irelan v. Colgan*, 96 Cal. 413, 31 Pac. 297; *Cummings v. Everett*, 82 Me. 260, 19 Atl. 456; *State v. Woodson*, 128 Mo. 497, 31 S. W. 105; *State v. Beck*, 21 R. I. 288, 43 Atl. 366, 45 L. R. A. 269.

Of the rule, it is thus stated in *Lewis' Sutherland, Statutory Construction*, § 443:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly with statutes in *pari materia*, are treated prospectively, and treated together as though they constitute one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. They are all to be compared, harmonized if possible, and if not susceptible of a construction which will make all of the provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment. It is to be observed that in the comparison of different statutes passed at the same session, or nearly at the same time, this circumstance has weight; for it is usually referred to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended."

No reason existed for the distribution of the 1915 production tax among the counties according to plans so widely variant from that provided for in the 1916 act. The latter act is clear and explicit, and provides that one-third of the 3 per cent. tax shall be returned to the county from whence the oil or gas or other mineral was produced. The former statute, construed in connection with the latter, requires but a slight change or transposition of words to make its meaning quite as clear as the latter. This court has frequently held that in the construction of statutes, when the intention of the Legislature is apparent, words may be modified, altered, or supplied, to give the enactment the

force and effect which the Legislature intended. Territory ex rel. Sampson v. Clark, Trustee, 2 Okl. 82, 35 Pac. 882; Trapp, Auditor, v. Wells Fargo Express Co., 22 Okl. 377, 97 Pac. 1003; State ex rel. Caldwell v. Hooker, 22 Okl. 712, 98 Pac. 964; State ex rel. Reardon v. Hooker, 26 Okl. 460, 109 Pac. 527; Schaffer v. Board of Commissioners, 33 Okl. 288, 124 Pac. 1069; Beaty v. State ex rel. Lee, 35 Okl. 677, 130 Pac. 956; Trustees', Executors' & Securities' Ins. Corp., Ltd., v. Hooton, 157 Pac. 293.

[5] The rule of construction announced is unaffected by section 7 of the 1916 statute, the purpose of which was to make clear that prior taxes should be collected and distributed under the old law, and not that the latter statute could not be taken as an aid in the construction of the former. If the statute is valid, it is to have effect according to the purpose and intent of the lawmakers. The intention is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. If a statute is plain, certain, and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless. Where the intention of the statute has been ascertained by the application of the rules of interpretation, they have served their purpose, for all such rules are intended to reach that intent. The rules of construction with which the books abound apply only where the words used are of doubtful import. They are so many lights to assist the court in arriving with more accuracy at the true interpretation of the intention. These rules are part of the law of the land, equally with the statutes themselves, and not much less important. The functions of such interpretation, unrestrained by settled rules, would introduce great uncertainty, and would involve a power virtually legislative. The intention of the Legislature in the passage of the act may be arrived at in many ways. In the present case that intent is made clear by the passage, at the extraordinary session of the Legislature, and during the last week of the session, of a joint resolution declaratory of its aim in the passage of the 1915 act, which in part reads:

"That it was the purpose and intent of the Legislature, and shall be so construed, that the remaining one-half of said gross production tax shall be by the state treasurer paid to the county treasurer of the county from whence the oil or gas or other mineral was produced, to be by the said county treasurer distributed in aid of the common schools of such county upon a per capita basis, as are other common school funds, it being the intent and purpose to give back to each county producing the oil or gas or other mineral one-half of said gross production tax for the purpose of carrying on the schools of the county."

This resolution was not signed by the Governor; hence, under section 11, art. 6, of the Constitution, has not the force of a law. Though it does not come to us in such character, it is evidence of high class of the legis-

lative intent. The due passage and enrollment of the resolution by the Legislature is a matter of contemporaneous history; the act of a co-ordinate branch of the state government, of which we may take notice. We know judicially of its passage, as well as of its contents; and, as courts are not confined to the acts of the Legislature in ascertaining the legislative intent, it is both competent and proper that in construing the statute due consideration should be given said declaratory resolution. Lewis' Sutherland, Statutory Construction, §§ 4770, 4771.

We think it may fairly be presumed that it was the purpose of the Legislature to compensate the county from which the production tax was collected for the loss of the ad valorem tax collected under the two original acts, by paying back to such county, to be distributed according to law, a portion of the tax collected for its account by the state authorities. A fair and equitable interpretation of the statute, in the light of the manifest purpose and intention of the Legislature, considering the history of other legislation upon the same subject, and construing it in connection with the subsequent act providing that a portion of the tax should go, not to the counties that participated in the payment thereof, but to the county from whence the tax was collected, together with the joint resolution of the same Legislature that passed the 1915 act, makes clear the purpose of the Legislature.

Having so ascertained, the statute should be construed so that one-half of the tax collected should be distributed to the county treasurer of the county from whence the same was collected, to be by said officer distributed in proportion to the school enumeration of such county, in aid of the common schools of said county, upon a per capita basis, as are other common school funds. Such a distribution, except possibly as to the local county officer having the apportionment thereof, would harmonize with the requirements in that regard found in section 7694, Rev. Laws 1910, making it the duty of the county superintendent to apportion the state school funds, together with the unapportioned county school funds in the county treasury, including all fines, forfeitures, and escheats, which may have accrued to such fund, among the school districts and parts of districts in such county, and in the ratio of the number of persons of school age residing in each district or part of district, as shown by the last annual reports of the several clerks of such districts and parts of districts.

As it appears that the state treasurer's position has been induced largely through a doubt entertained by him as to his duty in the proper distribution of the gross production taxes collected under the 1915 statute, in view of our construction of the act, no question is entertained but that said officer will promptly proceed to the apportionment

of said tax in conformity to the views herein expressed, and that until otherwise ordered the issuance of a peremptory writ will be withheld. All the Justices concur.

DONNELL et al. v. DANSBY et al.
(No. 5892.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. ACTION \S 50(3)—JOINDER OF CAUSES—INTERESTS INVOLVED.

A joint action may be maintained on a guardian's bond by or on behalf of two wards for an accounting and settlement, where they have a joint interest in the fund or property for which the guardian has failed to account.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 514-523; Dec. Dig. \S 50(3).]

2. GUARDIAN AND WARD \S 182(1)—ACCOUNTING BY GUARDIAN—RIGHT OF ACTION.

Where a guardian dies without an accounting and settlement of his affairs as guardian having been made in the county court, his former wards may maintain an action in the superior or district court against his personal representatives and the sureties on his bond as guardian for such accounting and settlement.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 626; Dec. Dig. \S 182(1).]

3. GUARDIAN AND WARD \S 182(7)—LIABILITIES ON BONDS—ACTIONS.

In such action, the court has jurisdiction to state the account of the deceased guardian with his wards and may hear evidence, and allow defendants any credits to which the deceased was lawfully entitled, and may determine the balance due, if any, by said guardian and render judgment against the sureties therefor.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 659-662; Dec. Dig. \S 182(7).]

4. GUARDIAN AND WARD \S 182(2)—ACTION FOR ACCOUNTING—CONDITIONS PRECEDENT.

It is not necessary that a claim for a fund wrongfully misappropriated by a guardian be presented to the administrator of such guardian before an action for the recovery thereof can be maintained.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 627, 630-636; Dec. Dig. \S 182(2).]

5. GUARDIAN AND WARD \S 174—LIABILITIES ON BONDS—ESTOPPEL TO DENY LIABILITY.

The surety upon a guardian's sale bond, where property has been sold by such guardian and the proceeds squandered, will not be permitted in an action on the bond to deny the validity of the guardian's appointment or of the proceedings resulting in the sale, nor to deny that he received the proceeds of said sale in his fiduciary capacity.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 590-599; Dec. Dig. \S 174.]

6. GUARDIAN AND WARD \S 182(6)—LIABILITIES ON BONDS—ACTION—EVIDENCE.

Evidence held sufficient to show execution of the bond sued on by defendant surety company.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 654-657; Dec. Dig. \S 182(6).]

7. GUARDIAN AND WARD \S 30(1)—ADMINISTRATION OF ESTATE—SUPPORT AND EDUCATION OF WARDS.

A father who has been appointed guardian of his minor children is entitled to their cus-

tody, services, and earnings, and is charged with the duty of supporting and educating them in a manner suitable to their circumstances; and, when he cannot reasonably afford to so support and educate them, and they possess property the income of which will do so, he may, under the direction of the county court, apply such income to the support and education of such minor children.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 116-127, 129, 130, 182-135; Dec. Dig. \S 30(1).]

8. GUARDIAN AND WARD \S 182(1)—LIABILITIES ON BONDS—CREDITS.

Where a father who had been appointed guardian of his minor children made no charge against them for moneys expended in their behalf, and obtained no authority of the county court to expend moneys belonging to them, no credits can be allowed therefor after his death in an action against the sureties upon his bond.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. \S 423, 624-626, 628, 629, 644, 658, 663; Dec. Dig. \S 182(1).]

Error from Superior Court, Pittsburg County; W. C. Liedtke, Judge.

Action by Dorano Dansby and another against W. P. Donnell, as administrator of the estate of Sam Lewis, deceased, and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

J. E. Whitehead, of McAlester, for plaintiffs in error. Wm. S. Rogers, of Muskogee, for defendants in error.

HARDY, J. This action was commenced against W. P. Donnell, administrator, and the Southern Surety Company as surety upon the bond of Sam Lewis, deceased, former guardian of defendants in error, to recover the sum of \$750 alleged to be due from said guardian as the proceeds of the sale of certain lands in which plaintiffs owned a one-half interest. The parties will be referred to as they appeared in the trial court. Separate demurrers to the petition were filed by defendants, which were overruled, and after issue joined trial was had to the court, at the conclusion of which the court directed a verdict for plaintiff in the sum of \$500, the full penalty of the bond.

[1] The first ground of reversal urged is that there was a misjoinder of parties plaintiff and causes of action, because it is said that there was no privity of interest between plaintiffs and that each had a separate and independent cause of action. Plaintiffs were the joint owners of the fund received from the sale of land owned jointly by them. Their father, by the same order, had been appointed guardian of both in one proceeding, had sold the land in that proceeding, and the bond sued on was given as a sale bond therein by order of the court, as a condition precedent to the making of such sale. Section 4690, Rev. L. 1910, is as follows:

"All parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article."

Section 4692 is as follows:

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants. * * *"

In *Burkett et al. v. Lehmen-Higginson Gro. Co.*, 8 Okl. 84, 61 Pac. 856, the plaintiffs, who were sureties upon the official bond of a sheriff, had paid a certain judgment rendered against him for the wrongful seizure of certain property, under a writ of attachment sued out by defendants, and had sued to recover the amount paid. One of the contentions was that plaintiffs were not entitled to jointly maintain the action. The trial court held this view and sustained a demurrer to the petition, which action was reversed by the Supreme Court. The first paragraph of the syllabus in that case is as follows:

"In all actions, those between whom there is a unity of legal interest must be joined as plaintiffs. Persons in whose favor an obligation exists must all join in an action thereon against the obligor, unless the interest of each of the parties to be benefited is specially stated in the contract, or is determined by the character of the obligation."

In *M. & P. Bank v. Horton et al.*, 27 Okl. 689, 117 Pac. 201, it was held that two joint makers of a note to a national bank who had separately, but from a joint fund, paid usurious interest on the note may jointly maintain an action to recover the penalty provided by section 5198, U. S. Rev. Stats. (U. S. Comp. St. 1913, § 9759). There was no misjoinder of parties or causes of action.

[2] Neither does the fact that the guardian's account had not been settled by the county court defeat the plaintiffs' right of action. This court held in *Pennington et al. v. Newman*, 36 Okl. 594, 129 Pac. 693, that an action would not lie against an administrator nor the sureties on his bond for a breach of the bond until there had been an accounting and settlement in the county court and a decree rendered therein, showing a balance due or a breach of some other condition of the bond, and a failure upon the part of the administrator to comply with the decree entered on the settlement or accounting. In that case, the administrator was living and was within the jurisdiction of the court and within reach of its process, while here the guardian has departed this life prior to any accounting or settlement being had. The question of whether an accounting or settlement must first be had where the guardian has died, before an action will lie on the bond, has been decided differently by the courts of the various states. The rule in California is that such is not necessary. It is there held that the executors of a deceased guardian have no authority to present an account of the testator as such guardian to the probate court, nor to institute proceedings for the settlement of such account in said court; nor has the probate court any authority to exercise jurisdiction over such a proceeding. A settlement of this nature can only be obtained by a proceeding in a court

of equity against the executors of the deceased guardian and other necessary parties. See *In re Alliger et al.*, 65 Cal. 228, 3 Pac. 849; *Reither v. Murdock*, 185 Cal. 197, 67 Pac. 784; *Zurfluh v. Smigh*, 185 Cal. 644, 67 Pac. 1089; *Woerner's Am. L. Guardianship*, § 46.

The same rule also prevails in the state of Kansas. In *Mitchell v. Kelly*, 82 Kan. 1, 107 Pac. 782, 136 Am. St. Rep. 97, the right of action upon the bond of a deceased guardian, without an accounting and settlement having been had in the court having jurisdiction of such proceeding, was upheld. It was said by the court:

"The district court possesses both law and equity powers which may be exercised in the same proceeding. It has general jurisdiction to investigate accounts and to ascertain and declare balances due, and it possesses the common-law powers exercised by chancery courts to settle guardians' accounts. Its methods and rules of procedure are as well calculated to attain just results as are those of the probate court. A finding of a balance due from the defunct guardian and of facts making the equivalent of a default must precede a judgment holding the surety liable. * * * The guardian is a managing agent for his ward, nobody is interested in his conduct except the ward, and his duty is primarily to account to the ward, rather than to the court. * * * The ward, on reaching his majority, may settle with the guardian as he pleases. When the guardian dies, the trust does not pass to his executor or administrator. His personal representative stands toward the ward as any third person having money or property of the ward in his possession."

The authorities supporting both views of this question are cited in 21 Cyc. 240.

[3] The amount which came into the hands of the guardian is easily ascertainable, and the superior court had jurisdiction of this cause and the power to investigate and determine the balance due, if any, upon the deceased guardian's bond, and in doing so might hear evidence as to the state of his accounts with his wards, and, in order to render judgment for the balance found to be justly due, might allow the defendants to show any credit to which the deceased guardian was lawfully entitled. See *Woerner's Am. L. Guardianship*, § 46.

While in the decisions in California it is said that a proceeding of this nature must be brought in a court of equity, this rule would not affect the jurisdiction of the superior court; for by statute the distinction between actions at law and equity are abolished and in their place there exists but one form of action called a civil action (section 4850, Rev. L. 1910), in which may be administered all the relief that was formerly administered in an equitable action.

[4] Section 6346, Rev. L. 1910, requires that all claims must first be presented to the executor or administrator before an action can be maintained thereon; and it is claimed by reason thereof plaintiffs' cause of action is barred. Plaintiffs were not creditors of deceased, but are seeking an accounting of a

trust fund held by him, which he had wrongfully misappropriated. We are justified in saying this because it is shown that none of this fund came into the hands of his administrator. There was no contractual relation existing between them, but the relation was one created and governed by law. In *Am. Trust Co. et al. v. Chitty et al.*, 36 Okl. 479, 129 Pac. 51, it was held that claims arising in tort or other wrongful acts of the deceased need not be presented to the executor or administrator before an action will lie thereon. A requirement that the claim here involved be presented to the administrator necessarily carries with it the proposition that the administrator has the power to allow or reject such claim, and that the county court in the administration proceedings would be authorized to state the account of the guardian with his wards, allowing or disallowing claims of the wards or the administrator in reference thereto, and in determining the balance due, which, we have seen, it cannot do. While the property of the ward may come into the hands of the administrator upon the death of the guardian, the trust does not descend to him, but is a personal trust reposed in the guardian; and the administrator merely takes possession of the property of the ward coming into his hands, for the purpose of holding and preserving it, until the persons entitled thereto can obtain a settlement of the guardianship affairs in the proper forum, when the rights of all parties may be definitely determined. See *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Chaquette v. Ortet*, 60 Cal. 600; *Theller v. Such*, 57 Cal. 447.

[5] When the guardian petitioned the county court for an order permitting him to sell the lands of his wards, and obtained an order directing a sale thereof and requiring him to give a bond before making such sale, and the Southern Surety Company became surety thereon and said lands were thereafter sold and the guardian received the proceeds thereof, for which he failed to account, the surety will not be permitted to question the validity of his appointment or the proceedings resulting in the sale, nor to deny that he received the moneys arising therefrom in his fiduciary capacity when suit is brought upon the bond to recover the amount of the guardian's default. *Boudinot v. Locust et al.*, 151 Pac. 579.

[6] J. E. Whitehead, the attorney for the Southern Surety Company, testified that he had represented the surety company in the trial of a few cases, and that F. D. Ungles, as agent and attorney in fact for the Southern Surety Company, had signed a number of bonds in probate matters in which he was interested; and, while he was not an expert on handwriting, he would guess the signature to the bond was in the handwriting of Ungles. R. W. Higgins, who was attorney for defendant Donnell, testified that he served as county judge of Pittsburg county for about three

years and that the Southern Surety Company had qualified as surety on a number of guardians' and other probate bonds which were executed by F. D. Ungles as agent and attorney in fact, and that he had seen the signature of said Ungles to said bonds quite often, and that in his judgment the signature to the bond in question was in the handwriting of Ungles. When it was shown that Ungles, as agent for the Southern Surety Company, had, as expressed, "quite often" executed bonds in the name of the surety company which were filed and approved in the court, and that in the opinion of two persons who were familiar with his handwriting the bond was executed by him, this was sufficient, in the absence of evidence to the contrary, to warrant a finding that he had authority to execute said bond and that same was in fact executed by him.

[7, 8] Defendants offered to show that deceased had expended various items for plaintiffs in the nature of transportation from Mississippi to the Indian Territory, and for buying improvements to obtain a suitable allotment, and for expense in going to the land office, and also in defending Jim Lewis upon a charge of larceny. Deceased was the father of plaintiffs, and the lands sold were the interest possessed by them in the allotment of their mother, who had died. In addition, they each owned an allotment equal to 320 acres of the average allottable lands of the Choctaws and Chickasaws. At the time of the trial Jim Lewis was 22 years of age, and, while the age of Dorona Dansby is not apparent, it does appear that she had been married. The father was entitled to the custody, services, and earnings of plaintiffs during their minority (section 4368, Rev. L. 1910), and was charged by law with the duty to support and educate them in a manner suitable to their circumstances (section 4367); and, if he could not reasonably afford to maintain and educate them in keeping therewith, he might, under the direction of the county court, defray the expense of such maintenance and education from the income of their individual property (section 6535), but the authority given by this section does not authorize the payment thereof from the corpus of the estate, in other words, from the capital. Being entitled to the services and earnings of the plaintiffs, and the duty to educate and maintain them being imposed upon him by law, and not having made any claim for such allowances in his lifetime, the sureties in this action cannot make such claim for him. To have entitled him to credit, the expenditures must have been made under the direction of the county court and no claim is made that such authority was obtained. In *Woerner's Am. L. Guardianship*, § 104, the author says:

"The law regulating the duties and powers of guardians in respect of the support and education of their wards is discussed in a former chapter. It appears, from what is stated there, that where the father is able to maintain and educate his child out of his own means, there

will be no allowance to the guardian for such purpose; hence, when a father has property of his infant child in his possession, and has not during his lifetime applied to the court to appropriate the child's property for its education or support, nor made any charges to the child, his estate will be allowed nothing for such support without the clearest proof that justice requires it. To justify the allowance of credits in the guardian's settlement for expenditures in the maintenance of a ward who has parents living, there must be a preceding order of the court having jurisdiction allowing the expenditure." *Knox v. Kearns et al.*, 73 Iowa, 286, 34 N. W. 861.

The facts that the guardian had the custody and was entitled to the earnings and services of the minors, and that they had other property which is not here involved, and that no account was ever presented to the county court asking an allowance for the items now urged justify the conclusion that he intended to make no such charge; and, where no such intention existed upon his part, the surety company cannot claim said items as an offset in an action upon the bond, even if such items could be allowed without an order of the county court. *State v. Miller*, 44 Mo. App. 118; *In re MacKall*, 60 Wash. 655, 111 Pac. 884.

Some of the items claimed are not within the contemplation of the law authorizing the property of the wards to be expended under the direction of the county court for their education and maintenance. When the father moved from Mississippi, it was his duty to remove his family, including his minor children, with him; and it was a natural thing for him to seek suitable lands for his children to select in allotment and to see that proper filings were made. One of the items sought to be proven is that the father paid for the marriage license of his daughter and the wedding clothes in which she was married. It appears that the father never thought of making a charge for such matters, and that the attempt to claim credit therefor is now made in an effort to escape liability upon the bond. If the surety may defeat its liability by these means, there is scarcely a bond in an probate proceeding involving the lands of Indian minors that may not be satisfied and discharged by offsetting against liability thereon expenses of the character here urged, even though not allowed by the county court. There was no error in excluding the testimony offered.

No error appearing in the record, the judgment is affirmed. All the Justices concur.

PHILLIPS v. HARGADINE-MCKITTRICK DRY GOODS CO. (No. 7333.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. BILLS AND NOTES §104—VALIDITY—DURESS.

It is not duress under the second paragraph of section 900 of the Revised Laws of Okla-

homa 1910, where the defendant signs notes in settlement of an account which is not due and upon which a former suit was filed and at the same time an affidavit alleging statutory grounds of attachment was filed, but no order of attachment was issued and none of the defendant's goods were detained either lawfully or unlawfully by the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. § 104.]

2. SET-OFF AND COUNTERCLAIM §35(2) — SUBJECT-MATTER—UNLIQUIDATED DAMAGES.

The defendant cannot plead unliquidated damages as a counterclaim in an action against him on promissory notes, which damages arose out of the wrongful suing out of an attachment in a former suit in settlement of which the promissory notes involved here were executed and delivered to the plaintiff in this action, even though the grounds of the attachment affidavit were false, and even though the order of attachment was issued wrongfully and he was damaged thereby.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 61, 62; Dec. Dig. § 35(2).]

Commissioners' Opinion, Division No. 2. Error from District Court, Atoka County; J. H. Linebaugh, Judge.

Action by the Hargadine-McKittrick Dry Goods Company against A. D. Phillips. Judgment for plaintiff, and defendant brings error. Affirmed.

Humphreys & Cook, of Atoka, for plaintiff in error. Robert M. Rainey, of Atoka, and Utterback & MacDonald, of Durant, for defendant in error.

BRUNSON, C. For convenience the parties to this suit will be designated here as they were in the trial court.

On the 3d day of December, A. D. 1914, the plaintiff filed its action against the defendant, alleging its cause of action on four promissory notes dated May 18, A. D. 1914; the first one becoming due on the 1st day of October, A. D. 1914, and the last one on the 1st day of November, A. D. 1914, and at the time of the filing of this suit all of said notes were due and unpaid. Thereafter on the 23d day of December, A. D. 1914, the defendant filed his answer to said petition, alleging: (1) That he signed and delivered the notes in controversy under threats and duress; that the plaintiff threatened to close the defendant out of business and on the 20th day of May, A. D. 1914, brought suit on an open account which was not due, and for the purpose of avoiding as far as possible loss of business and loss of financial standing because of the wrongful attachment which the plaintiff was threatening the defendant signed the notes in controversy; (2) a plea which the defendant designates as "Second Defense and Counterclaim" under which he alleges that on the day aforesaid and more than six months prior to the institution of the case at bar the plaintiffs had commenced an action in the district court of Atoka county on an open account, which was not

due and caused an attachment to issue as provided by statute, alleging that said attachment was maliciously, willfully, and without probable cause issued and procured and that by reason thereof the defendant was damaged in the sum of \$24,100, for which the defendant prayed judgment. To this answer the plaintiff on the 7th day of January, A. D. 1915, filed its demurrer, which presented two propositions: (1) That the allegations in paragraph 1 of the defendant's answer did not state facts sufficient to constitute a valid defense to the notes sued upon; and (2) that the allegations set forth in plaintiff's answer under the heading of "Second Defense and Counterclaim" were not proper matters of counterclaim or set-off under the statute. Thereafter and on the 5th day of February, A. D. 1915, the court sustained said demurrer, to which action of the court the defendant duly excepted and refused to plead further. Whereupon judgment was entered by the court in favor of the plaintiff and against the defendant, and to reverse said judgment this case is here on appeal.

[1] The defendant in the first paragraph of his answer says that he admits that he executed the notes in controversy, but says that he did so under threats and duress; that the plaintiffs herein threatened to close this defendant out of business and brought suit upon an open account which was not due, and for the purpose of avoiding, as far as possible, loss of business and financial standing because of the wrongful attachment which plaintiff was threatening; this defendant signed the notes in controversy. Are these facts, if true, sufficient to constitute duress? Duress is defined by Revised Laws of Oklahoma 1910, as follows:

"Sec. 900. *Duress Defined.* Duress consists in:

"First: Unlawful confinement of the person of the party, or of husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband or wife;

"Second: Unlawful detention of the property of any such person; or,

"Third: Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly, harassing or oppressive."

There are no allegations that any person was confined either lawfully or unlawfully, and hence the defendant does not bring himself within the first and third paragraphs of this statute. It is left for us to determine whether or not he has alleged facts sufficient to bring him within the second paragraph of this statute. To constitute duress under this paragraph there must be a detention of property, and that detention must be an unlawful detention. Can a threat to close defendant out of business and the bringing of a suit upon an open account, which was not due, and threatening to have an attachment issued, amount to an unlawful detention of defendant's property, and do such acts constitute duress?

In Cyc. vol. 14, p. 1124, it is said:

"*Duress of Goods.* An act which consists in seizing by force, or withholding from the party entitled to it, the possession of personal property, and extorting something as the condition for its release, or in demanding and taking personal property under color of legal authority, which, in fact, is either void, or for some other reason does not justify the demand."

We think that this is a broad and liberal statement of the rule. Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Cobb v. Charter, 32 Conn. 358, 87 Am. Dec. 178. The rule is announced in these two cases thus:

"Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them, but refuses to surrender them unless exaction is endured."

In the case of Wilcox v. Howland, 23 Pick. (Mass.) 167, the rule is announced:

"A threat by a judgment creditor to levy his execution on the property of the debtor will not render a promissory note given thereupon by the debtor void, as being made under duress, such note being in other respects valid."

In the case of Bolln v. Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898, it is said:

"It is claimed that this suit in attachment, if commenced at all, was not in proper form, and that the notes were given without consideration, and under duress; but it is immaterial whether the action was in proper form, or whether it was commenced at all or not. The parties had a right to prosecute an action by attachment against Rastaetter to obtain indemnity as his sureties, and the alleged mistake in the form of action is immaterial. The settlement of an action either begun or threatened, unless it be founded on a fraudulent or fictitious claim, is a valid consideration for promises by a third party to pay the claim, and the service or threatened service of an attachment in such action is not duress of goods. So the defense of no consideration and of duress fails."

There is no allegation that the plaintiff in this case demanded the giving of the notes in controversy; none that the notes were founded on an illegal, fictitious, fraudulent, or void consideration; none that the defendant did not in fact owe the debt upon which he was sued or that he had to execute the notes in order to secure the release of his property which was unlawfully detained or held by the plaintiff; and none that the plaintiffs held any property belonging to him either lawfully or unlawfully, or that the plaintiffs refused to deliver the same until the notes were so executed. There is no allegation that an order of attachment was in fact issued or served. The defendant was free to appear in court and defend against said suit, but he did not do that; he preferred to settle it by giving the notes sued on, and he did so execute said notes. It is not an unlawful detention of the property of the defendant for the plaintiff to threaten to put him out of business or to sue on an open account which was not due or to threaten to have an attachment issued, but where none was in fact issued and such allegations, if true, are not sufficient to constitute duress

under the second paragraph of section 900, supra.

[2] Was what the defendant designates as "Second Defense and Counterclaim" good as against the plaintiff's demurrer?

The defendant in his brief contends that his right to damages is supported by section 4746 of the Revised Laws of Oklahoma 1910, which reads as follows:

"The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action or on account of a wrongful attachment or garnishment issued and levied in said action after the same has been set aside. The right to relief concerning the subject of the action mentioned in the same section must be a right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the question involved therein: Provided, that either party can plead and prove a set-off or counterclaim of the proper nature, in defense of the liability sought to be enforced by the other party, and it shall not be necessary that such set-off shall exist as between all parties plaintiff and defendant in such suit, but any party may enforce his set-off or counterclaim against the liability sought to be enforced against him. Such set-off or counterclaim shall not be barred by the statutes of limitations until the claim of the plaintiff is so barred."

It is true under section 4746, supra, the defendant may in his answer set out and plead any new matter constituting a defense or counterclaim, but the counterclaim must be one existing in favor of the defendant and against the plaintiff and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action or on account of the wrongful attachment or garnishment issued and levied in said action after the same has been set aside.

It is not contended that an attachment was issued or levied in the instant suit, but that the attachment complained of was issued in a former suit between the parties to this action.

The third paragraph in the case of *Clark v. Kelley*, 163 Cal. 207, 124 Pac. 846, reads:

"Under Code Civ. Proc. § 442, providing that whenever a defendant seeks affirmative relief against any party to the action relating to or depending upon the contract or transaction on which it is brought, the term 'transaction' means some commercial or business negotiation, and not a wrong of violence or fraud, and so, in an action on notes, defendant cannot set up a cross-action for damages because of the improper issuance and levy of an attachment in a former action on such notes."

This court has discussed set-off and counterclaim in the following cases: *First National Bank v. Thompson*, 41 Okl. 88, 187 Pac. 668; *Harris v. Warren-Smith Hardware Co.*, 44 Okl. 477, 144 Pac. 1050.

In the case of *First National Bank v. Thompson*, supra, Commissioner Brewer discussed the two clauses, "arising out of the contract or transaction," and "must be a

right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the questions involved therein"; the language quoted being taken from section 4746, supra. The court used this language:

"It cannot avail as a right to relief, because it is not concerning the subject of plaintiff's action, nor is the right to relief necessarily or properly involved in the action for a complete determination or settlement of the questions involved. The defense pleaded has not, in the remotest degree, any connection or relation to the cause of action, or subject of the action, or transaction, upon which plaintiff's action is founded."

In the case of *Harris v. Warren-Smith Hardware Co.*, supra, Commissioner Harris, in speaking of the doctrine as announced in the case of *First National Bank v. Thompson*, supra, and in construing the section of the statute here involved, says:

"It is clear from this action that the counterclaim contemplated by statute must be one arising out of, or in some way connected with, the transaction set forth in plaintiff's petition, and must be a relief so involved that a determination thereof is necessary to a complete determination or settlement of the questions involved in plaintiff's action. Hence, under the statutes, supra, and the case of *First National Bank v. Thompson*, supra, the relief sought in the two counts of plaintiff's answer do not constitute a proper counterclaim against plaintiff's action."

Further on in the same opinion appears this statement:

"The relief sought in defendant's counterclaim is as distinctly disconnected and independent of the questions involved in plaintiff's action as was the note sought to be pleaded as a defense in the *First National Bank Case*, supra, and a determination of the issues presented in such counterclaim could have no bearing or effect whatever in a proper determination of the issues presented in plaintiff's petition. The plaintiff may or may not have been entitled to recover the amount sued on under the plumbing contract. The defendant may or may not have been entitled to the relief sought in his counterclaim. Testimony for or against the issues presented in plaintiff's action is wholly irrelevant to the issues presented in defendant's counterclaim, and vice versa. Hence, in order to avoid the confusion of the issues, and the testimony for and against independent issues, it has become a settled rule of practice, and we think a sound one, that such issues can be more satisfactorily settled, and finally determined with less confusion, by requiring a separate trial."

The defendant denominates his plea a counterclaim, but the court must test a pleading by its averments, and a mere name applied to it will not alone determine its character. *Brown v. Massey*, 19 Okl. 487, 92 Pac. 246; *Kimball v. Connor*, 3 Kan. 414. This part of the answer cannot, technically speaking, be classed as a counterclaim, since it does not arise out of the transaction pleaded in the plaintiff's petition, and in the instant suit.

It is probable that this answer could have been good in the former suit, but we are of opinion that the trial court did not err in sustaining the demurrer to the defendant's answer.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

PIERCE et al. v. BARKS. (No. 7227.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION §34(3)—ISSUES AND PROOF—EVIDENCE ADMISSIBLE UNDER PLEADING.

It is material error to admit, over objection, testimony in support of facts not put in issue by the pleadings.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 209; Dec. Dig. § 34(3).]

2. TRIAL §251(3)—INSTRUCTIONS—APPLICABILITY TO CASE.

An instruction upon a material issue, not raised by the pleadings, when excepted to is prejudicial error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 590; Dec. Dig. § 251(3).]

3. JUDGMENT §951(2)—PLEADING AS DEFENSE—ADMISSIBILITY OF EVIDENCE.

The rejection of material testimony offered in support of a material issue raised by the pleadings when excepted to is prejudicial error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808, 1810; Dec. Dig. § 951(2).]

Commissioners' Opinion, Division No. 1. Error from County Court, Craig County; Edw. H. Brady, Judge.

Action by J. E. Barks against M. L. Pierce and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

A. C. Wallace, of Miami, for plaintiffs in error. F. M. Smith, of Vinita, for defendant in error.

DAY, C. This was an action tried in the county court, wherein J. E. Barks was plaintiff and M. L. Pierce and C. M. Harvey were defendants, having come to the county court on appeal from a justice of the peace court. The parties shall hereinafter be referred to as they appeared in the trial court. Plaintiff's bill of particulars charged defendants with the conversion of a buggy and set of harness of the value of \$110; that defendants got possession of the buggy under a promise to him to repair said buggy and make good their warranty made by them when he had purchased said buggy from them, and that defendants had wrongfully taken possession of the harness, and that they had wrongfully and unlawfully converted said buggy and harness to their own use. Defendants answered by way of general denial, and, further, that all the matters complained of in plaintiff's bill of particulars had been formally adjudicated and settled in the case of Pierce and Harvey against J. E. Barks in the county court of Craig County, and further answered that de-

fendants sold said buggy and harness under and by virtue of a chattel mortgage executed by plaintiff to defendants, and that defendants duly credited plaintiff's note with the proceeds of such sale. The cause proceeded to trial, and resulted in judgment against defendants, from which this appeal is prosecuted.

[1] It will be observed that plaintiff in his bill of particulars charges a conversion and no other ground of recovery against defendants. The court admitted, over objection of the defendants, evidence tending to establish against defendants a breach of warranty of the buggy. This evidence was wholly without the issues, and should have been rejected. *C. R. I. & P. R. Co. v. Spears*, 81 Okl. 469, 122 Pac. 228.

[2] The court gave the following instruction:

"If the jury find that the defendants warranted the buggy to plaintiff and that said warranty was broken, then plaintiff should recover the amount of damages which he sustained by such breach, not exceeding the amount claimed by plaintiff's petition, excluding costs and attorney's fees"

—to which the defendants duly excepted. This instruction was erroneous for the reason that under the pleadings there was no issue of a breach of warranty. *Chambers v. Van Wagner*, 32 Okl. 774, 123 Pac. 1117; *American Jobbing Ass'n v. James*, 24 Okl. 460, 103 Pac. 670.

[3] Defendants called as a witness the clerk of the county court of Craig county, who identified the records and files in cause 296, the same being the case of Pierce and Harvey against J. E. Barks, referred to and pleaded in defendant's answer, and after a proper identification, offered in evidence the final judgment in said cause, which was by the court rejected, to which action of the court defendants duly excepted. This evidence was clearly competent upon defendants' plea of former adjudication, and should have been admitted.

We therefore conclude that these errors are material and prejudicial, and this cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

BROWN v. CHOWNING. (No. 7606.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §248, 301—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Alleged errors occurring in the trial, which are not excepted to at the time nor set forth in the motion for new trial, are waived, and will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1482, 1748, 1758-1765; Dec. Dig. § 248, 301.]

2. REPLEVIN §386 — ACTIONS — POLICY OF LAW.

In a suit in replevin, it is the policy of the law to settle in one action all the conflicting claims of the parties for the possession of the property in controversy or for damages for detention or loss.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 336-340; Dec. Dig. §386.]

Commissioners' Opinion, Division No. 4. Error from District Court, Carter County; W. F. Freeman, Judge.

Action in replevin by R. H. Ohowning against J. M. Ratliff and T. B. Brown. Judgment for plaintiff, and defendant Brown brings error. Affirmed.

Sigler & Howard, of Ardmore, for plaintiff in error. Potterf & Gray, of Ardmore, for defendant in error.

EDWARDS, C. The plaintiff brought an action in replevin against one S. M. Ratliff and the defendant in error in the name of John Doe, for the recovery of two mules, the action being based upon a special ownership predicated upon a promissory note secured by chattel mortgage upon said mules, made by the said Ratliff. The defendant Ratliff was never served with summons, and made no appearance. The answer of the plaintiff in error was a general denial. The case was tried to a jury, and the verdict was returned for the plaintiff, in the following form:

"We, the jury impaneled and sworn in the above-entitled cause, do, upon our oaths, find for the plaintiff and fix the amount of his recovery at \$100.00 for mule not produced and for possession of mule produced or the value of same in the sum of \$150.00"

—upon which verdict the court rendered judgment. No objection was made to the form of the verdict at the time it was returned, nor did the motion for new trial raise any objection to its form.

[1] The plaintiff in error argues at length that the verdict does not respond to the issues in the case; that as to the defendant Brown, sued as John Doe, no relief was sought except for the possession of the mules or their value, and that the returning of the verdict in the form in which it was returned is, in effect, converting an action in replevin into an action for damages. It is well settled that alleged errors, not excepted to at the time nor presented in the lower court by a motion for new trial, are waived and will not be considered unless they go to the jurisdiction of the court. *McDonald v. Carpenter*, 11 Okl. 115, 65 Pac. 942; *D. M. Osborne & Co. v. Case et al.*, 11 Okl. 479, 69 Pac. 263; *Weaver v. Kuchler et al.*, 17 Okl. 189, 87 Pac. 600; *Bank of Cherokee v. Sneary*, 148 Pac. 157; *Baker v. Marcum & Toomer*, 22 Okl. 21, 97 Pac. 572; *Stem v. Adams*, 30 Okl. 101, 118 Pac. 382.

[2] In the trial of this case it developed that one of the mules involved in the action had been shipped out of the country and was

not produced, and while the form of the verdict properly should have found the value of this mule, the trial court evidently construed the verdict so to find, and so specified in the judgment rendered. It is the policy of the law, in an action in replevin, to settle all the conflicting claims of the parties in one action, and if there is any error in the verdict as rendered, the same was waived by failure to make timely objection.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

LOCKETT v. ELY-WALKER DRY GOODS CO. (No. 6697.)

(Supreme Court of Oklahoma, April 5, 1916. Rehearing Denied May 16, 1916. Second Petition for Rehearing Denied Aug. 8, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §544(1) — RECORD — QUESTIONS PRESENTED.

The action of the court below in overruling motion to file an amended answer cannot be reviewed on an appeal by transcript, but same must be preserved and presented by case-made or by bill of exceptions made a part of the record in order that this court may consider the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. §544(1).]

2. MOTION FOR JUDGMENT ON PLEADINGS SUSTAINED.

From an examination of the record the trial court properly sustained motion for judgment on the pleadings.

Commissioners' Opinion, Division No. 3. Error from District Court, Kiowa County; James R. Tolbert, Judge.

Action by the Ely-Walker Dry Goods Company against H. B. Lockett. Judgment for plaintiff, and defendant brings error. Affirmed.

H. B. Lockett, of Comanche, for plaintiff in error. Wilson & Tomerlin and E. E. Buckholts, all of Oklahoma City, for defendant in error.

HOOVER, C. [2] The plaintiff in error brings this case to this court by transcript of record. The record here consists of petition, amended petition, answer, and judgment. Considering this record, there is no error, as the answer of the defendant did not contain facts sufficient to constitute a defense to the cause of action set forth in the amended petition, and the motion for a judgment on the pleadings was properly sustained.

[1] There is incorporated here an amended answer which does contain a defense, but the same cannot be considered as a part of this record, for the reason that the judgment of the court affirmatively shows that permission to file an amended answer was refused by the court, and the purported amended answer was not considered. (And the motion for

new trial filed by the plaintiff in error improperly incorporated here assigns as error the refusal of the court to permit plaintiff in error to file the amended answer.) So it appears that the amended answer was never properly filed by permission or authority of the court and it cannot be considered as a part of this record. If the court erred in overruling the motion of plaintiff in error to file said answer, we cannot review its action here, for the record is not preserved and presented for review on appeal by case-made or by bill of exceptions made a part of the record.

There being no error, the judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

WOOD et ux. v. JONES. (No. 7282.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

CONTINUANCE \S 12—GROUNDS—ABSENCE OF PARTY—DISCRETION OF COURT.

Where a cause is called for trial within a few days subsequent to the settling of the issues, and defendants interpose a motion for a continuance supported by the affidavits of the wife who is codefendant, and the family physician, showing that the husband and codefendant was absent from the state upon the order of said physician, by reason of serious illness, and that said absent defendant had sole knowledge of the facts regarding the transaction from defendant's viewpoint, and that said defendant would be present at the next term, and the application was not made for delay, but that justice may be done, said absent defendant, should have been given a reasonable opportunity to be present at the trial to advise with and assist his attorneys in the presentation of his case, and the denying of said continuance constitutes an abuse of discretion of the trial court.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. $\S\S$ 40, 42, 49, 50, 52; Dec. Dig. \S 12.]

Commissioners' Opinion, Division No. 1. Error from District Court, Marshall County; Jesse M. Hatchett, Judge.

Action by Bob Jones against George W. Wood and wife. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Rider & Hurt, of Madill, for plaintiffs in error. F. E. Kennamer and Chas. A. Coakley, both of Madill, for defendant in error.

DAY, C. Plaintiffs in error were defendants, and defendant in error was plaintiff below, and hereinafter shall be styled as in the trial court.

Plaintiff, in November, 1914, brought suit in replevin against defendants for the possession of certain hotel furniture. On January 15, 1915, only a few days after issues were joined, the cause was called for trial and defendants interposed a motion for continuance for the term, which motion was supported by the affidavit of the defendant,

Mrs. George W. Wood, which showed, in substance, that defendants were unable to proceed to trial on account of the absence of George W. Wood, her husband and codefendant, who was in El Paso, Tex., having been there since about 2 or 3 days after the filing of the suit, which was November 16, 1914; that he had been in ill health for some time, and just prior to departing for El Paso was ordered by his physician, Dr. A. H. Bray, to leave this climate and not return until the spring of 1915, and that he had not been back; that he would, if alive, be present at the next term of the court; that in the transaction of the purchase from plaintiff of the property involved in this suit, said George W. Wood acted for himself and as agent for affiant, and the contract involved was in parol and affiant, of her own knowledge, knew nothing of the terms of said contract; that the application is not made for delay, but that justice may be done. It was also supported by the affidavit of Dr. Bray, which was as follows:

"A. H. Bray upon his oath states that he is a physician and surgeon and resides and practices his profession in the city of Madill, Okl. That he is acquainted with the defendant George W. Wood, and as such physician he attended the said Geo. W. Wood in the months of October and November, 1914. That some time about 3 or 4 weeks before the suit was filed herein on November 16, 1914, the said Wood was sick and confined to his bed, and that he was suffering from the following disease: Nervous breakdown, with tubercular symptoms caused from living 7 years in the tropics. That it became necessary, in the opinion of said affiant as such physician, that the said defendant Wood should leave Madill, and he as such physician ordered him to leave for the preservation of his health, and he did so leave and was gone for about 2 weeks, and came back and was in greatly improved health, and stayed in Madill until a few days after the filing of said suit, when he again was taken to his bed by said disease, and became very sick, and it was the opinion of the affiant as such physician that unless the said Wood did at once leave Madill, that he would die, and that this affiant thereupon did order and direct that, for the preservation of his health, and to save his life, that the said Wood leave Madill, and go to El Paso, Tex., or some other point where the climate was similar, and other conditions the same, and not to return until the spring of 1915."

The motion for continuance was by the court overruled, to which defendants excepted, and the case proceeded to trial and resulted in judgment against defendant, from which this appeal is prosecuted.

It will be observed that the absent defendant was in sole possession of the facts regarding the transaction, from defendant's viewpoint, involved in litigation in this action; the suit was filed on November 16, 1914, and on trial day, January 15, 1915, the issues had been settled only a few days, and not quite 60 days had elapsed since the bringing of the action. The defendant was sick and absent from the state upon the order of his physician with direction not to return until spring, to the end that his health

might be preserved and his life saved. There had been no former continuance, and it was only asked that the cause be continued to the May term.

We are of the opinion that justice would require that said absent defendant have a reasonable opportunity to be present at the trial to advise with and assist his attorneys in the presentation of this case, and in view of the facts, as disclosed by the record, the trial court in denying the continuance abused its discretion. *McMahan v. Norick*, 12 Okl. 125, 69 Pac. 1047.

There are other errors urged, but we deem it unnecessary to consider them.

It follows that this cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

MCLEOD et al. v. SPENCER. (No. 7511.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES ⇐119(5)—
SURFACE WATERS — RIGHT OF ADJOINING
PROPRIETORS.

Where surface water has been accustomed to gather and flow along a well-defined channel, it may not be obstructed to the injury of the dominant estate. *Miller v. Marriott*, 149 Pac. 1164.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 134; Dec. Dig. ⇐119(5).]

2. WATERS AND WATER COURSES ⇐177(1)—
FLOWAGE—INJUNCTION.

Regardless of his ability to respond in damage, the owner of the servient estate may be enjoined in equity from constructing or maintaining an obstruction in a water course preventing the flow of ordinary flood waters from naturally following the course of the stream and thus causing same to unnaturally overflow and injure the dominant estate, since a single action at law ordinarily furnishes no adequate remedy for recurring injuries consequent upon successive overflows.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 260-262; Dec. Dig. ⇐177(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Cotton County; Cham Jones, Judge.

Action by Earl B. Spencer against N. I. McLeod and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Elliot F. Hook, of Walter, and W. C. Stevens, of Lawton, for plaintiffs in error. J. A. Diffendaffer and Chas. Mitschrich, both of Lawton, for defendant in error.

BLEAKMORE, C. On August 20, 1915, at the suit of Earl B. Spencer, plaintiff below, N. I. McLeod and B. S. Coleman were permanently enjoined by judgment of the trial court from constructing, repairing, or maintaining any obstruction in a certain water course, interrupting the natural flow of the

ordinary flood waters through the same or diverting them therefrom so as to cause an overflow and consequent damage to plaintiff's land, from which judgment defendants have appealed.

The evidence disclosed that in 1901 plaintiff and defendant McLeod, as homestead entrymen, acquired adjoining quarter sections, at which time a natural water course, the source of which was some two miles distant, meandered through the lands of plaintiff, and thence across a portion of those of defendant. In December of that year McLeod filled the channel of such stream where it crossed the section line between the two quarters, and from a ditch which he dug, intended to divert the natural flow of the waters thereof from their regular course, erected an embankment preventing such waters from reaching his premises, and forcing them back upon those of plaintiff. Such conduct was the basis of an action for damages between these parties, wherein, after successive trials, Spencer recovered for injuries thus occasioned. In 1909 McLeod conveyed title to his lands to his codefendant, Coleman, but continued to occupy the same. In April, 1912, McLeod and Coleman, having obtained permission of the township trustees to make repairs of the highway on the section line between the two tracts for the ostensible purpose of improving the same for the benefit of public travel, were proceeding to grade said highway, without culverts or bridges, in such manner as to obstruct said water course and divert the waters which might reasonably be anticipated to flow through the same in ordinary flood time, and cause such waters to overflow the lands of plaintiff to his damage. At this juncture defendants were temporarily enjoined; the order subsequently being made permanent.

Defendants contend that the finding and judgment of the trial court is not sustained by the evidence. After a careful examination of the record we are of the opinion that the evidence strongly supports the judgment. There was no prejudicial error in the admission or rejection of evidence.

[1, 2] Defendants further contend that whatever injury accrued, or might reasonably be anticipated by reason of such grading of the highway, would result from the overflow of surface waters, and is injury without wrong, for which no recovery could be had, and to prevent which equity affords no remedy by injunction.

Such doctrine does not prevail in this jurisdiction. With regard to the respective rights of proprietors of lands situate upon a water course to interfere with ordinary high water naturally following the course of the stream, the rule in this jurisdiction was announced in *Town of Jefferson v. Hicks*, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214, where it is held:

"The owner of lands situated upon a water course may construct an embankment thereon to protect his land from the superabundant water in times of flood; but, in doing so, he must so place the embankment that the natural and probable consequences of the embankment in times of ordinary floods will not be to cause the overflow to erode, destroy, or injure the lands of other proprietors upon the water course. An 'ordinary flood' is one which, by the exercise of ordinary care and diligence in investigating the character and habits of the water course, might have been anticipated. Overflow waters that continue in a general course, although without defined banks, back into the water course from which they started, or into another water course, do not become 'surface waters,' but remain a part of the water course. An injunction will lie in equity to restrain the landowners on one side of a stream from maintaining a levee upon the bank thereof whereby the flood waters of the stream are made to overflow unnaturally the land of others on the opposite side of the stream, without regard to the ability of the landowners who constructed the embankment to respond to damages, since a single action at law would not furnish an adequate remedy to the landowners whose lands are subject to recurring injuries from the recurring diversion of the overflow waters caused by the embankment."

In *Miller v. Marriott* (not yet officially reported), 149 Pac. 1164, it is held:

"Where surface water has been accustomed to gather and flow along a well-defined channel, it may not be obstructed to the injury of the dominant estate; so where, in case of high water, the surplus water from a creek regularly discharges itself through a well-defined channel, which is the accustomed way, through which it flows, such channel constitutes a 'water course.'"

It follows that the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

CITY OF EUFAULA v. AHRENS et al.
(No. 6945.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

EMINENT DOMAIN—§253(4)—REVIEW—DECISIONS REVIEWABLE—FINALITY.

An order setting aside the report of commissioners, appointed to view the property and assess damages sustained by property owners in condemnation proceedings, and directing a new appraisal is interlocutory and not final, and an appeal will not lie therefrom.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 663; Dec. Dig. §253(4); *Appeal and Error*, Cent. Dig. §§ 136, 568.]

Error from District Court, McIntosh County; Preslie B. Cole, Judge.

Condemnation proceedings by the City of Eufaula against Kate S. Ahrens and others. On motion of defendants the report of the commissioners was set aside and a new appraisal ordered, and plaintiff brings error. Dismissed.

Carl W. Gust, of Eufaula, for plaintiff in error. Jess W. Watts and Alvin F. Molony, both of Wagoner, for defendants in error.

HARDY, J. The city of Eufaula, a municipal corporation, instituted proceedings to condemn certain lands within its corporate limits for street purposes. The proceedings were regularly conducted according to statute, resulting in the appointment of commissioners who inspected said property and assessed the damages sustained by the owners thereof, and made a report in writing to the clerk of the district court in which the proceedings were pending, as required by law. Thereafter, upon motion of the property owners alleging that the commissioners had viewed the property and appraised the damages without notice to or an opportunity to be heard by the said owners, and upon the ground that the damages assessed were inadequate, the report of the commissioners was set aside and a new appraisal ordered, to which action the city reserved exceptions and prosecutes error.

Defendants in error file a motion to dismiss this appeal upon the ground that the order complained of is not a final order involving the merits of the action. The statute under which the proceedings were had is found in section 1400, and certain succeeding sections, of Rev. L. 1910; and by section 1402 it is provided that the report of the commissioners may be reviewed by the district court on written exceptions filed by either party in the clerk's office within 60 days after the filing of such report, and the court shall make such order therein as right and justice may require, either by confirmation, rejection, or by ordering a new appraisal on good cause shown; and said section further provides that either party may demand a jury trial within 80 days. Section 1403 in part is as follows:

"Either party aggrieved may appeal from the decision of the district court to the Supreme Court; but such review or appeal shall not delay the prosecution of the work on such railroad over the premises in question, if such corporation shall first have paid to the owner of said property, or deposited with the said clerk for said owner, the amount so assessed by said commissioners or district court. * * *

While the language quoted indicates that the statute is applicable to proceedings by railroad corporations, the next section, 1404, makes the provisions of this article apply to all corporations having the right of eminent domain.

The question here presented is whether the order of the court, sustaining the exceptions to the report of the commissioners and directing a new appraisal, is a final order such as may be reviewed by this court on appeal. That the court had authority to direct a new appraisal is shown by section 1402. Plaintiff in error says in this connection, however, that the court was without power to entertain and hear said exceptions for the reason that they were not filed within 60 days after the filing of the report of the

commissioners, as required by said section. If the order is not of such a nature as that from which the statute authorizes an appeal, that question cannot be considered and determined in this proceeding. The right of appeal in this character of proceeding is granted by section 1403, and an examination of its language convinces us that it contemplates a final disposition of the proceeding; for it is provided in that section that such review or appeal shall not delay the prosecution of the work of the corporation over the premises sought to be condemned, in the event such corporation shall pay to the owner of the property taken the amount awarded by the report of the commissioners or shall deposit said amount with the clerk of the district court, or, in the event trial is had to a jury, shall pay or deposit the amount awarded by the verdict of the jury.

These steps could not be taken where no amount had been ascertained. The right of the corporation to take possession of the property and proceed with the work contemplated depends upon the ascertainment of the amount of damages to be paid either by the report of the appraisers or by verdict of the jury and judgment of the court pronounced thereon. Such a decree would be a final order determining the rights of the parties, from which an appeal would lie under the statute. Likewise, should the court reject the report of the appraisers and render judgment denying the right to compensation, this would be such a final order as would sustain an appeal. In the present case, however, no order of either kind was entered, but the report was set aside and a new appraisal ordered, and the proceedings then stood in the same attitude as if no report had been filed. A similar question has frequently been presented where an order is made setting aside a judgment for the purpose of permitting a party to prosecute or defend, or for other good cause, and it is held that such an order is interlocutory and is not a final order from which an appeal will lie to the Supreme Court. See *Town of Byars v. Sprouls*, 24 Okl. 290, 103 Pac. 1038; *Moody & Co. v. Freeman et al.*, 24 Okl. 701, 104 Pac. 30; *Aetna Bldg. & Loan Ass'n v. Williams et al.*, 26 Okl. 191, 108 Pac. 1100; *Moody & Co. v. Freeman-Sipes Co. et al.*, 29 Okl. 390, 118 Pac. 135; *Smith v. Whitlow et al.*, 31 Okl. 758, 123 Pac. 1061; *Langston v. Thigpen*, 33 Okl. 605, 127 Pac. 258; *Pierce Coal Co. et al. v. Walker*, 35 Okl. 187, 128 Pac. 498; *Rahl v. Marlow State Bank et al.*, 37 Okl. 170, 131 Pac. 525.

That an order in condemnation proceedings, sustaining exceptions to the report of the board of commissioners or appraisers and ordering a new appraisal, is interlocutory and not final, and is not an order affecting the substantial rights of the parties, is declared in the decisions of the courts in

the following cases. See *Smith et al. v. Long*, 43 Ind. App. 668, 88 N. E. 356; *Cape Fear & Y. Val. R. Co. v. King et al.*, 125 N. C. 454, 34 S. E. 541; *Leavenworth Ter. Ry. & B. Co. v. Atchison*, 137 Mo. 218, 37 S. W. 913; *In re Road in Kiskiminitas Twp.*, 32 Pa. 9; *In re Pet. N. Y. & Harlem R. R. Co.*, 98 N. Y. 12; *In re App. N. Y., West Shore v. Buffalo Ry. Co.*, 94 N. Y. 287; *Turner et al. v. Holleran et al.*, 11 Minn. 253 (Gil. 168); *McNamara v. Minn. Cent. R. R. Co.*, 12 Minn. 338 (Gil. 269); *Fletcher v. O., St. P., M. & O. Ry. Co.*, 67 Minn. 339, 69 N. W. 1085; *Judson et al. v. Gage*, 98 Fed. 540, 39 C. C. A. 156; *Matter of Croasdel*, 2 K. B. (1906) 569. See, also, 2 Lewis, *Eminent Domain*, § 803.

The order from which the appeal is prosecuted not being one from which an appeal would lie, the cause is dismissed.

INCORPORATED TOWN OF CADDO v. J. S. TERRY CONST. CO. (No. 8415.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 356—TIME FOR TAKING PROCEEDINGS—EFFECT OF FAILURE TO PROCEED IN TIME—DISMISSAL.

Where plaintiff in error fails to file his appeal in the Supreme Court within six months from the date of the rendition of the judgment or order appealed from, as required by Sess. Laws 1910-11, c. 18, the same will be dismissed for want of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. \S 356.]

Error from County Court, Bryan County; J. L. Rappolee, Judge.

Action between the Incorporated Town of Caddo and the J. S. Terry Construction Company. From the judgment, the town brings error. Dismissed.

John L. Boland, of Caddo, for plaintiff in error. McPherrren & Cochran, of Durant, for defendant in error.

PER CURIAM. The order overruling motion for new trial herein, and from which this appeal is attempted to be prosecuted, was made December 27, 1915. Petition in error and case-made were not filed in this court until June 28, 1916, which is more than six months from the date of the order appealed from. Sess. Laws, 1910-11, c. 18, p. 35, requires that all proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within six months from the rendition of the judgment or final order complained of; and, where such statute has not been complied with, the appeal will be dismissed for want of jurisdiction. *Thomason v. Champlin*, 43 Okl. 86, 141 Pac. 411; *Pittsburg Mtg. Inv. Co. v. Savage*, 149 Pac. 1147.

The appeal is therefore dismissed.

BREWER v. DODSON et al. (No. 7559.)

(Supreme Court of Oklahoma. June 20, 1916.
Rehearing Denied July 25, 1916.)

*(Syllabus by the Court.)***1. GUARDIAN AND WARD §165—APPROVAL OF FINAL REPORT—DIRECT ATTACK.**

A petition, in an action by a ward against a former guardian and his surety, charging that an order of the county court approving the final report of such guardian, discharging him, and releasing the surety from further liability, was procured by fraud, is a direct attack upon such order.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 531-537; Dec. Dig. §165.]

2. INDIANS §15(1) — ADMINISTRATION OF WARD'S ESTATE—SALE OF PROPERTY—EFFECT.

Where allotted and inherited lands of a minor Creek freedman allottee are sold and converted into money by his guardian, through the medium of the county court, there occurs a mere change in the form of such property, which is still charged with the trust, and remains subject to the jurisdiction of that court during the minority of the ward as defined by congressional enactment and shown by the enrollment records.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 37; Dec. Dig. §15(1).]

3. INDIANS §15(1)—LIMITATION OF ACTIONS §72(4)—EMANCIPATION OF MINOR—EFFECT OF JUDGMENT—PERIOD OF LIMITATION—MINORITY OF PARTY.

(a) A judgment, conferring rights of majority upon a minor Creek freedman allottee, regardless of fraud in its procurement, is ineffectual and void in so far as it purports to empower him to transact business as an adult with reference to the proceeds of his allotted and inherited lands, or to personally maintain an action for the recovery thereof.

(b) And where more than three years after the rendition of such judgment the allottee, while still a minor as defined by the act of Congress of May 27, 1908 (35 Stat. 312, c. 109), and evidenced by the enrollment records, by next friend, commenced suit against a former guardian and his surety, to recover the proceeds of the sale of his allotted and inherited lands, *held*, that the statute of limitations had not been set in motion as to the allottee plaintiff in such action, and interposes no bar to the relief sought.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 37; Dec. Dig. §15(1); Limitation of Actions, Cent. Dig. § 395; Dec. Dig. §72(4).]

Commissioners' Opinion, Division No. 3. Appeal from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by Emmett Brewer, by his guardian ad litem, George W. Parker, against J. S. Dodson and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Dan M. Meredith and Geo. W. Parker, both of Muskogee, for plaintiff in error. Thomas H. Owen and Joseph C. Stone, both of Muskogee, Alvin F. Molony, of Wagoner, and Thea E. Lipscomb, Sumner J. Lipscomb, and L. J. Roach, all of Muskogee, for defendants in error.

BLEAKMORE, C. On August 20, 1914, Emmett Brewer, by Alice Goodman, his next friend, commenced this action against J. S. Dodson and the American Surety Company. The parties occupy the same relative position here, and are referred to, as they appeared in the trial court.

By the petition it is alleged, in substance, that plaintiff is a minor Creek freedman, enrolled as of 4 years of age in September, 1898; that there was allotted to him 160 acres of land, and upon the death of his father and sister he inherited 320 acres of other lands; that on April 25, 1910, the defendant Dodson was appointed guardian of plaintiff's estate, and as such executed two bonds for \$1,500 and \$5,000, respectively, with the American Surety Company as surety; that on September 2, 1910, by virtue of proper proceedings in the county court of Muskogee county, his guardian sold his allotted lands for the sum of \$6,519, and on October 5, 1910, in the same manner, sold his inherited lands for \$2,700; that three days thereafter defendant Dodson, together with his stepfather, A. M. Goodman, induced plaintiff, then a minor as shown by the records of the Commission to the Five Civilized Tribes, and in fact 16 years old, to petition the superior court of Muskogee county to confer upon him the rights of majority, and in said petition falsely represent that he had been a resident of Muskogee county for more than 1 year, and was then 19 years of age; that plaintiff, who had theretofore worn knee pants, was dressed in long trousers on the occasion of his appearance before that court, which, on October 15, 1910, rendered judgment, conferring upon him the rights of majority concerning contracts; that on the same day defendant Dodson filed in the county court of Muskogee county his report as guardian, showing a balance of \$8,082.74 due the plaintiff, his ward; that two days later at the instance of Dodson, plaintiff, without receiving any part thereof, signed and delivered a receipt, acknowledging the payment to him of said \$8,082.74; that thereafter, on January 23, 1911, the county court of Muskogee county, relying upon the truthfulness of said receipt showing that plaintiff had been paid said amount in full, and upon faith of the judgment of the superior court, regarding the same as valid and binding, made and entered an order approving said report and discharging Dodson as guardian, and releasing the American Surety Company from further liability upon his bond; that thereafter Dodson gave the plaintiff a check for \$3,750, which was deposited by his stepfather, Goodman, and Dodson, in a bank to the credit of his mother, who subsequently withdrew and dissipated the same. There was a prayer for cancellation of the receipt, vacation of the order approving the final report of said guardian, and discharging him

and releasing his surety, for judgment against Dodson in the sum of \$8,982.74, and against the American Surety Company for \$6,500. Defendants demurred to the petition on the grounds: (1) Failure to state a cause of action; (2) that the cause of action alleged was barred by the statute of limitations; and (3) that the district court was without jurisdiction of the subject-matter.

[1, 2] In determining the principal questions presented by the record we may consider: First, the jurisdiction of the trial court, which involves the nature of the attack upon the order of the county court; second, the effect of the judgment of the superior court, conferring the rights of majority upon the plaintiff; and, third, the statute of limitations.

It is urged that the order of the county court, approving the report of the guardian, and discharging him and releasing the surety upon his bond, could only be vacated in a proper proceeding for the purpose in that court, and that the district court is therefore without jurisdiction to grant the relief sought. We are unable to agree with this proposition. In this case fraud is charged on the part of the defendant Dodson. It is alleged, in effect, that, having converted the whole estate of his ward, consisting of 490 acres of allotted and inherited lands, into money, between April 25 and October 5, 1910, in conjunction with plaintiff's stepfather, Dodson knowingly influenced the plaintiff, an ignorant negro boy of 16, in short trousers, to falsely represent his age and residence to a court, in a petition praying the removal of his disabilities as a minor; that he procured for plaintiff his first long trousers, to be worn upon the occasion of the hearing of said petition, ostensibly to deceive the court in regard to his age by his appearance, and on the very day the judgment of emancipation was procured as a result of such falsehood and deception, filed in the county court a report, showing final settlement of his guardianship account and receipt of his ward for more than \$8,000, which, in fact, had never been paid to him, and later consummated his scheme to exploit the estate by obtaining from that court the approval of such account, his discharge as guardian, and the release of his surety, by means of such false receipt, and the judgment procured by fraud upon the jurisdiction of another court.

It is clear that the judgment of the superior court, and the order of the county court, based upon falsehood, fraud, and chicanery, induced and participated in by the defendant Dodson, were not procured on behalf of the plaintiff or in his interest, but, on the contrary, were intended to, and will if permitted to stand, denude him of his estate and leave him penniless, the procedure designed by the law for his protection being employed to rob him and profit his guardian. It is in such instances, where intimate trust

relations are violated and advantage taken of ignorance, dependence, and helplessness, that speedy equitable remedies are peculiarly appropriate; and where, as a means of accomplishing such unconscionable purpose, fraud is practiced in invoking the jurisdiction of another tribunal, the district court may properly exercise its powers in equity under the Code to relieve against the wrong by setting aside the judgment of such tribunal, which would not have been rendered in the absence of fraud, or may refuse to give effect thereto. In *Brown et al. v. Trent et al.*, 36 Okl. 239, 128 Pac. 895, this court said:

"Fraud vitiates everything founded upon it, and when the fraud is established, no court will give effect to a judgment so procured. In one sense, it is not a judgment at all. *Grantham v. Kennedy*, 91 N. C. 148. The presumption is that the judgment would not have been rendered if the court rendering it had not been imposed upon, and the presumption applies with equal weight to the judgment to the highest and lowest court."

In *Bridges v. Rea et al.*, 161 Pac. —1 (not yet officially reported), a suit in ejectment and to set aside, for fraud in their procurement, certain proceedings in the county court culminating in the sale of plaintiff's land by her guardian, it was said by Mr. Justice Turner, speaking for the court:

"It will not do to say that this is a collateral attack, and that the proceedings of the county court, which show a sale for cash, cannot be impeached by evidence aliunde, as we held in *Hathaway v. Hoffman* [153 Pac. 184] not yet officially reported. This for the reason that this is not a collateral attack, but a direct attack, alleging fraud in the procurement of the proceedings. As to whether this is a direct or collateral attack was correctly decided and put at rest in *Brown et al. v. Trent et al.*, 36 Okl. 239 [128 Pac. 895], which was a suit in the district court to quiet title to certain lands, and there, as here, the charge was that the order of court directing the guardian to sell the land was procured by fraud. It was there held that the attack was a direct and not a collateral attack. This court said: 'This proceeding is a direct attack upon that judgment. It is a suit, one of the ultimate purposes of which is to set aside the order of sale and the order confirming the sale. *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760; *Campbell-Kawannanaka v. Campbell*, 152 Cal. 201, 92 Pac. 184. It is alleged that the orders were procured by fraud, and a portion of the prayer is that they be canceled and set aside.'"

And further on in the opinion:

"'But an attack upon a judgment for fraud in its procurement is a direct attack over which courts of equity take jurisdiction, and no well-considered case can be found in which such jurisdiction is denied. See *Sharp v. Danville, etc.*, R. Co., 106 N. C. 808, 11 S. E. 590, 19 Am. St. Rep. 533; *Uzzie v. Vinson*, 111 N. C. 138, 16 S. E. 6. The case of *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760, was a suit brought to quiet title, in which it was attempted to cancel a probate sale upon the ground of fraud. The court took jurisdiction and canceled the sale upon that ground. See, also, *Coffey v. Greenfield*, 62 Cal. 602; *Reed v. Bank of Ukiah*, 148 Cal. 96, 82 Pac. 845; *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219; *Fincke v. Bundrick*, 72 Kan. 182, 83 Pac. 403, 4 L. R. A. (N. S.) 820. The cases are very rare, and the circumstances very unusual, when the jurisdiction of a court of equity to cancel any sort of

¹ Rehearing pending.

contract or judgment procured by fraud cannot be invoked. 1 Story Eq. (16th Ed. 184). See, also, *Elrod v. Adair* (not yet officially reported) 153 Pac. 680; *Griffith v. Godey*, 113 U. S. 89 [5 Sup. Ct. 383], 28 L. Ed. 986."

[3] Under the circumstances of this case, even if it could be conceded that the recitals in the judgment of the superior court are conclusive, and that such judgment operated generally to confer the rights of majority upon the plaintiff, was it effective to qualify him personally to control and contract with reference to the proceeds of the sale of his allotted lands, which were and could only have been sold through the medium of the county court? We are of opinion that his emancipation, by virtue of said judgment, was limited to transactions exclusive of personal control and disposition of his allotment and inherited lands or the proceeds derived from the sale thereof. Section 1 of the Enabling Act (section 413, Williams' Constitution of Oklahoma) provides:

"That nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

By section 2 of an act of Congress of May 27, 1908 (35 Stat. at Large, 812), it is provided:

"That the jurisdiction of the probate courts of the state of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions; and the term minor or minors, as used in this act, shall include all males under the age of 21 years and all females under the age of 18 years."

And by section 6 of said act it is further provided:

"* * * That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specified by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma."

Considering sections 4955a, 4956, 4957, 4959, Comp. L. 1910, and sections 4427-4430, R. L. 1910, authorizing the proceedings of the character had in the superior court of Muskogee county, this court, in *B. F. Collins Inv. Co. v. Beard* (not yet officially reported) 148 Pac. 846, said:

"The statutes above referred to need no analysis, or even a construction here, for the reason that when the question of the removal of restrictions from allotted lands, or the right of alienation of such lands, or the power of alienation is involved, we must look to the acts of Congress and to those acts and laws alone. In other words, if a state law, by its language or through its proper construction or its operation, would permit the alienation of a restricted Indian allotment, or render a deed thereto effective, where the land would not be alienable, or the deed thereto effective, under the acts of Congress dealing with the subject-matter, then the state laws fail; and this, because the federal government retained jurisdiction in these Indian matters to the extent stated in the Enabling Act, under the terms of which Oklahoma

became a state; and this reservation of jurisdiction was assented to in the Constitution which the people adopted. To give the desired construction to either of the statutes under consideration would be, in effect, to accomplish the removal of the federal restrictions on the sale of allotted lands, by means of state legislation. Once conceding this principle, it is easily seen that the federal control would be interfered with, and might ultimately be entirely suspended. No such construction is possible. *Chapman v. Siler*, 30 Okl. 714, 120 Pac. 608; *Walker v. Brown*, 141 Pac. 681; *In re Probate of Will of Emerson Allen* (recently decided, but not yet officially reported) 144 Pac. 1055; section 1, Enabling Act (running section 413, Williams' Ann. Const.; section 43, art. 24, Constitution); *Truskett v. Closser*, 236 U. S. 223, 35 Sup. Ct. 885, 59 L. Ed. 549."

It has been repeatedly held by this court that the deed of a minor allottee, attempting to convey his allotted land, is void, and that such sale can only be made by guardian in the proper proceedings in the county court. *Tirey v. Darneal*, 87 Okl. 606, 133 Pac. 614; *Bald v. Taylor*, 48 Okl. 816, 144 Pac. 589. In *Bell v. Fitzpatrick* (not yet officially reported) 157 Pac. 334, it is held:

"A decree of a district court of this state, purporting to confer upon an Indian minor allottee of tribal lands majority rights, including authority to execute a conveyance of her allotment, is ineffectual and void, in so far as it undertakes to authorize a conveyance of said lands in violation of the congressional restrictions thereon."

In *Truskett v. Closser*, 236 U. S. 223, 35 Sup. Ct. 885, 59 L. Ed. 549, it was held by the federal Supreme Court:

"Section 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma. * * *"

"Section 2 defines minors, male and female, and provides for the disposition of their property under, as stated, rules and regulations provided by the Secretary of the Interior, and declares that the jurisdiction of the probate courts of the state shall be subject to its provisions. And 6 declared to what courts the property of minors so defined shall be subject. Explicitly such property is made 'subject to the jurisdiction of the probate courts of the state of Oklahoma.' The qualification 'except as otherwise specifically provided by law' means, as said by the Circuit Court of Appeals, 'federal law, not state law.' * * * The conferring of the rights of majority, conformably to a state statute, upon a minor Indian allottee so as to qualify him to make a lease, must be deemed to be beyond the power of an Oklahoma district court, notwithstanding the removal of restrictions on alienation by Indian allottees made by the act of May 27, 1908. * * *"

See, also, *Barbre v. Hood* (D. C.) 214 Fed. 478.

In *Cochran v. Teehee*, 40 Okl. 888, 138 Pac. 563, a case in which a female Cherokee allottee, under guardianship, actually over the age of 18 years, but shown by the enrollment records to be a minor, sought to recover certain royalties and proceeds derived from her allotted lands held by her guardian, this court held such royalties and proceeds subject to the control of the county court in the exercise of its probate jurisdiction, and, in

considering the provisions of the act of May 27, 1907, supra, said:

"That the statute in question placed the lands of these allottees who were minors under the jurisdiction of the probate courts of Oklahoma, and that such jurisdiction extended to a full superintending control over the lands and to the time when the said minors, as provided by the said act, attained their majority, presents a common highway which both parties to this action travel together; the divergence occurs on the rule obtaining where the proceeds of the allotments are involved and the actual age differs from that shown by the roll. Does this statute then apply? Congress retained all of its power and authority, notwithstanding statehood, and its right therein was yielded by the state on its organization. Section 1, Enabling Act (section 413, Williams' Ann. Const. Okl.). The contention of counsel for plaintiff is that the act should be so construed that, while the member was conceded to be incompetent to deal with his land, sell it, lease it, or otherwise dispose of it himself, yet, after this has been done and the proceeds of its sale, mortgage, or leasing were paid, he should be shown, otherwise than by the rolls, to have attained his majority, should be held to be legally competent and qualified to receive them free from all supervision; that, while it must be conclusively held that he was too weak and incompetent to protect himself while his property was invested in his land, yet that, as soon as it was in money, he would be astute and wise enough to protect himself and properly conserve it; that the lands themselves and their leasing or disposition presented the only question arising under this act; and that the proceeds themselves were beyond purview. We are unable to concur in this contention. To so hold would be to give full force, faith, and credit to the act during all of the time while the property was in a condition that it could not escape, be destroyed nor stolen, and eliminate all protection from these incompetent people when it would palpably be needed most. That it is not susceptible to the construction contended for is, to our minds, clear, not only from the specific terms of the act itself, but from the entire trend of congressional legislation and judicial constructions relating to these people. The act itself, in section 1, provides, in reference to certain full and mixed blood Indian lands, that the Secretary of the Interior may remove the restrictions under rules and regulations concerning the terms of the sale, and also provides for the disposal of the proceeds for the benefit of the respective Indians. Herein is recognized that it is the intention of the lawmakers not to withdraw the protection of the department from such allottees so far as the proceeds arising from the sale of their lands were concerned. Section 6, as noted above, provides that the minor allottees, as well as their property, except as otherwise specifically provided by law, shall be subject to the jurisdiction of the probate courts. The lands of these allottees, as conceded, are subject to such jurisdiction, and we can see no reason for holding that, where the lands are exchanged for money, then the protection is removed. In the absence of any specific congressional provision for the management and control of the proceeds derived from these lands, we presume that Congress intended that they should be managed in accordance with the statutes of the state of Oklahoma relating to such subjects. Section 5491, Comp. Laws 1909, provides as follows: 'Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward, and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may

sell the real estate, upon obtaining an order of the county court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.' The act provided for the retention by the probate court of jurisdiction over the lands of these allottees until they became of age as shown by the rolls, and we believe that a reasonable construction is that, until such allottee becomes of age as shown by the rolls, the disposition of his allotted lands and the proceeds thereof are subject to the jurisdiction of the probate court without reference to what extraneous proof may show with reference to his actual age, and that it was the intention of Congress that this should be so."

The exclusive plenary power of Congress to legislate with respect to inherited as well as allotted lands of members and freedmen of the Five Civilized Tribes was not impaired by the advent of statehood. Section 1, Enabling Act, supra. And to our minds the language used in the act of May 27, 1908, viz., "that the person and property of all minor allottees of the Five Civilized Tribes shall, except as otherwise specified by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma," is sufficiently comprehensive to embrace all property of such minors, including inherited lands, relative to which the federal government had authority to make any law or regulation, and plainly indicates the intention of Congress to exercise its superintending control over such property during the period of minority fixed by that act, by employing the probate courts of the state as federal agencies for that purpose. Clearly it was contemplated that the property of plaintiff, consisting of his allotted and inherited lands, during the period of his minority as fixed by congressional enactment, should be held in trust by guardian subject to the jurisdiction of the county court; and, when said lands were sold and converted into money under the order of that court, there occurred merely a change in the form of such property, which was still charged with the trust, and remained subject to the jurisdiction of the court until plaintiff reached his majority under the federal act. In *United States v. Thurston County*, 143 Fed. 287, 74 O. C. A. 425, it is said:

"No change of form of trust property can divest it of a trust. The substitution of one kind of property for another, of goods for promissory notes, of lands for bonds, or of money for lands, does not destroy it. The substitute takes the nature of the original, and stands charged with the same trust. *Taylor v. Plummer*, 8 Maule & Sel. 562, 574; *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Oham. Div. 696, 717, 719, 783; *Cook v. Tullis*, 18 Wall. (85 U. S.) 332, 341, 21 L. Ed. 983; *McLaughlin v. Fulton*, 104 Pa. 161, 171; *Third National Bank v. Stillwater Gas Co.*, 36 Minn. 75, 78, 30 N. W. 440; *2 Perry on Trusts*, §§ 885, 837; *National Bank of Commerce v. Anderson*, 147 Fed. 90, 77 O. C. A. 259. Intervening rights of innocent third parties are in no way involved in this case."

Upon the authority of the foregoing decisions it must be held, regardless of the fraud

in its procurement, that the judgment of the superior court of Muskogee county, conferring majority rights upon plaintiff concerning contracts, was ineffectual and void in so far as it purported to empower him to transact business as an adult with reference to the proceeds of the sale of his allotted lands, or to personally maintain an action for the recovery thereof. He was at all times under 21 years of age, in fact and as shown by the enrollment records of the Commission to the Five Civilized Tribes; and, with regard to such property, under the provisions of the federal statutes (which supplant the state law wherever Congress has seen proper to legislate in the interest of allottees of the Five Civilized Tribes, or concerning their property rights), he had not reached his majority.

It is here contended, and the trial court so held, that plaintiff's cause of action was barred by the statute of limitations. The provision of the statute relied upon by the defendant Dodson is as follows:

"Section 4657, R. L. 1910. 'Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards. * * *

"Second. Within three years: 'An action upon a contract, express or implied, not in writing; an action upon a liability created by statute, other than a forfeiture or penalty. * * *"

The statute relied upon by the surety company provides:

"Section 6582, R. L. 1910. *Action on bond.* No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed."

In *Bell v. Fitzpatrick*, supra, it was held:

"The statute of limitations does not begin to run against an action to set aside a void conveyance of an Indian minor allottee to his or her allotted lands, executed after the passage and approval of Act Cong. May 27, 1908, c. 199, 35 Stat. 312, until such minor has attained his or her majority, as shown by the enrollment records of the commissioner to the Five Civilized Tribes."

It follows from what we have heretofore said that at all times before and when this suit was commenced plaintiff was under the legal disability of minority, and not entitled to sue to recover the proceeds of his allotted and inherited lands; and therefore the statute of limitations was never set in motion as to him in that regard, and interposes no bar to the maintenance of this action therefor.

The trial court erred in sustaining the demurrers to the petition; and its judgment should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

SHERMAN v. PACIFIC COAST PIPE CO.
(No. 5346.)

(Supreme Court of Oklahoma. May 9, 1916.
Rehearing Denied July 25, 1916.)

(Syllabus by the Court.)

ACCORD AND SATISFACTION §8(1), 10(1)—
COMPROMISE AND SETTLEMENT §6(2)—
WHAT CONSTITUTES.

While, if a demand is unliquidated or disputed, payment and acceptance in discharge of the same of a less sum than that claimed will constitute an accord and satisfaction, yet in cases where the debt is liquidated and is due (except where changed by statute) the general doctrine is applied that payment by the debtor and receipt by the creditor of a part thereof is not a satisfaction of the whole, unless it be made on some new consideration, such payment operating only as a discharge of the amount paid, and the creditor may maintain an action for the balance.

ED. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 60-65, 67-72; Dec. Dig. §8(1), 10(1); *Compromise and Settlement*, Cent. Dig. §§ 86-88; Dec. Dig. §6(2).]

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by the Pacific Coast Pipe Company, a corporation, against N. S. Sherman, doing business as the N. S. Sherman Machine & Iron Works. Judgment for plaintiff, and defendant brings error. Affirmed.

Oliver G. Black and Welty & Orr, all of Oklahoma City, for plaintiff in error. Harris, Nowlin & Singleton, of Oklahoma City, for defendant in error.

BLEAKMORE, C. This action was commenced in the district court of Oklahoma county by defendant in error as plaintiff against plaintiff in error as defendant to recover an alleged balance of the purchase price of certain wood pipe sold and delivered by plaintiff to defendant. The parties are referred to as they appeared below. The defense pleaded is an accord and satisfaction. There was judgment for plaintiff, and defendant has appealed.

Plaintiff contracted with defendant to deliver to him at agreed prices certain wood pipe on board the cars at Ballard, Wash., to be used by defendant in the construction of waterworks system at Teague, Tex. The pipe was shipped at divers times, and was received and used by defendant in the installation of said waterworks system. An account of each shipment was rendered, and forwarded by mail to defendant, and retained without objection on his part. Defendant contends that there was an overcharge of \$312.24 in the aggregate amount of the account, and also that by reason of certain defects in the pipe and the failure of the plaintiff to furnish a competent person to superintend the laying thereof that he was damaged in the sum of \$2,396.07. There was correspondence between the parties, but no complaint was

made of any overcharge or defect in the pipe on the part of defendant. The entire indebtedness being past due, plaintiff in an effort to secure its payment presented its verified claim therefor to the city of Teague. Thereafter defendant telegraphed plaintiff as follows:

"The Western Union Telegraph Company,
"Teague, Tex., May 21, '09."

"Pacific Coast Pipe Co., Ballard, Wash.:

"Wire release claim filed with city and draft in full will come forward next week on acceptance plant otherwise time of your settlement indefinite. Act quick. N. S. Sherman."

Plaintiff answered:

"The Western Union Telegraph Company,
"May 21, 1909."

"To N. S. Sherman, Jr., Teague, Texas:

"Will wire release upon bank guarantee our account paid in full next week. Your indifference toward our account and withholding expense bills causes our action."

"Pacific Coast Pipe Co."

Four days later the plaintiff received the following telegram:

"The Western Union Telegraph Company,
"Teague, Texas, June 5, 1909."

"Pacific Coast Pipe Co., Ballard, Wash.:

"We hold money to pay your claim by check on us in your favor. Draw for account in full.
"First National Bank of Teague."

Whereupon plaintiff made draft through such bank for the amount of its account, which draft was subsequently dishonored. On May 26th following defendant wrote plaintiff as follows:

"N. S. Sherman Machine & Iron Works.

"Oklahoma City, May 26, 1909."

"Pacific Coast Pipe Co., Ballard, Wash.—Gentlemen: The writer has just returned from Teague, Texas, and we are handing you herewith freight expense bills covering the last three cars of pipe, same being for \$273.90, \$298.65, and \$285.15, respectively. The writer regrets very much that you saw fit and proper to file a bill with the city. However, we will take this matter up with you in a further communication during the present week."

"Yours very truly,

"N. S. Sherman Machine & Iron Works,
"Dict. NSS-D By N. S. Sherman, Jr.
"Inclosure."

On July 3d defendant telegraphed plaintiff:

"The Western Union Telegraph Company,
"Oklahoma City, Okla., July 3, '09."

"Pacific Coast Pipe Co., Ballard, Wn.:

"Yours twenty-fourth mail full settlement Monday. N. S. Sherman."

On July 14th he again telegraphed:

"The Western Union Telegraph Company,
"Oklahoma City, Okla., July 14, '09."

"Pacific Coast Pipe Company, Ballard, Wn.:

"Check mailed have been out of town hence delay. N. S. Sherman."

On July 15th defendant again wrote plaintiff as follows:

"N. S. Sherman Machine & Iron Works,
"Oklahoma City, Okla., July 15, 1909."

"Pacific Coast Pipe Company, Ballard, Wash.—Gentlemen: We have at last got straightened out on the Teague matter and are inclosing you herewith our check in the sum of \$10,278.66, in full and complete settlement for all mate-

rial furnished on or for account of Teague, Texas, waterworks system as per the inclosed statement; this without prejudice, as we feel that we are really paying you more than we should in view of all the circumstances. We have credited you with the total measurement of pipe, as allowed us by the city. This measurement includes all specials, valves, and hydrant connections, which amounts to far more than the amount of pipe that was left over, we have not credited you with the mauls and tompons, as in the first place Mr. Greenwood advised they would be furnished, and in the next place neither were of any use, except the small tompons.

"Now, as to our charge of \$907.56, our pay roll and expense account shows an expenditure of \$1,615.12, for cost of repairing leaks, maintenance of plant on account of leaks, caused by defective pipe, and defective instructions by your representative, to a certain extent, in our opinion, as his advice was: Fill the pipe up twice, let it soak, and then put on the pressure. This, we have discovered, will not do, as pipe that we let soak twenty days before putting on pressure gave us the least trouble; to be sure which rightfully should belong to you, further we paid Mr. Betaque the total sum of \$395.76, and of this amount it is a serious question in the mind of the writer if the last payment of \$289.76 would have been made, had he been at Teague, as his work was entirely unsatisfactory to the engineers, and, if drawn to a fine point, it occurs to us that you should reimburse us on this account. However, for the sake of a final settlement, we are willing to pass this, as well as for Mr. Betaque, because personally he is a fine fellow, but has a lot to learn about placing wood pipe in a complete waterworks system. We were compelled to pay quite a sum for storage, which we believe would have been unnecessary, had you followed our advice as to the shipments."

"We do not believe it is necessary to go into further details in this matter, and we believe that you can congratulate yourself that we are as liberal with you as we are in making this settlement. We certainly would 'shake' with ourselves if we had come out with the pipe laying as well. Please favor us with duplicate receipts in full."

"Yours very truly,

"N. S. Sherman Machine & Iron Wks.,
"NSSJr-D By N. S. Sherman, Jr."

"Pacific Coast Pipe Company

"Bought of N. S. Sherman Machine & Iron Works, Teague, Texas."

"We credit:

430 ft. 10-200' at 56	\$1,960.80
15590 ft. 8-200' at 40 1/2	6,313.95
5000 ft. 8-300' at 48	2,400.00
8091 ft. 6-200' at 28 1/2	2,406.62
9441 ft. 4-200' at 22 1/2	2,137.82

\$15,219.19

"Less we debit:

Freight bills rendered..... 4,132.97
One-half \$1,615.12..... 807.56 4,940.53

\$10,278.66"

The check inclosed was as follows:

"No. 1065 Teague, Texas, Jul. 15, 1909."

"The First National Bank:

"Pay to Pacific Coast Pipe Co. or order \$10,278.66 ten thousand two hundred and seventy-eight and 68/100 dollars, in full and complete settlement for any and all material furnished for Teague, Texas, waterworks system."

"N. S. Sherman Machine & Iron Works,
"N. S. Sherman, Jr."

Plaintiff retained said check and collected the amount thereof. Shortly after the receipt of same, plaintiff wrote defendant as follows:

"Pacific Coast Pipe Company,
"Ballard Station, Seattle, Wash.,
"Aug. 8, 1909.

"N. S. Sherman Machinery & Iron Co., Oklahoma City, Oklahoma—Gentlemen: We are in receipt of your delayed favor of July 15, inclosing check for \$10,278.66, and we hereby serve notice on you that this check does not pay us in full for our account as per notation made by you on its face, and is not received by us with that understanding. On advice of payment of the above-mentioned check, we will credit proceeds to your account, and will hold these funds separate and apart from our other funds subject to future action of the courts.

"As regards your claims on deductions, we refuse to allow any of them, our reason for this being that your claim for defective pipe is not founded on fact; further, we have nothing to do with the city measurements of pipe as laid. You are charged on our books with the amount of pipe shipped you, as per your order, and we expect you to pay for it in full. As per your original order, we were to receive monthly 80 per cent. of the engineer's estimate as allowed you, which has not been done, and we are entitled to interest for the delay. Payments were to be made in Chicago exchange at par, and any exchange charged us on your check will be charged to your account.

"On payment of the check we will send you a bill of the amount still due us, a copy of which we will send to our attorney at Oklahoma City, and we expect payment in full when presented. If not paid, we have given him instructions to proceed at once and collect by law. Trusting you will not force us to take this action, we are,

"Yours very truly,

"Pacific Coast Pipe Co.,
"By Treas."

In its reply plaintiff pleaded:

"Plaintiff further states that it has now in its possession the said sum of \$10,278.66, being the proceeds of the said defendant's check, and that it now tenders same into this court, subject to the final action and final order of this court as to its proper distribution or application, and is now ready, and stands ready at any and all times, to make its tender good, and to pay said fund into this court, or to dispose of same pursuant to any order, judgment, or decree which said court may render in this action."

The sole question for our consideration is whether, under the circumstances, the retention and use by plaintiff of the check reciting that it was "in full and complete settlement of any and all material furnished for Teague, Texas, waterworks," constituted an accord and satisfaction. While, if a demand is unliquidated or disputed, payment and acceptance in discharge of the same of a less sum than that claimed will constitute an accord and satisfaction, yet in cases where the debt is liquidated and is due (except where changed by statute) the general doctrine is applied that payment by the debtor and receipt by the creditor of a part thereof is not a satisfaction of the whole, unless it be made on some new consideration, such payment operating only as a discharge of the amount paid, and the creditor may maintain an action for the balance. 1 Corpus Juris. 539, 540 and cases cited.

In Fire Ins. Ass'n v. Wickham, 141 U. S. 584, 12 Sup. Ct. 84, 85 L. Ed. 880, it is said:

"The rule is well established that, where the facts show clearly a certain sum to be due from one person to another, the release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim; but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

The uncontroverted evidence in the instant case establishes that subsequent to the receipt and use of the pipe, and with full knowledge of any defects therein and of the alleged consequent damages, and after an account thereof had been rendered and received and retained for some time and the claim therefor filed with the city of Teague, defendant, without objection, specifically promised to pay the same in full. There was at that time no bona fide dispute as to the items or the amount of the account sued on; and no claim is even now asserted of any then existing fact or circumstances tending to impeach the same subsequently brought to the knowledge of defendant. In Chicago & Milwaukee, etc., R. R. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1086, it is said:

"The word 'liquidated' is used in different senses, and as applicable here means made certain as to what and how much is due; made certain by agreement of parties or by operation of law."

The general rule is that where an account has been rendered to a debtor, and he receives it without objection and promises to pay it, it becomes an account stated. Under the facts in the instant case, the account sued on may properly be regarded as an account stated. We are of the opinion that the evidence was insufficient to establish an accord and satisfaction. By the retention and use of the check under the circumstances of this case, the plaintiff was not estopped to maintain its action for the balance declared on. Harby v. Henis, 45 Misc. Rep. 366, 90 N. Y. Supp. 461; Jennings v. Durlinger, 23 Ind. App. 673, 55 N. E. 979; Amer et al. v. Folk et al., 28 Misc. Rep. 506, 59 N. Y. Supp. 532; Robinson v. Leatherbee, T. & L. Co., 120 Ga. 901, 48 S. E. 380; Fuller v. Kemp, 138 N. Y. 231, 83 N. E. 1084, 20 L. E. A. 785.

There being no error in the proceedings on the trial prejudicial to the substantial rights of defendant, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. R. CO. v. BELL.
(No. 3808.)

(Supreme Court of Oklahoma. June 13, 1916.
Concurring Opinion June 29, 1916.)

(Syllabus by the Court.)

1. RAILROADS \S 95(2), 350(3)—**CONSTRUCTION OF RAILROAD CROSSINGS—RESTORATION OF HIGHWAY—QUESTION FOR JURY.**

In a suit in damages for personal injuries, based upon the theory that defendant had failed to restore a highway to its former state or to such a condition that its usefulness would be materially impaired, in violation of Comp. Laws 1909, \S 1360, 7498, evidence examined and held that, as there was evidence reasonably tending to prove the condition of the highway at the place of the accident, prior to the construction of the crossing at which the injury occurred, and that the same had not been restored, the court did not err in submitting the question of whether it had been restored to the jury. Held, further, that section 7498, supra, was applicable to a railway crossing constructed subsequent to its enactment.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 275, 1154; Dec. Dig. \S 95(2); 350(3).]

2. NEGLIGENCE \S 98(1) — **IMPUTED NEGLIGENCE — AUTOMOBILE ACCIDENT — NEGLIGENCE OF DRIVER.**

The contributory negligence of the chauffeur cannot be imputed to one who is traveling in the vehicle with him by invitation of the owner of the car. To render one liable for the negligence of the chauffeur, either the relation of master and servant or principal and agent must exist, or the parties must be engaged in a joint enterprise, whereby responsibility for each other's acts exists.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 147, 148; Dec. Dig. \S 93(1).]

3. NEGLIGENCE \S 99(1) — **IMPUTED NEGLIGENCE—JOINT ENTERPRISE.**

Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control or management.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 130, 131, 135-137; Dec. Dig. \S 89(1).]

4. RAILROADS \S 337(2)—**INJURIES AT CROSSINGS—AUTOMOBILE ACCIDENT—PROXIMATE CAUSE.**

In a suit in damages for personal injuries, where the evidence discloses that, at the place of the injury, defendant's track runs practically east and west and intersects the public highway at right angles on about a 5-foot grade; that the highway is carried over the railroad on a crossing, and slopes back on both sides of the track for a distance of some 20 feet; that about that distance south and parallel to the track, and some three or four feet under the surface of the highway, defendant had placed a culvert, consisting of pipe about 18 inches in diameter and about 25 feet long, for the purpose of conveying the water from the hills south and east of the railroad into a creek some 40 or 50 feet from its west end; and where, at the time of the injury the water, in flowing through the culvert and falling from the west end of the pipe, had made a hole some 20 or 30 feet in diameter down to the level of the water in the creek, a distance of some 18 feet, and had caused the

dirt over that end of the pipe to sink and encroach upon the highway to such an extent that, while the wagon track of the highway ran straight from the crossing up to the hole, it deflected to the left around the hole which was obscured by weeds and undergrowth, and where, on the day of the injury, deceased and two others were riding as guests of the owner in the back seat of an automobile, going south along this highway; that over the chauffeur, in the front seat, he had no control; that the car mounted the crossing between the rails of defendant's railroad slowly and a little to the west of the traveled way; that, after the front wheels had crossed the south rail, the chauffeur, having dropped the magneto key on the floor of the car, with his right hand still grasping the steering wheel, reached to pick it up and that, while so doing, he deflected the car so far to the right as to run to the edge of the hole, where it slipped on the crumbling earth and fell into the hole, and in falling turned over and killed deceased—Held, that the negligence of defendant in leaving the hole in the highway was the proximate cause of the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1091; Dec. Dig. \S 337(2).]

5. NEGLIGENCE \S 61(2)—**"PROXIMATE CAUSE"—CONCURRENT ACT.**

Where the negligence of defendant and the act of a third person concur to produce the injury complained of, so that it would not have happened in the absence of either, the negligence is the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 75; Dec. Dig. \S 61(2).]

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

6. RAILROADS \S 351(5)—**INJURIES AT CROSSINGS—ACTION FOR DAMAGES—INSTRUCTIONS ON CARE REQUIRED.**

That part of the charge which made it the absolute duty of defendant to keep the hole in question "free from weeds, brush, or other obstruction, or to erect such barriers as would reasonably be calculated to prevent the driving or falling in such hole by persons traveling that highway," was not error in that it placed too high a degree of care on defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1198; Dec. Dig. \S 351(5).]

7. NEGLIGENCE \S 136(30)—**IMPUTED NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW.**

On the undisputed facts in this case, the question of imputed negligence was one of law for the court and not a question of contributory negligence required to be left to the jury as a question of fact, by Const. art. 28, \S 6.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 350-352; Dec. Dig. \S 136(30).]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Harriett Alma Bell against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Klenschmidt and J. H. Grant, both of Oklahoma City, for plaintiff in error. Harris & Nowlin, of Oklahoma City, for defendant in error.

TURNER, J. On December 21, 1910, Harriett Alma Bell, widow of Fred Bell, deceased, for herself and Mary Alma Bell, their only child, in the district court of Okla-

homa county, sued the St. Louis & San Francisco Railroad Company in damages for personal injuries resulting in the death of the said Fred Bell. The petition as amended, after alleging the corporate existence of defendant and that on October 28, 1910, it was operating a line of railroad in this state through Spencer to Oklahoma City, substantially states that on said day deceased was riding as a guest in an automobile driven by one Du Bose along the public highway; that, after the car had crossed defendant's tracks at right angles going south on a crossing one-half mile west of Spencer, and while descending the south side of its roadbed, the driver of the car ran it upon the brink of a hole in the highway, negligently left open by defendant in violation of the statute, and into which it fell and in falling overturned and killed said Bell, to her damage and that of her child in a sum certain. For answer, defendant, after a general denial, alleged that the injury, if any, was the result of the negligence, not of defendant, but of the driver of the car and also the contributory negligence of deceased. After reply filed, in effect a general denial, there was trial to a jury and judgment for plaintiff, and defendant brings the case here.

[1] At the close of all the evidence the court, in effect, instructed the jury (No. 5) that it was the duty of defendant in constructing a crossing for its railroad over a public highway to restore the highway to its former state, or to such a condition that its usefulness would not be materially impaired, and thereafter maintain the same in such condition against any effects in any manner produced by the railroad. He also told the jury that it was the further duty of defendant to construct a crossing across that portion of its tracks, roadbed, or right of way over which any public highway may run, and maintain the same, unobstructed, in a good condition for the use of the public, and to build and maintain in good condition all culverts that may be necessary on its right of way at such crossings, and that a failure so to do was negligence. No complaint is made that such is not the law, but it is assigned that the evidence was insufficient to support the charge, in that there was no evidence reasonably tending to prove the condition of the highway at the place of the accident, prior to the construction of the crossing, and hence none to show that it had not been restored within the contemplation of Comp. Laws 1909, § 1360. There is no merit in this contention for the reason that the evidence, considered with the photographs, discloses that, prior to the construction of this crossing, the road, at the precise point where the injury occurred, instead of being a hole was a fairly level well-traveled public road upon a section line. Neither is there merit in the contention that the charge was inapplicable for the reason that the crossing in question was already established

before section 7493 of Comp. Laws 1909 was passed. This for the reason stated in *City of Yonkers v. N. Y. C. & H. R. Co.*, 165 N. Y. 142, 58 N. E. 677, where the court, construing a similar statute in view of a like contention, said:

"It is quite true, as the learned counsel for the defendant contends, that this statute is prospective in its operation. It had no application to proceedings in the court pending prior to its enactment. * * * It is quite clear, however, that it is not limited in its application to railroads, constructed subsequent to its enactment, or to bridges over crossings thereafter constructed. It was manifestly intended to apply to objects in existence at the time of its enactment, and consequently to all bridges constituting the highway at railroad crossings, whether constructed after the law went into effect or before. The purpose of the statute was to insure greater safety at such highway crossings, and that object could not be effected without applying the law to all such bridges existing at the time that it went into effect, without regard to the date of their construction."

See, also, *Bush v. D. L. & W. R. R. Co.*, 166 N. Y. 210, 59 N. E. 838.

[2-5] Continuing, the court, in the same instruction, charged:

"* * * And if you find and believe from a preponderance of the evidence that the defendant railway company failed in the performance of any of its duties as above outlined, and that by reason thereof such a condition was created, caused, or permitted to exist at said crossing, and on said right of way, as that the said Fred Bell lost his life on or about the date mentioned in plaintiff's petition, and that but for the existence of said conditions at said crossing the said Fred Bell would not have lost his life, as aforesaid, then the court instructs you that negligence of the defendant company, if such you find existed, was the proximate cause of the death of said Fred Bell, regardless of any acts or conduct of the driver of the automobile in which the said Bell was riding, and your verdict should be for the plaintiff, unless you find from a preponderance of the evidence that the said Fred Bell failed to use ordinary care for his own safety, as explained in these instructions, but for which failure of care, on the part of said Bell, the accident would not have happened."

Which means that, if defendant failed to perform its said statutory duty and in consequence thereof deceased was injured, its failure so to do was the proximate cause of the injury, independent of any act on the part of the driver of the car, and that plaintiff should recover, provided, of course, deceased was not guilty of contributory negligence. This is the law. The jury was not concerned in the negligence of the driver. Assuming that the doctrine of imputed negligence is recognized in this jurisdiction under a proper state of facts, the jury was not concerned with the negligence of the driver for the reason that, if negligent, his negligence cannot be imputed to Bell, as we shall later see. That being true, the court did right to lay the negligence of the driver out of the case and leave it to the jury to say whether defendant violated its statutory duty as charged, and, if so, to declare, as a matter of law, that such was negligence and the proximate cause of the injury.

But it is contended, assuming the negli-

gence of defendant as charged, such was not the proximate cause of the injury as a matter of law under the facts in this case, and the court erred when he so charged. This sends us to the facts. Essential to the determination of this question, they are few and undisputed. The evidence discloses that, at the place of the injury, defendant's track runs practically east and west and intersects the public highway at right angles on about a 5-foot grade; the highway being carried over the railroad by a crossing, the dirt road sloping back on both sides of the track for a distance of some 20 feet. About that distance south of and parallel with the track, and about 3 or 4 feet under the surface of the highway, defendant had placed a culvert, consisting of a pipe some 18 inches in diameter and 25 feet long, in order to convey the water from the hills south and east of the railroad into a creek some 40 or 50 feet from its west end. At the time of the injury, the water, in flowing through the culvert and falling from the west end of the pipe, had made a hole some 20 or 30 feet in diameter down to the level of the waters of the creek, a distance of some 18 feet, and had caused the dirt over that end of the pipe to sink and encroach upon the highway to such an extent that, while the wagon tracks in the road ran straight from the crossing up to it, they deflected to the left around the hole, which was obscured by weeds and undergrowth. The evidence further disclosed that, on the day of the injury, deceased with two others was riding as a guest of the owner in the back seat of an automobile going south along this highway; that over the driver, in the front seat, he had no control; that the car mounted the crossing between the rails of defendant's track slowly and, selecting the best part of the crossing, a little to the west of the traveled way; that, after the front wheels had crossed the south rail, the driver, having dropped his magneto key on the floor of the car, with his right hand still grasping the steering wheel, reached to pick it up, and, that, while so doing, still going slowly, he deflected the car so far to the right as to run upon the edge of the hole where it slipped upon the crumbling earth and fell into the hole and, in falling, turned over and killed deceased. The act of the driver in so deflecting his car was the cause of the fall; but, as that act would not have resulted in injury but for the negligence of defendant in leaving the hole in the highway, the negligence of defendant was the proximate cause of the injury.

In *Bales v. McConnell et al.*, 27 Okl. 407, 112 Pac. 978, 10 L. R. A. (N. S.) 940, plaintiff was employed about a corn sheller, operated by cogs negligently left unguarded, when he slipped from a wagon and fell, and, upon alighting on the ground near the cogs, to steady himself, thrust out his hand which was caught in the unguarded cogs. In de-

termining, as a matter of law, the proximate cause of the injury, we said:

"That which caused plaintiff to slip from the wagon was the cause of his fall, but the negligently unguarded cogs were the proximate cause of his injury."

In that case we cited *Postal Tel., etc., Co. v. Zopfi*, 93 Tenn. 369, 24 S. W. 633, where, as to proximate cause, the court said:

"A familiar illustration is the fall of a person upon an ice-covered pavement into an open cellar. In such case, the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred."

In that case, plaintiff sought to recover for personal injuries sustained by his minor daughter. The facts were that defendant had negligently left a telegraph pole lying between the platform and the first stepping stone leading from his front gate to the pike. His little daughter, on her way home from school on a rainy day, in stepping over the pole to pass in at the gate, stepped upon the platform, slipped, lost her balance, fell upon the pole, and was injured. It was held that the negligence of the company, in leaving the pole where it was, was the proximate cause of the injury. Quoting approvingly from *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 612, we said:

"In *Postal Tel. Co. v. Zopfi*, 93 Tenn. 374 [24 S. W. 633], the same distinction is illustrated where the fall of a young girl was caused by the slippery condition of a walkway, but the injury proximately resulted from the telegraph company negligently leaving its pole where she fell upon it, and received an injury which would not have resulted but for the presence of the pole, even though she had fallen. In that case a hypothetical case is put to further illustrate the distinction of a person falling upon an ice-covered pavement into an open cellar. In such case, the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred"

—and cited other cases in support of our holding. Among others was *Campbell v. City of Stillwater*, 32 Minn. 308, 20 N. W. 320, 50 Am. St. Rep. 567, concerning which we said:

"* * * The material allegations of the complaint were that the railroad company, with the consent and permission of the defendant city, had its track and operated its railroad along the side of, and in places lengthwise upon, one of the streets of the city; that, owing to its construction, it was a dangerous place for a horse with a carriage to go upon; that it was without fence or barrier between the part of the street occupied by the track and the part not so occupied to prevent horses running upon it; that, as plaintiff in his buggy was driving his horse along the street near said part of the track, his horse, suddenly frightened by a car moving along the track and notwithstanding plaintiff's efforts to prevent him, ran upon the track where it was laid on and along the street, overturned the buggy, and injured plaintiff. One of the grounds of demurrer, which was sustained, was that the frightening of the horse by the moving car, and not the negligence of the city to properly guard the street, was the proximate cause of the injury, but the court held not so, and reversed the trial court."

In *Walrod v. Webster County*, 110 Iowa, 349, 81 N. W. 598, 47 L. R. A. 480, the facts

were that plaintiff was driving a team over a bridge, and, when near the north or bridge end of the approach, the off horse became frightened by a flash of lightning, and, squatting or setting back in the harness, guided or pushed the near horse against the railing of the approach, which gave way and precipitated horses and driver over the side of the approach and down to the ground beneath, resulting in the injuries of which plaintiff complained. As to the proximate cause, in the syllabus, it is said:

"Defects in the railing of a bridge were the proximate or efficient cause of the accident, when the railing was broken by a team of horses, one of which was frightened by a flash of lightning, if the accident would not have happened had the railing been sufficient, although, on the other hand, it would not have happened except for the lightning."

Which case, we think, is precisely in point for the reason that it is, in effect, there held that, while it was the lightning which deflected the team against the railing and caused the fall, as the deflection would not have resulted in injury but for the negligence of defendant in failing to maintain a sufficient railing, the negligence of defendant in failing so to do was the proximate cause of the injury. The most that can be said in favor of defendant in this connection is that the act of the driver in deflecting his car as stated concurred with the negligence of defendant to produce the death of Bell. Assuming such to be true, defendant's negligence was nevertheless the proximate cause of the injury; for, as stated in *Moore v. Jefferson City Light, etc., Co.*, 163 Mo. App. 266, 146 S. W. 825, quoting approvingly from *Johnson v. Northwestern Exp. Co.*, 48 Minn. 433, 51 N. W. 225:

"Where the negligence of the defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence was the proximate cause of the injury."

We are therefore of opinion that the instruction states the law.

We said awhile ago that the negligence of the driver, if any, could not be imputed to Bell. And this is true; for the reason that the undisputed facts disclose that Bell was riding in the car as a guest, at the invitation of the owner, and had no control over the driver. When such are the facts, 29 Cyc. 548, lays down the rule thus:

"While there are some decisions to the contrary, the great weight of authority is that the negligence of the driver of a private conveyance will not be imputed to a person riding with him but who has no authority or control over him, such as that of master and servant. To create the imputation of negligence, the passenger must have assumed such control and direction of the vehicle as to be considered practically in the exclusive possession of it. Merely making suggestions as to the route to be taken, or warning the driver of the danger, does not amount to sufficient authority or control. The negligence of the driver will not be imputed to persons on the vehicle at the invitation of the owner. * * *

In *Anthony v. Kiefner et al.*, 96 Kan. 194, 150 Pac. 524, L. R. A. 1915F, 876, a mother and son were sued in damages for personal injuries inflicted by an automobile driven by the son. There was judgment against them both. Of the mother's contention, the court said:

"She insists that she was a mere guest or passenger in the automobile, and that the negligence of Lynn Kiefner, the owner and driver of the automobile, is not imputable to her. If she was only a guest of his and had no control of the automobile or of the operator, his negligence cannot be imputed to her. It was determined in *City of Leavenworth v. Hatch*, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309, that a person riding in a private conveyance by invitation of its owner is not responsible for his action, and that his negligence which contributes to an accident cannot be imputed to the guest. In *Reading Township v. Telfer*, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355, a man accompanied by his wife was driving over a defective highway, and she was injured. In her action to recover from the township, it was insisted that her husband was guilty of contributory negligence, and that she was chargeable with his negligence. There was no personal negligence on her part, but it was claimed that in a sense her husband was her agent, that the visit was undertaken on her solicitation, and that therefore negligence on his part which contributed to the injury was imputable to her. Upon these claims, the court said: 'The fact, if it be such, that the journey was undertaken at the solicitation of the wife possesses no weight. It cannot be that one, who merely secures from another the favor of transportation in a private vehicle, takes upon herself or himself all risk of the driver's negligence en route. To so hold would minimize the problem for consideration into a mere question of fact as to which of the travelers solicited the other, the one the favor of journey, or the other the pleasure of company. If the one who asks to be carried hence is the master, so on the other hand the other who invites to a ride is also the master. If the maiden who begs of her escort a carriage drive is the mistress throughout the journey, so the gallant who invites his lady would likewise be the master until her safe return. It may be conceded that persons of mutual purpose and equal privileges of discretion and control, who travel in the same vehicle in pursuit of a common object, are the agents of each other in such a sense that the negligent act of one, in furtherance of the common scheme, is imputable to all; but such mutuality or equality of direction and control does not exist in the case of a journey taken by husband and wife.' 57 Kan. 801, 48 Pac. 185, 57 Am. St. Rep. 355.

"It was there recognized that there was a conflict in the authorities upon the question, but it was held that negligence could not be imputed to a guest or passenger, and it was further stated that: 'The doctrine of imputable negligence, except when countenanced by statute, is a fiction of the law which finds small favor with the courts, and has been very infrequently applied in our own.' 57 Kan. 803, 48 Pac. 136, 57 Am. St. Rep. 355. * * *

"In the late case of *Corley v. Railway Co.*, 90 Kan. 70, 133 Pac. 555 [Ann. Cas. 1915B, 764], a man was riding in an automobile as the guest of the driver. In a collision with a railway train, the occupants of the automobile were killed. The wife of the guest brought an action on the basis that her husband's death was due to the negligence of the railway company. It was claimed by the railway company that the collision resulted from the negligence of the driver of the automobile, and that the guest was chargeable with his negligence. In speaking of the claim, the court said: 'The doctrine that

one, who voluntarily becomes a passenger in a conveyance, thereby so far identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause, never gained much of a foothold in this country, and is now repudiated in England, where it originated. The history of its rise and decline is traced in a note in 8 L. R. A. (N. S.) 597, where cases are gathered illustrating all phases of the subject. Save in a few jurisdictions, the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. Note, 9 Ann. Cas. 408; note, 19 Ann. Cas. 1225; note, Ann. Cas. 1913B, 684. See, also, *Denton v. Railway Co.*, 90 Kan. 51, 133 Pac. 553, 47 L. R. A. (N. S.) 820 [Ann. Cas. 1915B, 638]. This rule applies in the case of a guest who is riding with the driver for their mutual pleasure. 29 Cyc. 548-550; note, 8 L. R. A. (N. S.) 648; 7 A. & E. Encycl. of L. 447, 448. 90 Kan. 75; 133 Pac. 556 [Ann. Cas. 1915B, 764.]

In the *Corley Case*, supra, the court also said:

"Save in a few jurisdictions, the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. * * * This rule applies in the case of a guest who is riding with the driver for their mutual pleasure."

In *Withey v. Fowler Co.*, 164 Iowa, 377, 145 N. W. 923, in the syllabus, it is said:

"To impute a driver's negligence to an occupant of his carriage, the relation between them must be something more than that of host and guest, and the mere fact that both have engaged in the drive because of mutual pleasure does not materially alter the situation."

In *Cahill v. Cincinnati, etc., Ry. Co.*, 92 Ky. 345, 18 S. W. 2, in the seventh paragraph of the headnotes, it is said:

"The contributory negligence of the driver of a vehicle cannot be imputed to one who is traveling in the vehicle with him by his invitation. To render one liable for the negligence of the driver of a vehicle in which he is traveling, either the relation of master and servant or principal and agent must exist, or the parties must be engaged in a joint enterprise whereby responsibility for each other's acts exists."

More could not be said in support of a doctrine so well settled. And the court did not err in refusing to submit to the jury the question of whether the deceased, at the time he was killed, was engaged in a joint or common enterprise with the driver of the car as requested (instruction No. 6). This for the reason that there was no evidence from which a joint enterprise might have been reasonably inferred. On this point there is no dispute as to the facts. The evidence discloses that, on the day of the injury, one Powell was the owner of an automobile; that he and his wife lived in Oklahoma City and had two lady friends visiting them; that a young man named Du Bose had been teaching Powell how to drive his car; that on that day Powell and his wife and his visitors planned an automobile trip in the country to purchase some chickens and eggs; that about noon that day Powell, finding it impossible for him to go, arranged with Du Bose to drive the car, which he did, the party consisting of the driver, Mrs. Powell, and the two lady visitors; that the par-

ty started from Powell's residence and drove to a garage in the city for gasoline; that there Du Bose suggested to Mrs. Powell to invite deceased to be their guest on the drive, to which she agreed, and suggested that he be asked to bring his gun along, as he was an expert rifle shot; that thereupon Du Bose telephoned the invitation from the garage, which was accepted, whereupon the party drove to his residence, where he joined them. The evidence further discloses that, on the journey, Du Bose and Mrs. Powell occupied the front seat of the car, the rear seat being occupied by the deceased and the two lady visitors; that the party drove east to Spencer, and, after spending a short time at the club grounds, started to return to the city, the passengers still being seated in the car as stated; and that, in crossing the defendant's line of road on the way home, the accident occurred as stated. Assuming that the trip was a "joy ride," as contended, it was not a joint or common undertaking.

In *Atwood v. Utah Light & Ry. Co.*, 44 Utah, 366, 140 Pac. 137, the court, quoting approvingly from *Cotton v. Willmar & S. F. Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935, said:

"Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management."

[7] It follows that, as the negligence of the driver cannot be imputed to the deceased, the court did right to decide that question on the undisputed facts as a matter of law, and that the question so decided was not a question of contributory negligence, required to be left to the jury as a question of fact by Const. art. 23, § 6, as contended by defendant.

[8] Did the court err in further charging thus:

"No. 7. It was not only the duty of the railroad company to so construct and maintain the said highway upon its right of way and said crossing as to prevent the washing or creation of a deep hole in said highway, or in close proximity to the traveled portion thereof, but it was also its duty to keep any such dangerous place free from weeds, brush, or other obstruction, or to erect suitable barriers as would reasonably be calculated to prevent the driving or falling into said hole by persons traveling that highway, and if it was neglect on the part of the railroad company of its duties, as herein explained, which was the direct and proximate cause of said accident, then the defendant railroad company is responsible for the consequences thereof, unless you shall further find from the evidence that the said deceased was guilty of contributory negligence, as set out in these instructions."

Defendant says he did because, it is urged, that part of the charge which made it the duty of defendant to keep the hole in question "free from weeds, brush, or other ob-

struction, or to erect suitable barriers as would reasonably be calculated to prevent the driving or falling into said hole by persons traveling that highway," placed too high a degree of care on defendant, who insists that the company was chargeable with ordinary care only in maintaining the highway at that point, and the question of whether it exercised that degree of care only should have been left to the jury. But the charge is substantially in keeping with the spirit of the statute. Section 1360, *supra*, made it the duty of defendant to restore this highway at the point in question "to its former state, or to such condition as that its usefulness shall not be materially impaired," and to keep it that way "against any effects in any manner produced by" its railroad. Now, if the statute had intended to charge defendant with the exercise of ordinary care only so to do, it would have said so. As it is, the statute is peremptory and reads, "shall restore," and "thereafter" shall "maintain." Besides, as this culvert was in aid of, if not a part of, its crossing across its right of way, section 7498 made it the duty of defendant to "maintain the same unobstructed, in a good condition for the use of the public." "Shall" construct "and maintain unobstructed" is the language of the statute, and not that defendant shall exercise ordinary care only so to do, as defendant would have us believe.

There being no contention that the court erred in charging on contributory negligence, or, indeed, that deceased was guilty of any, and no merit in the remaining assignments of error, the judgment of the trial court is affirmed. All the Justices concur, except THACKER, J., not announcing.

THACKER, J. (concurring). I concur in the conclusion reached in this case; but I am not satisfied with the manner in which the question of imputed negligence is treated, and cannot agree that it "was one of law for the court, and not a question of contributory negligence to be left to the jury as a question of fact." The essential facts are stated in the opinion of the court.

In Black's Law Dictionary (2d Ed.) 810, it is said:

"Contributory negligence, when set up as a defense to an action for injuries alleged to have been caused by the defendant's negligence, means any want of ordinary care on the part of the person injured (or on the part of another whose negligence is imputable to him), which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred. *Railroad Co. v. Young*, 153 Ind. 163, 54 N. E. 791; *Dell v. Glass Co.*, 169 Pa. 549, 32 Atl. 601; *Barton v. Railroad Co.*, 52 Mo. 253, 14 Am. Rep. 418; *Plant Inv. Co. v. Cook*, 74 Fed. 503, 20 C. C. A. 625; *McLaughlin v. Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 84 L. R. A. 812; *Riley v. Railway Co.*, 27 W. Va. 164."

If the negligence of a third party was such an independent intervening cause as to prevent the negligence of a defendant from

being regarded a proximate cause of plaintiff's injuries, there would be no occasion, of course, to impute such third party's negligence to the plaintiff to prevent his recovery, as there would be an absence of actionable negligence on the part of the defendant; and it is only where the negligence of a third party is contributory that the question of imputing it to a plaintiff can arise; when imputed to a plaintiff, such negligence becomes his own contributory negligence, of course. Imputed negligence is not a distinct and independent defense in any case, but is a feature and part of the defense of contributory negligence as shown by the above quotation. The question of imputed negligence is foreign to any issue in this case, and ought not to have been discussed unless involved in the defense of contributory negligence, which is relied upon by the defendant for relief against its actionable negligence; and the treatment of this question, in the opinion of the court, shows beyond question that it is involved in and arises out of this defense.

The defense of contributory negligence cannot arise, of course, in any case unless the defendant has been guilty of actionable negligence, that is, negligence which, but for such defense, would render it liable for damages to the plaintiff (*St. Louis & S. F. R. Co. v. Long*, 41 Okl. 177, 187 Pac. 1156, Ann. Cas. 1915C, 432); but when a defendant pleads this defense in a case where the legal effect of its existence would defeat the action, and there is evidence of actionable negligence on the part of the defendant, the court should leave the whole question of the existence of contributory negligence, including the question of imputed contributory negligence, to the jury.

Section 6, art. 25 (Williams', § 855) of the Constitution of Oklahoma, reads:

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

This provision of our Constitution was evidently intended to effect some change in the pre-existing law, or in what would otherwise be the law of this state; and, as no such provision was necessary to make all questions of fact in such defenses questions to be left to the jury, it seems too obvious to admit of extended discussion that the intent was to convert into questions of fact to be determined by the jury, what otherwise had been, or would be, in this state questions of law for the judge. Without this provision in our Constitution, whenever, as a matter of law, the evidence was conclusive that the plaintiff had been guilty of contributory negligence (whether directly or by imputation) or whenever, as a matter of law, there was no evidence or not sufficient evidence of such negligence, or any essential element thereof, to sustain this defense, the judge, with authority, might so direct the jury; but not so under this provision of our Constitution. If

this provision of our Constitution means less than this, it means practically nothing; and, if the opinion of the majority of my Associates, which treats a question as to an element of the defense of contributory negligence in this case as a question of law just as if there was no such constitutional provision, is allowed to stand, its logical effect will be to strike down this provision of our Constitution or, at least, to leave it merely declaratory of what was theretofore and would still be the law without it. In this, this decision is in conflict with all past decisions of this court touching this question. It must be clear from this provision of the Constitution that the defense of contributory negligence has been stripped of all those legal presumptions and conclusions formerly indulged and drawn by courts and reduced to a question of fact for the jury. See *St. Louis & S. F. R. Co. v. Long*, supra.

Imputed negligence, like every other element of contributory negligence, existed in fact before it had, and independent of, legal sanction; and the effect of this provision of our Constitution upon its elemental character is to leave it where the law found it, that is, a question of fact. It must be obvious that, under some circumstances, the negligence of one party may be imputable to another as a matter of fact, wholly independent of any question of legal sanction or effect; and, under our Constitution, as formerly, a plaintiff may, in fact, be guilty of contributory negligence, either directly or through another whose negligence is in fact imputed to him, with the legal effect that it defeats his right to recover; but the whole question as to whether he is so guilty is one of fact for the jury.

In *St. Louis & S. F. R. Co. v. Hart*, 146 Pac. 436, in discussing this section of the Constitution, it is said:

"It is obvious, however, that this section does not contemplate that a plaintiff, seeking damages for personal injuries, is entitled to recover regardless of the question of fault or negligence on his part. We take it that, if the evidence conclusively shows that such an one deliberately walked in front of a moving train with suicidal intent and was killed (injured), it would be the duty of the courts, trial or appellate, to set aside a verdict in his favor and grant a new trial."

The opinion in that case does not predicate the statement quoted upon any power of the court to pass upon the existence or sufficiency of evidence of contributory negligence, but is based upon the view that such a state of facts negatives the existence of actionable negligence on the part of the defendant, as will clearly appear from the following additional excerpt from the same:

"If the plaintiff permitted a train approaching at that gate to run him down and injure him, there being nothing to prevent him from getting out of the way, the court probably would be justified in reversing the verdict in his favor and remanding the cause for a new trial, upon the grounds that there was no evidence reasonably tending to support the same; but,

having arrived at the conclusion that there was sufficient evidence of negligence on the part of the defendant to take the case to the jury on that question, it would seem to follow that it was for the jury to say whether the testimony of the plaintiff as to getting his foot caught between the plank and rail was sufficient explanation of why he did not retire to a place of safety, after he discovered that the train was backing toward him, to absolve him from the charge of contributory negligence. As we have said before, in this jurisdiction the question of contributory negligence is always for the jury. At most, the only function of the court is to define for the jury the meaning of the term 'contributory negligence,' as used in section 6, supra, and instruct them that it is always a question of fact for their determination. In no event is the court authorized to direct a verdict or sustain a demurrer to the evidence, upon the ground that it conclusively appears that the plaintiff is guilty of contributory negligence as a matter of law."

The earlier case of *St. Louis & S. F. R. Co. v. Long*, supra, is to the same effect. If, as is undoubtedly true, "in no event is the court authorized to direct a verdict or sustain a demurrer to the evidence upon the ground that it conclusively appears that the plaintiff is guilty of contributory negligence as a matter of law," it must necessarily follow that in no event is the court authorized to direct a verdict or sustain a demurrer to the evidence, upon the ground that it conclusively appears that the plaintiff is not guilty of contributory negligence as a matter of law—the constitutional rule must be allowed to work both ways and be equally available to either of the parties. If trial courts would confine their instructions for the guidance of juries in such cases to the question of actionable negligence on the part of defendants, instead of invading the province of the jury in respect to the question of contributory negligence, much danger of confusion and much risk of error would be avoided; and if this court would abstain from discussing when and what evidence does, and when and what does not, prove or tend to prove contributory negligence, and confine itself to the field left to it by the constitutional provision under consideration, a clearer understanding of the law in this regard would result. See *Geirugh v. Charles T. Derr Construction Co.*, 151 Pac. 875.

It may be thought at first blush that this view would lead to the conclusion that, where the undisputed evidence shows actionable negligence on the part of a defendant, without any evidence whatever of contributory negligence on the part of the plaintiff, a trial court would be without power to set aside a verdict against plaintiff's right to recover and grant him a new trial; but no such result would ordinarily follow. It may also be thought at first blush that this view would lead to the conclusion that, where the undisputed evidence shows contributory negligence on the part of a plaintiff, the court would be without power to set aside a verdict against defendant and grant him a new trial; but no such result would ordinarily fol-

low. In either such case, such evidence of passion or prejudice would no doubt cause the trial judge to exercise the utmost care to see that, in respect to the primary question of actionable negligence, the verdict is justified; and, if there is no ground for setting the same aside, as against the evidence or the weight thereof upon this primary question, as where the pleadings or uncontroverted evidence left no question but that of contributory negligence to be determined by the jury, such a manifestly wrong verdict would ordinarily, at least, be attended by facts and circumstances which would bring the case within the discretionary power of the court to set aside the verdict and grant a new trial, upon the ground of "irregularities" or "misconduct" on the part of the jury within the meaning of the first or second subdivision of section 4196, Statutes 1893 (§ 5033, Rev. L. 1910), specifying causes for which a new trial may be granted. If, for instance, the jurors, upon examination as to their qualifications, had denied that they had any bias or prejudice, such a verdict, unsupported by any evidence or contrary to all the evidence, might tend to show that they had wrongfully qualified and were guilty of misconduct in this respect, and might entitle the party against whom the verdict was rendered to a new trial; and such bias or prejudice would ordinarily be referable to and tend to sustain some proposition under which the trial court might, in the exercise of its wide discretion, grant a new trial under the statutory causes therefor. See *Soper v. Medberry*, 24 Kan. 128; *Kelley v. Penn. R. Co. (C. C.)* 33 Fed. 857; *Baylis v. Travelers' Ins. Co.*, 113 U. S. 320, 5 Sup. Ct. 494, 28 L. Ed. 989; 9 Fed. Stat. Ann. 349, 350. This, of course, is upon the assumption that no other ground for granting a new trial appeared.

It does not follow that, because both parties are entitled to a jury verdict upon the defense of contributory negligence and every part of the same, that it is not within the power of the court to set aside such a palpably wrong finding of the jury as to the existence or nonexistence of contributory negligence, when not fairly reached, as the mere granting of a new trial, and thus sending the case to another jury, is not a denial to either party of his constitutional right to have a jury determine the existence or nonexistence of this defense without undue interference from any court (*Devine v. St. Louis*, 257 Mo. 470, 165 S. W. 1014, 51 L. R. A. [N. S.] 860); and this provision of our Constitution was not intended and should not be construed to deprive the courts of general jurisdiction of their inherent power to grant new trials for statutory causes known to the common law which were intended to secure a fair verdict. As to this power in general, see 29 Cyc. 722; 2 Thompson on Trials (2d Ed.) § 3711, p. 1975, and notes; vol. 4, pt. 1, Minor's Institutes,

836, 837; 2 Jones' Blackstone, §§ 510, 513, pp. 1998-2006; *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760, and notes thereto; *McMahon v. Rhode Island Co.*, 32 R. I. 237, 78 Atl. 1012, Ann. Cas. 1912D, 1229, and notes. Courts, in order to secure fair trials, often grant new trials where there is nothing to be determined except questions of fact within the exclusive province of the jury, and where the question must ultimately be determined by a jury; and the fact that it has long been the rule that the judge must ultimately yield to the jury in such cases is shown by the following statement in 2 Jones' Blackstone, 510, p. 1998 (287):

"If two juries agree in the same or a similar verdict, a third trial is seldom awarded; for the law will not readily suppose that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones."

And in *Devine v. City of St. Louis*, 257 Mo. 470, 165 S. W. 1014, 51 L. R. A. (N. S.) 860, it is held:

"The constitutional right to trial by jury is not infringed by the granting by the court of a new trial for the award of excessive damages by the jury."

This is true although the jury must ultimately determine the amount of damages. But if, in any case, the court has no such power to relieve from a finding unsupported by any evidence or against sufficient undisputed evidence, such a case is exceedingly improbable; and it may be said that, if the jury would be free to commit absurd errors and return false verdicts not subject to review, they are no more free to err than are the courts in respect to the ultimate powers intrusted to them. In any event, it seems very clear under this section of our Constitution that the entire defense of contributory negligence is one of fact, and that both parties are entitled to have the same and every part thereof determined by a jury, without any further instruction from the court than is permitted by the two cases first herein cited. The whole question of the existence or nonexistence of contributory negligence is for the jury, and their conclusion upon it, when fairly reached, is not re-examinable—their finding is conclusive. See 9 Fed. Stats. Ann. 349.

It follows from the foregoing views that, in my opinion, the court erred in instructing the jury to the effect that the negligence, if any, of the driver of the automobile in which Fred Bell, deceased, was riding at the time of the accident resulting in his death could not be imputed to the latter, notwithstanding such instruction appears to have been absolutely true, as this was an unwarranted invasion by the court of the exclusive province of the jury to determine the truth of the same—the instruction, being unauthorized, was impertinent though appearing to us to be true. And, although this instruc-

tion appears to us to have been true, and the jury would no doubt have so found without it, the error in my opinion probably constitutes a substantial violation of a constitutional right within the meaning of section 6005, Rev. L. 1910, which reads:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury * * * unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of * * * constitutes a substantial violation of a constitutional * * * right."

But, although I have more doubts as to this, I am inclined to think that it does not follow that this case should be reversed on account of this error, as the error appears to have been invited by the defendant when, in its sixth requested instruction, it asks the court to invade the province of the jury in respect to the defense of contributory negligence and instruct it that, under the hypothetical case therein stated, the negligence of the driver of the automobile, in which Fred Bell, deceased, was riding at the time of the accident resulting in his death, should be imputed to the latter, and that plaintiff's right to recover should be denied. That a judgment will not be reversed on account of an error invited by the party asking reversal is well settled by the opinions of this court. *Standard Marine Insurance Co. v. Trader's Compress Co.*, 148 Pac. 1019; *Wallace v. Duke*, 44 Okl. 124, 142 Pac. 308; *Brissey v. Trotter*, 34 Okl. 445, 125 Pac. 1119; *Ardmore Oil & Milling Co. v. Robinson*, 29 Okl. 79, 116 Pac. 191; *St. Louis & S. F. R. Co. v. Long*, *supra*.

It is true the defendant did not ask the instruction given, that asked by it being diametrically opposed to the one given, but it did ask the court to instruct upon the question of imputed negligence; and the error in the instruction given is in instructing at all upon this question.

I do not believe that such an error so invited would warrant a reversal of this case.

ST. LOUIS & S. F. R. CO. v. AKARD.
(No. 5998.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. TRIAL — 139(1)—TAKING CASE FROM JURY — DEMURRER—PEREMPTORY INSTRUCTIONS.

When any competent evidence has been presented for the consideration of the jury reasonably tending to prove the issues, it is proper to overrule a demurrer to the evidence or deny a motion for peremptory instruction; for in such a condition, under proper instructions from the court, the cause should be submitted to the jury for their determination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139(1).]

2. APPEAL AND ERROR — 1011(1)—REVIEW—QUESTIONS OF FACT.

Where the evidence in a case leaves it doubtful whether the particular carrier who is sued for a loss of goods, or another from whom that carrier received the goods, is liable, the Supreme Court will not disturb the findings in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. § 1011(1).]

3. COMMERCE — 8 — CARRIAGE OF GOODS — CONNECTING CARRIER — STATUTORY PROVISIONS.

The act to regulate commerce provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." Carmack Amendment to Hepburn Act (Act June 29, 1906, c. 3591, § 7, par. 11, 34 Stat. 595 [U. S. Comp. St. 1913, § 8592]). The act provides that nothing in the above section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.]

4. CARRIERS — 177(4)—CARRIAGE OF GOODS — CONNECTING CARRIERS.

The statute provides: "That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." Paragraph 12 (section 8592).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 791-803; Dec. Dig. § 177(4).]

5. CARRIERS — 2, 180(2)—CARRIAGE OF GOODS — CONNECTING CARRIERS—STATUTORY PROVISIONS—LIMITATION OF LIABILITY.

On February 29, 1908, the Circuit Court of the Western District of Arkansas (*Smeltzer v. St. Louis & S. F. R. Co.*, 153 Fed. 649), held that the provision in the Hepburn Act, commonly called the Carmack Amendment, which makes an initial carrier liable for loss, damage, or injury to through shipments, whether such losses occur on or off the line of the initial carrier, is constitutional, and that a clause in a bill of lading, providing that an initial carrier's liability on an interstate shipment of goods transported over the lines of several carriers from point of origin to destination shall be limited to losses occurring on its own line, is in conflict with the Carmack Amendment. The court said that Congress in adopting this amendment seems to have recognized the difficulty involved, on the part of shippers, when goods are lost, in tracing the goods, fixing the liability, and recovering their loss. It seems to have recognized the additional fact, that the facilities of the initial carrier are much greater than those of the shipper to locate the goods and fix the liability for loss or damage. The court further declared that these provisions rest on substantial grounds of public policy which inspired this remedial legislation for the regula-

tion of the immense volume of interstate commerce.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5, 817, 818; Dec. Dig. ¶ 2, 180(2).]

6. CARRIERS ¶ 180(2)—CARRIAGE OF GOODS—CONNECTING CARRIERS—LIMITATIONS OF LIABILITY.

Under the common law, independently of statute, where a common carrier receives property for carriage beyond its own line, issuing a through bill of lading therefor, specifying the freight for through carriage, it makes the connecting carriers its agents, and is responsible to the shipper for any loss or damage to such property, either on its own or the connecting lines, which liability it cannot limit by contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 817, 818; Dec. Dig. ¶ 180(2).]

7. COMMERCE ¶ 8 — CARRIAGE OF GOODS — CONNECTING CARRIERS—STATUTORY PROVISION.

The Carmack Amendment to the Hepburn Act, relating to the liability of common carriers of property in interstate commerce for loss or damage to such property, but which contains the proviso "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," leaves a shipper free to resort to the laws of a state applicable to his contract.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ¶ 8.]

8. TRIAL ¶ 280(1), 295(1), 298(2)—CARRIERS—ACTION FOR LOSS OF GOODS—REQUISITE INSTRUCTIONS.

Although requested instructions may correctly state the law, yet, if the law applicable to the issues involved in the case is fairly and substantially given by the court in its charge, a judgment will not be reversed because of refusal to give such requested instructions. It is not required that the entire law of the case shall be stated in a single instruction, and it is therefore not improper to state the law, as applicable to particular questions, or particular parts of the case in separate instructions, and if there is no conflict in the law as stated in different instructions, and all the instructions considered as a series present the law applicable to the case fully and accurately, it is sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651, 703, 704, 708, 713, 714, 717; Dec. Dig. ¶ 280(1), 295(1), 298(2).]

9. APPEAL AND ERROR ¶ 1001(1)—REVIEW—QUESTIONS OF FACT—VERDICT.

Where the jury is properly instructed upon an issue of fact joined by the pleadings, and there is evidence reasonably tending to support their finding on that issue, their verdict will not be disturbed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3933; Dec. Dig. ¶ 1001(1).]

10. CARRIERS ¶ 177(4)—CARRIAGE OF GOODS—CONNECTING CARRIERS—LIABILITY OF DELIVERING CARRIER.

The evidence in the case shows that these shipments were delivered to the initial carrier under a continuous contract to destination in a condition that was plenty good to ship, and the fact that the initial carrier received them for shipment and did ship them tends to show beyond a doubt that they were in a shipping condition. Under the rule laid down by this court in the case of St. Louis & S. F. R. Co. v. Jamieson, 20 Okl. 654, 96 Pac. 417, if the carrier finally delivering the goods does not deliver them in the condition in which they were re-

ceived by its agent, the initial carrier, then it must account for the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 791-808; Dec. Dig. ¶ 177(4).]

11. CARRIERS ¶ 177(4), 185(1)—CARRIAGE OF GOODS—CONNECTING CARRIERS—BURDEN OF PROOF—AUTHORITY OF INITIAL CARRIER.

The burden rests upon it, the delivering carrier, to show that the injury occurred without its fault or negligence. To the extent of involving it, the delivering carrier, in the liability of a common carrier after the goods shall have come to its custody, the initial or receiving carrier of the goods had such authority. The burden of proof in cases of loss or injury rests upon the carrier to exempt itself from liability, the law imposing the obligation of such duty upon it. The carrier, almost without exception, will be able to show the condition of the property when reaching its custody; the shipper or consignee can rarely, if ever, do so. This is a salutary rule, resulting in justice to the greatest number affected, leaving it also to the party to prove the fact in whose power it expressly lies.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 791-808, 835-844; Dec. Dig. ¶ 177(4), 185(1).]

12. APPEAL AND ERROR ¶ 1011(1)—REVIEW—QUESTIONS OF FACT.

Both sides brought forward their proofs before the jury touching these several matters and things, and the jury on the whole case found, by their verdict, that the cattle were injured while in the custody of the defendant, and through its fault or negligence. This court will not disturb the verdict, and will not, when the evidence in a case leaves it doubtful whether the particular carrier who is sued for a loss or an injury to live stock, or another from whom that carrier received such property, is liable, disturb the findings in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3933; Dec. Dig. ¶ 1011(1).]

13. CARRIERS ¶ 149½—CARRIAGE OF GOODS—LIMITATION OF LIABILITY.

Again as to interstate shipments, the common-law liability of the carrier for the safe carriage of property may be limited by special contract with the shipper, when such contract, being supported by a consideration, is reasonable and fairly entered into by the shipper, and does not attempt to cover losses caused by the negligence or misconduct of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 651-653, 660-662; Dec. Dig. ¶ 149½.]

Commissioners' Opinion, Division No. 4. Error from County Court, Pushmataha County; L. P. Davenport, Judge.

Action by A. H. Akard against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiff in error. Arnote & Powell, of Antlers, for defendant in error.

DAVIS, C. Reference will be made to the parties herein as they appeared in the court below. The amended petition of plaintiff is as follows, omitting caption and mere formal parts:

"Comes now the plaintiff and for cause of action against the defendant states:

"1. That defendant is a railroad corporation organized under the laws of the state of Missouri, and owns and operates a line of railroad, and which runs into and through Antlers and Pushmataha county.

"2. That on or about the 4th day of April, 1912, at Ft. Worth, Texas, plaintiff herein delivered to the St. Louis, San Francisco & Texas Railway Company, at Ft. Worth, Texas, for transportation over the line of the St. Louis, San Francisco & Texas Railway Company to Paris, Texas, and over the St. Louis & San Francisco Railroad from Paris, Texas, to Antlers, Oklahoma, for a reasonable compensation agreed to be paid by the plaintiff, said railroad companies agreed to carry from Ft. Worth, Texas, to Antlers, Oklahoma, and there deliver to the plaintiff in good condition and within reasonable time after receipt thereof by them as aforesaid, 51 head of yearlings, the property of the plaintiff and valued at \$——, which the plaintiff then and there delivered to the said railroad defendant, and the said railroad defendant then and there received the same upon the agreement and for the purposes aforesaid, on a through billing of said cattle over both roads from Ft. Worth, Texas, to Antlers, Oklahoma.

"3. Plaintiff further alleges that defendant in shipping and transporting said cattle above mentioned negligently and carelessly acted in such manner with said cattle that one was killed in the car before it arrived in Antlers, Oklahoma, and three others were so bruised, hurt, and wounded by defendant's negligence and careless handling of them that they died soon after their arrival and unloading at Antlers, to the plaintiff's damage in the sum of \$42.00.

"4. As a further cause of action against the defendant, plaintiff states that on or about the 5th day of April, 1912, at Ft. Worth, Texas, plaintiff delivered to the said St. Louis, San Francisco & Texas Railway for transportation over the line of the St. Louis, San Francisco & Texas Railway to Paris, Texas, and the St. Louis & San Francisco Railroad from Paris, Texas, to Antlers, Oklahoma, for a reasonable compensation agreed to be paid by the plaintiff, said railroad companies agreed to carry from Ft. Worth, Texas, to Antlers, Oklahoma, and there to deliver to the plaintiff in good condition and within reasonable time after receipt thereof by them as aforesaid, 45 head of cattle, the property of the plaintiff, which the plaintiff then and there delivered to the defendant, and the defendant then and there received the same upon the agreement for the purposes aforesaid, on a through billing of said cattle over both roads from Ft. Worth, Texas, to Antlers, Oklahoma.

"5. That upon the arrival of said cattle at Paris, Texas, the defendant negligently and carelessly and contrary to its agreement and obligation to plaintiff, unloaded said cattle in its stock pens at Paris, Texas, and held them for local freight, and that one steer was by the defendant left in the stock pens at Paris, Texas, and died there, to plaintiff's damage in the sum of \$25.00, and that by reason of said negligent and careless handling, the other cattle in shipment were damaged in the sum of \$35.00.

"6. That plaintiff herein filed his claim in writing with the station agent of the St. Louis & San Francisco Railroad Company at Antlers, Oklahoma, on the 29th day of April, 1912, a copy of which claim is hereto attached, marked Exhibit A, and made a part of this petition. "Wherefore plaintiff prays judgment against the defendant in the sum of \$102.00, and for the costs, and for general and special relief."

To this amended petition the following exhibit is attached:

"Antlers, Oklahoma, April 29, 1912.

"Agent, Antlers, Oklahoma:

"Herewith hand you my claim, \$54, for four head cattle killed in transit from Ft. Worth, Texas. On April 4th I shipped from Ft. Worth, Texas, to Antlers 51 head yearlings, and on arrival at Antlers there were one dead and two bruised and skinned up so bad that they died in few hours after unloading, and these three yearlings were worth \$10.50 each; and on April 5th I shipped from Ft. Worth, Texas, to Antlers, Oklahoma 45 head of cattle, and on arrival at Paris, Texas, these cattle were unloaded and held for local freight, and one steer was left in stock pens at Paris and died there. This steer is worth \$22.50. Total of claim, \$54. Please handle this claim as promptly as possible and an early settlement will be appreciated.

"Yours truly,

A. H. Akard."

The answer of the defendant is as follows:

"Comes now the defendant herein, and for answer to the petition of the plaintiff: Defendant denies each and every material allegation in said petition."

We adopt the reasoning and the conclusions reached and announced by Chief Justice Williams in the well-considered case of St. Louis & S. F. Ry. Co. v. Jamieson, 20 Okl. 654, 95 Pac. 417, and make the same the law of this case on the questions therein decided and herein raised.

It is true that this was an interstate shipment, and plaintiff could have sued the initial carrier, St. Louis, San Francisco & Texas Railway, but was not bound to do so, but could bring his action in the state courts against the delivering carrier, St. Louis & San Francisco Railway Company, as he did.

[3-6] "The act to regulate commerce provides: 'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.' The act provides that nothing in the above section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"The statute provides: 'That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.' On February 29, 1908, the Circuit Court of the Western District of Arkansas held that the provision

in the Hepburn Act, commonly called the Carmack Amendment, which makes an initial carrier liable for loss, damage, or injury to through shipments, whether such losses occur on or off the line of the initial carrier, is constitutional, and that a clause in a bill of lading providing that an initial carrier's liability on an interstate shipment of goods transported over the lines of several carriers from point of origin to destination, shall be limited to losses occurring on its own line, is in conflict with the Carmack Amendment.

"The court said that Congress in adopting this amendment seems to have recognized the difficulty involved, on the part of shippers, when goods are lost, in tracing the goods, fixing the liability, and recovering their loss. It seems to have recognized the additional fact that the facilities of the initial carrier are much greater than those of the shipper to locate the goods and fix the liability for loss or damage. The court further declared that these provisions rest on substantial grounds of public policy which inspired this remedial legislation for the regulation of the immense volume of interstate commerce.

"Under the common law, independently of statute, where a common carrier receives property for carriage beyond its own line, issuing a through bill of lading therefor, specifying the freight or through carriage, it makes the connecting carriers its agents, and is responsible to the shipper for any loss or damage to such property, either on its own or the connecting lines, which liability it cannot limit by contract."

Interstate Transportation, Barnes (2d Ed.) §§ 306 to 309, inclusive.

See *Smeltzer v. St. L. & S. F. R. Co.* (C. C.) 158 Fed. 649; *Riverside Mills v. A. C. L. R. Co.* (C. C.) 168 Fed. 987; *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7.

[7] "The Hepburn Act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1907, p. 909]), relating to the liability of common carriers of property in interstate commerce for loss or damage to such property, but which contains the proviso 'that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law,' leaves a shipper free to resort to the laws of a state applicable to his contract." *Latta v. Chicago, St. P., M. & O. Ry. Co.*, 172 Fed. 850, 97 C. C. A. 198; *Ft. Smith & W. R. Co. v. Awbrey & Semple*, 39 Okl. 270, 134 Pac. 1117; *Chicago, R. I. & P. R. Co. et al. v. Harrington et al.*, 44 Okl. 41, 143 Pac. 325.

[8] The defendant asked the trial court to give the following instruction to the jury:

"The jury are instructed in this case by the court that this is a suit for the recovery of damages against the defendant the St. Louis & San Francisco Railroad Company, for injuries

alleged to have been done to certain cattle shipments from Ft. Worth, Tex., to Antlers, Okl., and the plaintiff in his amended petition alleges the facts to be as follows, to wit: That on the dates set out in the contracts of shipment he entered into a contract with the St. Louis, San Francisco & Texas Railway to transport the cattle in question to Paris, Tex., and there deliver the same to the St. Louis & San Francisco Railroad, the defendant herein, and that the billing of said cattle was made by the initial carrier, the St. Louis, San Francisco & Texas Railway, through to Antlers, Okl.

"You are therefore instructed by the court that, if you shall find from the evidence and proof in this case, by a fair preponderance of the evidence and proof, that the initial carrier—that is, the St. Louis, San Francisco & Texas Railway—carried said cattle safely to Paris, Tex., and there delivered the same to the St. Louis & San Francisco Railroad in good condition, or in the same condition as when received by initial carrier, and that the injury, if any, was had and sustained after they were delivered to and were in the charge and custody of the defendant the St. Louis & San Francisco Railroad, between Paris, Tex., and Antlers, Okl., then and in that event your verdict should be for the plaintiff, and for whatever amount of damages you may believe from the evidence he sustained by reason of the injury, if any, to the cattle, not over \$102.

"But, on the other hand, if you shall believe from the evidence and proof that the injury and damage to said cattle, if any, was had and done while in the charge and custody of the initial carrier, the St. Louis, San Francisco & Texas Railway, between Ft. Worth, Tex., and Paris, Tex., and that the cattle in question were delivered at Antlers, Okl., by the connecting carrier, the defendant herein the St. Louis & San Francisco Railroad, in the same condition as when received by them from the initial carrier, the St. Louis, San Francisco & Texas Railway, and that no injury was done to the cattle while in the charge and custody of the St. Louis & San Francisco Railroad, the defendant herein, then and in that event you are instructed by the court that there would be no liability upon the part of the connecting carrier, the defendant herein, and that the plaintiff's right of action for whatever injury the cattle may have sustained would be against the initial carrier, the St. Louis, San Francisco & Texas Railway, and your verdict should be for the defendant.

"In other words, the court instructs you that, where a shipment of property is made over different lines of railroad, that road only is liable for injury done to the property while in its charge and custody."

This the court refused to do, and the defendant duly excepted; the court giving the following charge to the jury as shown by the record:

"The plaintiff in this case, A. H. Akard, has instituted suit against the defendant St. Louis & San Francisco Railroad Company for damages and injury to two shipments of cattle alleged to have been shipped from Ft. Worth, Tex., to Antlers, Okl., and that said cattle were delivered to the St. Louis, San Francisco & Texas Railway, under a through rate contract to point of destination, which was Antlers, Okl., on the St. Louis & San Francisco Railroad Company.

"Gentlemen of the jury, it will be your duty in this case to determine from the evidence adduced before you whether the damages and injury complained of by plaintiff in this case occurred on the defendant company's lines, as it would not be liable for any injury that occurred on the line of any other connecting carrier before delivery to this defendant.

"The court instructs you that if you believe from the evidence in this case that the injury

to any of said cattle occurred after delivery of same to it by the St. Louis, San Francisco & Texas Railway, the initial carrier in this contract, then you will find for the plaintiff in such sum as you may believe just and proper from all the evidence in the case, and if you fail to so find after a consideration of all the evidence you will return a verdict for the defendant.

"If you believe from the evidence in this case that the plaintiff, A. H. Akard, delivered the cattle in question to the initial carrier, the St. Louis, San Francisco & Texas Railroad Company, and the delivering carrier, the St. Louis & San Francisco Railroad Company, accepted the shipment under the through rate under said bill of lading, it thereby ratified the contract of the initial carrier, which, of itself, would make the initial carrier the agent of the delivering carrier, and if the delivering carrier does not deliver the cattle in the condition in which they were received by its agent, then it must account for the injury."

This, we think, was sufficient under the authority of *Great Western Coal & Coke Co. v. Serbantas*, 150 Pac. 1042; *Missouri, O. & G. Ry. Co. v. Millers*, 145 Pac. 367; *Grant et al. v. Milam*, 20 Okl. 672, 95 Pac. 424; *M., O. & G. Ry. Co. v. Vandivere*, 42 Okl. 427, 141 Pac. 799; *S. L. & S. F. R. Co. v. Peery & Murray*, 40 Okl. 253, 138 Pac. 144; *St. L. & S. F. R. Co. v. Long*, 41 Okl. 177, 137 Pac. 1156.

[2, 9] The jury were properly instructed in the light of the evidence in the case. The testimony was conflicting as to where and just when the injuries complained of were received by the cattle in question. These were all questions of fact to be submitted to the jury, and to be found and determined by them from the evidence, under proper instructions from the court. The jury saw and heard all the witnesses, observed their manner of testifying and their demeanor while on the witness stand, and were in a far better position to judge of the weight and credibility to be given to the testimony of each than is this court, and, having found the defendant liable to the plaintiff for the damages sued for by their verdict, under these circumstances, this court will not interfere to set such verdict aside. "Where the jury is properly instructed upon an issue of fact joined by the pleadings, and there is evidence reasonably tending to support their finding on that issue, their verdict will not be disturbed by the Supreme Court." *Burns, Receiver, v. Vaught*, 27 Okl. 711, 113 Pac. 906; *Grant et al. v. Milam*, 20 Okl. 672, 95 Pac. 424; *Great Western Mfg. Co. v. Davidson Mill & Elevator Co.*, 26 Okl. 626, 110 Pac. 1096; *Binton v. Lyle*, 28 Okl. 430, 114 Pac. 618; *Oklahoma Portland Cement Co. v. Anderson*, 28 Okl. 650, 115 Pac. 787; *Bland v. Peters*, 30 Okl. 798, 120 Pac. 631; *American Nat. Bank v. Halsell*, 43 Okl. 126, 140 Pac. 399; *Johnson v. Johnson*, 43 Okl. 582, 143 Pac. 670.

[10, 11] The defendant makes the following contention in its brief:

"The contracts upon which plaintiff's cattle were transported are identically the same, and contain a notice in bold-face type at the top, reading as follows:

"Notice.

"This Company has Two Rates on Live Stock.

"The rate charged for shipment of live stock under the following contract is lower than the rate charged if the shipment is not made under the following contract, but at carrier's risk. The rates of freight are based upon the nature and extent of liability assumed by the carrier. The shipper has the right of election whether to ship live stock under this contract at the lower rate, or not under this contract, but at the carrier's risk, at a higher rate."

"Section 4 of the contract is as follows: 'The company shall not be responsible for any death, loss or injury sustained by the live stock from any defect in the cars, overloading of cars, escape of live stock, or because the live stock are wild, unruly or weak, or maim each other or themselves, or from fright, crowding, heat or suffocation.'

"Section 17 of said contract is as follows: 'The shipper acknowledges that he has had the option of shipping the live stock at carrier's risk at a higher rate, or under this contract at a lower rate, and that he has elected to make this contract and accept the lower rate.'

"Since the passage of the Hepburn Act by Congress on June 29, 1906 (34 Stat. 584, c. 3591, U. S. Comp. St. Supp. 1911, p. 1284), the state under its police power has ceased to have authority to pass acts relative to contracts made by carriers relating to interstate commerce, and the common-law liability of the carrier for the safe carriage of property may be limited by a special contract made with the shipper. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *Kansas City S. R. Co. v. Carl*, 227 U. S. 689, 33 Sup. Ct. 391, 57 L. Ed. 683; *Atchison, T. & S. F. R. Co. v. Robinson*, 238 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; *Boston & Maine R. Co. v. Hooker*, 223 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 848, L. R. A. 1915B, 450, Ann. Cas. 1916D, 593; *St. Louis & S. F. R. Co. v. Bilby*, 35 Okl. 589, 130 Pac. 1089; *St. Louis & S. F. R. Co. v. Zickafosse*, 39 Okl. 302, 135 Pac. 406; *Missouri, O. & G. R. Co. v. French* (No. 5351, not yet officially reported) 152 Pac. 591; *St. Louis & S. F. R. Co. v. Wood & McAlester* (No. 5700, not yet officially reported) 152 Pac. 848.

"The gist of plaintiff's cause of action is found in the third paragraph of the bill of particulars, reading as follows: 'That said defendant, in shipping and transporting said cattle above mentioned, negligently and carelessly acted in such manner with said cattle that one was killed in the car before it arrived at Antlers, Oklahoma, and three others were so bruised, hurt, and wounded by defendant's negligent and careless handling of them that they died soon after their arrival and unloading at Antlers.' And in the fifth paragraph thereof, reading as follows: 'That upon the arrival of the said cattle at Paris, Texas, the defendant negligently and carelessly and contrary to its agreement and obligation to plaintiff, unloaded said cattle in its stock pens at Paris, Texas, and held them for local freight, and that one steer was by the defendant left in the said stock pens at Paris, Texas, and died there, to plaintiff's damage in the sum of \$25.00, and that by reason of said negligent and careless handling the other cattle in shipments were damaged in the sum of \$25.'

"There is an entire lack of evidence as to any negligence on the part of the defendant, or on the part of the St. Louis, San Francisco & Texas Railway Company, or the Paris & Great Northern Railroad Company. The plaintiff did not introduce one line of testimony tending to show any rough handling of either of said shipments,

and under the allegations upon which said action is predicated there is no proof upon which the verdict of the jury and the judgment of the court can stand."

The evidence in the case shows that these shipments were delivered to the initial carrier under a continuous contract to destination in a condition that was plenty good to ship, and the fact that the initial carrier received them for shipment and did ship them tends to show beyond a doubt that they were in a shipping condition. Under the rule laid down by this court in the case of *St. Louis & S. F. R. Co. v. Jamieson*, supra, if the carrier finally delivering the goods does not deliver them in the condition in which they were received by its agent, the initial carrier, then it must account for the injury. The burden rests upon it, the delivering carrier, to show that the injury occurred without its fault or negligence. To the extent of involving it, the delivering carrier, in the liability of a common carrier after the goods shall have come to its custody, the initial or receiving carrier of the goods, had such authority. The burden of proof in cases of loss or injury rests upon the carrier to exempt itself from liability, the law imposing the obligation of such duty upon it. The carrier, almost without exception, will be able to show the condition of the property when reaching its custody; the shipper or consignee can rarely, if ever, do so. This is a salutary rule, resulting in justice to the greatest number affected, leaving it also to the party to prove the fact in whose power it expressly lies.

[12] Both sides brought forward their proofs before the jury touching these several matters and things, and the jury on the whole case found, by their verdict, that the cattle were injured while in the custody of the defendant, and through its fault or negligence. This court will not disturb the verdict, and will not, when the evidence in a case leaves it doubtful whether the particular carrier who is sued for a loss of and injury to live stock, or another, from whom that carrier received such property, is liable, disturb the findings in the court below.

[13] Again, as to interstate shipments, the common-law liability of the carrier for the safe carriage of property may be limited by special contract with the shipper, when such contract, being supported by a consideration, is reasonable and fairly entered into by the shipper, and does not attempt to cover losses caused by the negligence or misconduct of the carrier. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *St. Louis & S. F. R. Co. v. Cox et al.*, 40 Okl. 258, 138 Pac. 144.

We find no reversible error in the action of the trial court complained of by the defendant in permitting the plaintiff's witness, Helms, to give certain testimony to the jury

over the objection and exception of the defendant.

[1] For these reasons we do not think the trial court erred in overruling defendant's demurrer to plaintiff's evidence, in overruling defendant's request for a peremptory instruction at the close of the plaintiff's case and at the close of all the evidence in the case, in refusing to give to the jury the instruction asked for by the defendant, in giving the instructions that were given to the jury in the case, and in overruling the defendant's motion for a new trial, and the judgment of the trial court is therefore affirmed.

PER CURIAM. Adopted in whole.

WATERS-PIERCE OIL CO. et al. v. PROGRESSIVE GIN CO. (No. 6294.)

(Supreme Court of Oklahoma. June 27, 1916.)

(Syllabus by the Court.)

1. SALES \S 24, 418(1)—CONSTRUCTION—OPTIONS.

The W. P. O. Co., whose successor was the Pierce Oil Corporation, entered into a written contract with the P. G. Co., whereby the W. P. O. Co. sold and agreed to deliver to the P. G. Co. 200 barrels of gasoline during a specified period, and provided in said contract that the P. G. Co. should have the optional right to order and receive and the W. P. O. Co. should thereupon deliver under said contract such additional quantity of gasoline as it might desire, not to exceed 400 barrels during the life of the contract. The W. P. O. Co. delivered 230 barrels of gasoline and refused, upon order therefor by the P. G. Co., to furnish to defendant 150 barrels more of gasoline. Held, that the part of the contract providing for furnishing the additional 200 barrels of gasoline was not a unilateral contract, but was an option based upon a consideration—the purchase of the 200 barrels of gasoline which were delivered. Further held, that, upon failure of the successor of the W. P. O. Co. to fill the order of the P. G. Co. for the additional 150 barrels of gasoline, the Pierce Oil Corporation, as successor of the W. P. O. Co., was liable to the P. G. Co. for the difference between the contract price of said gasoline and the market price of said gasoline at the time the order for the said 150 barrels was made by the P. G. Co.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 49-51, 1174, 1180, 1201; Dec. Dig. \S 24, 418(1).]

Commissioners' Opinion; Division No. 1. Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Action by the Waters-Pierce Oil Company, a corporation, in which the Pierce Oil Corporation, its successor, was substituted as plaintiff, against the Progressive Gin Company, which cross-petitioned. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiff in error. J. F. McKeel, of Ada, for defendant in error.

COLLIER, C. This action was instituted by the plaintiff in error, Waters-Pierce Oil Company, a corporation, against the Progressive Gin Company, a corporation. Afterwards the Pierce Oil Corporation, as successor to the Water-Pierce Oil Co., was substituted as the party plaintiff, to recover the sum of \$367.20 on account of goods, wares, and merchandise sold and delivered by plaintiff in error to defendant in error. The parties hereafter will be styled as they were in the trial court.

The defendant answered and filed his cross-action as follows:

"Answering affirmatively, this defendant says that on, to wit, August 22, 1911, this defendant entered into a written contract with plaintiff, whereby the plaintiff sold and agreed to deliver to this defendant from time to time as ordered by the defendant, during a period of 12 months from said time, 200 barrels of 50 gallons each of engine gasoline at 8 cents per gallon. It was further agreed as follows: 'The exact quantity desired by the said second party not being definitely known, it is agreed that the quantity above specified is the minimum quantity of engine gasoline which shall be ordered, delivered, received, and paid for under this contract. But the second party shall have the optional right to order and receive, and the first party shall thereupon deliver under this contract, and at the place and price specified above, such additional quantities as the second party may desire, provided quantity does not exceed 400 barrels during the period of time covered by this contract.' Copy of said contract is hereto attached, marked 'Exhibit A,' and made a part of this answer.

"That on, to wit, August 17, 1912, this defendant ordered of and from plaintiff 150 barrels of engine gasoline to be supplied to it at once, and that plaintiff failed and refused to furnish said gasoline, or any part thereof, except the gasoline charged in plaintiff's petition herein, which said gasoline amounts in quantity to 2,127 gallons, and that under said contract this defendant was bound to pay the plaintiff 8 cents per gallon for said gasoline furnished, amounting to \$170.16. This defendant admits further that it received the other merchandise charged in plaintiff's petition, amounting to \$37.54, making a total of merchandise received by this defendant, when charged at the contract price, of \$207.70. Now, this defendant says that said plaintiff was bound under its contract to furnish him 150 barrels of engine gasoline of 50 gallons per barrel, making a total of 7,500 gallons, and the defendant admits that it received from plaintiff 2,127 gallons, as above set out, which leaves the plaintiff owing this defendant 5,373 gallons not delivered. The defendant says that said gasoline advanced to the price of 15½ cents per gallon, and that by reason of the advance in price of said gasoline and by reason of the failure of plaintiff to deliver to this defendant 5,373 gallons, as it was bound to do under its said contract; this defendant was damaged in the sum or amount of 7½ cents per gallon for the amount not delivered, in the sum of \$402.97, and that plaintiff thereby became and now is indebted and bound to pay this defendant the said sum of \$402.97; that said sum due from plaintiff to this defendant of \$402.97, less the amount due from this defendant to plaintiff for merchandise received of \$207.70, leaves a balance due this defendant on settlement of \$195.27, and this defendant says that plaintiff is indebted to it in the said sum of \$197.27."

A general demurrer was interposed to the fourth and fifth paragraphs of defendant's

answer and cross-petition, which demurrer was overruled by the court and such action of the court duly excepted to.

The plaintiff denied generally the allegations contained in the answer of the defendant. It admitted entering into the contract pleaded by the defendant, but alleged that plaintiff had fully complied with all the conditions thereof and had furnished the defendant more than 200 barrels of gasoline of 50 gallons each, prior to the termination of said contract, and that if the defendant in fact did order 150 barrels of gasoline on the 17th day of August, 1912, it was after plaintiff had fully complied with the contract.

It was further alleged that plaintiff was not bound to supply the defendant with the said 150 barrels of gasoline, for the reason that the provision in the contract in that regard was optional and unilateral and lacking in mutuality, and plaintiff was not bound thereby. It also alleged that, if the defendant did order the said 150 barrels of gasoline, it was ordered with the intention of not paying for the same; that at the time the defendant was insolvent, and had been for a number of months prior thereto, and had failed to pay for gasoline ordered from plaintiff, and was still indebted therefor to plaintiff, for which reason plaintiff alleged it was not bound or obligated to fill said order.

The evidence in the case is undisputed that the said contract was entered into; that 200 barrels of gasoline had been delivered to defendant and that, after the delivery of said 200 barrels, the defendant had ordered 150 barrels of gasoline additional, and that the plaintiff had failed and refused to deliver such gasoline so ordered. The evidence was in conflict as to whether or not the defendant was insolvent.

The court, among other instructions, instructed the jury as follows, to which the defendant duly excepted:

"No. 2. The court instructs the jury that, under the terms of the contract between the plaintiff and the defendant, the Progressive Gin Company bound itself to receive and pay for 200 barrels of engine gasoline, and the plaintiff bound itself to sell and deliver to the defendant 200 barrels of gasoline at the price of 8 cents per gallon, and that said contract contained an offer on the part of the plaintiff to sell to the Progressive Gin Company 200 additional barrels of engine gasoline at 8 cents per gallon during the year, and that the defendant, the Progressive Gin Company, would have the right to accept the offer of the plaintiff at any time within the year, unless notified that the same was withdrawn; and, if the defendant ordered engine gasoline not to exceed 200 barrels within a year, then it would become a binding contract on the part of the plaintiff, if the defendant had complied with all the duties imposed upon it by the terms of the contract.

"No. 3. The court instructs the jury that, if you believe from a preponderance of the evidence that the defendant, the Progressive Gin Company, substantially complied with its duties as set out in the contract given in evidence, and accepted the offer of the plaintiff contained in the contract to sell additional barrels of engine gasoline, not in excess of 200 bar-

rels at 8 cents per gallon, within the time specified in the contract, and that the said Progressive Gin Company ordered 150 barrels of engine gasoline, and were in no different financial condition than at the time when the contract was entered into, that is to say, were not insolvent by being unable to pay its undisputed debts when due, then you are instructed that you should find for the defendant upon its cross-petition against the plaintiff for the difference in the price of 8 cents per gallon, and the market price per gallon of engine gasoline at Roff, Okl., on the date said order was made, and deduct from this amount the sum sued for by the plaintiff, to wit, \$367.20."

The plaintiff requested the court to give special instructions Nos. 1, 2, and 3, which said instructions are in words and figures as follows, which the court refused to do, and to the refusal of which the plaintiff separately duly excepted:

"No. 1. Plaintiff asks the court to direct the jury to return a verdict for it and against the defendant for the amount admitted to be due, as shown by its original petition.

"No. 2. You are instructed that, if you believe from the evidence that the plaintiff and defendant entered into a contract upon the 22d day of August, 1911, whereby the plaintiff was to deliver to the defendant 200 barrels of engine gasoline at 8 cents per gallon, of 50 gallons each, and that said contract did not specify or defendant did not agree to accept and pay for more than 200 barrels of gasoline, then, and in that event, the plaintiff was not obligated or bound to deliver to said defendant more than 200 barrels of gasoline and would not be liable for its failure to deliver the said 150 barrels of gasoline after it had delivered the 200 barrels of gasoline, and your verdict should be for the plaintiff.

"No. 3. You are instructed that, if the contract set out in defendant's answer could not be enforced against the defendant if it had not ordered more than 200 barrels, it is what is known in law as an unilateral contract, and could not be enforced against the defendant for over 200 barrels of gasoline, and that it would not be liable to defendant for its failure to deliver the said 150 barrels of gasoline ordered on the 17th day of August, 1912."

Upon the issues joined, the case was tried to a jury, who returned a verdict for the defendant in the sum of \$195.30. Timely motion was made for a new trial, which was overruled. To reverse said judgment, this appeal is prosecuted.

The material evidence in this case is undisputed, and the determining question in the cause is the construction of the contract, a copy of which is attached to the answer and cross-petition of the defendant. We think that the contract is not unilateral, but that it is an option given by plaintiff to defendant to purchase the 200 additional barrels of gasoline, in addition to the 200 delivered, and that the consideration for said option was the purchase of the 200 barrels of gasoline, which was purchased and delivered, and that it was the duty of the plaintiff to have furnished the 150 barrels of gasoline prior to the expiration of the said contract upon demand of defendant, and it is entirely immaterial whether or not the plaintiff needed the 150 barrels of gasoline in his business, or what he did or intended to do

with said 150 barrels of gasoline. In short, it is our opinion that the contract was not only for the purchase of the 200 barrels that was delivered, but in addition was an option given defendant, in consideration of the purchase of the 200 barrels, for 200 barrels additional gasoline, provided the same was ordered during the life of the contract.

"Where the offer is founded on a consideration, as where something is paid or promised for the option or refusal, the offer cannot be withdrawn, but continues in force until the expiration of the time limited for its acceptance. Where the offer is in a lease and gives the lessee the right to purchase within a certain time for a certain price, the lease is a sufficient consideration to make the offer binding. * * * And a promise cannot be revoked without the consent of the promisee, although the latter may not perform the condition of acceptance within the time limited; yet, if he does he is entitled to demand performance." 9 Cyc. 286.

In *Olympia Bottling Works v. Olympia Brewing Company*, 58 Or. 87, 107 Pac. 969, it is said:

"And it is well settled that an optional agreement, executed upon proper consideration, is not lacking in mutuality, and is enforceable." 21 Am. & Eng. Ency. Law, 929; *House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Clarno v. Grayson*, 80 Or. 111, 46 Pac. 426; *Belch v. Miller*, 32 Mo. App. 387; *Worthington v. Beeman*, 91 Fed. 232, 33 C. C. A. 475; *Seaver v. Thompson*, 189 Ill. 158, 59 N. E. 553; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Hawraity v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 618; *Hall v. Center*, 40 Cal. 63.

In *Ross v. Parks*, 93 Ala. 158, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47, it is said:

"It may be stated as a sound principle of law, if an owner of land, in writing, gives another an option on land for a valuable consideration, whether adequate or not, agreeing to sell it to him at a fixed price, if accepted within a specified time, it is binding upon the owner and upon those who purchase from the owner with a knowledge of such agreement. *Moses v. McClain*, 82 Ala. 370 [2 South. 741] * * *; *Maull v. Vaughn*, 45 Ala. 134."

"Under such circumstances, the fixed time is a material part of the contract, and, when supported by a valuable consideration, the owner of the land cannot revoke the offer before the time has expired within which the offer may be accepted." *Robert C. Ross et al. v. Robert Scott Parks*, 93 Ala. 158, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47.

"An option, supported by a consideration, furnishes another illustration of a contract which is valid notwithstanding the lack of mutuality. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it. Similarly the privilege of purchasing given a lessee, in case the lessor makes a sale of the premises, is not invalid on the ground that it is wanting in mutuality, since this privilege is part of the consideration for accepting the lease." 6 *Ruling Case Law*, p. 686.

In the instant case, the consideration given by the defendant for the option was the purchase of the 200 barrels of gasoline, which were delivered. We are of the opinion that the demurrer to the fourth and fifth paragraphs of defendant's answer was without merit and that the court did not err in overruling the same.

We have carefully examined the instruc-

tions given by the court and excepted to, together with instructions requested, refused, and excepted to, and, from the views expressed, we are of the opinion that the instructions given correctly state the law, except possibly were too favorable to plaintiff upon the right of plaintiff to withdraw the option, and the court did not err in giving the same, and that the instructions requested do not correctly state the law, and were properly refused. There being evidence reasonably supporting the verdict, such verdict includes the finding that defendant was solvent, and we are without authority to disturb the verdict upon this point.

"A general finding in favor of a party includes a finding of all those facts necessary to constitute the claim of the party in whose favor the finding is made." *Oland v. Malson*, 39 Okl. 456, 135 Pac. 1055.

Where there is competent evidence to sustain a verdict based on conflicting evidence, it will not be disturbed on appeal. *Tulsa Street Ry. Co. v. Jacobson*, 40 Okl. 118, 136 Pac. 410. It follows that the court did not err in overruling the motion for new trial.

This cause should be affirmed.

PER CURIAM. Adopted in whole.

AMERICAN SURETY CO. OF NEW YORK v. CABELL (No. 5958.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY — 175 — REQUISITES OF CONTRACT—CONSIDERATION.

Forbearance by a surety company from withdrawing from the bond of an executor; by giving notice, etc., pursuant to the provisions of a statute, is sufficient consideration to support a contract to indemnify the surety company against loss upon the executor's bond.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 505-509; Dec. Dig. —175.]

2. INSURANCE — 181 — PREMIUMS—SURETY COMPANIES—DEATH OF PRINCIPAL.

Upon the death of the principal, an executor's bond, furnished by a surety company, can earn no further premiums.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 391; Dec. Dig. —181.]

3. PRINCIPAL AND SURETY — 175—CONSTRUCTION OF CONTRACT—EXTENT OF LIABILITY—ATTORNEY'S FEES.

An executor in his written application to a surety company for a bond conditioned for the faithful performance of his duty agreed: "That the indemnitor will perform all conditions of said bond and any and all renewals and extensions thereof on the part of indemnitor to be performed and will at all times indemnify and save the surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fee of special counsel whenever by the surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment, adjudication against it by reason of such suretyship and any and all renewals and extensions thereof, and before it shall be required to pay same." *Held*, that such covenant imposes no duty upon

the indemnitor to pay for the services of an attorney employed by the surety company to procure a contract for indemnity from the indemnitor, such indemnity not having been provided for in either the original application or the bond. *Held*, further, that in the circumstances disclosed by the record the surety company was not entitled to recover an attorney's fee paid for services rendered in an action commenced by a legatee against the executor, but not upon his bond, wherein the surety company was made a party.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 505-509; Dec. Dig. —175.]

Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by Ellen D. Cabell against the American Surety Company of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilson, Tomerlin & Buckholts, of Oklahoma City, for plaintiff in error. J. V. Cabell, of Moorovia, Cal., for defendant in error.

KANE, C. J. This was an action commenced by the defendant, in error, plaintiff below, against plaintiff in error, defendant below, for the purpose of recovering an unexpended balance of a certain sum deposited for the purpose of indemnifying defendant against any loss which it might suffer by reason of its suretyship upon the bond of B. F. Cabell, the husband of the plaintiff, who was nominated executor of the last will and testament of J. M. Cabell, deceased. Hereafter the parties will be called "plaintiff" and "defendant," respectively, as they were designated in the court below.

The defendant in its answer admitted the contract of indemnity, and there was an unexpended balance of the indemnity fund still due the plaintiff, as alleged in her petition, and further alleged, by way of cross-petition, that the executor, B. F. Cabell, defaulted in the payment of certain of the premiums due upon said bond, for which it claimed credit, and that by reason of a certain action having been commenced against said executor in the circuit court of Jefferson county, Ky., by one of the devisees under the will of J. M. Cabell, deceased, said defendant, in order to defend said suit and protect itself from liability by reason of being surety upon the bond of B. F. Cabell, executor, was put to an expense of \$1,014.75, which said amount said B. F. Cabell was obligated to pay to this defendant; the items constituting said sum being as follows: Attorney's fees, \$1,000; expenses by way of telegrams, traveling, etc., \$14.75.

Thereafter the defendant filed an amended and supplemental answer, to the effect that since the filing of said answer this defendant has delivered to the plaintiff, and the plaintiff has received from the defendant, the certificate of deposit referred to on page 12 of said original answer, for the sum of \$2,486.86, issued by said Fidelity Trust Company

of Louisville, Ky., and duly indorsed, which sum constitutes the balance due said plaintiff by virtue of said contract of indemnity.

The reply consisted of a general denial of every material allegation contained in the answer and cross-petition, "except such as hereinafter are specifically admitted," and numerous specific admissions and denials which were followed by allegations of affirmative matter, which it is not necessary to notice in detail.

Upon trial to the court, the court made very full findings of fact and conclusions of law, upon which it rendered judgment in favor of plaintiff for interest on the sum of \$2,486.86, from the 28th day of November, 1911, until the date of the filing of the answer of defendant, wherein said certificate of deposit was tendered to the plaintiff, with interest, and in favor of the defendant for the amount of the premium due on December 20, 1908, amounting to \$42.15 and credited same on judgment for plaintiff, leaving a net balance for plaintiff of \$10.69. The defendant was denied any judgment on its cross-petition, whereupon it commenced this proceeding in error for the purpose of reviewing the action of the trial court in denying relief upon its cross-petition, and the plaintiff below, defendant in error here, filed a cross-petition in error for the purpose of reviewing the action of the trial court in refusing to grant the full relief prayed for in her petition.

The facts necessary to review the questions of law presented may be stated briefly as follows: In March, 1907, J. M. Cabell died in Louisville, Ky., leaving a will nominating his brother, B. F. Cabell, executor without bond. The heirs consisted of Mrs. E. O. Brownfield and B. F. Cabell, of Bowling Green, Ky., and Mrs. Martha Chelf of Harrodsburg, Ky. In December, 1907, Mrs. Brownfield filed a motion in the probate court of Jefferson county, Ky., requiring the executor to file an inventory and execute bond for the faithful performance of his duties. On the 20th day of the same month the executor executed a bond, with the American Surety Company of New York, the defendant herein, as surety. In October, 1908, Mrs. Brownfield filed suit in the circuit court of Jefferson county against the executor for final settlement and distribution of the estate, making Mrs. Chelf, the other heir, the American Surety Company, Miss Bettie Y. Ray, and Mrs. Nannie B. Reed defendants. The petition alleged that the executor had mismanaged and wasted said estate, and that a note of \$5,492.13, payable to Bettie Y. Ray, and one to Nannie B. Reed of \$1,784.80, signed by deceased, were not legitimate obligations against the estate and should not be paid. The court referred the matter to a commissioner, who filed his report in October, 1910, wherein said executor was exonerated from all charges alleged against him by

Mrs. Brownfield, sustaining the validity of the Ray and Reed notes, and discharging both the executor and the surety company. On the 16th day of December, 1910, the court adopted the report of the commissioner in toto, rendered judgment thereon and spread the same upon the records of said court. Immediately upon the commencement of this action, to wit, on the 23d day of March, 1909, the American Surety Company asked the executor to indemnify it against any possible liability or loss, on said bond, and, in pursuance of said request, B. F. Cabell and his wife, Ellen D. Cabell, the plaintiff herein, executed an assignment of certain funds payable to them on July 20, 1909, from the state of Kentucky in the sum of \$20,000 cash. Mrs. Cabell's interest in this sum was \$15,000, and B. F. Cabell's \$5,000. On the 19th day of September, 1909, B. F. Cabell died, and Ellen D. Cabell was appointed administratrix of his estate, giving bond in the sum of \$8,000 as such administratrix with the Title Guaranty Company of Scranton, Pa., as surety. About the same time she was appointed administratrix of the estate of J. M. Cabell, deceased, giving bond with the Title Guaranty Company as surety. The state of Kentucky paid the American National Bank of Bowling Green the consideration expressed in the contract of indemnity, the proceeds of which were assigned by them to the American Surety Company, but the bank refused to pay the surety company anything under its assignment. In December, 1909, the bank delivered to Ellen D. Cabell two Kentucky state warrants for \$5,000 each, bearing dates of September 1, 1909, and December 1, 1909. Mrs. Cabell forwarded same to American Surety Company, Louisville, where, when paid, \$5,500 was to be held by the American Surety Company, as security against possible loss until final judgment of the Jefferson county circuit court in the Brownfield suit. In December, 1909, these warrants were paid, and January, 1910, \$4,500 was returned to Mrs. Cabell. In December, 1910, upon rendition of final judgment of the circuit court of Jefferson county exonerating and discharging the executor and the surety company from liability, demand was then made for the return to Mrs. Cabell of the \$5,500, and by it refused. On June 6, 1911, the surety company returned to Mrs. Cabell \$2,000, retaining the remainder for which this suit was brought in Oklahoma county, February, 1912. The action was for the recovery of \$2,486.86, and damages for the conversion of these moneys from December 15, 1909, at 6 per cent. per annum, expenses and attorney's fees.

[1] The theory of the plaintiff was that the surety company, having executed the executor's bond, as surety, for the yearly premium, it was bound by its contract and could not withdraw, and therefore the assignment of the fund of B. F. Cabell and Ellen D. Cabell

for the purpose of indemnifying it against any possible loss by reason of its being surety upon the bond of B. F. Cabell was without consideration and void. The theory of counsel on this point is disclosed by the following excerpt from his brief:

"It [the surety company] could not withdraw from the bond, although it set out a statute of Kentucky, and claims it could have invoked same, for a release from the bond. We insist the statute was passed exclusively for private sureties and not for insurance companies, as surety companies are classed both in Kentucky and Oklahoma. The higher court of Kentucky does not appear to have construed the statute involved with this point in question, but New York, with a similar statute, has."

Then follows a quotation from the case of *Thurber's Estate*, In re, 43 App. Div. 528, 60 N. Y. Supp. 198, which seems to support the contention of counsel, that such statutes are applicable to private sureties only. However, in their reply brief counsel for defendant call attention to the opinion of the Court of Appeals of the state of New York in the same case, reported in 162 N. Y. 244, 56 N. E. 631, which reverses the lower court and holds such statutes are applicable to both classes of sureties. Assuming, as counsel seem to have done, that if such statutes are applicable to surety companies, then the forbearance of the company would constitute a sufficient consideration for the contract of indemnity entered into between B. F. Cabell, Mrs. Cabell, and the surety company, but there is slight room for controversy between the parties as to the issues involved in the petition itself, for the reason that the proper disbursement of the indemnity fund, according to the terms of the contract, except as to the specific amount stated in the petition of the plaintiff is not questioned. The indemnity contract contained a defeasance clause, which reads as follows:

"It is agreed that the assignment asked by the American Surety Company from B. F. Cabell is merely as collateral security to protect said corporation from liability as such surety, the money that may be collected on said assignment shall be used to defray and discharge the obligations of said estate and of said executor to said estate, and whatever remains after the discharge of said executor, shall be returned to said Cabell or his wife as said Cabell and his wife may direct."

The court below found the 28th day of November, 1911, the date the last heir waived her right to appeal from the judgment rendered by the Jefferson county circuit court, as the date when the balance of the fund should have been turned back to the Cabells, and allowed the plaintiff 6 per cent. from that date until the 15th day of July, 1912, the date when the defendant filed its answer. We think there was no error in this. The court below cut off interest at 6 per cent. on the date of the filing of the answer, upon the theory that at that time the defendant made a tender of the balance due. There is some contention on the part of the plaintiff that, even admitting the validity of

the contract of indemnity, and the correctness of the findings of the court as to the time the money should have been turned over to the Cabells under the defeasance clause, still the balance remaining unpaid should draw interest at 6 per cent. until the following October, the date the balance was actually received by the plaintiff. Neither the answer of the defendant, nor the evidence, if there was any, tending to show a tender are set out by either side in their brief, as required by rule 25 of this court (137 Pac. xi), and, in the absence of any showing on that point, this court will presume that the trial court's findings as to the time interest ceased are supported by the pleadings or the evidence.

What we have heretofore said sufficiently covers the assignments of error predicated upon the cross-appeal of the plaintiff.

[2] We will now examine briefly the assignments of error predicated upon the petition in error of the defendant: The plaintiff admits liability for the premium due on the executor's bond for the years beginning December 20, 1908, and December 20, 1909, but as to the remaining premiums claimed by the surety company contends, that as the obligation of the bond was a personal one, upon the death of the executor in September, 1909, liability for further premiums ceased. We think this position is well taken. As no further defaults of the terms of the bond could occur after the death of the principal, it would seem to follow that no further premiums could be earned by the surety company.

[3] On the question of the allowance of an attorney's fees, counsel for the surety company contend that by the express terms of the application for a suretyship bond, signed by B. F. Cabell, it was left to the discretion of the surety company to employ attorneys if it saw fit to do so; that unless the plaintiff showed that the defendant acted in bad faith, or that its acts would amount to fraud upon the plaintiff, the fees so paid to attorneys would constitute a proper charge against the principal. The clause in the application for a bond, upon which the defendant relies to support its contention, reads as follows:

"That the indemnitor will perform all conditions of said bond and any and all renewals and extensions thereof on the part of indemnitor to be performed and will at all times indemnify and save the surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fee of special counsel whenever by the surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment, adjudication against it by reason of such suretyship and any and all renewals and extensions thereof, and before it shall be required to pay same."

The services rendered by counsel, for which compensation is claimed, consist of two separate and distinct items, which are stated by

counsel for defendant in their reply brief as follows:

"The defendant was compelled to employ an attorney, and to go to expense not only to defend the suit that the act of the principal had brought about, but to procure the funds from the principal so that it might be protected against loss. The record shows that it was necessary to threaten Mr. Cabell with legal proceedings before he would deliver the funds to protect the surety. It was necessary to enter into long and tedious negotiations with the principal, and to make numerous contracts and agreements with reference to the funds and the payment of interest to the plaintiff and his successor in interest, the plaintiff. That during these negotiations, the principal was represented by counsel antagonistic to the surety's interest, and every effort was made to reduce the amount to be deposited."

From this it appears that the principal service rendered by counsel was to procure the funds from the principal, so that the surety company might be protected against loss.

In our judgment, the principal and surety company did not contemplate, and therefore did not provide in their contract against the consequences of a controversy of this kind, arising between the surety company and the indemnitor. As we understand the facts touching this specific point, the surety company, upon action being commenced against the executor, became alarmed and demanded indemnity from the principal, asserting that it had a right under a Kentucky statute to withdraw from the bond, and that it would do so, unless the indemnity was given. No injury had resulted to the company by reason of its having signed the bond, nor was there any consequent breach of its conditions by the executor. The surety company simply insisted upon the execution of a separate contract of indemnity to which it was not entitled by any of the conditions of its previous undertaking, which was supported by a new consideration, to wit, forbearance from withdrawing from the executor's bond which, under the Kentucky statute, it had a right to do upon giving notice, etc. It is quite clear to us that the clause of the application heretofore quoted imposes no liability upon the plaintiff to pay for the services of an attorney employed by the surety company in this behalf. On this point we think the case at bar is more nearly analogous to *Fidelity & Deposit Company of Maryland v. Crouse*, 86 N. J. Law, 55, 90 Atl. 1026, and *Wain v. Cuthbert*, 54 N. J. Law, 1, 22 Atl. 1007, than to *United States Fidelity & Guaranty Co. v. Hittle*, 121 Iowa, 352, 96 N. W. 782, and *Ellis v. Norman* (Ky.) 44 S. W. 429, relied upon by counsel for the surety company.

We do not know the precise ground upon which the court below denied the right of recovery of attorney's fees, but if it reached the conclusion reached by this court, as it probably did, that the surety company was not by the terms of its contract with B. F. Cabell entitled to recover an attorney's fee

paid for services rendered in procuring funds from the principal to indemnify the surety company against loss, in view of its findings that, "other counsel were retained and paid by the said B. F. Cabell and by the plaintiff herein in said settlement suit, * * * and that said attorneys were able and competent attorneys and counselors in said suit and thoroughly capable of handling his interest in all respects," it would have been justified in finding that the employment of special counsel by the surety company at the expense of the principal in the *Brownfield Case*, which was not an action on the executor's bond, was not in good faith. As was said in a somewhat similar case, *American Surety Company v. Vinsonhaier*, 92 Neb. 1, 137 N. W. 848, in distinguishing *United States Fidelity & Guaranty Co. v. Hittle*, supra:

"Without determining whether we would be willing to follow that court to the full extent of its opinion in that case, we are satisfied that the language there used should not be applied in a case of this kind. In that case, it does not appear that the principal upon the bond agreed to place funds in the hands of the surety sufficient to protect it against any claim or demand, and we cannot believe that that court would hold that in such case, if the defendant complied with that agreement and while there were funds in the hands of the surety, furnishing protection against the claim that was being urged against the principal, and, while the principal was properly and sufficiently defending the action, the surety could, without the knowledge or consent of the principal, incur additional and apparently unnecessary expense, and recover the same from the principal. The case at bar is more nearly analogous to *American Surety Co. v. Lehr* (Tex. Civ. App.) 93 S. W. 681."

For the reasons stated, the judgment of the court below is affirmed; the costs of this appeal to be taxed against the party incurring same. All the Justices concur.

PIONEER TELEPHONE & TELEGRAPH CO. v. KOPHART. (No. 5145.)

(Supreme Court of Oklahoma. June 30, 1916.)

(Syllabus by the Court.)

NEGLIGENCE \S 119(6) — PLEADING—ISSUES RAISED.

Where plaintiff in her petition negatives contributory negligence, and defendant in its answer alleges that if plaintiff received any injuries, such injuries were the result of her own carelessness and negligence, and plaintiff replies, denying that her injuries were the result of her own carelessness and negligence, the issue of contributory negligence is made by the pleadings.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. \S 202, 210; Dec. Dig. \S 119(6).]

Commissioners' Opinion, Division No. 6. Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by Susan E. Kophart against the Pioneer Telephone & Telegraph Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Harris, Nowlin & Singleton and J. R. Spielman, all of Oklahoma City, for plaintiff in error. Burford, Robertson & Hoffman, of Oklahoma City, for defendant in error.

DUDLEY, C. The defendant in error commenced this action as plaintiff in the trial court to recover damages for personal injuries alleged to have been received on account of the carelessness and negligence of the telephone company. The cause of action is set forth in the petition as follows:

"Plaintiff alleges among other things that the defendant maintained a telephone line between Rossville, Wellston, and Warwick, in Lincoln county, Okl., which crossed a public highway between Rossville and Warwick on the section line about two miles north of Rossville. That for a long time prior to, and on the 16th day of January, 1912, it negligently suffered and permitted said wire to be and remain suspended over said road and within such proximity thereto that travelers unavoidably and unnecessarily might come in contact therewith. That on the 16th day of January, 1912, the plaintiff was traveling in company with members of her family along the highway in a covered surrey in the usual and ordinary manner. That at that time in the evening, to wit, about the hour of 6 o'clock, it was growing dusk. That the place where said wire crossed the roadway was right at the foot of a steep hill. That the plaintiff was returning home at dusk in the evening and was driving down said hill in the usual and ordinarily careful manner. That in going down said hill said wire was invisible and could not be seen. That plaintiff's husband was driving the carriage. That the top of said carriage in front came in contact with said wire through no fault or negligence on the part of this plaintiff or the person driving the said carriage, but through the gross negligence and carelessness of the defendant in allowing said wire to swing so low as to obstruct ordinary travel. That the said wire, so negligently allowed to swing across the highway as aforesaid, caught the top of the said buggy and pushed the same back upon this plaintiff, then and there and thereby bending plaintiff back over the seat of said buggy and injuring and crushing her breast in and about the fifth rib of the right side thereof, and wrenching and straining and dislocating and putting out of line certain vertebrae in plaintiff's back and otherwise injuring and bruising plaintiff in and about the back, breast, head, neck, and face. That said injuries were directly and proximately caused by the negligence and carelessness of the defendant aforesaid in suffering and permitting the said wire to exist and remain in said defective, dangerous, and sagging condition, across the highway as aforesaid, without the fault of plaintiff and could not have been seen or apprehended by her. That said injuries thus inflicted caused plaintiff great and excruciating bodily pain and suffering, as well as great mental worry, suffering, and anxiety, and has incapacitated her from carrying on her usual labor as housewife, and will further incapacitate her from such labor permanently, as plaintiff believes."

Defendant filed its answer to this petition, which answer, omitting the caption and signature, is as follows:

"Comes now the defendant, Pioneer Telephone & Telegraph Company, and for its answer to the petition of the plaintiff filed herein, denies generally and specifically each, every, and all of the allegations in said petition contained, except such as are hereinafter specifically admitted.

"Defendant denies that the plaintiff received her said injuries, if any were received, without

fault on her part, and alleges that if she received any injuries at the place alleged, that such injuries were the result of her own carelessness and negligence.

"Wherefore the defendant prays judgment of dismissal of said action, and for its costs and disbursements herein."

Plaintiff filed her reply, which reply, omitting caption and signature, is as follows:

"Comes now the plaintiff and for reply to the answer of the defendant in the above-entitled cause denies that her injuries complained of were the result of her own carelessness and negligence, and denies, further, that she was at fault in any manner when said injury was received or that she contributed in any way or manner by her own negligence to the receipt of said injury."

On the trial in the court below, judgment was rendered for plaintiff for the sum of \$1,150, to reverse which judgment defendant prosecuted this proceeding in error.

The principal error assigned is the refusal of the trial court to submit to the jury the defense of contributory negligence.

On the trial the defendant requested the court to give the following instruction:

"You are instructed that if you find from the evidence that the plaintiff was injured as alleged in her petition and that the injuries, if any, sustained by her were caused by the carriage or vehicle in which she was riding being driven into a wire owned by the defendant company and strung over and across the public highway upon which such vehicle was being driven; yet if plaintiff knew of the existence of such wire at such place and that its position was such as to bring it in contact with the top of the carriage if the carriage was attempted to be driven past or under it on said highway, then it became the duty of the plaintiff to exercise such care and caution in approaching the wire in the carriage as an ordinarily prudent person would exercise under the same circumstances to avoid injury to herself. And if you find that the plaintiff in approaching said wire, with knowledge of its condition as aforesaid, failed to use such care and caution for her own safety, and that such failure of care on the part of plaintiff contributed to the injuries sustained by her, if any, then plaintiff cannot recover, and your verdict should be for the defendant."

On which was indorsed:

"Refused for the reason that the issue of contributory negligence is not presented by the pleadings in the case.

"Exceptions allowed the defendant.

"Chas. B. Wilson, Jr., Judge."

In the case of *Watkins v. Southern Pac. R. Co.* (D. C.) 88 Fed. 711, 4 L. R. A. 239, plaintiff having alleged in his complaint that the injury occurred without fault or negligence on his part, and the defendant having chosen to meet this allegation with his specific denial of the same, the court held that it was not necessary for plaintiff to allege nor prove that he was without fault in the premises, but plaintiff having chosen to make the allegation, and the defendant having chosen to meet it with specific denial, that there was an issue of fact formed in the question, which must be tried as such before judgment could be rendered in the case, and that where plaintiff alleged in his complaint that the injury, which is the subject of the action, was not caused by any fault or negli-

gence on his part, and the defendant, instead of moving to strike out the allegations, specifically denies the same, that the issue is formed on the question of contributory negligence, and no further pleading is necessary.

In the case of *Brown v. Seattle R. R. Co. et al.*, 16 Wash. 465, 47 Pac. 890, the court held that the complaint having negatived contributory negligence, an allegation in the answer that plaintiff's injuries were caused by her carelessness, fault and want of care, if denied by plaintiff in her reply, is a good plea of contributory negligence.

In the case of *Chicago, Rock Island & Pac. Railroad v. Pitchford*, 44 Okl. 197, 143 Pac. 1146, the second paragraph of the answer filed by defendant was as follows:

"That, if any injuries were sustained, * * * said injuries were the result of plaintiff's own negligence and want of care."

On a rehearing of the case, opinion delivered by Mr. Justice Sharp, who was then a member of the commission, it was held that the defense of contributory negligence was made an issue.

In the case at bar, plaintiff alleged in her petition that the top of said carriage in front came in contact with said wire through no fault or negligence on the part of the plaintiff, and that said injuries were directly and proximately caused by the negligence and carelessness of defendant, without the fault of plaintiff, and could not have been seen or apprehended by her, and defendant in its answer denies these allegations specifically, and affirmatively alleges that if any injuries were received, they were the result of her own carelessness and negligence, and plaintiff in her reply denies that her injuries were the result of her own carelessness and negligence, and further specifically denies that she was at fault in any manner when said injury was received, or that she contributed in any way or manner by her own negligence to the injury.

The testimony of plaintiff given at the trial, as set forth on page 30 of case-made, is as follows:

"Q. How often have you traveled this road or highway you testified? A. We traveled quite frequently during the years we have been there. Q. Did you travel it that morning? A. Yes, sir. Q. Which direction were you going that morning? A. Going west. Q. About what time in the morning? A. I can't tell you, maybe 8 or 9 o'clock. Q. Eight or 9 o'clock? A. Yes, sir; I can't tell the exact hour. Q. Did you pass this particular spot that morning? A. Yes, sir; we went the same road we came back. Q. At the time you passed this spot that morning you noticed the wire hanging low over the roadway, didn't you? A. I didn't notice the wire at all. Q. Didn't you notice your husband stop? A. I was in the back seat and my brother-in-law was visiting us; we hadn't seen him for 14 years; we were in conversation. Q. Never mind that. In the morning when you traveled by this place did you notice your husband take his buggy whip and raise this wire so you could drive under there? A. I think he did; I didn't

see the wire. Q. You saw him raise something so he could go under it? A. Yes, sir."

The testimony of plaintiff given at the trial as set forth on page 31 of the case-made, in regard to the manner in which they were traveling, and as the accident occurred, is as follows:

"Q. You were coming down the hill only faster than when you went up? A. Yes, sir. Q. How were you traveling down hill? A. Just like we always did. Q. How did you travel? A. Well, we had a team of ponies; they are no good holding back down a hill. Q. They were going a pretty good gait? A. Yes, sir. Q. The road at that place is smooth; it is rough right up to that? A. It is not smooth. Q. It is comparatively smooth? A. It is smoother than before. Q. You came to the incline of a pretty steep hill? A. Yes, sir; and they would naturally go fast. Q. They were going faster than an ordinary trot, were they not, Mrs. Kophart? A. Yes, sir; I suppose they were; I didn't notice the ponies."

And on page 38 of case-made, shows that plaintiff testified as follows:

"A. I knew a wire was there; I know a wire belonged there. Q. Belonged down where this wire was? A. No, sir; not where it was, but I knew a wire across the road there. Q. You knew it was crossing the road there? A. Yes, sir. Q. And knew it was hanging down that morning because you saw your husband raise it over the top? A. Yes, sir."

Under the testimony of plaintiff, above set forth, there was a question of fact which should have been submitted to the jury. Under the petition of plaintiff, answer of defendant, and plaintiff's reply, issue was joined on the question of contributory negligence, and the instruction No. 2, requested by defendant, should have been given. The trial court nowhere submitted to the jury the question of contributory negligence, but took the position that it was not made an issue by the pleadings, and for that reason should not be given.

By reason of the error in not giving the jury instruction No. 2, requested by defendant, it is recommended that the judgment of the trial court be reversed and the case remanded to the district court of Lincoln county for a new trial.

PER CURIAM. Adopted in whole.

IN RE SURVEY OF SECTION 30, TOWNSHIP 19, RANGE 20, DEWEY COUNTY.

CROW v. FAIRCHILD, County Surveyor,
et al.

(No. 7616.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. BOUNDARIES — §54(3)—DETERMINATION—SURVEY—APPEAL.

Upon the filing of the report of a survey, any person served with notice of the survey and being aggrieved by such survey may, within 30 days after the filing of such report, appeal to the district court of the county by filing with the county surveyor a notice of his intention to appeal, stating in such notice the errors in the

survey appealed from, and by giving an appeal bond.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 271; Dec. Dig. ¶54(3).]

2. BOUNDARIES ¶54(3)—DETERMINATION—SURVEY—APPEAL.

When the notice and bond is not given within 30 days from the filing of the report of survey, but is given after the expiration of that time, the district court does not acquire jurisdiction of the cause.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 271; Dec. Dig. ¶54(3).]

Commissioners' Opinion, Division No. 4. Error from District Court, Dewey County; T. P. Clay, Judge.

In the matter of the survey of section 80, township 19, range 20, in Dewey county by J. E. Fairchild, as county surveyor. From a judgment of the district court dismissing an appeal by Alex Crow from the report of survey, Crow brings error. Affirmed.

W. P. Hickok, of Taloga, for plaintiff in error. Adams & Smith, of Taloga, for defendant in error.

EDWARDS, C. On the 16th of October the county surveyor completed a survey, and on November 14th filed his report. On March 27th following, the appellant served notice of appeal and filed his appeal bond, the proceeding being regular, except that the notice and bond were not filed within 30 days from the filing of the report by the county surveyor. The appeal, as taken, is supported by affidavit explanatory of the delay in filing the notice and bond and setting out the method pursued by the county surveyor in making the survey and the nature of the damage sustained by appellant thereby, and stating that on November 15th, appellant went personally to the county surveyor and inquired if he had filed a report, and was by said county surveyor informed that he had not, and was not going to file any for the reason that he did not consider that he had made a completed survey. The survey in question appears to have been made upon the application of one Mat Jones, guardian, appellee, who appeared in the district court and filed his motion to dismiss the appeal, and contested the affidavit filed by the appellant in support of the appeal. The court, in considering such motion to dismiss, made findings of fact substantially as above set out, but held that the failure of the appellant to file his notice within 30 days was such a defect in the appeal that the district court did not acquire jurisdiction, and rendered judgment dismissing the attempted appeal. From such order of the district court the appellant has brought the case to this court. The case is ably presented by the briefs of counsel representing both appellant and appellee.

[1, 2] The question to determine is, Did the failure of the plaintiff in error to serve notice within 30 days bar the right of appeal? Section 1721, Rev. Laws 1910, provides the

procedure for appeals from the county surveyor to the district court as follows:

"Upon the filing of the report of each survey, any person served with the notice of the survey as herein provided, and being aggrieved by such survey, or the costs thereof, may at any time within thirty days after the filing of such report, appeal to the district court of the county by filing with the county surveyor a notice of his intention to appeal, in which notice he shall state in what particulars the survey as shown by such report is erroneous or fails to do him justice, or, if he appeals from the apportionment of costs alone, then in what particulars the costs stated in the cost bill are unauthorized or excessive, and by giving a bond with two sureties to be approved by and filed with the clerk of the district court, running to the said clerk and conditioned for the payment of the costs of the appeal if the report of the county surveyor shall be affirmed by the court. Upon the filing of such notice and bond, the county surveyor shall certify such appeal to the clerk of the district court, by filing with such clerk a certified copy of the report, if the survey be appealed from, and the original notice of the appeal, but if the appeal be from his apportionment and assessment of costs, then by filing with such clerk a certified copy of his cost bill and the original notice of appeal."

Counsel for appellant earnestly and with much force contends that, as the law does not require the surveyor to file the report of a survey in any particular place in his office, nor require him to keep a public record of such filing, all appellant was required to do was to make an inquiry of the officer himself; that appellant is guilty of no laches and has done all that the law, diligence, honesty, and fairness required of him; that the failure to serve the notice and take the appeal within the time specified is due to misconduct on the part of the officer from whom the appeal was sought to be taken; and that the court below should have allowed the appeal to be entered nunc pro tunc. The appellee contends that, in the absence of a statute providing relief in cases of fraud, accident, or mistake, neither an officer, the trial court, nor appellate court has power to extend the statutory time for an appeal; that if the appeal be not taken within the time fixed by law, it is a nullity, and the appellate court is without jurisdiction thereof; that the appellate court cannot act in such a case unless authority to grant relief is granted by some provision of law. Numerous authorities are cited by both appellant and appellee in support of their respective contentions.

It seems to be settled law that where a party does all that is required of him, he cannot be deprived of his right of appeal by the omission of an officer to perform his duty, either through negligence or design. But, as we construe the authorities this applies only to a duty imposed upon the officer by some provision of the law. In the instant case the law does not require the surveyor to notify the parties of the filing of his report, but merely fixes a time within which it must be filed; and there is no evi-

dence or finding that the appellant went to the office of the surveyor and demanded to see the report of the record of this filing, or filed, or tendered for filing, any notice of appeal. The appellant did not appeal nor attempt to appeal within the time fixed by the statute. The steps necessary to have been taken by him was to serve the notice or tender same. If this had been done and the surveyor had refused to accept the notice and bond, or, after having accepted same, had failed to certify up the appeal, the district court would have acquired jurisdiction, and could have required such officer to perform the steps necessary to make the appeal effective.

A great many of the states have statutes authorizing the taking of appeals after the time fixed has expired, and most, if not all, of the authorities cited by appellant will be found to be based upon such a statute, except in cases where the party seeking to appeal has actually done the things required of him, to transfer the jurisdiction to the higher court.

"(a) Under the statutes of some of the states an appeal may be allowed from a justice's judgment by the appellate court after the expiration of the time for appeal where the appellant brings himself within the terms of the statute." 24 Cyc. 664.

The following citations are an illustration of the effect of a statute in such cases:

Thomas v. Littlefield, 1 Ind. 381:

"The statute on the subject enacts that the circuit court may, on motion and affidavit, authorize the taking of an appeal * * * after the expiration of 30 days from the rendition of the judgment, if it shall appear * * * that the party wishing the appeal was prevented from taking the same within said 30 days by unavoidable circumstances, or by the improper conduct of the justice * * * or of the appellee, and that he has merits in such appeal. Rev. Stat. 1843, page 502." Goldhamer v. Lillibridge, 107 Mich. 259, 65 N. W. 97.

"The general statute relative to justices' courts provides that appeals to the circuit court shall be taken within 5 days after the rendition of judgment, but that the circuit judge may authorize an appeal after the expiration of that time where the party has been prevented from taking the same by circumstances not under his control" (citing 2 How. Stat. Mich. §§ 6900-7005).

But these authorities and the numerous others sustaining the same proposition are not in point here, for the reason that in this state no such statute exists. To sustain the contention of the appellant and extend the time for appeal, it would be necessary to ingraft upon the law a proposition not expressed therein. The general rule supported by many authorities is stated in 2 Enc. of P. & P. pp. 239, 244, 245:

"Statutes of Limitation Jurisdictional. Statutes limiting the time to appeal from a decision below are mandatory and jurisdictional. They must therefore be strictly complied with. The court cannot ingraft any exceptions on the statute nor admit any excuse for failure to comply with its requirements; and, unless an appeal is taken within the statutory period, the court has

no jurisdiction, and the appeal is void for all purposes, and will be dismissed either on motion of appellees or on the appellate court's own motion. In such case the court has no power to make any other order than that of dismissal; it cannot inquire into the jurisdiction of the lower court.

"Extension of Time. * * * No court or judge can extend the statutory time for taking an appeal, except where the statute so authorizes.

"Relief against Accident. The prevailing doctrine is that an appellate court cannot relieve an appellant from the effect of misfortune, accident, or mistake, unless the statute expressly authorizes relief. Therefore the appellant's right of appeal lapses with the expiration of the statutory period beyond recall."

In Murff v. Osburn (Miss.) 24 South. 873, the court says:

"To sustain the contention of counsel for the appellant, and maintain the jurisdiction of the circuit court in this case, we shall be compelled to ingraft an exception on the statute, and this we are not authorized to do. While it is true that during the greater part of the entire 5 days following the rendition of the judgment, the justice of the peace was absent, and therefore that the appellant could not file his appeal bond and have it approved, yet it is also true that the [appeal] bond might have been filed and approved on the day of the rendition of the judgment, as the justice of the peace was not absent himself until the next day. The cause presents a hardship, perhaps, but we cannot relieve against it without ingrafting on the statute an exception which the Legislature has not seen proper to make."

And in line with these holdings this court in Vowell v. Taylor, 8 Okl. 625, 58 Pac. 944, says:

"An appeal is purely a statutory privilege, and is not a matter of right. It is only by complying with the statutory requirements that one becomes entitled to the privilege of an appeal. By other provisions of the statute the courts are authorized to permit the filing of new bonds, or the giving of additional sureties, in cases where the appeal bond or sureties shall be insufficient. Statutes 1893, § 4772. But such authority is only conferred where a bond has been given and accepted, and is, for some defect or irregularity, insufficient. Where no bond is given no right to an appeal exists, and no such right can be acquired in the absence of a bond. The jurisdiction of the cause is in the court rendering the judgment, and such jurisdiction cannot be transferred to the district court unless an appeal bond be executed, and approved by the justice who rendered the judgment."

See, also, cases of Huzza v. Clark et al., 102 Ga. 579, 27 S. E. 677; Deacon v. Parry, 68 N. J. Law, 186, 52 Atl. 623; Henderson v. Pendleton, 154 Pac. 1145.

That there may be hardship upon appellant in the instant case may be admitted, but we think this court, in the absence of a statute, is without the power to extend or enlarge the time for an appeal in order to mitigate the hardship of any particular case. Equity may relieve. Dunlap v. Rumph, 43 Okl. 491, 143 Pac. 329. But as the district court did not acquire jurisdiction of the appeal, it was without power to hear and determine same.

The judgment will be affirmed.

PER CURIAM. Adopted in whole.

BURNETT v. SAPULPA REFINING CO.
(No. 7632.)

(Supreme Court of Oklahoma. July 11, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 100(1)—DECISIONS REVIEWABLE—FINALITY.

An order of the district court allowing a temporary injunction may be appealed from and brought for review in this court before final judgment is had in the trial court in the main action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670-674; Dec. Dig. — 100(1).]

2. INJUNCTION — 128—NATURE OF REMEDY—ADEQUACY OF REMEDY AT LAW.

Where a party testifies that he is worth from \$12,000 to \$15,000, and the trespass threatened by him, if committed, will result in the suspension of the business of an extensive oil refinery, the court was warranted in finding that he was not able to respond in such damages as would likely be incurred by said refinery if the threatened trespass was actually carried out.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. — 128.]

3. INJUNCTION — 137(4)—TEMPORARY INJUNCTION—GROUNDS.

A temporary injunction should never be granted because of the mere apprehension that injury may be done.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 309; Dec. Dig. — 137(4).]

4. INJUNCTION — 47—GROUNDS—TRESPASS.

Where an oil refinery is in the actual possession of a certain tract of land claiming the title thereto, and a party sets up an adverse claim thereto and takes forcible possession thereof, and, having been ousted, threatened to return and again take forcible possession, and there is a reasonable probability of said threats being executed, the said party should be restrained by means of injunction until the title to said property is determined by the proper legal procedure.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 100; Dec. Dig. — 47.]

Commissioners' Opinion, Division No. 4. Error from District Court, Creek County; Ernest B. Hughes, Judge.

Action by the Sapulpa Refining Company against Brooks G. Burnett. Judgment for plaintiff, and defendant brings error. Affirmed.

H. B. Martin and A. F. Moss, both of Tulsa, for plaintiff in error. J. F. Lawrence, of Sapulpa, for defendant in error.

MATHEWS, C. The parties will be designated as in the trial court. This is an action for an injunction, which was begun by the filing of the following petition, duly sworn to:

"Comes now the plaintiff and for its cause of action against the defendant, alleges and states: "That the plaintiff is a corporation, organized under the laws of the state of Oklahoma, and is engaged in the manufacturing business, to wit: The refining business near the city of Sapulpa, Creek county, Okl. That the plaintiff is now and has been for more than three years last past in lawful, peaceable and ac-

tual possession, occupancy and control of the following described property, to wit: [Describing premises.] That said land above described has at all times aforesaid been used by plaintiff for the purposes of its said business.

"That on or about the 1st day of August, 1915, and about 12 o'clock, midnight, the defendant, Brooks G. Burnett, without notice, and without warning, entered upon said premises, and destroyed the improvements thereon, and cut and removed, and laid down the fence, and erected thereon fences, and obstructions, and otherwise mutilated said premises above described, and undertook to take possession without warrant of law, and the said defendant did stay on said premises and did undertake to forcibly prevent plaintiff from the free use and occupancy and control of said premises aforesaid, and did undertake to prevent the servants and employes of plaintiff from crossing said premises, and did threaten to violently hold possession of said premises or a part thereof, and did so remain on said premises, and did so act until about 12 o'clock noon of August 1, 1915.

"That defendant threatens to and plaintiff is led to believe and does believe that defendant will attempt to forcibly enter said premises, and trespass thereon unless restrained by this court. That plaintiff believes, and therefore states the facts to be that unless restrained by this court, the defendant will immediately and continuously trespass upon said property aforesaid, or a part thereof, and will interfere with the business of the plaintiff, and will undertake by force to take possession of said property or a part thereof, and will seriously interfere with the business of the plaintiff, and that plaintiff will be irreparably injured.

"That defendant threatens to and plaintiff believes will, unless restrained by this court, prevent plaintiff or will by force undertake to prevent plaintiff from crossing said property or a part thereof, and that in the ordinary course of plaintiff's business it is necessary to cross and use said premises.

"That the business of plaintiff is a large one, and the good will is of considerable value, and that it is necessary to have the free and unhampered use of said property aforesaid in order to carry on its business, and that the threatened acts of the defendant will damage and irreparably injure said business aforesaid.

"Wherefore plaintiff prays judgment that the defendant, his agents and employes be restrained and enjoined from trespassing upon, or interfering with, the business of plaintiff, or its property aforesaid, and more especially from entering upon said premises above described or in any manner interfering with plaintiff's possession or attempting to take possession of said premises or any part thereof, or from removing or destroying any fences, or other improvements thereon, or in any manner interfering with the employes and servants of plaintiff in entering, crossing or using said premises or in their vocations, and for such other and further orders as to the court shall seem equitable and just.

"J. F. Lawrence, Attorney for Plaintiff."

The defendant waived summons, but it does not appear that any pleadings were filed by defendant. A court trial was had and a temporary injunction granted, from which defendant appeals.

The evidence in the case was, in substance, that the plaintiff was a corporation engaged in the refining of crude oil. The refining plant was located near Sapulpa upon a tract of land near the Frisco Railroad right of way, and consisted of 20 acres, and also of a small triangular tract lying between the

main plant and the Frisco right of way, which is the bone of contention.

The main plant of the refining company was located on the 20-acre tract, and the small tract or strip aforesaid was used for a yard and passageway to the loading rack on the railroad right of way, and the pipes for transferring the oil from the refinery to the railroad right of way for shipping ran across the strip. The refinery company had been in actual possession of the entire tract, including this strip, which it was claiming under deed, since 1907. The defendant also claimed this strip by virtue of a certain deed, and on the night of August 1, 1915, went upon the same and took possession thereof and cut down plaintiff's fences and refused to permit any of plaintiff's employees to enter or cross said strip, and so held possession until about noon of the next day, when plaintiff again obtained possession in some way not divulged by the evidence, and as defendant was still threatening to return and again take forcible possession of said strip, the plaintiff applied to the court for an injunction to restrain him from so doing.

[1] It was correctly held in *Pioneer Telephone & Telegraph Co. v. City of Bartlesville*, 27 Okl. 214, 111 Pac. 207, that an order of the district court allowing a temporary injunction may be appealed from and brought for review in this court before final judgment is had in the trial court in the main action.

Plaintiff also raises the point that no motion for a new trial was filed in the trial court. As this proposition is not discussed and no authorities cited, without passing thereon or expressing any opinion as to its merits, we will deem this point as waived and will pass to the points raised by plaintiff in error.

The two propositions presented and discussed by defendant are:

"(1) It is error to grant a temporary injunction to restrain a threatened trespass such as could be fully compensated in money damages.

"(2) The mere apprehension of injury or trespass is not sufficient to warrant an injunction."

[2] It was admitted at the trial that the defendant about midnight went on the strip of land in controversy, which was then in possession of the plaintiff, and destroyed the fences inclosing it and erected fences of his own and remained on the property until noon of the next day, and ordered the employees of plaintiff to stay off this strip, and threatened to use force to keep them off and that afterwards he still threatened to go back and again take forcible possession thereof, but defendant contends that an injunction will not lie in such a case to restrain a trespass, but that plaintiff had a full, adequate, and complete remedy at law by way of an action for damages, and that the evidence shows that defendant was solvent, and cites *Marshall v. Homier*, 18 Okl. 264, 74 Pac. 363, *Thompson v. Tucker et al.*, 15 Okl. 486,

83 Pac. 413, 6 Ann. Cas. 1012, and *Bracken v. Stone et al.*, 20 Okl. 613, 95 Pac. 236, as sustaining his contention.

Without going into the first point of this proposition here we take issue with the contention that the evidence showed that defendant was solvent to the extent that he was able to respond in damages should it be found that plaintiff was entitled to damages. While defendant testified that he owned real estate worth from \$12,000 to \$15,000, yet after being urged at length to describe the same and give its value, in an indefinite way he testified he owned some lots in Sapulpa of the approximate value of \$2,000, and some property in Kiowa county, no value given. It is a matter of common knowledge that the value of town lots generally in this state is of an indefinite status, and too often more imaginary than real. The evidence in this case showed that plaintiff was engaged in an extensive oil refining business, and that in order to ship its products it was necessary to use the strip of land in dispute and the damage it would incur, should it be deprived of its shipping facilities for a very short while, would easily exceed the value of defendant's property. We believe the evidence shows that defendant was not able to respond in such damages that would probably be incurred by plaintiff if the threatened trespass was actually carried out.

[3, 4] Defendant's second contention is that the temporary injunction was improperly granted because at the most the evidence only showed a threatened trespass, and that this court has held in *Hodgins v. Hodgins*, 23 Okl. 625, 103 Pac. 711, and *City of Woodward et al. v. Raynor*, 29 Okl. 493, 119 Pac. 964, as well as other cases, that a temporary injunction should never be granted because of the mere apprehension that injury may be done. We find no fault with these cases and believe they state a correct proposition of law when properly applied, but in the case at bar the evidence shows that the defendant, instead of applying to the courts to have his right and claim to the strip of land in controversy determined in an orderly and prescribed way, saw fit to adopt force and violence as his remedy and went upon the premises, which plaintiff had occupied and had possession of for several years, at the hour of midnight and demolished the improvements and proposed by force to keep the employees of plaintiff away from said premises, and it was admitted at the trial that he was then still threatening to return and repeat the trespass. It would be but to admit the impotency and inefficacy of the law to say that in such an extreme case as is here presented that the only redress available to plaintiff would be some law action. For authority it is unnecessary to look beyond the decisions of our own courts.

The case of *Murphy v. Fitch*, 35 Okl. 364, 130 Pac. 298, presents facts very similar to

those in the case at bar, and there it was held:

"Where certain lots were in possession of F., claiming title thereto, and the same are sought to be taken forcible possession of by M., who claimed an adverse title, F.'s possession may be preserved until the final determination as to the title by means of injunction."

To the same effect in *Glasco v. School Dist. No. 22*, McClain County, 24 Okl. 236, 103 Pac. 687:

"Where a school district is in possession of a tract of land, occupying the same with its buildings and claiming title thereto by virtue of a deed of donation, and the same is invaded by a party likewise claiming title thereto, who takes possession thereof and destroys a portion of the property of the district and piles lumber and building material thereon and begins the erection of a building, it will be granted a temporary injunction restraining said party from interfering with its possession until the title to the same is determined."

While the order complained of was made in court and not in chambers, and while a permanent injunction was prayed for, yet the court saw fit and proper to grant a temporary injunction only. The title to the strip of land in controversy was in dispute; it being claimed by both plaintiff and defendant. It was entirely proper that the status of property should be thus preserved by the court until the title thereto could be regularly litigated in an action brought for that purpose, and the granting of a temporary injunction in such cases is a matter within the sound discretion of the trial court, and such action of the court will be reversed only for abuse of such discretion, and we believe the action of the court here was especially warranted and proper. *Bourland et al. v. Langford*, 36 Okl. 278, 128 Pac. 240; *Webb v. Bowman et al.*, 149 Pac. 159; *Galbreath v. McLane*, 152 Pac. 355.

We recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

MESSNER v. CARROLL et al. (No. 7350.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

MORTGAGES § 32(3)—REQUISITES—ABSOLUTE DEED AS MORTGAGE.

Where the mortgagor executes to the mortgagee a deed to the property mentioned and described in certain mortgages which are given to secure certain notes, the notes are not canceled nor the mortgages released of record, and the mortgagee is permitted to retain them in his possession and under his control, and said deed is placed in a bank in escrow to be delivered to the mortgagee on a certain date, unless the indebtedness, principal and interest, are paid prior to that time, and on failure to pay the same at said date certain said deed is delivered, *held*, the deed should be treated as a mortgage, even though it is in form a deed, and should be foreclosed as such.

[Ed. Note.—For other cases, see *Mortgages*, Gent. Dig. § 60; Dec. Dig. § 32(3).]

Commissioners' Opinion, Division No. 2. Error from District Court, Alfalfa County; James B. Cullison, Judge.

Action by T. J. Carroll against Henry L. Messner and others, in ejectment, rents and damages. Trial to the court and judgment for plaintiff, and defendant Messner brings error. Reversed and remanded, with directions.

Titus & Talbot, of Cherokee, for plaintiff in error. H. C. Kirkendall, of Cherokee, and E. C. Wilcox, of Anthony, Kan., for defendants in error.

BRUNSON, C. The parties to this case will be referred to and designated here as they were in the trial court.

On the 24th day of April, A. D. 1914, T. J. Carroll brought suit in ejectment in the district court of Alfalfa county, Okl., against Henry L. Messner, Roy Martin, and Mrs. Roy Martin. The defendants Roy Martin and his wife, Mrs. Roy Martin, were made parties to the suit in order that any interest they have in the lands in controversy might be barred. They were served with process, but made no appearance or otherwise defended against the action, and it appears that they had no interest in the lands further than that they were tenants thereon. They will not be referred to further in this opinion. The contest was between T. J. Carroll, plaintiff, and Henry L. Messner, the defendant.

It is alleged in the plaintiff's first amended petition that on the 2d day of March, A. D. 1911, the defendant Henry L. Messner and his wife, Matilda Messner, for a valuable consideration, made, executed, and delivered to the plaintiff, T. J. Carroll, and John C. Carroll, their certain promissory note in writing for \$1,000, with interest at the rate of 10 per cent. per annum from date until paid, the same becoming due and payable on the 15th day of February, A. D. 1912, and that at the same time and for the purpose of securing said promissory note the defendant Henry L. Messner, joined by his wife, Matilda Messner, executed and delivered their certain mortgage in writing, whereby they mortgaged to T. J. Carroll, the plaintiff, and to John C. Carroll, the following described real estate situate in Alfalfa county, state of Oklahoma, to wit: The N. W. $\frac{1}{4}$ of section 17, township 29, R. 9, W. I. M., containing 106.49 acres, less the right of way of the Kansas City, Mexico & Orient Railway and Chicago, Rock Island & Pacific Railway; that said mortgage was duly signed, acknowledged, and delivered to said plaintiff, and was thereafter duly filed for record in the office of the register of deeds of Alfalfa county, state of Oklahoma, on the 15th day of March, A. D. 1911; that thereafter the said John C. Carroll by assignment conveyed all of his right, title, and interest in and to

said note and mortgage to the said T. J. Carroll, plaintiff.

It is further alleged that on the 2d day of March, A. D. 1911, the defendant Henry L. Messner, joined by his wife, Matilda Messner, made, executed, and delivered another certain promissory note for the sum of \$1,000, for a valuable consideration to the plaintiff, T. J. Carroll, and to John C. Carroll, said note bearing interest at the rate of 10 per cent. per annum from date until paid, it becoming due and payable on the 15th day of February, A. D. 1912; that at the same time the said defendant, Henry L. Messner, joined by his wife, Matilda Messner, and for the purpose of securing said note, made, executed, and delivered a certain mortgage, in writing, to T. J. Carroll and to John C. Carroll, to the following described lands situated in Alfalfa county, state of Oklahoma, to wit: The W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 5, township 28, R. 9, W. 1. M., containing 163.81 acres, according to the government survey; that said mortgage was duly signed and acknowledged, and was thereafter recorded in the office of the register of deeds of said Alfalfa county, state of Oklahoma, on the 15th day of March, A. D. 1911, and that the said John C. Carroll, by proper assignment, conveyed all of his right, title, and interest in and to said mortgage and note to said plaintiff, T. J. Carroll.

It is further alleged that on the 22d day of April, A. D. 1911, William T. Rush, joined by his wife, Gertrude Rush, for a valuable consideration, made, executed, and delivered to the plaintiff, T. J. Carroll, their certain promissory note in the sum of \$250, which note became due and payable three years after date, together with interest thereon at the rate of 10 per cent. per annum from date until paid, and that at the same time and as a part of the same transaction and for the purpose of securing said indebtedness the said William T. Rush and Gertrude Rush, his wife, made, executed, and delivered their certain mortgage to said plaintiff, covering the following described real estate situate in Alfalfa county, state of Oklahoma, to wit: Lot 4 and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 5, township 28, R. 9, W. 1. M., containing 81.21 acres; that thereafter and on the 16th day of October, A. D. 1911, said William T. Rush, joined by his wife, Gertrude, conveyed by warranty deed to the defendant Henry L. Messner, said real estate so mortgaged for the payment of said note of \$250, and interest thereon, and in said deed said defendant agreed to pay said note.

It is further alleged that on the 29th day of March, A. D. 1913, the defendant Henry L. Messner and Matilda Messner, his wife, for the purpose of satisfying said notes and mortgages above set out and mentioned, executed and delivered to the plaintiff their certain warranty deed covering all of the lands above described, and that the plaintiff there-

by has a legal estate, in fee simple, and also an equitable estate in and to all of the above-described lands, making a total acreage of 361.51 acres, less the right of way of the railroads above named; that said deed was duly executed, acknowledged, and delivered to the plaintiff, and by him caused to be filed in the office of the register of deeds of Alfalfa county, state of Oklahoma, on the 9th day of March, A. D. 1914, and recorded in book 15 at page 326, and that the plaintiff is entitled to the immediate possession of said premises, but that the defendant Henry L. Messner is unlawfully and wrongfully withholding possession of said premises from him, and that said Henry L. Messner has been wrongfully in possession of the property herein described since on or about or near the 28th day of March, A. D. 1913.

It is further alleged that the plaintiff has been damaged by said defendant in the sum of \$400, because of the wrongful possession of said real estate, and that the reasonable rental value of said property is the sum of \$200 per annum; that defendant is unlawfully and wrongfully keeping plaintiff out of the use and possession of said premises, and is collecting and using the rents and profits arising therefrom for his benefit, and in the prayer he further asks for all other proper relief.

To this petition several motions were filed and overruled and exceptions saved. On November 10th, A. D. 1914, the defendant, Henry L. Messner filed his answer to said first amended petition and denied: (1) All and singular the material allegations of said petition not expressly admitted; (2) denied that plaintiff had title to said real estate; (3) denied that plaintiff was entitled to possession thereof at the time of filing this action or at any other time, and in the prayer of his answer he asked for "all other and further relief to which in law and equity he may be entitled." A receiver was applied for in this case by the plaintiff and was by the court appointed; to which action of the court exceptions were duly saved and thereafter a motion was made by the defendant to vacate the appointment of receiver, which motion was overruled and exceptions saved. On November 14th, A. D. 1914, the same being a day of the regular November, A. D. 1914, term of the district court, this cause came regularly on for trial. The plaintiff introduced in evidence the deed and all of the notes and mortgages above referred to; they were properly marked for identification and admitted as evidence; also introduced in evidence without objection the following agreement:

"This agreement made and entered into this 8th day of March, A. D. 1913, by and between T. J. Carroll as party of the first part and Henry L. Messner as party of the second part, witnesseth: That wherein party of the second part is indebted to party of the first part for the sum of about \$2,700, which indebtedness is secured by three mortgages on certain lands

in Alfalfa county, Oklahoma, and as second party is unable at this time to pay said mortgage or the interest thereon, he hereby agrees with party of the first part to execute and deliver to Waldron State Bank a warranty deed for the lands covered by said mortgages, said deed to be made to T. J. Carroll, and left in escrow with said Waldron State Bank together with this contract and said party of the first part in consideration of the above covenants and agrees to give second party the right to recover said deed at any time before March 1st, 1914, by paying to said first party or his assigns the amounts of said mortgages on the lands conveyed in said deed with interest to date of payment thereof and said Waldron State Bank is hereby authorized to return to party of second part the above-mentioned deed upon sufficient proof that said mortgages have been satisfied.

"It is further agreed that second party shall execute and put up with this contract a promissory note in favor of the first party for the sum of \$225.00 for one year's interest on said mortgages, which note is also to be held by said Waldron State Bank and in case said second party shall redeem said deed within one year from March 1st, 1913, said note shall be null and void and shall be returned to party of the second part but in case said second party shall not redeem said deed said note shall be delivered to said party of the first part who shall agree to release said mortgages when said deed is delivered him at the expiration of one year from March 1st, 1913, unless redeemed sooner by party of second part."

The defendant executed the note and deed mentioned in this contract and deposited them in escrow in the bank as therein provided. He did not pay the indebtedness, principal, and interest before the 1st day of March, A. D. 1914, and the depositary delivered the deed to the plaintiff and he caused it to be placed of record. The plaintiff demanded possession of the premises some time in or about the month of March, A. D. 1914, from the defendant, which possession was refused, defendant saying that he had information that the deed that he executed to said premises was void. The defendant did not deny the execution of any of the above notes, mortgages, contract or deed. He testified that the rentals on said premises would amount to about \$200 per year, plaintiff and the defendant being the only witnesses that testified. At the close of the testimony the court rendered judgment for the plaintiff for the possession of said real estate and for \$200 rents. A motion was filed for a new trial by the defendant in due time, and it was heard by the court and by him overruled, to which action of the court the defendant excepted, and the case is now before us on appeal.

The defendant has 13 specifications of error in his petition in error, but he argues all of the assignments except assignments Nos. 2 and 3 under the proposition that a deed, though absolute in form, if given as security for an indebtedness, is merely a mortgage, and does not convey title nor right of possession to the grantee.

If the relation of debtor and creditor existed prior to the execution of the deed and

continued to exist between the parties to this cause of action after the deed was delivered to the possession of the depositary, then the deed must be treated as a mortgage. If, on the other hand, this transaction was a conditional sale, then the title passed upon the delivery of the deed by the depositary.

The escrow agreement fixes the amount due upon the several notes, principal and interest, at \$2,700. It also provides for the giving of a note in favor of the plaintiff for \$225 to cover the interest for a period of one year on said indebtedness, and that the defendant shall have the right to pay the indebtedness, together with the interest due, at any time before the 1st day of March, A. D. 1914, and that upon satisfactory evidence being produced to the depositary of the payment of the notes and mortgages, it was authorized to return said deed to said defendant, and that in case the defendant "did not redeem said deed," the \$225 note was to be delivered to the plaintiff, and in case of the payment of said indebtedness the plaintiff was to release said mortgages of record. The trial court found that the defendant executed the \$225 note to cover the interest upon the amount due for the year 1913. The authorities hold that a mortgagor may sell the mortgaged property to the mortgagee, although the transaction will be scrutinized closely to determine its fairness; that such a transaction is almost as much open to suspicion as a purchase by a trustee from his beneficiary. *Villa v. Rodriguez*, 79 U. S. 323, 20 L. Ed. 406. It is also said that a conveyance of the mortgaged premises from the mortgagor to the mortgagee will be regarded as a mere change in the form of security, unless it clearly and unequivocally shows that both parties intended otherwise. *Ennor v. Thompson*, 46 Ill. 214; *Earle's Adm'r v. Blanchard*, 85 Vt. 288, 81 Atl. 913.

The deed being placed in escrow could not be delivered by the bank until on or after the 1st day of March, 1914, and the defendant, according to the terms of the escrow agreement, had from the 8th day of March, A. D. 1913, until the day when the deed could be delivered in which to pay said indebtedness and have the deed returned to him, and thereupon the plaintiff was to release said mortgage. It appears to us that at the most this could only be regarded as a mere change in the form of security. If the defendant had immediately delivered the deed upon its execution by him to the plaintiff and the plaintiff had canceled the notes and the mortgages and there had been an agreement whereby the defendant retain the right to buy the land back within a specified length of time, then the title would have passed. The rule is laid down in 4 Kent, Com. at page 144:

"The test of the distinction is this: If the relation of debtor and creditor remains and a

debt still subsists it is a mortgage, but if the debt is extinguished by the agreement of the parties, * * * and the grantor has the privilege of refunding if he pleases in a given time, and thereby entitle him to a reconveyance, it is a conditional sale."

The rule is also laid down in 27 Cyc. P. 974, as follows:

"Once a mortgage always a mortgage. * * * For the same reason it is not competent for parties to make a conveyance of land, absolute in form, a security for the payment of money by a given day, with the further agreement that if payment is not then made, the instrument shall be treated as an absolute sale; if the instrument is a mortgage when delivered, it will so continue until the right of redemption is cut off in some of the modes recognized by law."

In the case of *Beverly v. Davis*, 79 Wash. 537, 140 Pac. 696, it is said in the syllabus:

"Whether an instrument is a deed or a mortgage is determined at the inception of the transaction; the intention of the parties determining its nature. The statutory right of redemption inheres in a mortgage, and cannot be waived, whether the mortgage be in the usual form or in the form of an absolute deed; the rule being 'once a mortgage, always a mortgage.'"

In the case of *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 77, it is said:

"Where a deed, absolute in form, is given by a debtor to his creditor, if the indebtedness remains uncanceled, the conveyance is treated in equity as a mortgage, though the grantee may not regard it as such."

In *Voris v. Robbins*, 153 Pac. 120, it is said:

"Whether a transaction evidenced by an absolute conveyance will be held to be a sale or only a mortgage must be determined by a consideration of the peculiar circumstances of each case. The form of the conveyance is not conclusive. The intention of the parties is the only true and infallible test. This intention is to be gathered from the circumstances attending the transaction and the conduct of the parties, as well as from the face of the written contract. Before a deed can be declared to be an equitable mortgage, there must exist a debt which must be personal in its nature and enforceable against the person independent of the security."

In the case of *Krauss v. Potts*, 38 Okl. 674, 135 Pac. 362, it is said:

"The holder of a deed absolute, taken as a security for a debt, can only acquire title by a foreclosure of his mortgage, and any agreement of forfeiture is void."

In the case of *Live Stock Co. v. Trading Co.*, 87 Kan. 221, 123 Pac. 733, L. R. A. 1915B, 492, the Supreme Court of that state had before it the question of whether a deed, deposited in escrow to be delivered to the grantee in the event debtor failed to pay the debt by a stated time, was an absolute deed of conveyance, or merely a mortgage securing a debt. The syllabus in that case on this question is as follows:

"Where by the agreement of the mortgagor and mortgagee the note secured and deed for the mortgaged property from the mortgagor to the mortgagee are deposited in escrow, both to be delivered to the mortgagor if he pays his debt by a certain date, otherwise the note to be delivered to him and the deed to the mortgagee, the delivery of the deed in accordance with the agreement does not divest the mortgagor's title. If such a deed is regarded as taking effect at the time of its deposit in escrow, the continued

existence of the indebtedness thereafter characterizes it as a mortgage. If it is regarded as taking effect at the end of the designated period, it is invalid as an absolute conveyance of title, because it is an attempt to procure in advance a release of the equity of redemption."

The plaintiff in his petition pleaded the execution and delivery of the notes and mortgages; pleaded that the mortgages were given to secure the payment of the notes, and contained a description of the real estate and the conditions contained in the defeasance clause of the mortgages and the default of the defendant in making payments. The date of the filing of the mortgages in the office of the register of deeds and also the deed in question, was pleaded, and each and all of said instrument, together with the notes, were attached to said petition and marked exhibits and made a part thereof, and in the prayer he asked for all other proper relief. It was not necessary to have pleaded all the notes and mortgages in his petition, but since he has done so, we think that the mortgages and notes, together with the escrow agreement and the evidence offered by him, are sufficient, together with the finding of the court that the \$225 note was given as interest, to establish the fact that the relation of debtor and creditor existed between the parties to this transaction, and that the deed, though absolute in form, was given as security for the indebtedness, and that it is merely a mortgage, and that it does not convey title or right of possession to the grantee. The plaintiff in his brief says that this court may consider the entire record of the case, weigh the evidence, and render such judgment as the trial court should have rendered and that, if it finds that the deed is in fact a mortgage, this court should render the proper decree, or order one entered in the trial court, foreclosing said deed as a mortgage. And the following authorities are cited in support of this contention: *Tucker v. Thraves*, 151 Pac. 598; *Hatcher v. Kinkaid*, 150 Pac. 182; *Success Realty Co. v. Trowbridge*, 150 Pac. 898.

It is contended that it was prejudicial error for the court to refuse to vacate the order appointing a receiver, but since the trial court should have treated the case as a foreclosure proceeding and he is ordered by this court to so treat it, it was not error to appoint a receiver, or to refuse to vacate the order appointing him.

The trial court committed reversible error in not treating said deed as a mortgage, securing the indebtedness mentioned and described in plaintiff's petition. The case is therefore reversed and remanded, with directions to the trial court to set aside the judgment heretofore rendered in said cause and treat said deed as a mortgage and foreclose the same under the law as if it were a mortgage.

PER CURIAM. Adopted in whole,

TAILEY v. HARRISON. (No. 7312.)
(Supreme Court of Oklahoma. July 25, 1916.)

(*Syllabus by the Court.*)

SALES \S 179(4)—**IMPLIED WARRANTY—INSPECTION BY BUYER.**

Where there is no express warranty accompanying a description of personal property, and the buyer, after inspection and with full opportunity to examine, accepts the property, he is estopped from afterwards claiming damages for failure to comply with the description.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 460-463; Dec. Dig. \S 179(4).]

Commissioners' Opinion, Division No. 1. Error from County Court, Tulsa County; Conn Linn, Judge.

Action by M. A. Harrison against H. B. Talley. Judgment for plaintiff, and defendant brings error. Affirmed.

S. S. Bassett, of Tulsa, for plaintiff in error. Lydecker & Steele, of Tulsa, for defendant in error.

RUMMONS, C. This case was commenced before a justice of the peace of Tulsa county, by the defendant in error against the plaintiff in error, to recover the sum of \$3.55 for chicken wire sold by defendant in error to plaintiff in error. Plaintiff in error filed his answer and counterclaim, claiming damages in the sum of \$40 because of the defective condition of said wire. Upon appeal to the county court, defendant in error had judgment in the sum of \$3.55. The motion of plaintiff in error for a new trial having been overruled, he brings this proceeding in error to reverse said judgment.

Plaintiff in error makes several assignments of error which we deem it unnecessary to set out herein, since the undisputed evidence shows that plaintiff in error had an opportunity to investigate the wire complained of before attempting to use it, and after such investigation did use it and still retains it. His only complaint is of the unsuccessful results obtained from the use of said wire, nor does he rely upon any express warranty. The facts bring this case squarely within the rule laid down by the territorial Supreme Court in the case of *Brown v. Baird*, 5 Okl. 133, 48 Pac. 180, wherein it is said:

"Where there is no express warranty accompanying a description of personal property, and the buyer, after inspection and a full opportunity to examine, accepts the property, he is estopped from afterwards claiming damages for failure to comply with the description."

This rule is followed and adhered to by this court in the case of *Brown v. Davidson*, 42 Okl. 598, 142 Pac. 387, wherein it is said by Commissioner Brewer, in commenting upon the rule announced in *Brown v. Baird*, supra:

"This rule works no hardship when applied to cases like this. Upon receipt of the horse, if it was found that he did not come up to the

description given of him, defendant could have so advised the seller, repudiating the sale, and demanded the advance payment back. If what he had paid out had been returned to him and the colt taken back, he would have been unhurt; if it had not, and he could prove his contention that it was not such an animal as he had contracted for, he could have recouped his damages. But with full knowledge he chose to affirm the sale and renew his promise to complete the payment when due."

In the instant case, plaintiff in error with full knowledge, according to his own evidence of the defective condition of the wire sold him by defendant in error accepted it and used it, and still continues to use it. He cannot now be heard to complain that he has been damaged because of the imperfect results obtained by the use of said wire.

We find no merit in the assignments of error presented in the brief of plaintiff in error, and the judgment of the court below should therefore be affirmed.

PER CURIAM. Adopted in whole.

KOSTACHEK v. OWEN. (No. 7439.)
(Supreme Court of Oklahoma. July 11, 1916.)

(*Syllabus by the Court.*)

APPEAL AND ERROR \S 567(1)—**CASE-MADE—NULLITY.**

In an absence of a waiver by the defendant in error, a case-made, signed and settled by the trial court before the expiration of the time granted for the suggestion of amendments, is a nullity.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2515-2518, 2520-2522; Dec. Dig. \S 567(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Noble County; Wm. M. Bowles, Judge.

Action by B. A. Owen against Joseph Kostachek. Judgment for plaintiff and defendant brings error. Dismissed.

H. A. Johnson, of Perry, for plaintiff in error. P. W. Cress, of Perry, for defendant in error.

BLEAKMORE, C. This case presents error from the district court of Noble county, wherein judgment was rendered for the plaintiff on January 7, 1914. Thereafter, January 29th, motion for new trial was overruled, and defendant granted 60 days in addition to the time allowed by statute within which to prepare and serve a case-made. On February 24, 1914, defendant was granted an additional 60 days from the expiration of the time allowed in the original order within which to make and serve such case, and plaintiff was given 20 days thereafter to suggest amendments, the case-made to be settled and signed on 5 days' notice. On June 2, 1914, 29 days before expiration allowed him to suggest amendments thereto, and without waiver of such right, in the absence of plain-

tiff or his counsel, the case-made was settled and signed by the judge. Plaintiff now moves to dismiss this proceeding for the reason that the action of the trial judge in signing and settling case-made under circumstances was a nullity. In *Cummings v. Tate* (not yet officially reported) 147 Pac. 304, it is held:

"The time allowed by the trial court for the suggestion of amendments to a case-made commences to run, not from the date of the service of the case-made, but from the expiration of the period of extension. In an absence of a waiver by the defendant in error, a case-made, signed and settled by the trial court before the expiration of the time granted for the suggestion of amendments, is a nullity."

The motion to dismiss is well taken and should be sustained.

PER OURIAM. Adopted in whole.

BUTLER et al. v. FRYER. (No. 7366.)
(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. JUDGMENT ¶682(1)—CONCLUSIVENESS—MATTERS CONCLUDED—PARTIES.

A judgment rendered in an action of ejectment, in which the grantee in a champertous deed is the plaintiff and the party in possession of the land in question is the defendant, is not conclusive of the questions raised in a subsequent action brought by the grantors in a champertous deed for the use and benefit of the grantee therein to recover possession of the same land, since the titles upon which the causes of action are based are not the same and the parties are not the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. ¶682(1).]

2. JUDGMENT ¶682(1)—CONCLUSIVENESS—MATTERS CONCLUDED—PARTIES.

There is no such privity of estate between the grantee in a champertous deed and his grantor as will render a judgment, given in an action of ejectment in which a grantee was plaintiff, conclusive in a subsequent action brought by the grantors in such deed against the party in possession.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. ¶682(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Atoka County; J. G. Ralls, Special Judge.

Action by William Butler and another, for the use and benefit of C. W. Miller, against Andrew J. Fryer. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Humphreys & Cook, of Atoka, for plaintiffs in error. W. S. Farmer, of Atoka, for defendant in error.

BURFORD, C. This was an action instituted by Wm. Butler and Adeline Butler, his wife, for the use and benefit of C. W. Miller, against Andrew J. Fryer, to recover the possession of, and to cancel the deeds to, certain land in Atoka county, Oklahoma. It appears that Wm. Butler and wife were

Choctaw Freedmen, and allottees of the land in controversy. They executed deeds to this land to the defendant, Fryer, at a time when, it seems to be admitted, they could not convey by reason of the restriction acts passed by Congress. Thereafter, and at a time when they could lawfully convey the land in question, they did convey it by warranty deed to C. W. Miller. Meanwhile however, Fryer, the defendant, had entered into the possession of the land, and has at all times been in actual and adverse possession thereof. Miller commenced an action in ejectment against Fryer to recover possession. Pending this action Fryer secured a deed from William and Adeline Butler conveying to him the land, of which he was then an occupant. The action by Miller against Fryer was decided in favor of Fryer, and upon appeal to this court the decision of the district court was affirmed (*Miller v. Fryer*, 35 Okl. 145, 128 Pac. 713), upon the ground that the deed of the Butlers to Miller, while Fryer was in possession of the land, was champertous, and as to Fryer was void. After the conclusion of this case the present action by the Butlers for the benefit of Miller was brought. The defendant, Fryer, denied the transfer to Miller, and further pleaded that the judgment of the case of Miller against Fryer was res judicata of all the questions in the present case. The trial court found that Miller was the real party in interest in the present action, and that he was concluded by the former judgment. This is the principal error assigned upon appeal.

[1, 2] We are unable to agree with the conclusions of the trial court. In order for a judgment to be a bar in a subsequent action, among other things the prior judgment must have been rendered in an action in which the same parties, or their privies, were concerned, as are parties litigant in the action in which the former judgment is pleaded as a bar. So, too, it must be shown that the questions involved in the instant action were those which were litigated or could have properly been litigated in the former action. In the case at bar, Miller is not the plaintiff, nor is he a party to the action. The action is brought in the name of the Butlers. It is true it is for the use and benefit of Miller, but he is not, as concluded by the trial court, the real party in interest.

This court has held (*Gannon v. Johnston*, 40 Okl. 695, 140 Pac. 430, Ann. Cas. 1915D, 522) that the grantee in a champertous deed may sue in the name of his grantor to recover the land conveyed by such deed. Our statute requires that all actions shall be brought in the name of the real party in interest. Section 4681, Rev. L. 1910. It can only be, therefore, by holding that the grantor in the champertous deed is the real party in interest that the right to sue in his name can be sustained. Such is the effect

of the decisions cited in support of the doctrine laid down in *Gannon v. Johnston*, supra. See *Steeple v. Downing*, 60 Ind. 478; *Coogler v. Rogers*, 25 Fla. 853, 7 South. 391; *Pearson v. King*, 99 Ala. 125, 10 South. 919. In the case of *Miller v. Fryer et al.*, the reason of the decision in favor of the defendant was that Miller could not maintain the action on his champertous deed. Under *Gannon v. Johnston*, supra, the Butlers can maintain the action, or it can be maintained in their name for the benefit of Miller. In the former case the title relied upon as the basis of the action in ejectment was the deed by the Butlers to Miller; in the instant case the title relied on is the patent from the government to the Butlers. It seems, therefore, that there is neither identity of parties plaintiff nor of causes of action. We think it can hardly be said that, if a person prosecutes an action which he has no right to maintain, the judgment for defendant therein is conclusive against a party who does have the lawful right to maintain an action involving the same subject-matter. But it is said, and truthfully, that this court has held that a judgment is conclusive, not only of the matters litigated, but also of matters which might have been given in evidence or pleaded in the original action, except such as related to set-off and the like; and further that the judgment binds not only the parties to the action, but also those in privity with them. Neither of these holdings, however, are applicable to the instant case. It is true that in *Gannon v. Johnston*, supra, we held that where the action was brought in the name of the champertous grantee he might thereafter by amendment join the name of his grantor and maintain the action, but we have never understood the rule that judgments are conclusive to those matters which might have been pleaded to be carried so far as to hold that such judgment concludes the right of a necessary party to the action, who was never served or appeared therein, merely because he might have been made a party, and might have been brought into the action. Neither can it be said in any proper sense that the Butlers are privies in estate with Miller. Privity in estate, as we understand it, implies mutuality of or succession in interest. Thus Miller might be in privity with the Butlers and bound by the judgment against them; but that does not necessarily mean that the Butlers are in privity with Miller and bound by the judgment in an action in which he

alone was the party defendant. As is said in *Bigelow on Estoppel*, p. 142, approved in *Seymour v. Wallace*, 121 Mich. 402, 80 N. W. 242:

"To make a man a privy to an action, he must have acquired an interest in the subject-matter of the action, either by inheritance, succession, or purchase of a party subsequent to the action, or he must hold the property subordinately."

So it is said that the ground on which persons standing in privity to the litigating party are bound by the proceeding to which he is a party is that they are identical with him in interest. *Williams v. Barkley*, 165 N. Y. 48, 58 N. E. 765; *Pennington v. Hunt* (C. C.) 20 Fed. 195. "Privity implies succession." *Boughton v. Harder*, 46 App. Div. 352, 61 N. Y. Supp. 574. "The title of the privy must be derived from a party bound by the judgment." *Allan v. Hoffman*, 83 Va. 129, 2 S. E. 602; *Dickinson v. Lovell*, 35 N. H. 9; *Hunt v. Haven*, 52 N. H. 162; *Coleman v. Davis* (Tex. Civ. App.) 36 S. W. 103; *Hungate v. Hetzer*, 83 Kan. 285, 111 Pac. 183.

If there are exceptions to this rule they are not applicable here. As was said in *Allred v. Smith*, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924: "No one can be bound by or take advantage of an estoppel of another who does not succeed or hold subordinately to his position." In the instant case the Butlers did not succeed to any estate or hold subordinately to Miller in any manner. It is Miller who, if he has any interest at all, holds subordinately to the Butlers. We are of the opinion, therefore, that, although a recovery of the Butlers may inure to the benefit of Miller, there is no such identity of parties or causes of action in the instant case as to render the judgment in the former case *res judicata* of the questions in the case at bar.

The rulings and findings of the trial court, suggested as erroneous by the defendant in error, we are precluded from reviewing by reason of the fact that he has filed no cross-petition in error, and these questions must therefore be left for the determination of the trial court upon a retrial.

For error of law in holding the judgment in *Miller v. Fryer* conclusive of the questions in the case at bar, the judgment of the trial court is reversed for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

BANKSON v. LAFLAM et al. (No. 13479.)

(Supreme Court of Washington. Aug. 7, 1916.)

1. ACTION \S 450(2)—JOINDER—SINGLE CAUSE OF ACTION—PRINCIPAL AND SURETY.

Under Laws 1915, p. 227, making the surety jointly liable with the principal, only one cause of action is stated where both are sued jointly, although the recovery demanded against the surety is limited to the amount of the bond.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 512, 513; Dec. Dig. \S 450(2).]

2. TRIAL \S 251(9) — ASSESSMENT — INSTRUCTION—DAMAGES—CONFORMITY TO PLEADINGS AND PROOF.

Where the complaint did not allege future pain nor was there any express proof thereof, but the evidence showed continuous suffering since the accident, and a probability that the injury would not entirely heal, an instruction authorizing the jury to include damages for future pain was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 595; Dec. Dig. \S 251(9).]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by E. Bankson against Joseph Laflam and the Pacific Coast Casualty Company. Judgment for plaintiff, and defendants appeal. Affirmed.

O. C. Moore, of Spokane, and Henry S. Noon, of Seattle, for appellants. Plummer & Lavin, of Spokane, for respondent.

BAUSMAN, J. [1] Plaintiff in crossing a street was struck by Laflam's jitney, for the safe operation of which the defendant casualty company became surety under Laws 1915, p. 227. By that act a surety becomes jointly and directly liable with the principal to the extent of the penal sum, and only one cause of action was stated here when the two were sued jointly, though the limit of the bond was prayed for against the surety and more from the principal. A motion for separation of causes of action was consequently ill taken.

[2] A verdict being rendered for plaintiff, an error is assigned in the court's instructing the jury that they might include damages for such pain and suffering as under the evidence plaintiff might be reasonably expected to endure in the future.

Future pain or suffering is not an allegation of the complaint, which, however, states such shocking, spraining, straining, and tearing of cords, tendons, nerves, and muscles in a leg as causes extreme pain and suffering and permanently cripples plaintiff. The proof relates a continuous suffering since the accident aggravated whenever plaintiff puts any weight upon his leg, besides constant experiencing of pain and a probability that at plaintiff's age of 59 the limb will never heal and be as strong as before. Conceding all this, appellants contend that it does not make future pain recoverable, relying upon *Bennett v. Oregon-Washington R.*

& Nav. Co., 83 Wash. 64, 145 Pac. 62. That was a case in which is involved not future pain and suffering, but future mental anguish; the latter a distinctly different element though at times, to be sure, coming out of the former. The law presumes a continuance of what exists, and it is neither surprise to the opposite party nor unreasonable from any point of view to say that when a man exhibiting a permanent injury testifies also to his having pain up to the very time when he is talking to the jury, there may be a continuance of it for some time in the future, so no express proof upon that is necessary. *Passage v. Stinson Mill Co.*, 52 Wash. 661, 670, 101 Pac. 239.

In the *Bennett* Case mental anguish was not an existing condition, the court carefully noting the fact that:

"There is no evidence tending to show any mental anguish or anything other than the pain and suffering naturally incident to an injury like the one complained of."

That was what the *Bennett* Case turned upon. As to pain or suffering, that the court did not exclude as a future element, permitting it on the contrary "when the jury can find from a preponderance of the evidence that future pain and suffering is reasonably certain to result," which language we deem conformed to here in "reasonably expected." *Harris v. Brown's Bay Logging Co.*, 57 Wash. 8, 14, 106 Pac. 152, explaining *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916.

We find no other points requiring discussion, and the judgment is affirmed.

MORRIS, C. J., and MAIN, PARKER, and FULLERTON, JJ., concur.

PHOENIX ASSUR. CO., Limited, v. COLUMBIA & P. S. R. CO. (No. 13348.)

(Supreme Court of Washington. Aug. 4, 1916.)

1. CONTINUANCE \S 49 — CONDITIONS—PAYMENT OF COSTS.

Under Rem. & Bal. Code, \S 299, 303, permitting amendment to cure variance, etc., upon such terms as may be just, on objection by defendant to amendment at trial of complaint to plead an ordinance and defendant's refusal to state whether it desired a continuance on the ground of surprise, it was error to peremptorily order a continuance until the afternoon on ground of surprise, on condition of defendant's paying to plaintiff the sum of \$250 by 1:30 p. m. that day, which amount was later reduced to the witness fees of plaintiff and costs at that time and \$10.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. \S 143-145; Dec. Dig. \S 49.]

2. DAMAGES \S 228—CURE OF ERRORS—CONTINUANCE ON TERMS—REMISSION OF PART OF JUDGMENT.

Such error is not cured by ordering a remission by plaintiff of \$500 from its recovery of \$2,800.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 576-579; Dec. Dig. \S 228.]

3. TRIAL \Leftarrow 191(1), 260(1)—REQUESTS COVERED BY GENERAL INSTRUCTIONS—ASSUMING FACTS.

Where requested instructions are mere amplifications of the law given in other portions of the charge, or are based upon improper assumptions of fact, their refusal is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420, 421, 435, 651; Dec. Dig. \Leftarrow 191(1), 260(1).]

4. APPEAL AND ERROR \Leftarrow 216(1), 263(3)—PRESENTATION OF OBJECTIONS—INSTRUCTIONS.

Where as to measure of damages no instruction was prayed for by appellant, nor any exception taken to failure to instruct thereon, such failure was not reversible error, where the damages allowed were within the issues and proofs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1518, 1525; Dec. Dig. \Leftarrow 216(1), 263(3); Trial, Cent. Dig. § 640.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by the Phoenix Assurance Company, Limited, against the Columbia & Puget Sound Railroad Company. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Farrell, Kane & Stratton and Stanley J. Padden, all of Seattle, for appellant. Shepard, Burkheimer & Burkheimer, of Seattle, for respondent.

HOLCOMB, J. After trial and verdict for plaintiff, respondent here, of \$2,800 damages, the defendant moved first, unsuccessfully, for judgment n. o. v. and then for a new trial, which latter motion was denied upon the election of respondent to consent to a remission of \$500 from the recovery, on a finding that the jury had been prejudiced by certain proceedings and conduct on the part of the court. This brings up the third ground of reversal relied upon by appellant.

[1] If the jury were prejudiced by the acts and conduct of the trial judge, it is difficult to ascertain and determine just how much, in dollars and cents, they were influenced in their verdict. This is what happened: Respondent, having sued as the insurer of an automobile on an assigned claim by the insured for \$4,000, its alleged damage for negligent injuries by appellant, offered in the course of the trial copies of ordinances of Seattle as evidence under its complaint of certain allegations. One of the ordinances had been expressly pleaded by reference to its number, and it was stated by counsel for respondent that sufficient foundation had been laid in the complaint for the introduction of the other ordinance as one governing speed of trains within the city limits, under an allegation that the train which struck the automobile was running, at the place of injury, at an unlawful speed. Upon objection by counsel for appellant his honor stated that he would allow respondent to amend

its complaint to plead Ordinance No. 16081, to which appellant objected. The court then asked counsel for appellant if they desired a continuance on the ground of surprise, and repeated the inquiry several times upon the evasive response of counsel for appellant each time that they desired counsel for respondent to state the object of introducing the other ordinance. Upon the repeated refusal, by evasion, of counsel for appellant to state whether it desired a continuance upon the amendment being ordered, his honor, having at last apparently lost his patience, peremptorily ordered a continuance until the afternoon—

"on the ground of surprise, on the condition of the defendant paying to the plaintiff the sum of \$250 by 1:30 o'clock this afternoon."

The jury were then excused till that hour. On the reconvening of court at 1:30, the jury being present, counsel for appellant stated that they desired to make a motion and desired the exclusion of the jury. Upon the retirement of the jury the court had read the ruling of the forenoon immediately before adjournment. His honor then stated that the order would be modified as to the amount, and the order would be that the amount would be the witness fees of plaintiff and costs at that time and the sum of \$10. Mutual apologies were made, after which appellant refused to pay the costs ordered, and moved that the jury be discharged from further consideration of the case because of having been prejudiced by the remarks and conduct of the court so that it could not have a fair and impartial trial. This motion was denied, and the trial proceeded with the result mentioned.

[2] Both his honor and counsel for appellant were at fault. It was certainly within the power and discretion of the trial judge to permit the amendment of the pleadings at the trial. Upon such amendment being allowed, it was the duty of the adverse suitor, either to proceed with the trial under the pleadings as amended, or to demand a continuance on the ground of surprise. *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156; *Lee Hong v. Schoenwald*, 86 Wash. 326, 150 Pac. 436. Respondent had pleaded the unlawful speed of the train and, if not properly or fully covered by pleading the proper local ordinances, had the right, under Rem. & Bal. Code, §§ 299, 303, to amend the pleading to cover it definitely. Appellant's indefinite objection to the introduction of the ordinance was met by the order to amend, and the order to amend was without prejudice unless appellant could show that it was actually prejudiced. But the allowance of an amendment on such terms are as just, as permitted by the statutes cited, does not contemplate the requirement of the payment under such circumstances as were here shown of a penalty of

\$250, nor even of the witness fees and costs up to that time and \$10, where the adverse party to the amendment was not demanding a continuance nor the amending suitor the imposition of any "just terms" of continuance. Respondent asserts that there is no showing, nor can there be any inference, that there was prejudice in the proceedings. The court, weighing the matter conscientiously after the trial, in considering the motion for new trial, felt that there was. He was undoubtedly the best judge when he deliberated calmly upon the matter. We must therefore agree that there was prejudice, but we are unable to weigh it in any exact amount of money. It might have been to the whole extent of the verdict. There was great conflict in the facts. There must be a new trial.

[3, 4] Of the other complaints of appellant we find none justifying reversal. The facts were such as justified the submission of the case to a jury, uninfluenced by any prejudice. We find no error in the admission or exclusion of evidence, nor in the refusal of instructions prayed by appellant or given by the court. The instructions given by the court, in general, fairly, though tersely, stated the law and correctly covered the subjects of negligence and contributory negligence in law, correctly measuring the respective duties, under the circumstances, of both the driver of appellant's assignor and appellant. The requested instructions were mere amplifications of the law as given, or were, as in requests numbered 3, 12, and 14, based upon improper assumptions of fact. There was one feature of the case on which the court failed to instruct—the measure of damages to respondent upon recovery. As to this, however, the record shows no instruction thereon prayed by appellant, nor any exception to the failure to instruct thereon. Such being the case, it could not be ground of reversal now, the damages allowed having been within the issues and the proofs.

For the error heretofore discussed, the judgment is reversed and the cause remanded.

PARKER, BAUSMAN, and MOUNT, JJ., concur. FULLERTON, J., concurs in the result.

DOBRENTAI v. PIEHL. (No. 18417.)
(Supreme Court of Washington. Aug. 4, 1916.)

1. CONTRACTS — 354 — CONCESSIONS — ACTIONS FOR INTERFERENCE — SUFFICIENCY OF FINDINGS.

In action by assignee of an "exclusive concession to serve lunches, refreshments," etc., for a season, "in and front of" a building, against his landlord and two other tenants, for interfering and competing with his business, findings reciting that the two tenants acted "with the consent of the defendant" landlord in what they did, to the injury of plaintiff's business, held sufficient to show that the landlord's consent

was active rather than merely passive, and was the controlling cause of the actions of the two defendant tenants, and to support a judgment against the landlord.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 858, 859; Dec. Dig. § 354.]

2. TRIAL — 404(1) — FINDINGS — INTERPRETATION.

Generally, when the language of findings is equivocal and susceptible of a construction which will support the judgment, though also susceptible of another construction, that meaning will be given to the findings which supports the judgment rather than one which would defeat it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 957; Dec. Dig. § 404(1).]

3. APPEAL AND ERROR — 223 — PRESENTATION OF OBJECTIONS — WAIVER.

In action by tenant against his landlord and other tenants for disturbance of his enjoyment of the premises, where the question of misjoinder of causes of action was not suggested to the trial court, and judgment against the landlord could rest upon the breach of his contract with plaintiff, the objection by the landlord that judgment was rendered separately against him and defendant tenants, made for the first time on appeal, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1338-1342, 1344, 1346-1350; Dec. Dig. § 223.]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Suit by L. J. Dobrentai against Henry G. Piehl and others. From judgment for plaintiff, the named defendant appeals. Affirmed.

Blair & Blinn, of Seattle, for appellant. E. L. Sanders and Ralph Simon, both of Seattle, for respondent.

PARKER, J. The purpose of the plaintiff, Dobrentai, in commencing this action in the superior court was to have the defendants Piehl and Jewell and Bunting, copartners, enjoined from interfering with his concession to sell refreshments in front of the building known as the "Steeplechase" at Alki Beach in King county, and incidentally to recover damages for such interference. We are here concerned only with the judgment for damages awarded by the court upon trial without a jury against the defendant Piehl for the sum of \$290, from which he has appealed.

[1] The principal question for our consideration is as to the correctness of the judgment against appellant in the light of the findings of the trial court; the evidence not being before us. The controlling facts so appearing may be summarized as follows: Appellant is the owner of the premises known as the "Steeplechase" and also the storeroom immediately adjoining known as the "Seaside Drug Store." Jewell and Bunting, as copartners, are engaged in the drug business in this storeroom as tenants of appellant. On March 17, 1915, a contract evidenced by the following writing was entered into between appellant and Mrs. Eva Barth:

"Seattle, Wash. March 17, 1915.

"Received in full of Mrs. Eva Barth two hundred dollars and one cluster diamond ring repre-

sending forty-five dollars, for the exclusive concession to serve lunches, refreshments, popcorn, peanuts and for all other purposes pertaining to same for the season of 1915 in and front of the building known as the 'Steeplechase' at the corner of 61st and Alki avenue, Alki Beach, the space behind the counter and railing in said building premises to be kept in sanitary condition and no sleeping premises at night.

"[Signed] Henry G. Piehl."

This so-called concession was assigned by Mrs. Barth to respondent on May 10, 1915, with the consent of appellant, and respondent immediately commenced to exercise his rights thereunder. Touching the invasion of respondent's rights under this contract and appellant's responsibility therefor, the trial court found:

"That in the same building and in the room adjoining the room and premises mentioned in said contract the defendants Jewell and Bunting were at the said time engaged in the said drug business, and immediately after the plaintiff entered into possession and occupation of said premises defendants Jewell and Bunting acting without the consent and over the objections of the plaintiff removed a large window in the wall and partition that had theretofore divided the said drug store from the room and premises leased by the plaintiff, and occupied by plaintiff under said contract, and for the period of several weeks after the time that the plaintiff entered into occupancy of said premises the defendants Jewell and Bunting, with the consent of the defendant Piehl competed with the plaintiff in the sale of the articles, goods, and merchandise mentioned in said contract by erecting, maintaining, and opening counters and other fixtures in their said drug store, and that during all the said time the defendants Jewell and Bunting, with the consent of the defendant Piehl, permitted the door in the said partition wall to be opened out into the premises of the plaintiff, and caused thereon to be displayed signs and posters advertising and soliciting the patronage of the public to the said drug store of the articles of merchandise described in said contract, the exclusive concession for the sale thereof which had been granted to the plaintiff, and that by reason of the interference of the defendants with the business of the plaintiff on the premises which the defendant Piehl had reserved in said contract for the use of the plaintiff, the volume of the plaintiff's business was thereby diminished, and a large portion of same diverted to defendants, causing the same to be conducted to his loss and damage, by reason of said acts, in the sum of \$300; that the defendants Jewell and Bunting are responsible for said plaintiff's loss in the sum of \$10, and that the defendant Henry G. Piehl is responsible for said loss in the sum of \$290."

[2] Counsel for appellant invoke the general rule that a covenant in a lease for quiet enjoyment on the part of the tenant does not insure against the invasion of his rights thereunder by third parties who are wrongdoers acting independent of the lessor, as held by us in *Hockersmith v. Sullivan*, 71 Wash. 244, 247, 128 Pac. 222. The argument of counsel seems to be that the findings are not sufficiently certain to render appellant liable for this invasion of respondent's rights, because they do not show clearly that appellant actually participated in the wrong. The court found that the defendants Jewell and

Bunting acted "with the consent of the defendant Piehl" in what they did, to the injury of respondent. This, it may be conceded, is not very clear touching the part that appellant played in this interference with the rights of respondent under his contract. It is the general rule, however, which we think applicable to the facts of this case that, when the language of findings is equivocal and susceptible of a construction which will support the judgment, though also susceptible of another construction, that meaning will be given to the findings which supports the judgment rather than one which would defeat it. *Whitlock v. Manciet and Bigne*, 10 Or. 166; *Cantwell v. Nunn*, 45 Wash. 536, 88 Pac. 1023. Having this rule in mind and in view of the fact that Jewell and Bunting were tenants of appellant occupying the adjoining storeroom, and in view of the judgment rendered by the court, we are constrained to hold that the language of the findings is sufficient to show that appellant's consent was active rather than merely passive, and was the controlling cause of the actions of Jewell and Bunting. This, we think, is the correct conclusion, even though we should regard respondent as a lessee rather than as a concessioner. Should he be regarded as a "concessioner" in the usual acceptance of that term, which would seem to be the correct view, looking to the words of his contract alone, his right to damages as against appellant would be even more certain, since the law seems to be that in such cases the grantor is bound to protect his grantee as against all persons, regardless of whether the wrongdoer is claiming under the grantor or not. *Robinson v. Clark*, 53 Ill. App. 368; 2 C. J. 994. We conclude that the findings support the judgment against appellant.

[3] Some contention is made on appellant's behalf that the trial court erred in rendering judgment separately against appellant and Jewell and Bunting. This argument apparently proceeds upon the theory that respondent's cause of action was for a tort, and therefore not divisible. That this was so as against Jewell and Bunting is probably true, but we do not think it was so as against appellant, Piehl. As to the former the trial court seems to have awarded nominal damages only. As to the latter we think the judgment can well rest upon the breach of appellant's contract with respondent. We conclude from the record before us that this contention is made for the first time in this court. We find nothing in the record indicating that the question of misjoinder of causes of action was suggested to the trial court, so we think the contention does not merit serious consideration.

The judgment is affirmed.

BAUSMAN, MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

WESTERN DRY GOODS CO. v. HAMILTON. (No. 13106.)

(Supreme Court of Washington. Aug. 4, 1916.)

1. GUARANTY ⇐36(5)—SCOPE.

A guaranty of payment of account of K. store, in consideration of guarantee selling to it on credit, is a guaranty only of the purchase price of goods to be sold the store under its own management as a going concern, and not to secure the price of goods sold to its management under the control of its creditors in the course of liquidation.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 41; Dec. Dig. ⇐36(5).]

2. GUARANTY ⇐17—CONSIDERATION.

A guaranty of payment of the account of K. store, whether then due or thereafter to become due, never became effective as to the existing indebtedness; there having been no subsequent sale to the store on credit, which was the expressed consideration, and no extension of indulgence on the past-due indebtedness, even if that was contemplated as part of the consideration.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 19; Dec. Dig. ⇐17.]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by the Western Dry Goods Company against M. L. Hamilton. From an adverse judgment, plaintiff appeals. Affirmed. See, also, 86 Wash. 478, 150 Pac. 1171.

Wetrick, Anderson & Wetrick, of Seattle, for appellant. Karr & Gregory, of Seattle, for respondent.

PARKER, J. The plaintiff, Western Dry Goods Company, seeks recovery from the defendant, M. L. Hamilton, upon a guaranty contract executed by him and Lester E. Hamilton, reading as follows:

"Seattle, Wash. Feb. 3, 1911.

"Western Dry Goods Co., Inc., Seattle, Wash.
—Dear Sirs: We hereby guarantee you full payment of the account of Kegley's Bee Hive Store, Inc., of Georgetown, Wash., whether now due or hereafter to become due and payable to you, limiting the extent of this guaranty however to \$2,000. This guaranty is given in consideration of your selling goods upon credit to the said Kegley's Bee Hive Store, Inc., of Georgetown, Wash., it being understood that the terms of credit on the account hereby guaranteed are two per cent. 60 days or net 90 days. It is further agreed that this is a continuing guaranty to remain in force until revoked in writing by the undersigned guarantors. This guaranty is absolute as to any balance or balances due you on said account before such revocation. It is also agreed that no extension of time of [or] other indulgence by you on said account shall release, discharge or change the obligation of this guaranty.

"[Signed] Lester E. Hamilton.
"M. L. Hamilton."

This action was commenced in the superior court against both guarantors. The defendant Lester E. Hamilton was adjudged to be in default, but the record before us does not show that any judgment was ever rendered thereon against him. However, the trial proceeded against the defendant M. L. Hamilton, resulting in findings and judgment in

his favor, from which the plaintiff has appealed.

Appellant is a corporation engaged in the wholesale dry goods business in Seattle. Kegley's Bee Hive Store, hereinafter referred to as the store, is a corporation and at the time of the execution of the guaranty here involved was engaged in the general merchandise business at Georgetown, a suburb of Seattle. At that time the defendant Lester E. Hamilton was the manager of its business and respondent M. L. Hamilton was the owner of the building in which it carried on its business as his tenant. At that time it was indebted to appellant in the sum of \$862, which, with sums owing to other creditors, rendered its affairs in a somewhat critical condition. While possibly not then wholly insolvent it would have been rendered immediately insolvent had appellant and its other creditors forced payment of the indebtedness due from it to them. It was then apparently unable to purchase goods on credit in the usual course of business. On February 6, 1911, 8 days after the execution of this guaranty contract and before the sale of any additional goods by appellant to the store, there was held in Seattle a meeting of its creditors to consider its affairs and the possibility of its being able to continue in business. The result of this meeting, at which appellant was represented by its vice president, was that an agreement was reached between all of the creditors represented and the store by which its business should be conducted for a time under the direction of a representative of the creditors with a view of the liquidation of its debts. There is some dispute as to the extent of the control over the business such representative should have and did exercise, but in any event it is clear that he was to and thereafter did control the business as to the general policy to be pursued, and especially as to the paying out of money. It was also agreed that a special sale should be immediately advertised and conducted with a view of reducing as much of the stock to cash as possible and paying the proceeds thereof pro rata to all the creditors, and that the purchase of goods necessary to render the stock salable should be for cash as near as possible. The creditors, including appellant, placed their several claims in the hands of the Seattle Merchants' Association, an association of wholesale merchants organized for the purpose of winding up the affairs of insolvent concerns without the expense and formalities of a receivership or bankruptcy proceeding, when consented to by all parties concerned. It was through this association and its representative in control of the store that the creditors, including appellant, were represented. Commencing at that time under this management, the conduct of the business resulted in dividends being paid to all the

creditors, including appellant, through the Seattle Merchants' Association in April, May, June, July, August, and October, 1911. The evidence seems to indicate that this management was at the beginning contemplated to exist for a period of 30 days largely as an experiment to determine whether or not the store would be able to continue its business and the creditors could safely surrender their control thereof. This management, however, seems to have continued up to October 31, 1911, when the officers of the store executed an absolute bill of sale of its stock and fixtures to the Seattle Merchants' Association in trust for all of its creditors, and thereafter the remainder of its property was reduced to cash which was distributed through that association by the payment of dividends to the creditors. After February 6, 1911, appellant sold goods to the store under this management. We think the evidence as a whole warrants the conclusion that the store was insolvent and unable to pay its debts in the usual course of business at all times following the making of its agreement with its creditors of February 6, 1911, and that it was then saved from passing into insolvency by formal legal proceedings by the action of its creditors in assuming control of its affairs. Appellant now claims \$1,481, due it from respondent upon the guaranty contract executed February 3, 1911, for an unpaid balance for goods sold by appellant after February 6, 1911, and a balance due upon the indebtedness existing at the time of the execution of the guaranty contract. No demand was ever made by appellant upon respondent for any sum due upon the guaranty contract until November 15, 1913, over 2 years after the last goods were sold by appellant. The foregoing summary of facts we think is as fair to appellant as can be made from the record of the evidence before us. The trial court having made findings in substance as above summarized, concluded in part as follows:

"That such goods as were sold after February 6, 1911, and beginning February 10, 1911, were sold to the representatives of the creditors.

"That Kegley's Bee Hive Store was to all intents and purposes in the hands of a receiver from the 7th day of February, 1911, until its final dissolution.

"That the guaranty was not accepted or acted upon by plaintiff."

[1] It is contended in appellant's behalf that the trial court erred in concluding that the goods sold by appellant after February 6, 1911, were in effect sold to the representatives of the creditors and not to the store under the management of its own officers in reliance upon the guaranty contract. This in its final analysis becomes a question of fact; that is, was the store after February 6, 1911, under the control and management of its officers or was it then under the control and management of representatives of its creditors? It is true that its manager, Lester M. Hamilton, continued to assist in the

conduct of the business, but it is also true, we think, that he did not have control of the business and was not acting other than for the creditors, and that he was subject to the order and direction of the representatives of the creditors. Indeed, it seems plain that the creditors, including appellant, would not have permitted the business to continue after February 6, 1911, upon any other condition than that they should have control of it until such time as it might appear that they could safely surrender such control, which manifestly never arrived. In the light of these facts it seems to us that the guaranty contract was never accepted or acted upon by appellant in so far as the sale of goods to the management of the store after February 6, 1911, is concerned, and that the guaranty contract will not bear the construction that it was intended as a guaranty for the purchase price of goods sold under such circumstances. Plainly, we think, it was only a guaranty of the purchase price of goods to be sold to the store under its own management as a going concern and not to secure the purchase price of goods sold to its management under the control of its creditors in course of liquidation. Appellant having sold the goods under these circumstances, we agree with the trial court that the guaranty contract never became effective as security for the payment of goods sold by appellant after February 6, 1911.

[2] Did the guaranty contract become binding and effective as such to secure payment of the \$862 of indebtedness due from the store to appellant, at the time of its execution? We think not. The consideration expressed in the contract is, "In consideration of your selling goods upon credit to the said Kegley's Bee Hive Store, Inc." It might well be argued that this excludes all thought of any other consideration which would render it of binding force so far as prior indebtedness is concerned, in the light of the facts we have above noticed and our conclusion therefrom that no goods were sold by appellant in reliance upon the guaranty contract. It is insisted, however, that it was contemplated by the parties to the guaranty contract that indulgence should be granted to the store by the extension of time upon the past-due indebtedness as part of the consideration for the guaranty. We may concede that there is some slight evidence tending to so show if we are to look beyond the terms of the written contract. But the fact remains that no such indulgence was granted, for within 8 days following the making of the contract appellant joining with the other creditors in effect caused the business of the store to be taken from the control of its officers and placed under the control of its creditors with a view of its management in their interest and the payment to them of dividends from its proceeds pro rata upon their several claims. This being done with the consent of all concerned, was adopt-

ed by the creditors, including appellant, as a means of collecting their claims as effectual as legal proceedings could have been. Indeed, appellant's president by his own testimony renders it plain that he regarded this method of protecting its interest, even more effectual than legal proceedings would have been looking to that end. In any view of the case we think that the contract of guaranty did not become effectual as security for this past-due indebtedness.

The facts of this controversy as to details are somewhat obscure and involved. We conclude, however, that the record calls for the conclusion that the goods sold by appellant after February 6, 1911, were in effect sold to the representatives of the creditors while the store was under their control in course of liquidation, and that no indulgence in the way of extension of time was granted by appellant touching the indebtedness due at the time of the execution of the guaranty contract. Having so concluded upon these questions of fact, we think it requires no citation of authority to demonstrate that the law calls for an affirmance of the judgment. The judgment is affirmed.

FULLERTON, MOUNT, and HOLCOMB, JJ., concur. MORRIS, C. J., not sitting.

McMULLEN & CO. v. CROFT.

GANDLER et ux. v. GOULD LUMBER CO.
et al. (No. 18320.)

(Supreme Court of Washington. Aug. 4, 1916.)

1. STATUTES §117(3)—TITLE—ENFORCEMENT OF LIEN.

Laws 1907, p. 693, entitled "An act relating to the registration and confirmation of titles to land," and requiring mechanics' lien claims against registered land to be filed with the registrar of titles instead of the county auditor, is not invalid because its title insufficiently states its purpose.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 154; Dec. Dig. §117(3).]

2. MECHANICS' LIENS §132(1) — PROCEEDINGS TO PERFECT—AMENDMENT OF CLAIM.

Rem. & Bal. Code, § 1134, required mechanics' lien claims to be filed with the county auditor within 90 days, and Torrens law (Laws 1907, p. 693) required filing with the registrar of titles, but set no time limit for such filing, held that, where plaintiff filed his lien in due time with the county auditor, the court properly allowed him to amend his complaint and lien by registering under the Torrens act, and the court, even after 90 days, could allow a claim filed under section 1134 to be amended by filing with the registrar.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 193; Dec. Dig. §132(1).]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Mechanics' lien foreclosure by McMullen & Co. against W. A. Croft, Gottlieb Gandler and wife, Gould Lumber Company, and Rickles Bros.. Decree for plaintiff, and de-

fendants Gottlieb Gandler and wife appeal. Affirmed.

C. H. Winders, William E. Froude, Higgins & Hughes and Hyman Zettler, all of Seattle, for appellants. J. P. Wall, Jay C. Allen, Edward Von Tobel, and Philip Tindall, all of Seattle, for respondents.

HOLCOMB, J. Respondents, who were materialmen, having failed to collect from the building contractor with whom they had dealt, recovered below in lien foreclosure against the property owners. The property owners appealed as to those materialmen who failed to comply with the statute relating to the registration of titles commonly called the Torrens system of registration. The real property sought to be reached was, long before this transaction, brought under the so-called Torrens system of registration. The lien claimants Gould Lumber Company, Schwager-Nettleton Mills, and Rickles Bros. failed to register within the 90-day period any claim of lien under that law. Instead, they filed their liens with the county auditor under the old recording statute, so that it would have been shown in the chain of title had this title been evidenced by recorded documents in the old way. The other lien claimants registered their claims in the proper manner so that the title to this property discloses their lien, the certificate of title being properly indorsed. As to them, no appeal has been taken. As to the others who did not register their liens within the time limit, the property owners are here assigning error to the allowance of such claims. The trial court over objection, allowed amendments as to these property owners, amending their complaints and liens by registering their liens at the time of the trial under the Torrens registration system.

The only question presented is this: Where the title is registered under the Torrens act, must a lien claimant register his lien under that system and within 90 days, as provided for recording the registration of liens? The old statute was:

"No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor." Laws 1893, p. 34, § 6; Rem. & Bal. Code, § 1134.

And:

"The county auditor must record the claims mentioned in this chapter in a book to be kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed." Laws 1893, p. 35, § 6; Rem. & Bal. Code, § 1135.

The new law provides:

"All dealings with the land or any estate or interest therein after the same has been brought under this chapter, and all liens, incumbrances, and charges upon the same shall be made only

subject to the terms of this chapter." Rem. & Bal. Code, § 8841.

"Every conveyance, lien, attachment, order, decree, judgment of a court of record, or instrument or entry which would, under existing law, if recorded, filed or entered in the office of the county clerk, and county auditor, of the county in which the real estate is situate, affect the said real estate to which it relates, if the title thereto were not registered, shall, if recorded, filed or entered in the office of the registrar of titles in the county where the real estate to which such instrument relates is situate, affect in like manner the title thereto if registered. * * * Same, § 8853.

"In every case where writing of any description, or copy of any writ, order or decree is required by law to be filed or recorded in order to create or preserve any lien, right, or attachment upon unregistered land, such writing or copy, when intended to affect registered land, in lieu of recording, shall be filed and registered in the office of the registrar of titles, in the county in which the land lies, and, in addition to any particulars required in such papers, for the filing or recording, shall also contain a reference to the number of the certificate of title of the land to be affected. * * * Same, § 8874.

"* * * All certificates, writing or other instruments, permitted or required by law, to be filed or recorded, to give effect to the enforcement, continuance, reduction, discharge or dissolution of attachments, liens or other rights upon registered land, or to give notice of such enforcement, continuance, reduction, discharge or dissolution, shall in the case of like attachments, liens or other rights upon registered land, be filed with the registrar of titles, and registered in the register of titles, in lieu of filing or recording." Same, § 8875.

"* * * The title or interest certified shall be subject only to such estates, mortgages, liens and charges as are so noted [on the certificate of title], except as herein provided." Same, § 8807.

"Every person receiving a certificate of title * * * shall hold the same free from all incumbrances except only such estates, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office, and except any" lease for three years or less, public highways, ditches, and water rights, taxes or special assessments before sale, right to appear or appeal, and federal liens not theretofore required to appear of record in the county auditor's office. Same, § 8838.

"All acts and parts of acts, if any there be, necessarily in conflict herewith, are herewith repealed; but this act is not intended to interfere with the present system of recording, transferring, or dealing in any real estate not brought under the provisions hereof." Laws 1907, p. 737, § 98.

We then have under consideration two statutes, one purporting to deal fully and exclusively with the subject of mechanic's liens, the other purporting to deal fully and exclusively with the subject of land title registration, but incidentally encroaching upon the domain of the statutes relating to liens. There are therefore two laws relating to mechanics' and materialmen's liens, one of which is referable to the old general statutes relating to such liens and the other to the Torrens system of registration. Under the old law, mechanics' and materialmen's liens are required to be filed in the office of the county auditor within 90 days from the cessation of the labor or furnishing of material, and under the new law, when real

property is brought under the registration system, such liens are required to be filed with the registrar of titles, who is the same person as the county auditor, and noted on the certificate of title, but no time within which such registration shall be made is specified. The respondents urge that the section of the Torrens law relied upon by appellants, requiring the registration of lien notice against registered land, is ineffectual to control the manner of enforcing liens for the reason that no such purpose was indicated in the title of the act; that therefore it is unconstitutional. The title reads: "An act relating to the registration and confirmation of titles to land."

[1] It is argued that the effect of the section in question is to amend the lien law, and that the constitutional requirement that the purpose of an act shall be stated in the title has not been complied with, citing *State ex rel. v. Superior Court*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831, and *Blalock v. Condon*, 51 Wash. 604, 99 Pac. 733.

[2] We have, however, so consistently and repeatedly held that the title to an act need not be an index to the contents thereof—that it is sufficient if it comprehensively covers the matter therein contained with sufficient in the title to indicate its scope and effect—that no authorities are necessary to be set forth here. The title of an act, reading, "An act relating to the registration and confirmation of titles to land," is sufficiently comprehensive to include any incumbrance or instrument affecting the title. The act and the title, however, are not sufficient to entirely set aside and supersede the prior laws with reference to the enforcement of liens and the provisions of the statute providing for liberal construction thereof. Rem. & Bal. Code, § 8875, a part of the registration act, provides that all liens shall be enforced by any proceeding or method sufficient or proper in law to enforce like liens on unregistered land. Section 1134, of the mechanics' lien statute, provides that claims of lien may be amended by order of court in so far as the interests of third parties shall not be affected by such amendment. Section 1147 adds that the provisions of the lien statute shall be liberally construed with a view to effect their objects. This court has consistently observed these provisions of the lien statutes in a great number of cases. In *Stetson & Post Lumber Co. v. Sloane & Co.*, 61 Wash. 180, 112 Pac. 248, where a lien notice failed to refer to the lease of Sloane & Co., or to claim a lien upon the leasehold estate, the lienholder upon foreclosure was permitted to cure this by amendment, and it was urged that the amendment came too late, in that it was permitted after the expiration of the statutory time for filing the lien. We said that if it were not for the amendment this claim of error would have much force, but that the amendment cured the defect, if any, and that the fact

that it was made after the expiration of 90 days was immaterial.

The purpose of the 90-day limit fixed by the mechanics' lien statute is to protect the owners of land against injury from the loss of evidence which delay in the prosecution of the claims would entail. In *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 384, we said:

"It is the manifest purpose of this statute to require the claimant to bring suit to establish his lien while the evidence upon which it rests is sufficiently recent to enable any party interested to successfully contest it if the facts do not warrant the lien."

In the *Sloane Case*, supra, we also said:

"The rule of amendment established by this court is that amendments of this character are in the nature of amendments to pleading, and the same liberal rule as to substance and time should be followed where the interests of third parties are not injuriously affected. Such is the plain import of our statute."

In the instant case there are no third parties who were or could be injuriously affected by the amendment. In *Malfa v. Crisp*, 52 Wash. 509, 100 Pac. 1012, we held that a lien notice against lot 22 of block 8 might be amended so as to be good against lot 21 in block 8; there being no third parties whose interests were injuriously affected.

Appellants contend that in the case of *Brace v. Superior Land Co.*, 65 Wash. 681, 118 Pac. 910, we definitely laid down the rule that the act of registration shall be the operative act to convey or affect title to the land. But that case had to do with a voluntary instrument, and Judge Ellis in writing the opinion was careful to limit its effect to voluntary conveyances, saying:

"The second sentence indicates the forms of instruments he may use to evidence the purpose to convey or incumber. * * * Such an instrument does not convey, but merely purports to convey; that is to say, evidences an intention to convey."

Several writers on the Torrens system of land registration are quoted by appellants, as, for instance, Prof. Beale in 6 *Harvard Law Review*, p. 370:

"A legal lien upon land, such as an attachment, judgment lien, or mechanic's lien, is secured in the same manner, to wit, by entry upon the register of a claim, to be enforced or removed by subsequent proceedings."

And a writer in 54 *Cent. Law J.* p. 284:

"No judgment, mechanic's lien or other statutory, legal or equitable lien, except taxes or special assessments, becomes a lien on registered property until a copy of the decree or instrument on which the lien is based has been filed with the registrar and noted on the certificate of title."

A similar statement is made in 8 *Columbia Law Review*, p. 448, and in *Shelton on Land Registration*, p. 10.

In view of the fact that there is no time limit in the land registration law as to when involuntary liens shall be registered with the registrar of titles, and of the statutes and the spirit of the law that lien laws shall be liberally construed and amendments liberally

allowed, that in this case the liens were filed within the time required by the lien law in the same office where they would be registered under the Torrens law, and that section 8875, Rem. & Bal. Code, part of the registration law, provides the same foreclosure proceedings and tested by the same rules of propriety and sufficiency as the lien laws, we consider that his honor was right in permitting the amendment. Any other construction is apt to work great hardship upon ordinary lien claimants, who in many cases would be ignorant of the fact that there are two systems of recording or registering titles and instruments affecting title to or liens upon land. Furthermore, a county auditor, who is also the registrar of titles under the registration law, is, if any one, the officer who would be deemed most familiar with the system under which the title stood at the time of the filing of the lien, and advantage should not be taken of the fact that he did not register it instead of recording it when the title was registered.

The decree is affirmed.

MORRIS, C. J., and BAUSMAN and PARKER, JJ., concur.

COMMERCIAL BANK OF PORT HURON v. ELLIOTT. (No. 13373.)

(Supreme Court of Washington. July 29, 1916.)

1. CARRIERS \S 58—BILL OF LADING—SUPERIORITY TO ATTACHMENT.

A bank by reason of owning a bill of lading had a right to all property covered by the bill of lading superior to a party whose only claim was by virtue of a subsequent attachment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. \S 58.]

2. CARRIERS \S 58—CLAIM TO CHATTEL—DETERMINATION—QUESTION FOR JURY.

On trial to determine whether plaintiff in an action or a bank which claimed to own the automobile attached by him was the owner of the car, the question whether the car attached was covered by the bill of lading held by the bank, being a question of fact, was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. \S 58.]

3. ATTACHMENT \S 181—CLAIM—SUFFICIENCY OF EVIDENCE.

On trial of a bank's claim to an automobile attached by plaintiff in his action against a motor car company, evidence that the car in question was not covered by the bank's bill of lading held insufficient to support verdict against it.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. § 576; Dec. Dig. \S 181.]

4. APPEAL AND ERROR \S 977(3)—GRANT OF NEW TRIAL—INSUFFICIENCY OF EVIDENCE—DISCRETION OF COURT.

The discretion of the trial court in granting a motion for new trial on the question of insufficiency of the evidence will be interfered with only when there has been a clear abuse of such discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3862; Dec. Dig. \S 977(3).]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by James R. Elliott against the Havers Motor Car Company, wherein an automobile was attached and the Commercial Bank of Port Huron filed affidavit claiming it was owner, plaintiff filing an answer denying its ownership. From an order granting the claimant a new trial after an adverse verdict, plaintiff appeals. Judgment affirmed.

France & Helsell, of Seattle, for appellant. Raymond D. Ogden, of Seattle, for respondent.

HOLCOMB, J. [1] In June, 1914, appellant, Elliott, instituted an action against the Havers Motor Car Company, and caused a writ of attachment to be issued, by virtue of which a certain automobile, described as a Havers Six, No. 683, was attached. Shortly afterwards, under authority of Rem. & Bal. Code, § 573 et seq., the respondent, Commercial Bank of Port Huron, hereinafter called the bank, filed an affidavit, claiming it was the owner of the automobile. The bank then filed a bond with the American Surety Company as surety, and the car was released from the attachment and delivered to a representative of the bank. Appellant filed an answer, denying ownership of the automobile by the bank, and a trial was had before a jury to determine its ownership. It developed during the trial that the bank, in April, 1913, discounted a sight draft with bill of lading attached, which bill of lading covered three cars shipped to R. H. and H. C. Gray, it being the bank's contention that the car attached in this action, No. 683, was one of the three cars covered by this bill of lading. The court correctly held as a matter of law that the bank, by reason of owning the bill of lading, had a right to all property covered by this bill of lading superior to appellant, whose only claim to the property was by virtue of a subsequent attachment.

[2] The only question to determine was whether the car attached, No. 683, was covered by the bill of lading held by the bank, and this, being a question of fact, was for the jury. The evidence being introduced, the court seemed doubtful whether there was sufficient evidence of nonownership by the bank to take this question to the jury, as evidenced by the following remark of the court upon motion for nonsuit of claimant and directed verdict for the bank:

"But I am disposed in the present instance to submit this one question of fact to the jury. In the event the jury returns a verdict in your favor, Mr. France, I don't know what I might do with the verdict."

This question was finally submitted to the jury, who returned a verdict against the bank and its bondsmen for \$987.15. Counsel for the bank then secured some affidavits, with documentary evidence attached, tending to prove more conclusively that the automobile in question was the property of the bank, and moved for a new trial on all the statutory grounds, which motion was granted. From this order appellant prosecutes this appeal.

[3, 4] Whatever may be the legal effect of these affidavits filed subsequent to the trial of the cause, we think the court was fully justified in granting a new trial on the ground that the evidence was insufficient to support the verdict, as the only evidence that car No. 683 was not one of the cars covered by the bank's bill of lading was Mr. Gray's evidence, as follows:

"Q. Now, was the car attached by Mr. Elliott one of the cars that were shipped out in that way without your ordering it? A. It was one of the carloads. I think I had two carloads of that model. They sent two carloads of that model out."

This evidence of nonownership of the bank was so meager that the trial court, as shown by his remark above quoted, was inclined to give the bank a directed verdict. This court has uniformly held that it is in the discretion of the trial court to grant or refuse a motion for a new trial upon the question of the insufficiency of the evidence to support the verdict, and that this court will only interfere with the discretion of the lower court when there has been a clear abuse of such discretion. In such case the court weighs the evidence and grants or refuses a new trial in his discretion. If he exercises sound discretion, we do not disturb it, and the presumption is in favor of his exercise of sound discretion. *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166, and cases there cited. In *Koenig v. Whatcom Falls Mill Co.*, 67 Wash. 632, 122 Pac. 16, we said:

"Under the law as established in this state, it sometimes becomes the duty of the court to grant a new trial because of the insufficiency of the evidence to sustain the verdict, even though there is some slight evidence, which, if standing alone, might sustain the verdict."

Applying this rule to the evidence in this case, which consisted of ample testimony of the ownership of the car by the bank and the meager, indefinite testimony of Gray, as hereinbefore quoted, of nonownership by the bank, it seems evident that there was no such clear abuse of discretion by the trial court in granting this motion for a new trial as would justify us in disturbing it.

The judgment is therefore affirmed.

MORRIS, C. J., and PARKER, BAUSMAN, and ELLIS, JJ., concur.

SWANSON v. OREGON-WASHINGTON R. & NAV. CO. (No. 13369.)

(Supreme Court of Washington. Aug. 4, 1916.)

1. MASTER AND SERVANT ⇨204(1)—INJURIES TO SERVANT—RISKS ASSUMED.

Assumption of risk is a defense where no violation of a statute enacted for the employee's safety is alleged as a bar, whether the action is brought under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) or not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544; Dec. Dig. ⇨204(1).]

2. MASTER AND SERVANT ⇨155(1)—INJURIES TO SERVANT—DUTY TO WARN—OBVIOUS RISK.

An employer need not warn an experienced laborer against the obvious risk of pinching his finger while unloading rails from a flat car and piling them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. ⇨155(1).]

3. MASTER AND SERVANT ⇨219(5)—INJURIES TO SERVANT—RISKS ASSUMED—OBVIOUS RISK—METHOD OF WORK.

An experienced laborer assumes the risk of having his finger pinched while unloading rails from a flat car and piling them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 614; Dec. Dig. ⇨219(5).]

Department 1. Appeal from Superior Court, Spokane County; Wm. T. Darch, Judge.

Action by John Swanson against the Oregon-Washington Railroad & Navigation Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Robertson & Miller and E. W. Robertson, all of Spokane, for appellant. A. C. Spencer and Hamblen & Gilbert, all of Spokane, for respondent.

CHADWICK, J. Action to recover for personal injuries. Motion for nonsuit by defendant was granted by the trial court at the close of the submission of plaintiff's evidence. We find no error in this judgment.

[1] Whether appellant's action was properly brought under the federal Employers' Liability Act it is unnecessary to determine. No violation of any statute enacted for the safety of employes being alleged, the defense of assumption of risk is a bar whether the action falls within or without the statute. Federal Employers' Liability Act, § 4 (U. S. Comp. St. 1913, § 8660).

Appellant was one of a crew of seven men who were unloading rails from a flat car, and piling them on the right of way. Four of the men skidded the rails from the flat car to the ground. Appellant and two others, with the help of some of the men from the car, would pile them. In doing so, they would pull them into place. While thus engaged, appellant's finger was caught and so injured as to necessitate amputation.

The grounds of complaint were negligence of fellow workmen, failure to furnish proper appliances, and a sufficient number of workmen, and failure to give proper warning of the dangers attending the work. The record discloses no support for the first three allegations sufficient to justify a submission of the case to the jury. Neither do we find a request, on the part of appellant, for different tools, or more workmen.

[2] Appellant was a man 39 years of age and experienced as a laborer. The danger of pinching one's finger while unloading rails is an obvious and patent one, and the contention that there was a failure to warn appellant of the danger is not well taken. Deaton v. Abrams, 60 Wash. 1, 110 Pac. 615, 47 L. R. A. (N. S.) 266; Props v. Washington Pulley & Mfg. Co., 61 Wash. 8, 111 Pac. 888, 45 L. R. A. (N. S.) 658; Hanson v. Shipley, 71 Wash. 632, 129 Pac. 377; Sainis v. Northern Pac. R. Co., 87 Wash. 18, 151 Pac. 93.

[3] The risk was an incident of the employment which appellant must be held to have assumed. Brown v. Tabor Mill Co., 22 Wash. 317, 60 Pac. 1126; Anderson v. Oregon R. R. & Nav. Co., 28 Wash. 467, 68 Pac. 863; Waterman v. Skokomish Timber Co., 65 Wash. 234, 118 Pac. 36.

Affirmed.

MORRIS, C. J., and MOUNT and ELLIS, JJ., concur.

STATE ex rel. FAIR v. HAMILTON et al.
Board of Com'rs of King County.
(No. 13266.)

(Supreme Court of Washington. July 29, 1916.)

1. STATUTES ⇨207, 214—CONSTRUCTION—AMBIGUOUS LANGUAGE.

Courts must give effect to a statute if the intent can be ascertained with reasonable certainty, and, when the language is ambiguous or contradictory, may resort to extrinsic aids to ascertain the intent, or, failing to dissolve the ambiguity, give effect to the expression last in time.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 284, 290; Dec. Dig. ⇨207, 214.]

2. STATUTES ⇨217—VALIDITY—AMBIGUITY—TERM OF OFFICE.

Laws 1913, p. 103, § 1, relating to justices of the peace and constables, is not void for ambiguity in declaring that elections for such offices shall be held quadrennially, and that the term shall be two years, where the legislative journals disclose that the word "biennially" was in the act when introduced and passed by the House of Representatives and was changed to "quadrennially" in the Senate, that it was so passed by the Senate and returned to the House, which concurred in the change, thus showing that it was intended that the term should be four years.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. ⇨217.]

3. JUSTICES OF THE PEACE ⇨8—STATUTES ⇨73(2)—UNIFORMITY—COUNTY OFFICERS—TERMS.

Const. art. 11, §§ 4, 5, requiring uniformity in county government, and article 6, § 8, re-

quiring county officers to be elected biennially, relate solely to executive and administrative officers and not to justices of the peace and constables, so that Laws 1915, p. 316, making the term of such officers four years, is not void for lack of uniformity or because of excessive term.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 11-14, 56; Dec. Dig. ¶¶ 8; *Statutes*, Cent. Dig. §§ 74, 75; Dec. Dig. ¶ 73(2).]

4. COUNTIES ¶85 — OFFICERS — TENURE — POWER OF LEGISLATURE.

Const. art. 6, § 8, requiring county officers' terms to be two years, must be construed in connection with article 11, § 5, empowering the Legislature to prescribe the duties of county officers and fix their terms, so that the Legislature may fix the terms of the justices of the peace, or even of executive and administrative officers, at a longer period than two years.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 97, 98; Dec. Dig. ¶ 65.]

5. STATUTES ¶125(5)—VALIDITY—SUBJECTS AND TITLES OF ACTS.

Laws 1913, p. 103, entitled "An act relating to justices of the peace and constables in cities having a population of 50,000 or more inhabitants and providing for their election and appointment and fixing their salaries," is not invalid for want of sufficient title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 187, 188; Dec. Dig. ¶ 125(5).]

6. STATUTES ¶125(6)—VALIDITY—SUBJECTS AND TITLES OF ACTS.

Laws 1915, p. 316, entitled "An act relating to justices of the peace and constables and the compensation of justices of the peace in cities of 225,000 population, and amending section 6533-1 of Remington & Ballinger's Annotated Codes and Statutes of Washington," is not invalid for want of sufficient title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 190; Dec. Dig. ¶ 125(6).]

7. STATUTES ¶230—AMENDMENT—AMBIGUITY—CONSTRUCTION.

Laws 1915, p. 316, providing for election of certain justices to be held in November, 1914, is not void for ambiguity in providing for an election at a past date, since the act amends Laws 1913, p. 103, § 1, and its provisions as to dates of election having been continued are not to be considered as having been repealed and re-enacted, but as having been continuously in force.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 311; Dec. Dig. ¶ 230.]

8. STATUTES ¶138(2)—AMENDMENT—REFERENCE TO TITLE.

Laws 1915, p. 316, as to justices of the peace, amending Laws 1913, p. 103, on the same subject, is not invalid as attempting to amend a statute by mere reference to its title; the act having sufficiently set forth the statute amended at length.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 206; Dec. Dig. ¶ 138(2).]

9. STATUTES ¶64(4)—PARTIAL INVALIDITY—EFFECT.

Laws 1915, p. 316, as to justices of the peace, is not void because section 2 thereof attempts to delegate to county commissioners the power to increase salaries of justices of the peace, but the attempted delegation, if void, does not affect the remainder of the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 61, 195; Dec. Dig. ¶ 64(4).]

10. SHERIFFS AND CONSTABLES ¶9—CONSTABLES—ELECTIONS—NUMBER.

Under Laws 1915, p. 316, as to justices of the peace and constables, it was the intention

that there should be one constable for each justice, so that in cities of less than 500,000, justices being limited in number to five, there can be but five constables.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 20-22; Dec. Dig. ¶ 9.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Mandamus by the State, on relation of A. H. Fair, against M. L. Hamilton and others, as the Board of County Commissioners of King County. From a judgment dismissing the application on relator's refusal to plead further, after demurrer to the application was sustained, relator appeals. Affirmed.

R. B. Brown, of Seattle, for appellant. John B. Wright, John E. Carroll, Otis W. Brinker, and Reah M. Whitehead, all of Seattle, amici curiæ. Alfred H. Lundin, of Seattle, and Robert H. Davis, for respondent. John W. Linck and Frank H. Graham, both of Tacoma, amici curiæ.

FULLERTON, J. This is a proceeding in mandamus instituted by the relator A. H. Fair, against the board of county commissioners of King county, to compel that board to appoint a justice of the peace and two constables for the city of Seattle in addition to the five justices and five constables now holding such office therein. A demurrer was interposed by the board to the application for the writ, which the trial court sustained. The applicant thereupon refused to plead further, and a judgment dismissing his application was entered. From this judgment the relator appeals.

The questions suggested by the appeal involve a construction of the statutes relating to the election and tenure of office of justice of the peace and constables in cities of the first class. Passing the earlier statutes as having no bearing upon the inquiry, the first one necessary to be noticed is that of March 17, 1909 (Laws 1909, p. 567). This statute provided for the election at the general election to be held in November, 1910, and biennially thereafter in each city having a population of 80,000 or more as shown by the census of 1900, four justices of the peace and four constables, "and no more," whose terms of office should be for the period of two years from the second Monday in January following their election. Under this statute four justices of the peace and four constables were elected in the city of Seattle at the general election of 1912, for a term of two years from the second Monday in January following. At its session of 1913 the Legislature passed a new act relating to the subject (Laws 1913, p. 103), the first section of which reads as follows:

"Section 1. After the taking effect of this act, there shall be in cities of fifty thousand population two justices of the peace and two constables, and one additional justice and one additional constable in such cities for each ad-

ditional fifty thousand population or a major fraction thereof, to be elected at the general election to be held in November, 1914, and quadrennially thereafter, whose term of office shall be for the term of two years from the second Monday of January following the election: Provided, there shall not be more than five justices in any city unless the same has a population of 800,000 or more: And provided further, that nothing in this act shall be construed to affect justices of the peace or constables or the offices of justices of the peace or constables in cities having a population of less than fifty thousand inhabitants."

Section 2 of the act provides that whenever it shall appear to the board of county commissioners of any county containing a city of 50,000 inhabitants or more that such city is entitled to an additional justice and constable as provided in the first section of the act, the board is authorized to appoint such additional justice and constable. Section 3 fixes the salaries of such justices and constables, and section 4 provides that the justices and constables thereafter appointed or elected under the act should receive the salary therein provided. Under this act five justices and five constables were elected in the city of Seattle at the general election held in November, 1914. At its session of 1915, the Legislature amended the first section of the act of 1913, making the same read as follows (Laws 1915, p. 316):

"After the taking effect of this act, there shall be in cities of fifty thousand population two justices of the peace and two constables, and one additional justice and one additional constable in such cities for each additional fifty thousand population or a major fraction thereof, to be elected at the general election to be held in November, 1914, and quadrennially thereafter, whose term of office shall be for the term of four years from the second Monday of January following the election: Provided, there shall not be more than five justices in any city unless the same has a population of 500,000 or more: And provided further, that nothing in this act shall be construed to affect justices of the peace or constables or the offices of justice of the peace or constables in cities having a population of less than fifty thousand inhabitants."

To the act was added a second section, authorizing boards of county commissioners in counties containing cities having a population of 225,000 or more to pay to justices of the peace in such cities such additional compensation to that then allowed by law as such commissioners should deem fit and proper, such additional compensation not to exceed \$350 per annum.

The appellant's contentions in this court have taken a somewhat wide range. He contends, first, that the acts of 1913 and 1915 are unconstitutional and void, and that the statutes of 1909, and the acts prior thereto, not repealed by that act, are the only statutes now in force relating to justices of the peace and constables in cities of the first class, and that under these statutes a peremptory writ of mandate should issue for the appointment of four justices of the peace and four constables for the city of Seattle. This on the principle that the act of 1909

limits the number of justices of the peace and constables that can be elected in any city to four of each, and that those now in office in the city of Seattle, since they were elected under an invalid statute, are holding office without right or authority. His second contention is that if the court finds the statute of 1913 to be valid and that of 1915 invalid, then a writ should issue for the appointment of one justice of the peace and two constables, since such appointment is required whenever a city has a population of 300,000 and more, and that the city of Seattle has such a population. His third contention is that if the court finds both of the later statutes to be valid, then a writ should issue for the appointment of two constables.

[1, 2] Since the respondents themselves make no question of the sufficiency of the appellant's application to raise these several questions, but have discussed them upon their merits, we shall pursue the same course, although it would seem that the questions suggested by the application could be disposed of on somewhat narrower grounds. The objection to the act of 1913 is founded upon the ambiguity contained in the language used therein. It will be observed that it provides for the election of justices of the peace and constables at the general election to be held in November, 1914, "and quadrennially thereafter," and limits the tenure of the term to "two years from the second Monday of January following the election." It is thought that this ambiguity renders the act void, but such is not the rule. It is the duty of the courts to give effect to a statute whenever the intent and purpose of the Legislature which enacted it can be ascertained with reasonable certainty. It is a rule, also, that when the language is ambiguous or contradictory the courts may resort to extrinsic aids to ascertain its intent and purpose, and may, in construing a statute containing contradictory expressions, if extrinsic inquiry does not suggest the true intent and purpose, give effect to the expression last in time. Here we think the intent of the Legislature is made plain by extrinsic inquiry. On consulting the journals of the Legislature it is found that the act had its origin in the House of Representatives, and that as introduced and as it passed that house it contained the word "biennially" in the place where the word "quadrennially" now appears; that when under consideration by the Senate the act was amended by striking out the word "biennially" and substituting therefor the word "quadrennially." As so amended, it was passed by the Senate and returned to the House, which concurred in the amendment. House Journal 1913, pp. 637, 638; Senate Journal 1913, p. 683. This amendment created the ambiguity or contradiction before mentioned. The act was made to provide for quadrennial elections and for two-

year terms. But manifestly this was an inadvertence. The senator moving the amendment overlooked the fact that consistency of language required a change in the phrase defining the tenure of office. It being clear, however, that the Legislature intended to give to the officers elected at the November election of 1914 a four-year term of office, it is the duty of the court to give the act that effect.

[3, 4] But the appellant argues that to give the act this effect is to render it violative of sections 4 and 5, art. 11, of the Constitution, which require uniformity in county government, and section 8, art. 6, which requires county officers to be elected biennially. But these sections we think relate solely to the executive and administrative officers of a county, those officers necessary to the scheme of county government provided in the Constitution, not to justices of the peace and their executive officers, the constables, who properly belong to the judicial department of the state. In other words, justices of the peace and constables "are not designated as county officers, and are not such officers in law." *McElwain v. Abraham*, 58 Wash. 26, 107 Pac. 832. Moreover, we have held that section 8, art. 6, of the Constitution must be construed in connection with section 5, art. 11, of that instrument, which confers upon the Legislature power to prescribe the duties of county officers and fix their term of office, and that this section permits the Legislature to extend the tenure of office of even an executive or administrative county officer for a longer period than two years. *State ex rel. Hays v. Twichell*, 9 Wash. 530, 38 Pac. 134. It follows as of course that if the section of the Constitution providing for biennial elections of county officers does not limit the tenure of office of the executive and administrative officers of a county to two years, it does not limit the tenure of office of justices of the peace or constables to that term.

[5, 6] It is contended, further, that the act of 1913 is invalid for want of a sufficient title. The same objection is made also to the act of 1915. The title of the first is:

"An act relating to justices of the peace and constables in cities having a population of 50,000 or more inhabitants and providing for their election and appointment and fixing their salaries."

The title of the second is:

"An act relating to justices of the peace and constables and the compensation of justices of the peace in cities of 225,000 population, and amending section 6533-1 of Remington & Ballinger's Annotated Codes and Statutes of Washington."

It seems to us that the question of the sufficiency of these titles does not require discussion. They fall within all of our numerous decisions on the question of sufficiency of titles to legislative acts. These will be found collected in the case of *State ex rel. Lindsey v. Derbyshire*, 79 Wash. 227, 140 Pac.

540; *State v. Seattle Taxicab & Transfer Company*, 156 Pac. 837, and the cases to which reference is therein made.

[7] Turning to the act of 1915, it will be observed that the first section of that act is a literal transcript of the first section of the act of 1913, changing only the word "two" to the word "four" and the figures "300,000" to "500,000." Reading it as an independent act, it contains an ambiguity, in that it provides for a future election to be held at a past time. But the statute is not to be so read. It is amendatory, and the portions of the amended statute which were copied into it without change are not to be considered as repealed and re-enacted, but are to be considered as having been at all times in force. As is said in *Lewis' Sutherland on Statutory Construction*, § 237:

"The word 'hereafter' used in the statute as amended must be construed distributively. As to cases within the statute as originally enacted, it means subsequent to the passage of the original act; as to cases brought within the statute by the amendment, it means subsequent to the time of the amendment."

Tested by these rules, there is no ambiguity in the amendatory act.

[8] Again it is asserted that the act of 1915 is void because in conflict with section 37, art. 2, of the Constitution, which provides that no act shall ever be revised or amended by a mere reference to its title, but the act revised or the section amended shall be set forth at full length. This objection is also without merit. The section amended was set forth at full length, within the meaning of the Constitution as construed by us in *Holzman v. Spokane*, 157 Pac. 1086, and the cases there cited.

[9] It is contended, further, that the act of 1915 is unconstitutional because of the second section, which vests in the county commissioners power to increase the salaries of the justices of the peace within certain defined limits. The argument is that the authority attempted to be conferred is beyond the power of the Legislature, since the Constitution vests the power to fix the salaries solely in the Legislature. But we think we need not determine the validity of this objection. Conceding that the Legislature has exceeded its power in this respect, the fact would not render the entire act void. This part of the act is distinct and separable from the other provisions, and it cannot be supposed that the Legislature would not have passed the one without the other. In such a case the courts are not authorized to declare the whole act void, but must give effect to that part of the act which is within the Constitution. *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 65 L. R. A. 336, 102 Am. St. Rep. 888; *State ex rel. Matson v. Superior Court*, 42 Wash. 491, 85 Pac. 264; *State ex rel. State Board of Tax Commissioners v. Cameron*, 90 Wash. 407, 156 Pac. 537.

The foregoing considerations require an

affirmance of the judgment below in so far as it affects the justices of the peace. There are now five of such justices in office in the city of Seattle, and the latest enactment distinctly provides that "there shall not be more" until the city "has a population of 500,000 or more," and there is no contention that the city of Seattle has as yet reached this population.

[10] It remains to inquire whether there is any reason for the appointment of additional constables. It will be observed that the act provides that there shall be in cities of 50,000 population two justices of the peace and two constables, and one additional justice and one additional constable in such cities for each additional 50,000 population or a major fraction thereof. The proviso, it will be further observed, limits the number of justices that may be elected or appointed to five until the city reaches a population of 500,000, but makes no such limitation as to the number of constables that may be elected or appointed. In his application for the writ of mandamus the appellant alleges that the city of Seattle has a population of 300,000. In his brief in this court he asserts that the city has a population of 331,000, and that the courts must take judicial notice of this fact. Based thereon, the conclusion is drawn that there is at least one vacancy in the office of constable in the city of Seattle, and that, if the court agrees with the appellant's estimate of the present population of the city, there are two such vacancies which should be filled by appointment through the board of county commissioners. If we were to admit the appellant's premise, there might be some ground for the conclusion he draws therefrom. But we cannot accept his construction of the legislative acts. It seems clear to our minds that the Legislature intended there should be but one constable for each justice's court, and when it limited the number of justices' courts it of necessity limited the number of constables that could be elected or appointed. At any rate, there is no such clear right shown as to make the duty of appointment imperative.

It is our conclusion that the judgment of the lower court should be affirmed; and it will be so ordered.

MORRIS, C. J., and MOUNT, CHADWICK, and ELLIS, JJ., concur.

STATE ex rel. McMANNIS, City Attorney, v.
SUPERIOR COURT OF WHITMAN
COUNTY et al. (No. 13412.)

(Supreme Court of Washington. July 29, 1916.)

1. MUNICIPAL CORPORATIONS §47, 57—LIMITATION OF POWERS.

Municipalities have no power except such as is expressly delegated by the state, and an

extension or limitation of municipal power takes effect on the date the statute takes effect.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 126, 144, 148; Dec. Dig. §47, 57.]

2. MUNICIPAL CORPORATIONS §958—TAXATION—POLL TAX—PERSONS SUBJECT.

Tekoa Ordinance of 1905, No. 100, enacted pursuant to Rem. & Bal. Code, § 7766, authorizing imposition of street poll tax on all males over 21, became void or was amended by Laws 1913, p. 315, § 1, subd. 7, limiting subjects of tax in cities of third class to males between ages of 21 and 50, so that the city could neither collect the tax nor impose the penalty for refusal to pay, by a male over 50 years of age.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2023-2037; Dec. Dig. §958.]

Proceeding by the State, on the relation of J. D. McMannis, City Attorney of Tekoa, Whitman County, against the Superior Court of Whitman County and R. L. McCroskey, Judge, to review an order dismissing a writ of review of proceedings of a justice court. Judgment affirmed.

J. D. McMannis, of Tekoa, for plaintiff. J. P. Burson, of Tekoa, for respondents.

HOLCOMB, J. In this proceeding, as to the correctness or propriety of which there is no issue, we review a judgment by the superior court of dismissal of a writ of review of the proceedings of a justice of the peace.

The superior court had the matter upon a written stipulation of the facts which are, in substance, these: On March 16, 1915, complaint in writing was made to the police justice court of Tekoa, Whitman county, this state, wherein the state was plaintiff and one Follett was defendant, charging Follett with violation of the provisions of sections 1 and 2 of Ordinance No. 100, which was an ordinance providing for an annual street poll tax for the city of Tekoa. Follett was placed under arrest, and obtained a change of venue from the police justice court of Tekoa to another justice in that municipality, to which justice the cause was transferred. The case was set for trial on July 16, 1915, and upon that date, the case being called for trial, the justice dismissed it as of his own motion. Thereupon the plaintiff obtained a writ of review in the superior court. Ordinance No. 100 of Tekoa is as follows:

"An ordinance providing an annual street poll tax for the town of Tekoa, and for the collection thereof, and providing a penalty for the violation hereof; and repealing ordinance numbered twenty-one (21) and all other ordinances or parts thereof of the town of Tekoa in conflict with the provisions of this ordinance.

"Be it ordained by the council of the town of Tekoa:

"Section 1. That there be and there hereby is imposed upon each and every male inhabitant of the town of Tekoa, over the age of twenty-one (21) years, an annual street poll tax of two (\$2.00) dollars; and such poll tax shall be due and payable from such inhabitant on demand at any time during the calendar year.

"Sec. 2. That any such inhabitant failing or

refusing to comply with the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than \$10.00 nor more than \$25.00, together with the costs of prosecution, and may be imprisoned until such fine and costs are paid; provided that such violation may be redressed and the amount of said poll tax may be collected and recovered, by civil action instituted for that purpose, against the party liable therefor.

"Sec. 3. That ordinance number twenty-one (21), and all other ordinances or parts thereof, of the town of Tekoa, in conflict with the provisions of this ordinance, be and the same are hereby repealed.

"Sec. 4. That this ordinance shall take effect and be in force from and after its passage, approval and publication.

"Passed the council August 7, 1905."

It is stipulated that the defendant Follett is a male inhabitant of Tekoa over the age of 50 years, and refused to pay his annual poll tax for the year 1915 after due demand. The question for determination is whether or not Follett, being over the age of 50 years, was liable for the payment of poll tax or for the penalty for failure so to pay, under the ordinance of Tekoa. Tekoa is a city of the third class. By the laws of 1890 as amended in 1891, found in subdivision 7, § 7685, Rem. & Bal. Code, cities of the third class were empowered—

"to impose on and collect from every male inhabitant between the ages of twenty-one and fifty years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city; provided, that any member of a volunteer fire company in such city shall be exempt from such tax."

In *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 67 L. R. A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634, this provision was held unconstitutional by this court upon the ground that it contained ununiform and invalid classifications. In *Tekoa v. Reilly*, 47 Wash. 202, 91 Pac. 769, 13 L. R. A. (N. S.) 101, the *Ide* Case was specifically overruled by this court. In 1905 the Legislature empowered councils of cities of the third and fourth classes in this state—

"to impose on and collect from every male inhabitant of such city over the age of twenty-one years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city." Rem. & Bal. Code, § 7766.

The ordinance in question was passed pursuant to that grant of power. In 1913, an amendment was enacted by the Legislature (Laws 1913, c. 108, § 1, subd. 7, p. 315), which is practically a re-enactment, as to cities of the third class, of subdivision 7, § 7685, Rem. & Bal. Code, which had been declared unconstitutional in the *Ide* Case, later overruled by the *Reilly* Case, *supra*.

[1, 2] There is no need to discuss the intricacies of the legislation as affected by the decision of the court in the *Ide* Case and the later amendments and repeals by the Legislature. These questions are discussed at great length in the briefs of counsel, but it

is thoroughly established in this state that municipalities have no power except such as is expressly delegated by the sovereign power, the state. When that power is extended, the extended power takes effect from the date of the grant by the state. When it is limited, the limited power also takes effect upon the date of the taking effect of such limiting legislation. While the ordinance of Tekoa of 1905 was valid at the time, as applying to all male citizens over the age of 21 years, and was the only such power granted by the state to such municipality, nevertheless that power was again limited by the later act of 1913, which limited the power of such municipalities to levy and collect poll taxes only from males between the ages of 21 and 50 years. That act being a limitation upon the power of the municipality, it follows that, at the time of the attempt to collect the poll tax in question, the city had no such power. Either its ordinance was void or it was necessarily amended in effect by the legislation of 1913 to the extent that a poll tax could not be collected from, nor could the ordinance be enforced in any of its provisions against, persons 50 years of age or over.

The superior court was right in holding that there is no liability of the defendant charged for the payment of the poll tax under the ordinance of Tekoa, or for any penalty for failure to pay the same.

The judgment is affirmed.

MORRIS, C. J., and PARKER, MAIN, and BAUSMAN, JJ., concur.

GREENIUS et ux. v. AMERICAN SURETY CO. OF NEW YORK et al. (No. 13252.)

(Supreme Court of Washington. Aug. 4, 1916.)

1. ARREST \S 63(4)—CRIMINAL CHARGE—AUTHORITY WITHOUT WARRANT—PEACE OFFICER.

A peace officer can arrest without a warrant where he has reasonable grounds for believing that the party arrested has committed a felony.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 149-156; Dec. Dig. \S 63(4).]

2. SHERIFFS AND CONSTABLES \S 157(4)—LIABILITY ON OFFICIAL BOND.

A constable's action in arresting and assaulting plaintiffs without a warrant or reasonable grounds for believing that they committed a felony is an act done by virtue of his office, so as to render his surety liable.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 359-364, 370, 371; Dec. Dig. \S 157(4).]

Department 1. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by A. W. Greenius and Minnie Greenius, his wife, against the American Surety Company, of New York, and S. B. Moore. From a judgment sustaining defend-

ant American Surety Company's demurrer to the complaint and dismissing the action as to it, plaintiffs appeal. Reversed and remanded, with directions to overrule the demurrer.

Cooley & Horan and R. Mulvihill, all of Everett, for appellants. Sherwood & Mansfield, of Everett, for respondent.

CHADWICK, J. Defendant Moore is the duly elected, qualified, and acting constable of Monroe precinct in Snohomish county. Respondent American Surety Company is surety upon his official bond. The condition of the bond is:

"Now, therefore, if the said Samuel B. Moore will execute all process to him directed and delivered and pay over all moneys received by him by virtue of his office, and in every respect discharge all duties of a constable according to law during the term for which he was elected and until his successor is duly elected and qualified and while he shall act as such constable, and shall faithfully discharge all duties which may be required of him by any law enacted subsequent to the execution of this bond, then this obligation shall be void, otherwise to remain in full force and effect."

[1] A felony had been committed, and Moore, whom we shall refer to as the defendant, was directed to apprehend the guilty parties. The right of a constable to arrest without warrant has not been defined by statute. Authority to do so is to be found in the common law. At common law, a peace officer could arrest without a warrant when he had reasonable grounds for believing that the party arrested had committed a felony. 4 Blackstone's Com. 292; 3 Cyc. 878; Murfree on Sheriffs, § 1181.

The material parts of the complaint are:

III. "That on or about the 18th day of July, 1915, a felony was committed at Duvall in the county of King, state of Washington, by some person or persons unknown to these plaintiffs and the defendant S. B. Moore as such constable was informed of the commission of said felony and directed to arrest and apprehend the guilty parties. That the said S. B. Moore as such constable acting upon said information and in pursuance to said directions and by virtue of his authority as constable of said Monroe precinct, but without any warrant or other written process did arrest these plaintiffs and in making said arrest the said S. B. Moore did commit an assault upon each of said plaintiffs in said Monroe precinct and at the same time and place, by then and there shooting the said Minnie Greenius, plaintiff, and as a result of said shooting the said Minnie Greenius was struck by a bullet in the hip joint and a portion of said bullet passing on down through the leg and lodged in the flesh about six inches below the hip joint; that the said Minnie Greenius has suffered great pain and anguish as the result of said injury and shooting. That said injury is permanent and said Minnie Greenius will continue to suffer great pain and anguish in the future. That said constable in shooting at these plaintiffs mistook them for the persons who committed a felony."

V. "That immediately after said assault upon these plaintiffs by the said shooting the said constable took both of said plaintiffs into his custody claiming that said plaintiffs were the persons who committed the felony aforesaid at Duvall and said constable held these plaintiffs in custody by virtue of his authority as constable for the period of six hours in Monroe

precinct. That as a result of said holding in custody the plaintiffs and each of them suffered great mental anguish, pain and humiliation."

VI. "That said plaintiffs did not commit any felony at any time and the said constable did not have any reasonable grounds for believing that these plaintiffs committed any felony at any time or place."

[2] It is insisted by counsel for respondent, and the court below so held, that the complaint sets forth a naked trespass, an act done colore officii, for which the surety is not liable. Much mental energy has been expended in drawing distinctions between acts of public officers done colore officii, and acts done virtute officii, and we shall not undertake to assemble definitions. Our understanding is that when an officer acts in the performance of his duty, and, so acting, acts to the hurt or annoyance of a third party or an innocent party, he is nevertheless acting in virtue of his office. That is to say, if his office gives him authority to act, he is acting in virtue of his office, although, in the performance of a specific duty, he improperly exercises his authority. For instance, if an officer have a warrant for A. and, without reasonable ground for believing him to be the guilty person, takes B., he is still acting in virtue of his office. If it were not so, he would never be liable upon his bond. Nor would his surety ever be liable except for his lawful acts, which is reductio ad absurdum, for it follows that there could be no liability if there had been no breach of duty.

An official bond is a promise to the state and to all third parties that, in the execution of legal duty, the officer will do it well and without hurt to strangers to his process. The best argument against attempting to fix an arbitrary line of demarcation between acts done colore officii and those done in virtue of office is that the cases, after a hundred years of exposition, are in hopeless and interminable confusion. The later authorities preponderate, however, in favor of the doctrine that if an officer have process against A. and, without reasonable ground for believing him to be the guilty person, execute it upon the person or property of B. his sureties are liable where the bond is conditioned for the faithful performance of the duties of his office. Throop on Public Officers (Sureties, etc.), § 240; Murfree on Sheriffs, §§ 46a, 47a; Brandt on Suretyship & Guaranty (2d Ed.) § 566.

A complaint, in legal effect not unlike the one before us, was held good as against a motion in arrest of judgment based upon the ground that the complaint did not state a cause of action in that it showed that defendant was a trespasser, in *Clancy v. Kenworthy*, 74 Iowa, 740, 35 N. W. 427, 7 Am. St. Rep. 508; in *Hall v. Tierney*, 89 Minn. 407, 95 N. W. 219, the court says:

"And this attempted distinction led to very much refinement and fanciful reasoning by the courts, as will be seen upon examining the authorities. * * * But of later years, and

certainly in this court, this refined and fanciful distinction has been disregarded, and it has been held, in effect, that for improper acts performed by an officer under color of his office the sureties upon his bond can be held liable. * * * "The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office, and which would obtain no credit except for its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it." Murfree, Off. Bonds, § 211."

The claimed distinctions between acts done *colore officii* and acts done *virtute officii* are pointed out and rejected in *Lee v. Charmley*, 20 N. D. 570, 129 N. W. 448, 83 L. R. A. (N. S.) 275:

"The distinction made between the official acts that serve as the basis of these conflicting lines of authority is that 'acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly or abuses the confidence which the law reposes in him; while acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them.' * * * The almost uniform current of the later cases, however, regards wrongful acts of a public officer *colore officii* as official acts, for which the sureties upon his bond are liable."

See, also, *Lammon v. Feusler*, 111 U. S. 17-21, 4 Sup. Ct. 286, 28 L. Ed. 337, where the authorities are collected.

We think, too, that this court is committed to the later and better rule, and is in line with the preponderating authority.

We held the surety of an officer liable for a wrongful arrest in *Weber v. Doust*, 81 Wash. 668, 143 Pac. 148. This holding was not questioned on rehearing (s. c. 84 Wash. 330, 146 Pac. 623). In *White v. Jansen*, 81 Wash. 435, 142 Pac. 1140, although holding that a reasonable ground for believing that the plaintiff had committed a felony was a defense, the liability of the officer, in the absence of such probable cause, was not questioned. Nor do we attach the meaning to paragraph VI of the complaint that is given to it by respondents. It is a proper allegation of the ultimate fact, the affirmation and denial of which make up the ultimate issue.

It may well be questioned whether the complaint would be good under the doctrine of *White v. Jansen*, *supra*, where it is said:

"We think it was therefore a question for the jury whether the sheriff had reasonable grounds for supposing or believing that the respondent was the person charged with the crime"

—or, to meet the facts in this case, the persons who had committed a felony.

We are told that the judgment was based upon *Marquis v. Willard*, 12 Wash. 528, 531, 532, 41 Pac. 889, 890, 891 (50 Am. St. Rep. 906). Granting that the holding of the court in that case—that the chief of police and ex officio city jailor had no authority in law to incarcerate the plaintiff or any other person—was correct as applied to the facts involved, it can have no application in a case of this kind for here defendant had

authority to make arrests. If the jailor, having authority to confine a prisoner in the city jail, had, in breach of his duty, put the prisoner to hard labor, or otherwise mistreated or maltreated him, the cases would be parallel. This distinction is noted in the opinion:

"The most of the cases which have held that the sureties were liable, even though the action of the officer was but a naked trespass, have been those in which the officer having process in his hands which authorized his acts as against the person or property therein named had wrongfully enforced the same against other property or a different person. It is clear that in such a case the process furnishes no justification to the officer, and he is as much a trespasser when by virtue thereof he levies upon the property of a person not named therein as he would have been without process. * * *

"For an officer to serve process placed in his hands for that purpose is a strictly official act, and while such process would only justify him in a proper service of it, yet an improper service might be in an attempt to obey its command. It was as an officer that he received the process, and his acts under it, whether rightful or not, may well be held to have been by virtue of the office. But for the office he would not have had the process. Without it his acts would have been impossible. Hence such acts might well be said to be official. And since under all the authorities, the sureties are liable for acts done by virtue of the office, there is reason for holding them liable for the wrongful acts of the officer in the execution of process, even though in doing them he so departs from its command as to be a trespasser. But, when an officer without process does an act which under the law he has no right to do, he cannot in any proper sense be said to be acting by virtue of his office, and it is going far enough to hold that in so doing he is acting under color of office. Such is the reasonable rule."

We think the use of the words, "when an officer without process does an act which, under the law, he has no right to do," was ill advised. The court should have said, rather, that when one who is an officer is engaged outside of the performance of any duty imposed by law, his surety is not liable. For, as we have said, and there can be no doubt as to the present state of the law, a felony having been committed, an officer, having authority to arrest without warrant or process, subject only to proof of reasonable cause as explained in the *White Case*, is engaged in the performance of official duty when he goes in search of the offender. It makes no difference whether he is with or without process or warrant. He is an officer just the same, and his acts, whether right or wrong, are in *virtute officii*. It is only necessary to read the cases to understand that no other rule is either practical or tolerable. If an officer engaged in a search for either goods or persons can run amuck, saying, "This I did in excess and in violation of my duty and my bondsmen are not, therefore, liable," we can imagine no case where a surety might be held. The primary purpose of a bond is to insure third parties against the mistakes and trespasses of officers when officially engaged. Defendant was guilty of a breach of official duty, and it follows that

his surety must answer to the merit of the complaint.

Reversed and remanded, with directions to overrule the demurrer of the respondent.

MORRIS, C. J., and MOUNT, FULLERTON, and ELLIS, JJ., concur.

GABRIELSON v. GORIN. (No. 18317.)

(Supreme Court of Washington. Aug. 4, 1916.)

1. ATTORNEY AND CLIENT \S 144—COMPENSATION—RIGHT TO COMPENSATION.

An attorney employed under a contract fixing his compensation cannot recover for unusual professional services where the client did not request them, nor understand that they were outside the contract.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 382, 333; Dec. Dig. \S 144.]

2. COSTS \S 172—ITEMS—ATTORNEY'S FEE—SPECIAL PROCEEDING.

In a special proceeding for substitution of attorneys, the superseded attorney is not entitled to tax an attorney's fee, although recovering a judgment against the client for services.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 666-687; Dec. Dig. \S 172.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceeding for substitution of attorneys by E. O. Gabrielson against Henry J. Gorin. Judgment for defendant, and he appeals. Affirmed.

J. W. Russell, of Seattle, for appellant. Peterson & Macbride, of Seattle, for respondent.

MOUNT, J. This is a proceeding for the substitution of attorneys. The appellant consented to the substitution, but claimed a lien upon papers in his possession for unpaid fees amounting to something more than \$900. Upon a trial of the case to the court the appellant was allowed the sum of \$50 in addition to what had already been paid him, and a judgment was entered against the respondent to that effect. This appeal is from that judgment.

It appears that in February, 1915, the respondent employed the defendant to foreclose two mortgages, one a mortgage upon real estate situated in Kitsap county, and the other a chattel mortgage upon property located in King county. It was agreed at that time that the appellant, Mr. Gorin, would foreclose these mortgages for \$100 each, but that if upon the foreclosure the attorney's fees provided for in the notes were collected, that then Mr. Gorin should have the attorney's fees therein provided, and should return the fee paid by the respondent. Thereupon the respondent advanced to Mr. Gorin \$75.

Afterwards a complaint was prepared to foreclose the real estate mortgage, but this complaint was never filed. The chattel mortgage foreclosure was proceeded with and a de-

fense was interposed. When the defense was interposed an application was made for the appointment of a receiver of the chattels. Thereafter an agreement was made by the parties interested in the chattels for further time. A contract was entered into, and an attorney's fee of \$185 was paid to Mr. Gorin, and some real property was deeded to the mortgagee. Thereafter the mortgagee was not satisfied with the conduct of the case by Mr. Gorin, and requested that other attorneys be substituted in his stead. To this Mr. Gorin consented, but claimed that he had done extra work in the chattel mortgage foreclosure, and demanded additional fees therefor. The additional fees were demanded upon the ground that the settlement of the chattel mortgage foreclosure case by the extension of time for the payment of the mortgage was extra work not contemplated at the time the contract of foreclosure was entered into, and evidence was introduced to the effect that this extra work was worth from \$900 to \$1,200.

[1] The question presented here is whether the appellant was entitled to an extra fee for this work. There is no dispute in the record that at the time the mortgages were placed in the hands of Mr. Gorin for foreclosure, an agreement was entered into to the effect as above stated. And it is conceded that while this foreclosure was pending, the settlement above mentioned was entered into. It is not claimed, as we understand the record, that Mr. Gorin at any time notified Mr. Gabrielson that the work he did in preparing the contract of settlement for the extension of time was extra work under his contract. We think the rule in cases of this kind is well stated in *Isham v. Parker*, 3 Wash. 755, 767, 29 Pac. 835, 839, to the effect that where an attorney performs any unusual professional services—

"where there was no further understanding or request, and where there was nothing to show that it was understood by the client that such services were outside of or in addition to the services provided for by the contract of employment, the attorney should be precluded from recovering anything in excess of the contract price."

It was the duty of the attorney, at the time these services for which he claims extra compensation were being performed, to notify his client that such services were without the contract of employment, and in the absence of such information he ought not to recover therefor. We think the trial court was liberal in allowing \$50 in addition to the money which the appellant had already received.

[2] It is next claimed by the appellant that he should have been allowed an attorney's fee in this proceeding. The statute does not authorize an allowance as an attorney's fee in the conduct of this special proceeding.

"The statute of this state fixes the attorney's fees that may be allowed to a successful litigant as costs in civil actions, and no additional fees for their prosecution should be allowed without statutory authority." State ex rel. Maltbie, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797; Spencer v. Commercial Co., 36 Wash. 374, 78 Pac. 914; Criswell v. Directors School Dist. No. 24, 34 Wash. 420, 75 Pac. 984; Legg v. Legg, 34 Wash. 132, 75 Pac. 130; Trumble v. Trumble, 26 Wash. 133, 66 Pac. 124; Larson v. Winder, 14 Wash. 647, 45 Pac. 315.

The judgment is affirmed.

MORRIS, C. J., and ELLIS, CHADWICK, and FULLERTON, JJ., concur.

HANSON v. HODGE et al. (No. 13376.)

(Supreme Court of Washington. Aug. 4, 1916.)

1. APPEAL AND ERROR ⇐877(7)—PARTY ENTITLED TO ALLEGE ERROR.

The question of propriety of striking an allegation from the answer of a garnishee cannot be raised on appeal; only the principal defendant and another garnishee appealing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8569, 8571; Dec. Dig. ⇐877(7).]

2. APPEAL AND ERROR ⇐173(2)—APPEALABLE INTEREST.

A garnishee against whom no judgment was rendered, not having pleaded an assignment to it of the fund, but only a mere denial of indebtedness amounting to a disclaimer of any interest in the fund, has no standing to assert on appeal the assignment or any right under it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1029; Dec. Dig. ⇐173(2).]

3. APPEAL AND ERROR ⇐173(2)—APPEALABLE INTEREST.

The principal defendant has an appealable interest, though in his answer he disclaimed any indebtedness from the garnishee county, and neither pleaded any assignment to another of his salary owing by the county, nor claimed a common-law immunity from garnishment of his salary, the immunity, in the absence of statute abrogating it, being absolute, and hence invokable at any stage, and he having in his answer claimed his statutory exemption as head of a family, and that question, though not argued in his briefs, being sufficiently covered by his assignments to give jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1120; Dec. Dig. ⇐173(2).]

4. APPEAL AND ERROR ⇐671(1)—QUESTIONS NOT PRESENTED BY RECORD.

The question whether Laws 1915, p. 357, making counties and municipal corporations subject to garnishment, by necessary implication authorizes an assignment of future salary of an officer, cannot be considered; the record presenting no assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2867; Dec. Dig. ⇐671(1).]

5. GARNISHMENT ⇐63—OFFICERS' SALARIES—STATUTE.

Laws 1915, p. 357, making counties and municipal corporations subject to garnishment, by its provision that nothing therein shall impair the right of defendants to claim exemptions of wages as provided by law, by necessary implication abrogates the common-law im-

munity from garnishment of salaries of public officials.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 126-132; Dec. Dig. ⇐63.]

6. OFFICERS ⇐100(1)—SALARIES—DIMINISHING DURING TERM—STATUTE PERMITTING GARNISHMENT.

Laws 1915, p. 357, subjecting to garnishment the earned salary of a county officer, does not diminish it, in contravention of Const. art. 11, § 8, providing that the Legislature shall fix the compensation by salaries of county officers, which shall not be increased or diminished after election or during terms of office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. ⇐100(1).]

7. GARNISHMENT ⇐33 — SALARY — MONEY DUE.

After salary is earned, it is money due in a sum certain and owing, relative to being subject to garnishment, though it may not be a debt in the sense that it could have been made the subject of an action in debt or in indebitatus assumpsit at common law.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 54-58; Dec. Dig. ⇐33.]

8. EXEMPTIONS ⇐119(1)—TIME FOR CLAIMING.

The principal defendant, though knowing of the proceeding, having delayed his answer, claiming the statutory exemption, till after entry of decision striking allegation from garnishee's answer and giving judgment on the pleadings, is too late in his claim.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 140; Dec. Dig. ⇐119(1).]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Garnishment by Ole Hanson against Robert T. Hodge and others. From an adverse judgment, the named defendant and another appeal. Affirmed.

Tucker & Hyland and Wm. R. Bell, all of Seattle, for appellants. John H. Perry, of Seattle, for respondent. Alfred H. Lundin and Edwin C. Ewing, both of Seattle, amici curiæ.

ELLIS, J. This is a proceeding in garnishment under chapter 180, Laws of 1915. It presents a question for first impression in this state meriting full consideration. The facts are as follows: On August 31, 1915, plaintiff recovered a judgment in the superior court for King county against the principal defendant, Robert T. Hodge, who was then and now is sheriff of King county. On September 30, 1915, plaintiff sued out a writ of garnishment directed to Byron Phelps, as auditor of King county, and German-American Mercantile Bank, a corporation. The writ was served on the same day. On October 21, 1915, Phelps, as auditor, and also King county, appeared by the prosecuting attorney of King county and filed a joint answer, disclosing an indebtedness of King county in the sum of \$320 to Hodge at that date on account of his salary as sheriff at the rate of \$200 a month, for the month of September and the first 20 days of October, 1915, and further alleging that, prior to the

service of the writ, Hodge had executed and delivered to German-American Mercantile Bank an assignment of all his salary due and to become due, which assignment, prior to the service of the writ, was filed with the auditor of King county, and praying for such judgment as to the court might seem just. In its answer the county interposed no claim of immunity from garnishee process on any ground. The other garnishee defendant, German-American Mercantile Bank, on October 8, 1915, served an answer, alleging that it was not indebted to the principal defendant, Hodge, at the time of service of the writ, or at any time subsequent thereto, in any sum whatsoever, and neither then had, nor subsequent thereto has had, in its possession or control any personal property or effects belonging to the defendant, and prayed for its discharge with costs. The assertion in one of its briefs that in this answer also was pleaded the assignment referred to in the answer of Phelps and the county is without foundation in the record. On October 25, 1915, plaintiff served and filed his motion to strike from the answer of Phelps as auditor and King county, the allegation setting up the assignment from Hodge, on the ground that any such attempted assignment of unearned salary as sheriff was void as against public policy. At the same time plaintiff moved for judgment on the pleadings and for an order, directing Phelps as auditor of King county to issue to plaintiff a warrant for the amount due the principal defendant as admitted in the answer of the garnishee defendant. On October 30, 1915, as shown by the court's minutes, both motions were granted, and on November 5, 1915, a formal order was entered, striking from the answer of Phelps, as auditor, and King county all reference to the alleged assignment, and reciting that the garnishee defendants had elected not to amend, and granting the motion for judgment on the pleadings. On the same day the court entered also a formal order, directing Phelps as auditor of King county to audit and pay to plaintiff the sum of \$320, admitted in their answer to have been due from King county to Hodge on account of his salary as sheriff at the time of the service of the answer. On November 5, 1915, the principal defendant, Hodge, filed an answer, denying the allegation of the answer of the auditor, Phelps, and King county that there was due to him \$120 or any sum as salary for the month of October at the time of service of the writ or at the time the garnishee defendants made answer, and alleging that he is and has been at all times since the commencement of the action the head of a family dependent upon him for support and praying "in the event of the court disallowing the assignment pleaded in the answer of said garnishee" that he be allowed his statutory exemptions. The assertion that in this answer was pleaded the above-mentioned assignment and the perfec-

tion of the same prior to the service of the writ is also without foundation in the record. Prior to the hearing of this appeal in this court the appeals of Byron Phelps, as auditor of King county, and King county were dismissed on their own motion, so that the only parties now prosecuting this appeal are the garnishee defendant German-American Mercantile Bank and the principal defendant, Robert T. Hodge.

[1] The prosecuting attorney of King county has filed a brief as *amicus curiae* urging, as a question of practice, that the court erred in striking from the answer of Phelps and King county the allegation setting up the assignment of his salary by Hodge to the bank and in thereafter rendering judgment on the pleadings. The record before us does not present that question. The assignment was not pleaded in the answers of any of the defendants save that of Phelps and King county. They are the only parties, therefore, who could have raised the question in this court, and they have voluntarily abandoned their appeals.

[2] Respondent, Hanson, has interposed a motion to dismiss the appeal of the German-American Mercantile Bank on the ground that the bank's answer was a mere denial of any indebtedness of the bank to the defendant Hodge, and that inasmuch as no judgment was rendered against the bank, it has no appealable interest. On the record presented this motion must be sustained. If the bank ever intended to raise the question which it now seeks to raise, namely, that it had a right to the salary of the defendant Hodge, by reason of an assignment antedating the writ of garnishment, it should have pleaded that assignment and asked for such a judgment either in its answer to the writ or by intervention. Having done neither, it has no standing to assert that assignment or any right thereunder in this court. Its answer being a mere denial of indebtedness to the principal defendant, Hodge, without the assertion of any claim to the fund sought to be impounded by the garnishment, amounts to a disclaimer of any interest in that fund. The appeal of the German-American Mercantile Bank is therefore dismissed.

[3] The respondent also moves to dismiss the appeal of the principal defendant, Hodge, on the same ground. It is true that in his answer he disclaims any indebtedness from the county to him. It is also true that in his answer he did not plead any assignment to the bank as a defense to the garnishment, nor claim a common-law immunity from garnishment of his salary as a public officer. That rule of immunity rests solely in considerations of public policy. It exists only in the interests of efficient public service. *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 45 Pac. 31, 37 L. R. A. 207, 53 Am. St. Rep. 878. It would seem therefore, that in the absence of a statute abrogating the rule,

the immunity would be absolute, and hence invokable at any stage of the proceedings, whether pleaded in answer to the writ or not. Moreover, in his answer appellant did claim his statutory exemption as the head of a family, and though that question is not argued in his briefs, it is sufficiently covered by his assignments of error to give this court jurisdiction. The motion to dismiss the appeal of Hodge is denied.

[4] Appellant has filed two briefs. In the first he proceeds on the false assumption that in his answer he pleaded an assignment of his salary to the bank. He concedes that prior to the act of 1915 (Laws of 1915, c. 130, p. 357), making counties and other municipal corporations subject to garnishment, an assignment of the future salary of a public officer was void as against public policy. He argues that since a garnishment is an involuntary assignment, the act of 1915, authorizing garnishment of such salaries, by a necessary implication, authorizes also an assignment of such salaries. He overlooks the fact that the act of 1915 subjects counties and other municipal corporations to garnishment "only after judgment shall have been entered against the defendant in the main action," thus apparently negating the supposed implication. The question is an interesting one, but since the record before us presents no assignment, we cannot consider it.

[5] In his second brief he takes the inconsistent position that the act of 1915 merely abrogates the rule of the common law that municipal corporations are immune from garnishment, but does not abrogate the rule of the common law exempting from garnishment the salary of public officials. He overlooks the fact that the act of 1915 provides that "nothing in this act shall be construed to impair the rights of defendants to claim exemptions of wages as provided by law," thus necessarily implying that the act applies to "some class of persons entitled to receive money from the public funds who are also entitled to claim such money as exempt from execution. There is no such class in existence, except officers and employes engaged in public service." *Ruperich v. Baehr*, 142 Cal. 190, 75 Pac. 782. The California statute construed in the case cited provides a summary method of garnishment by filing a transcript of the judgment against the debtor with the auditor of the county or other municipal corporation who shall draw a warrant in favor of, or pay into the court from which the transcript comes, so much of the money, if sufficient there be owing to the judgment debtor, as will cancel the judgment, and further provides:

"Upon the receipt by any court of money under the provision of this act, so much thereof as is not exempt from execution shall be paid to the judgment creditor, the balance to the judgment debtor."

Aside from mere matters of procedure, the statute as relating to counties is substantially like ours. The California Supreme Court held that the provision touching exemptions carried the necessary implication that the statute applies to officers and employes engaged in public service. The opinion of the majority in the *Ruperich* Case is well reasoned and seems unanswerable. The view expressed in the concurring opinion of Van Dyke, J., that the statute might be unconstitutional as applied to incumbents of offices created by the Constitution obviously has no force as applied to county officers in this state. True the county offices are created by the Constitution, but the salaries they carry in this state are fixed by the Legislature. State Const. art. 11, § 5.

[6] It is true section 8, art. 11, provides that the Legislature shall fix the compensation by salaries which shall not be increased or diminished after election or during the terms of office; but to subject the earned salary of an officer to the payment of his just debts seems to us in no valid sense a diminution of his compensation. It goes to pay his debts, which is certainly but a form of compensation for his services. We are constrained to hold that the Legislature impinged no inhibition of the Constitution by making such salaries subject to garnishment, at the same time preserving to the officers the same right of statutory exemptions accorded to other debtors. It is no argument to say that the incumbent of an office created by the Constitution is selected because of some peculiar fitness for the place; hence should not be harassed or diverted from his duties by having his salary subjected to garnishment. That is but another way of stating the common-law rule of public policy and seeking to give it the force of a constitutional provision, which no one has ever claimed it has.

[7] Appellant cites and relies upon two decisions of the Colorado Court of Appeals, *Lewis v. Denver*, 9 Colo. App. 328, 48 Pac. 317, and *Troy Laundry & Machinery Co. v. Denver*, 11 Colo. App. 368, 53 Pac. 256. Both of these are reviewed and distinguished by the Supreme Court of California in *Ruperich v. Baehr*, supra. The Colorado statute, which is quoted in the *Troy Laundry & Machinery Co. Case*, contains no provision for statutory exemptions, nor other language from which it could be inferred that it was intended to apply to officers and employes engaged in public service. The argument in the Colorado cases, based upon the assertion that the salary of a public officer is not a debt, seems to us technical in the extreme. It may not be a debt in the sense that it could have been made the subject of an action in debt or *indebitatus assumpsit* at common law, but after the salary is earned it is none the less money due in a sum certain and owing, and no amount of argument can make it anything else. We are clear

that under the act of 1915 the salary of a sheriff is subject to garnishment for a debt reduced to judgment.

[8] It only remains to consider whether appellant seasonably claimed his statutory exemption as the head of a family. His answer shows upon its face that he had knowledge of the proceeding prior to the order striking from the answer of Phelps and King county the matter relating to the assignment, since in the prayer of his answer reference is made to that allegation. Appellant's answer, however, was neither served nor filed until after the court had entered on its minutes its decision sustaining the motion to strike and the motion for judgment on the pleadings. The case thus falls distinctly within the rule announced by this court in *United States Fidelity & Guaranty Co. v. Hollenshead*, 51 Wash. 326, 98 Pac. 749. On the strength of that decision we are constrained to hold that appellant's claim of his statutory exemption was tardily asserted.

There is some mention in the briefs and in a supplemental transcript of a second garnishment. There is, however, nothing in the record showing that any appeal was taken from the final order in that proceeding. We cannot consider it.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, CHADWICK, and FULLERTON, JJ., concur.

ZELLNER MERCANTILE CO. v. PARLIN & ORENDORFF PLOW CO. (No. 20285.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. LIABILITY OF PRINCIPAL TO AGENT—INSTRUCTION CORRECT.

Instructions concerning the liability of a principal to his agent for commission have been examined, and found to correctly state the law.

2. MONOPOLIES §17(2)—APPOINTMENT OF AGENT—VALIDITY—SOLE AGENCY.

Under section 1649 of the General Statutes of 1909 it is not a violation of the law for one to appoint a sole agent for the sale of goods, wares, and merchandise in a particular community.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. §17(2).]

3. APPEAL AND ERROR §602(2)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

A complaint that evidence was excluded will not be considered, where it appears from the transcript that the evidence was admitted and read to the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2851; Dec. Dig. §602(2).]

4. EVIDENCE SUFFICIENT—INSTRUCTIONS CORRECT.

On an examination of the evidence and instructions, it is found that the evidence supported the conclusion reached by the jury under the instructions, and that the instructions correctly stated the law.

Appeal from District Court, Leavenworth County.

Action by the Zellner Mercantile Company against the Parlin & Orendorff Plow Company. From a judgment for plaintiff, defendant appeals. Affirmed.

James B. Kelsey, of Leavenworth, for appellant. S. J. McNaughton, of Tonganoxie, and M. N. McNaughton, of Leavenworth, for appellee.

MARSHALL, J. The defendant appeals from a judgment against it for commission on the sale of machinery. The plaintiff was engaged in the retail mercantile business at Tonganoxie, and had a hardware and implement department. The defendant was engaged in the wholesale implement business. The plaintiff was the agent of the defendant at Tonganoxie for the sale of the implements and machinery sold by the defendant, receiving as compensation commission on the sales made by the plaintiff for the defendant. In June or July, 1913, Mr. Gaston, agent of the defendant, went to the plaintiff's place of business and induced the plaintiff to undertake the sale of a certain ensilage cutter, known as the Smalley cutter, and procured an order for one cutter, signed by a clerk in the plaintiff's store. This agent of the defendant, and others who went to the plaintiff's place of business in a short time thereafter, were taken by the plaintiff to various farmers in the country surrounding Tonganoxie, in an effort to sell them this ensilage cutter. In so doing they found that some of the prospective customers desired a different cutter and that others wanted engines to operate cutters. They began negotiations with these farmers looking to the sale of ensilage cutters and engines. Before these negotiations had been completed, the defendant, through its agent, went to other implement dealers in Tonganoxie, and through them sold the cutters and machinery to the prospective purchasers in the country at prices less than those offered by the plaintiff. The plaintiff claimed its commission for these sales. The defendant refused to pay and the plaintiff brought this action to recover the commission.

[1] 1. The defendant contends that the court erred in giving a number of instructions. We have examined these instructions. They concern the liability of a principal to his agent for commissions, where the agent has begun negotiations which finally culminate in a sale of the property of the principal to some third party. Seven different instructions are complained of. We have examined them. They state the law correctly as it has been repeatedly declared by this court. No good purpose will be served by setting out these instructions, or any of them, in detail.

[2] 2. The defendant complains of the re-

fusal of the court to give the following instruction:

"Gentlemen of the jury, you are further instructed that a contract from the Parlin & Orendorff Plow Company, with the Zellner Mercantile Company, to the effect that the Zellner Mercantile Company should have the exclusive agency to sell the implements of the said Parlin & Orendorff Plow Company, in Tonganoxie and vicinity, is in restraint of trade and is therefore illegal and void."

This matter is governed by section 1649 of the General Statutes of 1909, which reads in part as follows:

"A person, firm, corporation or association of persons doing business in this state shall not make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation, or association of persons, but the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares, or merchandise."

The statute excepts from its provisions such arrangements as were made by the plaintiff with the defendant for the sale of the Smalley cutter.

[3] 3. Another of the defendant's complaints is that the court erred in refusing to allow the defendant to introduce the order for an ensilage cutter signed by the plaintiff's clerk, Mr. Young. This order was introduced in evidence and read to the jury. See pages 49, 50 of the transcript. This complaint will not be further considered.

[4] 4. Another complaint is that the verdict is contrary to the evidence and the law. The evidence supports the conclusion reached by the jury under the instructions, and the instructions correctly state the law.

The judgment is affirmed. All the Justices concurring.

UNITED STATES TIRE CO. OF NEW YORK v. KIRK et al. (No. 20010.)

(Supreme Court of Kansas. March 11, 1916.
Affirmed on Rehearing July 8, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT §124(3)—RELATIONS TO THIRD PARTIES — AUTHORITY OF AGENT—QUESTION FOR JURY.

On the facts stated in the opinion, it is held, there was sufficient evidence from which the jury might infer that a general sales agent had authority to make an agreement to accept a return of the goods and merchandise sold to a creditor of the principal in payment of the purchase price.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 724; Dec. Dig. §124(3).]

2. COMPROMISE AND SETTLEMENT §23(3) — EVIDENCE—WEIGHT AND SUFFICIENCY.

The facts stated in the opinion are held sufficient to sustain a finding of a settlement between the plaintiff and the defendants by the terms of which the plaintiff agreed to accept a return of the specific goods sold and give credit to the defendants' account for the amount thereof, and that the settlement was executed by

the constructive delivery of the goods to the plaintiff's agent.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 94; Dec. Dig. §23(3).]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR §1051(1)—REVIEW—PREJUDICIAL NATURE OF ERROR.

Admission in evidence of a letter containing self-serving declarations was not prejudicial error, where the writer testified substantially to the same facts therein stated and the adverse party had an opportunity to answer the letter with a denial of the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162, 4165, 4166; Dec. Dig. §1051(1).]

Porter, J., dissenting.

Appeal from District Court, Reno County.

Action by the United States Tire Company of New York against Albert E. Kirk and another, doing business as the Hutchinson Motor Car Company. From a judgment for defendants, plaintiff appeals. Affirmed.

Fairchild & Lewis, of Hutchinson, for appellant. F. L. Martin and Van M. Martin, both of Hutchinson, for appellees.

PORTER, J. The action in the district court was to recover the sum of \$4,490.58, the balance claimed on an account for goods and merchandise sold and delivered by plaintiff to the defendants from August 2 to November 25, 1913. The defendants filed a voluminous answer setting up several defenses, including misrepresentation as to the quality of the goods, fraud and deceit, damages to their business, and the further defense of a settlement. Some of the defenses were eliminated by the rulings of the court, others were submitted to the jury, but the only one which needs to be considered in this appeal is that involving the question of a settlement.

There is no controversy over the fact that the defendants owed the plaintiff the amount sued for as the balance due on the account, unless the indebtedness is discharged by the alleged settlement. The jury returned a general verdict in favor of the defendants and answered certain special questions and found that the account had been settled as claimed by the defendants. A number of questions are raised by the plaintiff's appeal, but the only real question remaining for determination is whether the special finding that there was a settlement which bars the plaintiff's right to recover is contrary to the law and the evidence.

The plaintiff is engaged in the manufacture of automobile tires, casings, and tubes. On the 15th of January, 1913, it entered into a written agreement with the defendants by which the latter were to purchase, sell, and distribute goods manufactured by the plaintiff. The contract expired by its terms on August 1, 1913. The defendants handled the goods of the plaintiff for the territory;

surrounding Hutchinson and did a jobbing and retail business. The contract provided that they were to settle on the 10th of each month for goods purchased and delivered during the month previous, and were to make all adjustments on tires and tubes that might become necessary under the guaranty of the tire company in accord with instructions from the plaintiff from time to time; and credit was to be given the defendants for all proper replacements and adjustments made with customers according to the terms of the guaranty, which was on a mileage basis of 3,500 miles. Prior to August 1st, when the contract expired, the business transacted between the parties amounted to about \$40,000. All goods purchased previous to that date had been settled for at the end of each month.

As early as July, the defendants complained of the quality of the casings and tubes, and claimed they were obliged to make too many adjustments with customers. There was considerable correspondence between the parties from that time, involving complaints on the part of defendants in regard to the quality of the goods and complaints on the part of the plaintiff that defendants were too liberal in their allowances to customers in adjustments. Notwithstanding these complaints, the defendants early in September applied for a renewal of the contract for the ensuing season; but two weeks later, while their application was being considered by plaintiff, they entered into a contract for the coming year with another tire company. Meanwhile they continued to order goods from the plaintiff, and their aggregate purchases from August 2d to November 25th amounted to over \$15,000. Cash payments were made by them during this time to the amount of \$5,000. The credits to which they were entitled for adjustments left the balance for which plaintiff sued.

The settlement is pleaded in the answer substantially as follows: The defendants demanded of plaintiff that the latter accept a return of the goods on hand because of the inferior quality thereof and give the defendants credit for the cost price.

"(31) * * * Thereupon the plaintiff, through its agent, L. A. Brown, informed the defendants that it would settle with them and accept the said tubes, tires, and casings which were unsold, and promised the defendants that it would send their representative to check over all of the said tires, casings, and tubes on hand and give the defendants credit for the amount thereof and accept a return of the said goods and discontinue the business dealings provided for in the said contract with the defendants. That thereupon the defendants and the plaintiff, through the said agent, L. A. Brown, and other agents of the plaintiff, G. S. Shugart and Jno. J. Watts, did proceed to make a complete check and invoice of all the tires, casings, and tubes on hand in the defendants' possession in accordance with the said agreement and contract, and thereupon these defendants tendered to the said plaintiff all of said tubes, tires, and casings unsold and of the aggregate invoice price of about \$4,800 to the plaintiff, and there-

upon the plaintiff's agent G. S. Shugart refused to carry out the contract made for a settlement of the matter between the plaintiff and defendants and refused to accept the said tires and casings.

"(32) Defendants say that said adjustments and settlements were made in good faith by the defendants, and that by reason thereof the defendants are entitled to a credit upon the itemized account exhibited to the plaintiff's petition, for the full amount of all of said casings, tires, and tubes."

L. A. Brown was the sales manager of the plaintiff at Kansas City, and the business with the defendants was transacted through his office, except that all payments by defendants were made direct to the general office of the plaintiff at New York City. Albert E. Kirk, one of the defendants, transacted most of the business for the defendants, and his testimony with reference to the settlement is that in September, while his application for a renewal of the contract was pending, he had the first conversation concerning a settlement with Brown at Kansas City, in which he informed Brown that he was contemplating making a contract with another tire company for the coming season, and said:

"'Brown, you haven't got anything for me only a lot of junk. I have got to get something else, or lose my business.' And he said, 'I will take it up with the company.' He came to Hutchinson. In the meantime he had Mr. Watts come here and check up our tires to see if we had enough to check up our account. Mr. Brown said to me, 'Can I have these tires if I want them?' I said: 'Take them. They are yours.' He said, 'I will let you know in two or three days,' and he went back to Kansas City. In a short time after that, he called up and said: 'On Tuesday, Mr. Shugart and I will be down to check this stuff out. We will probably want to send it to Kansas City or Wichita.'"

Kirk further testified:

"Q. Did you go over all your accounts and check the whole thing over? A. Yes, sir. Q. According to this agreement? A. Yes, sir; and we checked up the tires, and found that there was plenty to satisfy the account. Q. How many tires did you have on hand, in dollars, compared with the amount of the accounts? A. \$6,500, and their claimed account was about \$4,490, I think, in that neighborhood. Q. Where were these tubes and casings at that time? A. All setting in the tire racks in our place of business. Q. You may state whether or not you were able to pay the freight on them to Wichita or Kansas City. A. Yes, sir. Q. Were you willing to do so? A. Yes, sir. Q. Did you inform them of that fact? A. Yes, sir. We paid plaintiff under this contract between \$35,000 and \$36,000, which does not include goods on hand at the time of this settlement."

Over plaintiff's objections, the court admitted in evidence a letter written by the defendants to the plaintiff company dated October 31, 1913, which contained the following statements:

"On July 28th we wrote a letter to your Kansas City branch telling them that unless your tires of the G. & J. line was made to give better service, it would be necessary for us to change to another line.

"We have had a constant fight in regard to adjustments we have been making. Have been compelled to raise our percentage of adjustments

or lose the privilege of adjusting tires. This was all previous to our signing for the new contract. We were then having considerable trouble, but in the last 40 days we have adjusted \$3,000.00 worth of tires. These tires are coming in on us so fast that we notified your Mr. Brown at Kansas City that we would change to another line and that we could not continue to fight with your people in our efforts to give our customers service, and that it was injuring our prospects for tire business in this territory.

"We later arranged for the Fisk line of tires. Last week your Mr. Brown called the writer up and told him not to ship any of these tires back to the factory, that we had on hand which amounts to between \$4,000.00 and \$4,500.00 worth that had not been settled for, that he and Mr. Shugart would be here the following Tuesday and would probably want to ship them to Wichita or Kansas City, and that they would check them out, inasmuch as we were dissatisfied with them.

"Mr. Brown and Mr. Shugart came and we checked up tires unpaid for and found that we were entitled to check back about \$4,400.00 worth of tires. However, this does not include Red tubes, or Wrapped tread casings with the G. & J. brand on them, as these tires and tubes have been giving us good service, and we have paid for these and expect to sell them.

"Mr. Shugart positively declined to take these tires over as per Mr. Brown's agreement over the phone while in Kansas City, and demanded his money, and finally wound up by promising us that he would put this matter in the hands of a collector. * * *

"We would like to know just what disposition you mean to make of this matter, as these tires are here subject to your disposition. These tires were never checked over to the Hutchinson Motor Car Company after dissolution, and the new concern has nothing to do with them.

"The writer offered to box these tires in question up and deliver them to the depot, and in case the company wished it, to ship them to either Wichita or Kansas City, freight prepaid. We give you timely notice in regard to this matter. * * *

"Trusting we will hear from you as to what disposition you are making of these tires, at an early date, we are."

[3] The objections to the admission of the letter to support defendants' contention as to the settlement relied upon are that it contains many self-serving declarations as to the facts, including statements of an alleged conversation with Brown in which he is said to have agreed to accept a return of the goods, and the letter appears by its date to have been written after the refusal to accept a return of the goods and when defendants knew that plaintiff was intending to hold them liable for their purchase price. If it was not competent evidence, there is force in the claim that its admission was prejudicial error, inasmuch as it is largely made up of a statement by defendants of facts favorable to defendants' contention relating to the alleged settlement, and the burden of proving the settlement rested upon defendants. The majority of the court are of opinion that, since the writer of the letter appears to have testified substantially to the same facts and the plaintiff had an opportunity to answer the letter with a denial of the facts if it desired so to do, there was no prejudicial error in the admission of the letter in evidence.

Brown was a witness for plaintiff, and denied that he had ever agreed to take back the goods and credit them on the account, and also denied that he had authority to enter into such an agreement. No testimony was offered to contradict his statement that his authority as agent of the plaintiff was limited to the usual duties of a sales agent and that he was not authorized to receive goods and credit them on a customer's account. The testimony of defendants is that all remittances for payment in cash were made direct to the company at its New York office. It appears, too, that, while Brown made the preliminary arrangements for the contract covering the season of 1913, the contract itself was made with the New York office; that the defendants, when they applied to Brown for a renewal of the contract, knew that the application had to be approved by the company at headquarters. In the first conversation which Kirk testified he had with Brown when the question of the settlement was broached, Kirk said Brown had told him he would "take it up with the company." On these facts, plaintiff insists that no authority to make the alleged settlement is shown, and that, on the contrary, it is self-evident that defendants were fully aware that Brown, as agent, lacked authority to make such an agreement; and decisions are cited to the effect that a sales agent has no implied authority to collect the purchase price of merchandise sold nor to agree to accept a return of the goods in lieu of payment.

[1] The majority of the court are of the opinion that there was evidence for the jury to determine the question of the "implied," which means the "actual," authority of Brown. See discussion of the law in reference to an agent's implied as distinguished from his ostensible authority in *Wilson v. Haun*, 155 Pac. 798. From the evidence showing that after Brown agreed to "take it up with the company" he went to Hutchinson, checked up the stock on hand, and made the statements testified to by Kirk, the jury might have believed he had obtained from his principal the necessary authority to make the arrangement for accepting the goods in lieu of the cash price. Brown's testimony is that he went to Hutchinson and checked up the goods on hand and the account with the defendants at the request of the credit department of the plaintiff company, because there was some question respecting the financial responsibility of defendants. It appears that the defendants, who had conducted their business under the name of the Hutchinson Motor Car Company, dissolved their partnership—just when is not stated, but apparently the plaintiff had been informed of the fact before Brown and Shugart (the latter, plaintiff claims, representing the credit department) went to Hutchinson. The jury may have disbelieved Brown's state-

ment of the purpose of his presence and conduct in checking over the accounts and stock.

[2] The conclusion of the court is that there was sufficient evidence from which the jury might infer that he had actual authority to make the settlement. The plaintiff, conceding for the purposes of argument that Brown possessed the necessary authority, strenuously urges that there was no agreement that the contract for the settlement should satisfy the debt, but only that the goods should be taken back and defendants' account credited with the cost price thereof; that, as the agreement was not executed and the goods remained in the possession of the purchaser, there was and could be no payment of the debt by virtue of the agreement until it was fully executed by an acceptance of the goods. On this question, the majority of the court holds there was evidence to sustain a finding (which must be regarded as included in the general verdict) to the effect that there was a constructive delivery. Kirk's testimony is that he said to Brown: "The goods are yours. Take them." Also, that he informed Brown that he was able, ready, and willing to prepay the freight to the place where plaintiff desired them shipped.

For reasons stated, the judgment will be affirmed.

JOHNSTON, C. J., and BURCH, MASON WEST, MARSHALL, and DAWSON, JJ. concurring.

PORTER, J. (dissenting). I have grave doubts whether there was any evidence upon which the jury could infer authority on the part of the sales agent, Brown, to make an agreement to accept goods in payment of the price; but, aside from the question of his authority, I cannot concede that either the agreement to take them back or what occurred at the time the goods were checked over satisfied the debt the defendants owed for the purchase price.

The defendants' case must either stand or fall upon the fact that Brown agreed to accept a return of the goods to the amount of the debt, or upon what occurred at the time the goods were checked up. The agreement itself could not satisfy the debt, in the absence of a contract to that effect. If the agreement had been that Brown was to accept defendants' note due in the future and defendants had tendered their note, a refusal to accept it would not have discharged the debt. To have that effect, the contract must have been that the execution and delivery of such a note was to constitute payment. After the goods had been checked up and it had been found that there were \$8,500 worth of them on hand, all of which Kirk says were sitting in the racks at defendants' place of business, this is what occurred. Brown said: "Can I have these tires if I want them?" Kirk said: "Take

them: They are yours." Brown then said: "I will let you know in two or three days." In addition to this, Kirk testified that he offered to prepay the freight on the goods to the place plaintiff might desire them shipped. Shugart notified the defendant very shortly afterward that the plaintiff would not accept the goods and that the claim would be placed in the hands of a collector. On cross-examination, Kirk's testimony shows that after the refusal to accept the return of the goods defendants treated the goods as their own and continued to sell from the stock without discrimination. In fact, no discrimination was possible, because the particular goods to satisfy the debt had never been set aside from the rest of the tires purchased from the plaintiff and there was no way to identify them. At the time of the trial, Kirk said he had on hand only about \$2,700 worth of tires and tubes, but that he had on hand \$900 from adjustments. Of course, defendants' right to make adjustments at the expense of plaintiff terminated with the contract, and, moreover, the proceeds of the adjustments and the value of the goods remaining amounted to only \$3,600, while the debt was \$4,490. It is true that, when the obligation is payable in specific goods, a tender of the specific articles need not be kept good, because the tender vests the title in the teree and discharges the obligation. 38 Cyc. 165. The obligation of the defendants was to pay cash by the 10th of each month. While the ordinary rule is that, unlike a tender of money, a tender of specific goods need not be kept good, it is otherwise when, after the tender has been refused, the tenderer treats the specific property as his own and sells it. 38 Cyc. 166.

"Where a creditor offers to receive payment of his debt in certain property at a certain price, and the debtor tenders the property accordingly, which is refused by the creditor, and the debtor retains the property and disposes of it as his own, it is not a satisfaction of the debt." *Mayfield v. Cotton*, 21 Tex. 1, Syl.

An examination of the answer as set forth in the majority opinion shows that defendants claimed no more with respect to the settlement than an agreement with Brown to accept a return of enough goods to be checked up at cost price to pay the debt, the checking of the goods, a tender of the goods, and a refusal to accept them. As a conclusion of law, the answer states that by reason of all this and the fact that the settlement was made in good faith on their part, defendants are entitled to a credit for the cost price of the goods tendered. I think that, so long as the goods remained mingled with the general stock of similar goods in the racks in defendants' warerooms, there was neither an actual tender nor constructive delivery, and that, because the defendants after the refusal to accept the goods treated them as their own and sold them the defense of a settlement fails.

In my opinion it was error to admit in evidence defendants' letter to the plaintiff written after the refusal to accept the return of the goods and containing defendants' version of the facts.

WOOD v. BROWN et al. (No. 20278.)
(Supreme Court of Kansas, July 8, 1916. Rehearing Denied July 29, 1916.)

(Syllabus by the Court.)

WATERS AND WATER COURSES §119(2) — STATUTE—CONSTRUCTION—"WATER COURSE."

Section 2 of chapter 175 of the Laws of 1911, permitting an owner of land to drain the same in the course of natural drainage by constructing open or closed drains whereby water will be carried into some natural water course, uses the term "water course" according to its previously accepted meaning, which excluded depressions lacking the characteristic of a distinct channel cut in the soil by running water and having a bed and banks discernible by casual glance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131, 133; Dec. Dig. 119(2).]

Appeal from District Court, Bourbon County.

Action by Frank Wood against Sarah A. Brown and others. From a judgment for plaintiff defendants appeal. Affirmed.

Chester A. Ramsey and John H. Crain, both of Ft. Scott, for appellants. C. E. Cory and H. A. Pritchard, both of Ft. Scott, for appellee.

BURCH, J. The action was one to enjoin the defendant from collecting water by means of a tile drainage system on his farm and discharging it upon the plaintiff's farm through a 6-inch pipe and a ditch. The plaintiff recovered, and the defendant appeals.

The 6-inch pipe was laid in a ditch through what is called a hogback near the line dividing the two farms. The pipe ends on the defendant's farm 19 feet from the line. It empties into a dug ditch leading to a depression on the plaintiff's land through which water naturally finds its way to Lath branch, a creek emptying into the Marmaton river. The plaintiff's contention was that before the defendant installed his tile drainage system only a small quantity of surface water, not enough to interfere with use of the plaintiff's land, found its way through the defendant's land to the depression. The tile drainage system collected surface and subsurface water which would not have reached the plaintiff's land and discharged it upon plaintiff's land in such quantities that it uncovered the roots of trees, even washed out one tree, and prevented the plaintiff from farming his land. The defendant justified under the statute of 1911, which reads as follows:

"Section 1. A lower owner or proprietor shall not construct or maintain a dam or levee for the

purpose of obstructing the flow of surface water onto his land to the damage of the adjacent upper owner or proprietor; but nothing herein shall be construed as preventing an owner of land from constructing a dike or levee along the bank of a natural watercourse to repel flood water from such natural watercourse: Provided, that the provisions of this act shall apply only to lands used for agricultural purposes and highways lying wholly outside the limits of any incorporate city.

"Sec. 2. Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, whereby the water will be carried into some natural watercourse, or into any drain upon a public highway, for the purpose of securing proper drainage to such land and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation: Provided, that owners of land constructing an outlet to a drain upon any public road shall leave the road in as good condition as it was before the drain was constructed, the question as to such condition to be determined by the board of county commissioners and the county engineer, in counties having a county engineer, and in other counties the county surveyor." Laws 1911, c. 175.

The journal entry of judgment reads as follows:

"The prayer of the plaintiff's petition should be sustained to the extent that defendants should be prohibited from further permitting the discharge of water from the present outlet of the 6-inch tile drain from which the water runs from defendants' lands on to and across a portion of the plaintiff's lands for that there was not at such point of discharge what is known or recognised by the court as a natural water way."

The first section of the act of 1911 changed the rule that surface water is a common enemy which every landowner may fight and forbade interference by a lower proprietor with the flow of surface water from lands of an upper proprietor. The second section of the act gave landowners the right to drain their lands in the general course of natural drainage by means of open or covered drains, but attached the condition that such drains should carry the water to a natural water course. The question is: What is a natural water course?

The defendant would have the term water course include any natural depression having reasonable limits as to width along which water is accustomed to flow. At the time the statute was enacted the term had a long-settled and well-understood meaning in this state, which accorded with the generally accepted meaning elsewhere. It excluded depressions in the land lacking the characteristic of a distinct channel cut in the soil by force of running water and having a bed and banks discernible by casual glance. *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Rait v. Furrow*, 74 Kan. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157, 10 Ann. Cas. 1044. The usual significance clearly attached to the term as used in the first section of the act and the court has no reason to believe the Legislature intended it should mean something entirely different in the second section. Whether or not cor-

rect rules of drainage have heretofore prevailed, the term water course has been employed in the law of drainage as elsewhere to distinguish a course having an eroded channel with clearly distinguishable bed and banks from simple depressions lacking that characteristic. If the Legislature had intended the word should henceforth mean the very thing from which its definition had previously distinguished it, some indication of the change would certainly have been given.

It is said that the statute was copied from a statute of the state of Illinois, and that the Supreme Court of Illinois assigns to the words "water course," as used in the statute, the broad meaning for which the defendant contends. *Lambert et al. v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611. What happened was this: In the earlier case of *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, the Illinois court, in announcing rules of law relating to drainage, in effect broadened the commonly accepted definition of water course to include depressions and swales. Afterwards the Legislature passed an act substantially adopting the court's drainage rules. The Legislature did not, however, adopt the court's definition of a water course. On the other hand, it used the term water course in the usual sense and accomplished the purpose in view by adding the words italicized in the following transcript from the statute:

"Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water-course, or into any natural depression, whereby the water will be carried into some natural water-course, or into some drain on a public highway with the consent of the commissioners thereto; and when such drainage is wholly upon the owner's land, he shall not be liable in damages therefor to any person or persons or corporation." Rev. Stat. Ill. 1891, c. 42, § 78; 8 Ill. Stat. Ann. § 4478.

All the court had to say in the *Lambert-Alcorn* Case about the statute, besides quoting it, is contained in the following extracts from the opinion:

"Since the decision by this court of the case of *Peck v. Herrington*, the Legislature has enacted a law, embodying substantially, in statutory form, the rule established in that case. * * * Under this statute, the landowner draining his own land, may drain it 'in the general course of natural drainage,' and discharge the water 'into any natural water course,' or 'into any natural depression whereby the water will be carried into some natural water course.' The system of drainage contemplated by the defendant, and which the bill was brought to restrain, comes clearly within the provisions of this statute, as well as within the rules established by the decisions of this court." 144 Ill. 327, 328, 33 N. E. 53, 21 L. R. A. 611.

Since the Illinois Legislature clearly distinguished between natural water courses and natural depressions it does not seem important that the Illinois court adhered to

its former inclusion of both in the same definition. When the Legislature of this state made use of the Illinois statute it stopped with drains into natural water courses and omitted what the defendant would have read into, the act, natural depressions whereby water would be carried to natural water courses.

The defendant by artificial means was collecting on his own land and discharging on the plaintiff's land, to the plaintiff's injury, water which would not otherwise reach the plaintiff's land and water which would reach the plaintiff's land in sufferable quantities and in a sufferable way. The defendant had no prescriptive right to do this because he utilized an old ditch in laying the 6-inch pipe. There was evidence that he did more than simply clean out the ditch in order to lay the pipe. The action was not barred by any statute of limitations. Sufficient objection by the plaintiff to the defendant's conduct appears in the transcript of the evidence to prevent application of estoppel, which was not pleaded.

The judgment of the district court is affirmed. All the Justices concurring.

OLIVER v. CHRISTOPHER et al. (No. 20637.)

(Supreme Court of Kansas. July 8, 1916. Rehearing Denied July 29, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §412—REVIEW—HARMLESS ERROR—RULINGS ON PLEADINGS.

The refusal to strike from a petition under the Workmen's Compensation Act (Laws 1911, c. 218) allegations regarding negligence held not to constitute material error, because in the light of the entire record it clearly could not have resulted in prejudice.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §412.]

2. APPEAL AND ERROR §1042(4)—REVIEW—HARMLESS ERROR—RULINGS ON PLEADINGS.

The refusal to strike from the petition matter negating an anticipated defense held to be nonprejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4113; Dec. Dig. §1042(4); Pleading, Cent. Dig. § 1172.]

3. MASTER AND SERVANT §405(6)—WORKMEN'S COMPENSATION ACTS—PROCEEDINGS—EVIDENCE.

Testimony of a plaintiff that the loss of an eye had impaired his efficiency as a workman, because he could not gauge distances as well as before, is a sufficient basis for a finding of partial disability under the Compensation Act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §405(6).]

4. APPEAL AND ERROR §302(3)—OBJECTIONS IN LOWER COURT—MOTION FOR NEW TRIAL.

The rule applied that the omission to produce excluded evidence at the hearing of the motion for a new trial waives any error in its rejection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747; Dec. Dig. §302(3).]

5. MASTER AND SERVANT — 412—REVIEW — HARMLESS ERROR—VERDICT.

Where in an action under the Workmen's Compensation Act the duration of the plaintiff's total disability and the existence of permanent partial disability are fixed by special findings which have not been influenced by any error available on appeal, a judgment making the minimum allowances required by the statute cannot be reversed at the instance of the defendant because the general verdict or other findings are not supported by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 412.]

Appeal from District Court, Sedgwick County.

Proceedings under the Workmen's Compensation Act by J. H. Oliver against George C. Christopher and another, partners. From an allowance of compensation, the defendants appeal. Affirmed.

T. A. Nofztger and George Gardner, both of Wichita, and Sherman & Landon, of Kansas City, Mo., for appellants. George W. Adams and John W. Adams, both of Wichita, for appellee.

MASON, J. J. H. Oliver, by reason of an injury resulting in loss of the sight of one eye, recovered a judgment against his employers, George C. Christopher & Son, under the Workmen's Compensation Act, for \$1,251. The amount was arrived at by deducting \$50 for medical service rendered from allowances for total incapacity for five months at \$6 a week, and for partial incapacity for seven years and seven months additional at \$3 a week. The defendants appeal.

[1] 1. The petition undertook to tell in detail how the accident happened, stating, in substance, that the machinery the plaintiff was using was defective, that his injury was due to its defects, and that he was without fault in the matter. The defendants complain of the overruling of a motion to strike out these statements as having no place in an action for compensation under the statute, and as tending to create prejudice in the minds of the jury, to whom this portion of the petition was known by its having been read by the plaintiff's attorney in opening the case, and by its having been quoted in the instructions. Matters relating to negligence are, of course, irrelevant in a proceeding under the Compensation Act, and bringing them before the jury may in some circumstances be prejudicial. *Ruth v. Witherspoon-Englar Co.*, 98 Kan. 179, 157 Pac. 403. Here the reference to the subject in the pleading was so incidental that the likelihood of its having influenced the jury was small. An instruction was given to the effect that the plaintiff was not required to prove negligence in order to recover, and that his recovery must be based only on his incapacity for work occasioned by his injury. It is true a verdict was returned for \$1,600,

a greater amount than was warranted by the pleadings, evidence, and findings. But, as will hereinafter appear, the only vital questions required to be determined by the jury were the duration of the plaintiff's total disability, and whether there was any permanent partial disability; that is, whether the loss of the sight of one eye was permanent, and, if so, whether it impaired his earning capacity. These issues were covered by special findings, which obviously could not have been influenced by the allegations regarding negligence, and the general verdict was properly disregarded. It is manifest, therefore, that no prejudice resulted from the ruling complained of. A copy of the claim for compensation which was attached to the petition as an exhibit, and which contained a statement that the injury was due to defective machinery, was introduced in evidence over the defendants' objection. The introduction was unnecessary, as service of the notice had been admitted, but it could not have been prejudicial, for the reasons already indicated.

[2] 2. The petition negatived all the conduct on the part of the plaintiff, such as his willful failure to make use of a protection provided for him, which under the statute (Laws 1911, c. 218, § 1) would have prevented a recovery. A motion to strike out these allegations was also overruled. They were doubtless unnecessary, as they related to matters of defense, but their presence in the petition could not have affected the judgment.

[3] 3. The jury returned a finding, which is attacked as contrary to the evidence, but which is held to be not without support, that the injury caused a total disability of five months. They also found that during the remainder of his life the plaintiff would be partially incapacitated, and in a separate finding they estimated his future earning capacity at \$1 a day. The defendants maintain that there was no evidence to support either of these findings. In a recent case a judgment based on a deduction of 15 per cent. of a workman's earning capacity by reason of the loss of an eye was reversed (by a divided court) for want of specific evidence in its support. *International H. Co. v. Industrial Commission*, 157 Wis. 167, 147 N. W. 53. In the opinion the character of proof required on that issue is discussed, the court refusing to take judicial notice that in employing workmen to operate machinery preference will be given to those having the use of both eyes. Here the plaintiff testified that since his injury he could not do the work at which he had been employed; that he "could not get the focus"; that he had undertaken work that involved driving nails, and had found that his usefulness was impaired, because he could not gauge their distance as he could before. This testimony tended to show some diminution

tion in his efficiency. Possibly its effect may have been increased by his appearance. *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244. The jury were therefore warranted in finding, as they did, that there was some substantial permanent impairment of his earning capacity. Their estimate that it was reduced to \$1 a day may be rejected without affecting the judgment. The statute requires minimum allowances of \$6 a week during total disability, and \$3 a week during partial disability. Laws 1911, c. 218, § 11, amended by Laws 1913, c. 216, § 5; *Roberts v. Packing Co.*, 95 Kan. 723, 149 Pac. 413. The amount of recovery was fixed by the court on this basis.

[4] 4. The defendants produced several witnesses, each of whom had for some time been deprived of the use of an eye, and offered to show by them that their capacity to obtain and perform such work as that at which the plaintiff had been employed had not thereby been diminished. The evidence was rejected. Assuming that it was competent, the ruling is not available as error because at the hearing of the motion for a new trial no proof was made as to what the witnesses would have sworn to had they been permitted to testify. Civ. Code, § 307 (Gen. St. 1909, § 5901).

[5] 5. Since the duration of the plaintiff's total disability and the existence of permanent partial disability are established by special findings which were not influenced by any error that is available on review, and the amount of the judgment was arrived at by applying the law to the facts so established, making the minimum allowances required by the statute, no defect in the general verdict or in the other findings can justify a reversal at the instance of the defendants.

The judgment is affirmed. All the Justices concurring.

HIBBARD v. CITY OF WICHITA.

(No. 20052.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS —733(1)—TORTS
—MAINTENANCE OF PARK—"GOVERNMENTAL
FUNCTION."

The maintenance of a zoological garden in a public park by a city is a "governmental function," and the city is not liable in damages for injuries inflicted on visitors by animals through the negligence of the city's officers or agents in not properly confining the animals.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1547; Dec. Dig. ¶ 733(1).

For other definitions, see *Words and Phrases*, Second Series, *Governmental Function*.]

West, J., dissenting.

Appeal from District Court, Sedgwick County.

Action by Bessie Hibbard, a minor, by her next friend and father, Pitt Hibbard,, against the City of Wichita. Judgment for plaintiff, and defendant appeals. Reversed, with direction to enter judgment for defendant.

Earl Blake, of Wichita, for appellant. Stanley, Stanley & Hegler, of Wichita, for appellee.

MARSHALL, J. In this action the plaintiff seeks to recover damages for an injury sustained by being bitten by a coyote in the defendant's park. The plaintiff recovered judgment. The defendant appeals.

The defendant maintained a public park in which were located a number of buildings, where wild animals were kept. Three coyotes were there confined in a cage constructed of heavy wire of 2-inch mesh, built upon a cement foundation, about two feet from the ground. Mrs. Hibbard, mother of the plaintiff, drove to this park with a neighbor, and upon her arrival there proceeded to prepare a lunch, permitting the plaintiff, a child of four years, and an 11 year old daughter, together with an 11 year old boy of the neighbor, to wander over the park and to the animal cages some 200 or 300 feet away. After the children had gone into the zoological part of the park, the plaintiff wandered away from her sister and the neighbor boy, and, with a man by the name of Tully Myers and his children, one in his arms, went up to the cage containing the coyotes. While watching these animals, and while Mr. Myers was adjusting the hat of the child in his arms, the plaintiff approached the cage and put her hand and arm on the wires of the cage. Her hand and arm were seized by one of the coyotes and scratched and bitten. One large wound on the forearm and numerous small ones were made by the claws and teeth of the coyote. Claim was filed against the city within four months, and action brought, resulting in a judgment against the city for \$500.

The city sets up contributory negligence on the part of the plaintiff, of her parents, and of Mr. Myers; and contends that in the maintenance of the park and zoo it was acting in the exercise of a purely governmental function and is not liable for the negligence of those in charge of the animals.

The question that determines the judgment that must be rendered in this case is, Was the city acting in the exercise of a purely governmental function and therefore not liable for the negligence of any of its officers or agents in the care and maintenance of the park and zoological garden? In *Harper v. City of Topeka*, 92 Kan. 11, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032, it is said that:

"The maintenance of a park by a city for the sole benefit of the public, and not for any profit or benefit to the municipal corporation, is a governmental or public function." Syl. par. 1.

Zoological gardens are commonly maintained in parks as a part thereof, under the same authority, and for the same reasons that parks are maintained. The same liability should attach to keeping a zoological garden as attaches to the maintenance of a park. No profit is ordinarily received from such gardens. In the present case it does not appear that the defendant city received any profit whatever from its zoological garden. It was kept for the pleasure and education of the entire public. Is the city liable for negligence in the manner in which the coyotes were confined and kept? In *Freeman v. Chanute*, 63 Kan. 573, 577, 66 Pac. 647, is found a quotation from Throop on Public Officers, as follows:

"With respect to cities and other municipal corporations, the general rule is that the body is liable for the acts or omissions of its officers in the lawful discharge of a corporate duty, imposed by law upon the body itself; but not where the act is for the general public interest, or where the statute specifically imposes the duty upon the officer." Section 551, p. 523.

In *Harper v. City of Topeka*, supra, this court said:

"Ordinarily, cities and other municipal corporations in the exercise of their governmental functions are not liable in damages for any neglect, or even wrongdoing, of their officers in the discharge of such duties, unless such liability is expressly imposed upon them by law." 92 Kan. 13, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032.

See, also, the cases there cited.

In *Butler v. Kansas City*, 97 Kan. 239, 155 Pac. 12, we declared:

"It is a general rule that the governmental agencies of the state are not liable in an action of tort for either nonfeasance or misfeasance." 97 Kan. 241, 155 Pac. 12.

This rule has been applied in actions for false imprisonment by city officers (*Peters v. City of Lindsborg*, 40 Kan. 654, 20 Pac. 490; *City of Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949); and in actions for damages sustained by reason of the defective condition of the prison in which the person injured was confined, or by reason of the negligence of the officers in charge of the prison (*La Cief v. City of Concordia*, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; *City of New Klowa v. Craven*, 46 Kan. 114, 26 Pac. 426). In *Harper v. City of Topeka*, supra, this court held a city not liable for the death of a boy drowned by breaking through the ice while skating on a pond in a park. The city stationed no watchman and did nothing to prevent children from going on the ice at any time. In *Butler v. Kansas City*, supra, the city was held not liable for injuries sustained by an inmate of a pesthouse by a splinter from the floor penetrating his foot while he was walking from his bed to a stove to make a fire. In that case it was admitted by demurrer that the city was negligent in maintaining the floor of the room in a defective and dangerous condition.

Following these authorities, there is but

one conclusion to be reached in the present case, and that is that the defendant was acting in a governmental capacity, and that it is not liable for the negligence of its officers or agents in confining the animals in the zoo.

Bowden v. Kansas City, 69 Kan. 587, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 965, is cited in support of the contention of the plaintiff. In *Harper v. City of Topeka*, supra, this court said that the real principle involved in *Bowden v. Kansas City*, supra, was the relation of employer and employé. There is no relation of employer and employé in the present case.

A number of states follow a principle contrary to the one that has been followed in this state, so far as negligence in the maintenance of parks is concerned; while a number of other states adhere to the rule declared in this state. A collation of these authorities at this time will not serve any good purpose. The rule herein announced is firmly fixed in our jurisprudence and must be followed, unless distinctly overruled.

There seems to be an inconsistency between the rule we now declare and that holding cities liable for negligence in the maintenance of its streets. In *Harper v. City of Topeka*, supra, after stating that cities in the exercise of their governmental functions are not liable for any neglect or wrongdoing of their officers in the discharge of such duties, unless such liability is expressly imposed by law, this court said:

"An exception to the rule has been made which holds cities liable for damages resulting from defects in their highways." 92 Kan. 13, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032.

McQuillin on Municipal Corporations, vol. 6, § 2720, page 5590, discussing the liability of cities for negligence in the maintenance of streets and sidewalks, says:

"This rule is said to be founded upon an 'illogical exception' to the general rule of the common law, prohibiting actions against municipalities for negligence in the discharge of duties imposed upon them for the sole benefit of the public, and from which they derive no compensation or benefit in their corporate capacity."

The defendant city is not liable. The judgment is reversed, and the trial court is directed to enter judgment for the defendant.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and DAWSON, JJ., concur.

WEST, J. (dissenting). The coyote cage was a most malignant and excuseless attractive nuisance. While the maintenance of a public park may be a governmental function, still, as we said in *Murphy v. Fairmount Township*, 89 Kan. 760, 765, 133 Pac. 169, quoting from the Iowa Supreme Court:

"The creation and maintenance of a nuisance is very clearly not a governmental function, and the authorities are practically of one voice on the subject."

The maintenance of a public park does not imply and should not include the provision

of man-eating specimens of zoology to dine upon the children of those who visit such park. The foregoing opinion is in conflict with *Kansas City v. Siese*, 71 Kan. 283, 80 Pac. 626; that portion of the opinion in *Harper v. City of Topeka*, 92 Kan. 11, 139 Pac. 1018, found on page 14; the doctrine of *Murphy v. Fairmount Township*, 89 Kan. 760, 133 Pac. 169; *Roman v. City of Leavenworth*, 90 Kan. 379, 133 Pac. 551; and *Roman v. City of Leavenworth*, 95 Kan. 513, 148 Pac. 746. I am entirely satisfied with these decisions, and do not believe they should be overturned or departed from.

WHITSEL v. WATTS. (No. 20069.)
(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. DAMAGES — 49 — ELEMENTS OF COMPENSATION — FRIGHT AND MENTAL ANGUISH.

In general, there can be no recovery for fright or mental anguish unless it results in or is accompanied by bodily injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100, 255; Dec. Dig. — 49.]

2. DAMAGES — 52 — ELEMENTS OF COMPENSATION — BODILY INJURY FROM FRIGHT.

A recovery may be had for bodily injuries which are the natural and proximate result of extreme fright caused by negligence, and especially where the fright is caused by willful wrong or an act so grossly negligent as to show utter indifference to consequences.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100, 255; Dec. Dig. — 52.]

Appeal from District Court, Bourbon County.

Action by Carrie Whitsel against D. M. Watts. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Keene, of Ft. Scott, for appellant. Hubert Lardner, of Ft. Scott, for appellee.

JOHNSTON, C. J. Carrie Whitsel recovered a judgment against D. M. Watts for \$225 as damages for injuries which he is alleged to have willfully and maliciously inflicted upon her. Defendant appeals, and insists that the evidence did not warrant the verdict of the jury and the judgment of the court and that several rulings made during the trial were erroneous.

It appears that defendant held a mortgage on some hogs belonging to the plaintiff's husband, and that accompanied by a constable he visited the plaintiff's home when her husband was absent and undertook to obtain possession of the mortgaged hogs. Upon arriving at the place, the constable went into the house and told the plaintiff of the purpose of their visit, but the plaintiff refused to surrender possession of the hogs. The interview between them occurred in the yard between the house and the gate near which the defendant was seated in a buggy. According to the plaintiff's testimony, the de-

fendant, upon learning of the plaintiff's refusal to give possession of the hogs, jumped out of his buggy, ran towards the plaintiff in an angry, threatening manner, swearing and shaking his fist saying: "You are fooling with the wrong person this time." She was greatly frightened, turned, and ran into the house, closing and fastening the door, and then collapsed. Her husband returned shortly after the occurrence and found her in an unconscious state, and when she became conscious she was suffering intense pain and within a few hours a miscarriage and subsequent illness resulted.

[1,2] Defendant insists that he inflicted no bodily injury upon her, that no physical injury was in fact threatened, that there was no assault upon her, and that proof of a mere fright furnishes no basis for a recovery. It has long been the rule here that there can be no recovery for fright or mental anguish unless it results in or is accompanied by physical injury to the person. *Shelton v. Bornt*, 77 Kan. 1, 93 Pac. 341. The plaintiff, however, is not asking a recovery for fright alone, but for the personal injuries directly resulting from fright caused by the willful tort of the defendant. It is argued that as the acts of the defendant did not amount to an assault she has no right to recover; but the defendant's liability does not depend upon whether his wrongful onset constitutes an assault. The plaintiff is seeking to enforce a civil liability for the consequences of the wrong and the general rule is that a wrongdoer is liable in damages for injuries which are the natural and reasonable consequences of his wrongful act, whatever name may be fittingly applied to the wrong. Taking the testimony of the plaintiff, as the jury did, the defendant advanced upon the plaintiff with clenched fist in a threatening manner, at the same time using violent, abusive, and insulting language towards the plaintiff which she says led her to fear that he would strike and injure her, and the result was the nervous prostration and miscarriage. A physician testified that miscarriages do result from fright and mental disturbances. In 1 *Thompson's Com.* on the Law of Negligence, § 156, it is said:

"Not only will every competent physician or surgeon that can be summoned testify that a severe fright or nervous shock has a tendency to produce a miscarriage in a pregnant woman, but it is a matter so well known that it may be rested upon common observation; and every court ought to take judicial notice of such a fact."

There is a conflict in the authorities in regard to whether there can be a recovery for physical injuries resulting from fright where the act causing the fright was merely negligent and not willful, and differences of opinion as to what constitutes a physical injury and whether certain injuries can be regarded as the proximate results of the negligence which caused the fright; but the great

weight of authority is that, if the bodily injury is the direct and reasonable consequence of the fright caused by the negligence, a recovery may be had although the negligence may have been unintentional. Notes: 3 L. R. A. (N. S.) 49; 22 L. R. A. (N. S.) 1073; 23 L. R. A. (N. S.) 667; 24 L. R. A. (N. S.) 1159; 12 Ann. Cas. 741; Ann. Cas. 1913E, 506; G., O. & S. F. Ry. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856; 8 R. C. L. § 81. Although the authorities are in conflict as to injuries resulting from fright where fright is caused by a merely negligent act, there is general agreement in the cases that a recovery may be had where the injury results from fright caused by a willful wrong or an act so grossly negligent as to show utter indifference to consequences. *Loneragan v. Small*, 81 Kan. 48, 105 Pac. 27, 25 L. R. A. (N. S.) 976; Notes: 3 L. R. A. (N. S.) 66; Ann. Cas. 1913E, 506; 13 Cyc. 4144. The testimony produced by the plaintiff tended to establish that the fright of the plaintiff was caused by the intentional wrong of the defendant, and the finding of the jury is that he acted wantonly and with the intention of injuring the plaintiff. It follows that he is liable for the injuries which resulted from his wrong.

There is complaint that the plaintiff's husband was allowed to testify to statements made by her which are said to be of a self-serving character. Those objected to were exclamations of pain and acts of the plaintiff indicating that she was suffering pain before the miscarriage, also requests that he obtain medicine or some relief for her. Husband and wife are not allowed to testify for or against each other concerning communications made by one to the other during the marriage, and one or two of the statements in question might be regarded as communications, but they cannot have been prejudicial. They only went to show the labor pains endured by the plaintiff about the time of the miscarriage, and as to that there can be no controversy. Only material errors are available for a reversal.

The judgment is affirmed. All the Justices concurring.

HADDOCK, v. McDONALD et al. (No. 20297.)
(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. GARNISHMENT §17—LIABILITIES SUBJECT—SALARY OF OFFICER.

A proceeding to subject to the payment of a judgment the salary due from a county to a deputy sheriff cannot be maintained under section 6117 of the General Statutes of 1909 (Code Civ. Proc. § 532).

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 32-34, 44; Dec. Dig. §17.]

2. GARNISHMENT §17—LIABILITIES SUBJECT—OBLIGATIONS OF MUNICIPALITY.

The Legislature, in enacting chapter 151 of the Laws of 1889 exempting municipal corporations from garnishment, intended to include and exempt counties and similar bodies, as well as cities.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 32-34, 44; Dec. Dig. §17.]

Appeal from District Court, Wyandotte County.

Action by William Haddock against Thomas McDonald and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Alex McIntosh, of Kansas City, for appellant. James F. Getty, of Kansas City, for appellees.

WEST, J. The plaintiff brought this action under section 522 of the Civil Code (section 6117, Gen. Stat. 1909) to subject to the payment of certain judgments the salary due the defendant from the county for his services as deputy sheriff. While it was alleged that he was an employé, it is admitted in the brief that he was deputy sheriff. The court sustained a demurrer to the amended petition, and from this ruling the plaintiff appeals.

[1] While the language of the section would bear the construction contended for by the plaintiff and given by the Supreme Court of Ohio in *City of Newark v. Funk & Bro.*, 15 Ohio St. 462, holding that a city is included in the words "body politic or corporation," this court in *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196, took the contrary position, and held that to subject a city to such a proceeding would be against public policy. It is suggested that, as the Ohio statute was made a part of the Code of 1868, this decision rendered in 1864 is controlling. The same provision, however, is found in *Compiled Laws 1862*, c. 26, § 470, except that the words "body politic or corporate" in the Code of 1862 read "body politic or corporation" in the present Civil Code (section 522). The present provision concerning counties (Gen. Stat. 1909, § 2057) is also found in *Compiled Laws 1862*, c. 52, § 1, each of which prescribes that a county shall be a body corporate and politic. While it is settled that under article 12 of the Constitution cities are corporations and counties are merely quasi corporations (*Beach v. Leahy*, 11 Kan. 23; *Elkenberry v. Township of Bazaar*, 22 Kan. 557, 31 Am. Rep. 198; *County of Marion v. Riggs*, 24 Kan. 255), the *Switzer* Case was followed in *National Bank v. City of Ottawa*, 43 Kan. 295, 23 Pac. 485, holding that considerations of public policy would not allow a city of the second class, a corporation, and not a mere quasi corporation, to be liable under process of garnishment. Different courts take different views of this matter. 12 Cyc. 28. Although the decision in the *Switzer* Case was under an act con-

cerning garnishment in justice court expressly naming corporations, and although it was held that such designation should include only private corporations, the reasoning of the opinion was that to subject public corporations to garnishment would be to turn them into instruments or agencies for the collection of private debts, which would be manifestly for private and not for public welfare, and that it would be against public policy to require such corporations to consume the time of their officers or the money in their treasuries in defending suits "in order that one private individual may the better collect a demand due from another." 40 Kan. 252, 19 Pac. 621, 10 Am. St. Rep. 196. That case and the cited one in 43 Kan. 295, 23 Pac. 485, which followed it, involved debts to private persons. Here the salary claimed is that alleged to be due to the deputy sheriff of Wyandotte county, an officer with whose appointment the county has nothing to do and whom it is required to pay a salary of \$1,200 a year. Gen. Stat. 1909, §§ 2193, 3714. The statute in question (Gen. Stat. 1909, § 6117) mentions "any money, goods or effects which he may have in the possession of any person, body politic or corporation." It can hardly be said strictly that an officer of a county entitled to a salary of \$100 a month has in the possession of such county any money, goods, or effects. It is not like the case of condemnation money paid into the treasury, ready to be turned over to the proper party. It is not like a document or article of property in the possession of the municipality, to be turned over on demand. It is simply the ordinary case of a right to salary earned. It is not money, it is not goods, it is not effects, in any literal sense; it is merely the right to a warrant drawn upon the treasury which, when received and indorsed, may be cashed.

[2] While this is not a direct proceeding in garnishment, but more in the nature of a proceeding in aid of execution, the result is the same, and the objections are the same. For unless expressly commanded by the Legislature the officers of a county should not be compelled to devote their time and attention, or that of their law officers, to making appearances in garnishment cases, or to the defense of proceedings of this character to subject the salaries of officers to the payment of judgments in favor of third parties. Again, when the garnishment statute was amended in 1889 (Laws 1889, c. 151), it was provided that any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person excepting a municipal corporation. In *Eikenberry v. Township of Bazaar*, 22 Kan. 557, 561, 31 Am. Rep. 198, in discussing the distinction between corporations and quasi corporations, it was said:

"The theory of these various decisions is, in effect, that such organizations, though corporations, exist as such only for the purposes of the general political government of the state; that all the powers with which they are intrusted are the powers of the state, and all the duties with which they are charged are the duties of the state; that in the performance of governmental duties the sovereign power is not amenable to individuals, and therefore these organizations are not liable at the common law for such neglect [leaving a highway defective], and can only be made liable by statute."

See opinion of former Attorney General (now Justice) Dawson, Attorney General's Reports 1897-98, p. 29, and cases cited.

In *Rathbone v. Hopper*, 57 Kan. 240, 242, 45 Pac. 610, 34 L. R. A. 874, it was held that the term "municipal corporations" may include townships. The statute there under consideration was the refunding act of 1879 (chapter 50):

"An act to enable counties, municipal corporations, the boards of education of any city, and school districts, to refund their indebtednesses."

In the opinion it was said:

"A township is generally spoken of as a municipality or municipal corporation, but, strictly speaking, every political subdivision of the state organized for the administration of civil government is a quasi corporation. In this respect they are placed on the same plane as counties and school districts. * * * In the broader sense and in common usage the term 'municipal corporations' includes counties and townships."

The reasoning of that decision and the authorities cited lead to the conclusion that the statute exempting municipal corporations from garnishment was intended by the Legislature to exempt counties as well as cities. The *Switzer Case* was decided in 1888, and it was quite natural that the Legislature, in revising the garnishment law the following year, should exempt municipal corporations, and it is held that the intention thus expressed was to include and exempt counties, as well as cities.

The ruling of the trial court is affirmed. All the Justices concurring.

NORTHRUP NAT. BANK v. YATES CENTER NAT. BANK. (No. 20231.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §934(2) — PRESUMPTIONS—GENERAL FINDING—EFFECT.

A judgment rendered on an oral contract between banks concerning the transfer of notes and credit given will not be reversed, when based on a general finding, where the evidence is not clear as to what the oral contract was, but shows that the contract was afterward confirmed by letters which referred to the oral contract, but did not state the complete terms thereof, and the contract is partly explained by the subsequent conduct of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cont. Dig. § 8777; Dec. Dig. §934(2).]

2. EVIDENCE ~~423~~(6)—NOTES—INDORSEMENT—PAROL EVIDENCE.

Where notes are transferred from one bank to another by indorsement, evidence to show the contract between the banks, as to the purpose for which the notes were transferred, is competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1962; Dec. Dig. ~~423~~(6).]

3. PLEDGES ~~33~~—DEPOSIT OF COLLATERAL—RETURN.

Where notes are indorsed by one bank to another as collateral security for a credit obtained under an agreement that any of the notes may be returned if found unsatisfactory, a delay of 2 months and 20 days in returning notes found unsatisfactory cannot be said to be unreasonable as a matter of law, although the bank transferring the notes and obtaining the credit has in the meantime been placed in the hands of a receiver.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 89, 92; Dec. Dig. ~~33~~.]

Appeal from District Court, Woodson County.

Action by the Northrup National Bank against the Yates Center National Bank. From a judgment for plaintiff, defendant appeals. Affirmed.

A. H. Campbell and S. A. Gard, both of Iola, for appellant. Baxter D. McClain, of Iola, for appellee.

MARSHALL, J. In this action the plaintiff recovered judgment against the defendants for money loaned. The defendants appeal.

On October 3, 1913, C. G. Ricker, president of the Yates Center National Bank, the defendant bank, went to the Northrup National Bank of Iola, the plaintiff bank, for the purpose of obtaining money or credit. This resulted in an agreement by which the Yates Center National Bank was to furnish to the Northrup National Bank notes held by the Yates Center National Bank. The Northrup National Bank was to give credit to the Yates Center National Bank for the face amount of the notes. The credit given was to be subject to check, except that at least 25 per cent. of the credit was to remain on deposit with the Northrup National Bank. A credit of \$12,000 was thus obtained.

We are met at the outset with a dispute as to the effect of this transaction. The plaintiff contends that the notes involved in the credit were deposited as collateral security for the loan, and belonged to the Yates Center National Bank, subject to its direction and control, and were not the property of the Northrup National Bank, except as security for the amount loaned. The defendant contends that to obtain this credit the Yates Center National Bank indorsed without recourse a number of promissory notes to the Northrup National Bank; that the notes, having been indorsed, and having been delivered with the indorsements on them, showed a complete and fully executed contract of sale. The case was tried without a jury. No special findings were made.

Pursuant to the agreement, several notes—the face value of which formed the basis of the credit account—were delivered to the Northrup National Bank by the Yates Center National Bank, and indorsed in blank by C. G. Ricker personally and by the Yates Center National Bank without recourse. That bank was given credit on the books of the Northrup National Bank for \$12,000. The agreement provided that any of the notes delivered to the Northrup National Bank, and not found satisfactory as a basis for the credit given, could be charged back against the account at the option of the Northrup National Bank. No time was fixed, nor limitation made, as to when or for what reason this option should be exercised. The agreement further provided that the Northrup National Bank was to receive 6 per cent. per annum on the total of the credit account, as evidenced by the aggregate face value of the notes held by it, and was to pay to the Yates Center National Bank 2 per cent. per annum on the daily balances of the account. The agreement was carried out by both banks until about December 20, 1913, although the 25 per cent. reserve was not always maintained. The reserve was restored when the attention of the Yates Center National Bank was directed thereto.

December 2, 1913, A. C. Cutler, the national bank examiner for that district, closed the doors of the Yates Center National Bank and was appointed receiver thereof on December 5, 1913. Between the time the agreement was entered into and the appointment of the receiver, some of the notes were paid and were replaced by others, and some were returned by the Northrup National Bank to the Yates Center National Bank, either upon the former's initiative or the latter's request. A note of W. G. Toedman et al., for \$848, due December 10, 1913, not being taken up or paid when due, was charged to the credit account and forwarded to the Yates Center National Bank on December 20, 1913. The receiver refused to accept such return, on the ground that he was not bound by the agreement. February 25, 1914, the Northrup National Bank returned a note signed by Frank Harder for \$500, and one signed by Emile Fugier et al. for \$1,500, charging these amounts to the credit account. These notes the receiver refused to accept.

The Northrup National Bank thereupon presented to and filed with the receiver its verified claim, and demanded payment thereof, for the sum of \$1,968.76, being the balance due it after applying funds on deposit with it. A statement of the account was made a part of the demand. The receiver refused to list the claim as presented, and demanded that the Northrup National Bank pay over to him in cash the balance that would have been in the credit account if the Toedman, Harder, and Fugier notes had not been charged off.

This was refused, and this action was commenced.

[1] 1. Who owned these notes? The defendants contend that the Northrup National Bank did. The trial court, by its judgment, found that the Yates Center National Bank owned them, and that the Northrup National Bank held them as collateral security for the credit that had been given to the Yates Center National Bank. Ordinarily the construction of a contract is a question of law for the court, and a reviewing court can construe a contract as well as the trial court. In the present case, however, it is not clear what the oral contract was. The correspondence introduced in evidence to show the contract referred to the conversation by which the contract was made between the officers of the banks, recited a part of the understanding of the parties, but did not specify the terms of the contract. This contract was explained somewhat by the subsequent conduct of the parties. The situation is such that the general finding of the trial court as to what the contract was, and the construction placed thereon by that court, are binding on this court. If the trial court was in error in its construction of the contract, that error does not appear in either the transcript or the abstract.

[2] 2. The defendant contends that, as the notes were indorsed in writing, evidence of the terms of the contract by which they were placed in the plaintiff bank could not be introduced. This is based on the ground that oral evidence cannot be introduced to add to, contradict, vary, or alter the terms of a written contract. The evidence to show the contract by which the notes were placed in the plaintiff bank was not subject to this objection. It is true that the indorsement of the notes was a contract by itself, but it was a part of the larger, or whole, contract between the banks. Under the terms of that contract, the notes were to be indorsed by the Yates Center National Bank and O. G. Ricker, its president, to the Northrup National Bank. Evidence to show the whole contract did not in any way contradict, add to, vary, or alter the terms of the written contract contained in the indorsement. Negotiable promissory notes are indorsed for various purposes—sometimes for the purpose of transferring all title, sometimes as collateral security for other obligations, and sometimes for collection, or other purposes. The purpose for which the notes are indorsed, rarely, if ever, appears in the indorsement. It is not necessary that the purpose shall so appear. The evidence objected to was competent.

[3] 3. The defendant contends that the plaintiff's delay in returning the notes was unreasonable, and argues that in the present case this has become a question of law. It was 2 months and 20 days from the time of the appointment of the receiver until the

plaintiff returned the last of the three notes in controversy. That was not a long time. It was short. That delay cannot be said, as a matter of law, to be unreasonable. Whether or not that delay was unreasonable was a question of fact, to be determined by the trial court. It was determined in favor of the plaintiff, so far as it was necessary to determine the question.

The judgment is affirmed. All the justices concurring.

Ex parte BROWN. (No. 20641.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD §29—CUSTODY OF PERSON—RIGHT OF MOTHER.

The right of a mother to the custody of her child is not impaired by an order of the probate court appointing a guardian, notwithstanding a recital therein that the guardianship extends to the person as well as the property, where no issue concerning the mother's fitness in that regard was actually presented or determined in the proceeding in which such appointment was made.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 109-116; Dec. Dig. § 29.]

2. HABEAS CORPUS §85(1)—PROCEEDINGS—EVIDENCE—CUSTODY OF CHILD.

The evidence held not to require depriving a mother of the custody of her child.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. §85(1).]

Original application by Mary A. Brown for writ of habeas corpus. Writ granted.

A. M. Harvey, of Topeka, W. W. Harvey, of Ashland, and W. E. Broadie, of Kinsley, for petitioner. George A. Neeley, of Hutchinson, for respondent.

MASON, J. The father of Louise F. Carter, now 7 years of age, died intestate in November, 1914, leaving considerable property. His widow, the child's mother, was appointed her guardian. In August, 1915, she resigned as guardian and at her request P. H. Johnson was appointed in her place. He assumed control of Louise and placed her in the immediate care of Henry Ficken and his wife. The mother (now Mary A. Brown, having remarried) brings this proceeding against Johnson and the Fickens, asking that the custody of the child be restored to her. The guardian at first filed a disclaimer, but now resists the application on the ground that by virtue of his appointment in that capacity he has the legal right to control his ward, and that the character of the petitioner renders her an improper person to be charged with that responsibility.

[1] 1. It has been said on the one hand that, in the absence of a statute to the contrary, a guardian of the person has a right to the custody of his ward, even as against parents (21 Cyc. 62), and on the other that a statute giving a preference to parents in that

regard is merely declaratory of the common law (*People v. Hoxie*, 175 Ill. App. 563). Some of the cases cited as bearing on the question are affected by local statutes, and some by the archaic notion that the mother is entitled to little consideration in the matter. It is not necessary to attempt to state any general rule by which to solve controversies between parent and guardian. Each must necessarily be determined according to its peculiar facts. In the present instance there is no difficulty in saying that the claim of the petitioner to the control of her child is not affected in the slightest degree by the appointment of the guardian. The original entry of the order of the probate court making such appointment, in August, 1915, did not in terms refer to guardianship of the person, but such a reference was inserted after this proceeding was begun, with the knowledge of the present probate judge, by the occupant of the office at the time the order was made, who testified that the additional recital was omitted from the original entry by oversight. This was a somewhat offhand way of undertaking to correct a court record, but if the alteration is given full force it does not militate against the conclusion already stated. The mother, as the surviving parent, was the natural guardian of the person of the child. Gen. Stat. 1909, § 3966. The statute makes no express provision for any other guardian of the person during her life, and there could be no occasion for such an appointment unless she were found to be unfit for the trust. In the proceedings in the probate court there was no allegation, proof, or finding of her unfitness. The only justification suggested for constituting some one else the guardian of the child's person is based on the mother's resignation as guardian, coupled with her request for the appointment of a successor. The order appointing her purported to constitute her the guardian of the person as well as of the property of her child, but to this extent was without any field of operation, since the statute invested her with that trust. Her resignation, which was occasioned by her lack of ability to look after the child's property interests, followed the form used in her appointment, and spoke of her guardianship as relating to the person and property of the ward. Her request for the appointment of a successor employed the same formula. Her intention was clearly to surrender the authority which she had derived from the order of the court, and have it transferred to some more competent business manager. The language she adopted (doubtless that of the printed forms in use for such purposes) cannot be given the effect of an admission on her part that she was not a fit person to have the custody of her child.

That issue was not involved or determined in the probate court proceedings, and without such determination there could be no valid appointment of a guardian whose right to the control of the person of the child would be superior to that of the mother.

[2] 2. The prayer of the petitioner should therefore be granted, unless this court is convinced of her unfitness. No useful purpose would be served by setting out the evidence in detail, or even in substance. She is shown to have acted at times with bad judgment and indiscretion. A part of the testimony, which, if given full credence, would justify a stronger characterization of her conduct, was not directly contradicted, as she did not take the witness stand, but need not on that account, be accepted as entirely accurate; its nature and the surrounding circumstances suggesting the probability of mistake or exaggeration. She undeniably acquired an unfortunate reputation in the community in which she was living, which may have caused harsher inferences to be drawn from her actions than would otherwise have been the case. That some feeling was engendered which colored local public opinion in relation to the case is evident from this circumstance: The probate judge testified that, shortly before the petitioner applied to this court, the report was circulated that her attorney was engaged in a plot to kidnap the child—that 20 people talked to him about it. No evidence is necessary to convince the court that his informants, however sincere in their belief, were mistaken. The petitioner's affection for her child is abundantly established. Confidence in her fitness to care for her has been expressed by a number of witnesses, who have been in a position to judge of her character by personal observation, including several who became acquainted with her after a recent change in her residence. Nothing to her discredit has been shown with respect to her conduct since that time. A parent will not be deprived of the custody of a child on the ground of unfitness, unless that objection is sustained by clear and satisfactory proof. *Pinney v. Sulzen*, 91 Kan. 407, 137 Pac. 987, Ann. Cas. 1915C, 649.

The evidence here is not regarded as meeting that requirement, and the prayer of the petition will therefore be granted, conditioned, however, upon the giving of a bond by the petitioner in the sum of \$1,000 for the retention of the child within the state and obedience to any further order that may be made by the court; jurisdiction of the case being retained. The respondents, having acted in evident good faith in the discharge of a responsibility placed upon them, will be allowed to recover their costs. All the Justices concurring.

SHEAT v. LUSK et al. (No. 20283.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

1. RAILROADS—RECEIVERS—LIABILITIES OF—DEFECTS.

The receivers of a railroad company, who have been in possession of the railroad for more than a year, are liable for an injury that results from a defective culvert on the right of way at the intersection of the railroad with a highway, although the defect existed before they came into the control of the railroad.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 838-853; Dec. Dig. ¶ 265.]

2. APPEAL AND ERROR—PRESUMPTIONS—GENERAL VERDICT—EFFECT.

In the absence of the evidence, and especially where only a part of the facts are embraced in special findings of the jury, the special findings, so far as they will admit of it, will be given an interpretation consistent with the general verdict, and the general verdict will be deemed to be sufficiently supported by the evidence, and to include every element necessary to its validity not negated by the special findings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3759; Dec. Dig. ¶ 980(3).]

Appeal from District Court, Bourbon County.

Action by William Sheat against James W. Lusk and others, as receivers of the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendants appeal. Affirmed.

R. R. Vermillion and W. F. Lilleston, both of Wichita, for appellants. Hudson & Hudson, of Ft. Scott, for appellee.

JOHNSTON, C. J. This action was brought by William Sheat to recover damages from the receivers of the St. Louis & San Francisco Railroad Company for injuries sustained while he was driving over a defective culvert on the right of way of the railroad at a highway crossing. The highway had been laid out and the culvert had been built some years before the railroad passed into the control of the receivers. The plaintiff and two others were taking the separator of a threshing machine along the highway, and when they drove upon the culvert near the railroad track a wheel broke through, causing a lurch of the separator, by which the plaintiff, who was riding upon the separator, was thrown to the ground and severely injured. At the trial special findings were returned by the jury, and in their general verdict they awarded the plaintiff damages in the sum of \$1,100. The defendants asked for a new trial because of insufficiency of the evidence, of inconsistency in the findings, and of erroneous instructions. Afterwards they withdrew their motion for a new trial and asked for judgment on the special findings. This motion being denied, the defendants appeal.

In argument some reference was made to

the evidence in the case, but as a transcript of all the evidence was not made, no consideration can be given to it. The defendants are therefore confined to the error assigned on the ruling refusing to enter judgment in their favor upon the special findings. The findings cover only a part of the facts of the case, and in the interpretation of them every reasonable inference must be indulged in favor of the general verdict. In the absence of the evidence it must be assumed that there was sufficient evidence to uphold the verdict, and that it included every element necessary to its validity not expressly negated by the special findings. *Anderson v. Pierce*, 62 Kan. 756, 64 Pac. 633; *Morrow v. Bonebrake*, 84 Kan. 724, 115 Pac. 585, 34 L. R. A. (N. S.) 1147. By withdrawing the motion for a new trial the defendants in effect waived any claim that there was a lack of evidence to support the findings and verdict as well as that there was inconsistency in the findings themselves. *Lumber Co. v. Limerick*, 53 Kan. 395, 36 Pac. 710; *McClain v. Railway Co.*, 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914C, 699. Of course, if the findings, fairly interpreted, cannot be reconciled with the verdict, it cannot stand, and if they are complete in themselves, and show clearly that no recovery can be had by the plaintiff, the defendants were, of course, entitled to judgment.

[1] First it is said that the plaintiff cannot recover because of a finding that the receivers had done nothing toward maintaining the culvert since they took charge of the railroad. It is alleged and claimed that the culvert was on the right of way and constituted a part of the approach to the crossing of the railroad track. It was defective, and the finding that the defendants did nothing towards its maintenance and repair tends to establish the charge that they were negligent rather than to exonerate them from it. They took over the management of the railroad, and it was as much their duty to keep the crossing in repair as it was of the corporation while it had charge of the railroad. They cannot escape liability because the culvert had been built before they were placed in charge of the railroad. *Bonner and Eddy, Receivers, v. Mayfield*, 82 Tex. 234, 18 S. W. 305; *Beach on Receivers* (2d Ed.) § 382; *High on Receivers* (3d Ed.) § 397b.

The trial court instructed the jury that if the defendants or their predecessor built and maintained the culvert, and allowed it to become so weak that the separator broke through it, the plaintiff might recover. The defendants acknowledged the correctness of the instruction by withdrawing their objection to it, and hence it must be accepted as the law of the case. Nor are they permitted to say that the defect had not been directly brought to their attention. Upon tak-

ing charge of the railroad it became their duty to inspect or cause an inspection to be made of the railroad and the crossings over the same, and their failure to find defects which might have been discovered by the exercise of due care, and to repair them is negligence upon which a recovery may be based. They stand in the shoes of the corporation, and are charged with the duties and responsibilities of maintaining the railroad and the crossings in a safe condition that were incumbent upon the railroad itself before they were appointed. In *Rouse v. Harry*, 55 Kan. 589, 40 Pac. 1007, it was held that a receiver of a railroad company was in effect exercising its corporate functions, and it was said that:

"Suit against a receiver is in form against an individual, but in substance it is against the corporate property in his charge. It is, in all essential particulars, in substance against the corporation itself." 55 Kan. 598, 40 Pac. 1010.

See, also, *State ex rel. v. Sessions*, 95 Kan. 272, 147 Pac. 789; *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114.

It is conceded that the receivers had been in possession of the railroad more than a year before the accident occurred, and under any view they had ample time to discover the defect in the culvert and repair it. According to the authorities cited the defendants should have known of the defect, and should have put and kept the culvert in a safe condition. Aside from their general verdict, the jury specifically found that the defendants were negligent in failing to repair the culvert, and that their negligence had continued from the time they took possession of the railroad.

[2] Contention is made that the findings show contributory negligence on the part of the plaintiff. In answer to a special question, the jury stated that the plaintiff and the man with him moved the separator over the highway at night and without a light. It may have been a moonlight night, so that an artificial light was unnecessary, and in the absence of the evidence it may be assumed that the night was not dark, and that a lantern was not needed. Again, it is contended that the findings show that the plaintiff was negligent in the manner in which he drove upon the culvert. In the seventh finding the jury answered that the separator was several feet wider than the usually traveled part of the road, and to the question, "If the separator had been driven within the usually traveled part of the road, would the accident have happened?" the jury answered, "Don't know." In answer to another question the jury found that the hind wheel of the separator began to slip before reaching the culvert, and did slip down upon the north end of it. The mere fact that the wheel slipped to the side as the plaintiff drove upon the culvert does not convict him of negligence. What caused the slipping is

not shown. The finding as to the width of the traveled way, and the answer of the jury that they did not know whether or not the accident would have happened if the separator had been driven within the usually traveled part of the road, afford no basis for a judgment against the plaintiff. It may be inferred that the separator was not upon the most traveled part of the road; but the accident did not happen because it was moved in or outside of the usually traveled part of the road. It was because of the weak culvert, which broke under the weight of the separator, and there is no reason to infer that it was stronger in the more traveled part than where the break occurred. This accounts for the answer of the jury that they did not know whether the accident would have happened if the separator had been taken across the defective culvert at another place. The plaintiff was warranted in driving in any part of the road that appeared to be fit for travel. Neither can it be inferred that the plaintiff was thrown from the separator because he drove off of the culvert, as the defendants contend. The finding is that the wheel of the separator slipped down upon the north end of the culvert, and not off of the north end, as the defendants would infer. Under the verdict the inference must be that the defective culvert, through which the wheel broke, was the proximate cause of the plaintiff's injury. The judgment is affirmed. All the Justices concurring.

INTERSTATE POWER CO. v. ANACONDA COPPER MINING CO. et al. (No. 3755.) (Supreme Court of Montana. July 17, 1916.)

1. EMINENT DOMAIN ¶255—REVIEW—QUESTIONS NOT URGED ON TRIAL.

The ruling of the court in condemnation proceedings requiring plaintiff to assume the burden of proving the amount of damages, thus giving plaintiff the right to open and close, cannot be urged as error on appeal where on the trial no objection with the reasons therefor, was urged as required by Rev. Codes, § 6785.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 666; Dec. Dig. ¶255.]

2. EMINENT DOMAIN ¶263—APPEAL—HARMLESS ERROR.

In condemnation proceedings, defendants cannot complain that plaintiff was given the right to open and close by an order directing it to assume the burden of proving damages, since the burden so imposed required proof by plaintiff by a preponderance of the evidence, and no prejudice could have resulted to defendant, as required by Rev. Codes, § 6593, to justify a reversal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 687; Dec. Dig. ¶263.]

3. EMINENT DOMAIN ¶191(6)—PROCEEDINGS—DESCRIPTION OF LAND—SUFFICIENCY OF PETITION.

An allegation of the petition in condemnation proceedings, having described the land sought to be acquired by naming the metes and bounds on three sides and a river known to be

navigable as a boundary on the fourth side, held a sufficient description of the land, the fourth boundary under Rev. Codes, § 4529, being the low-water water line of such river, which could be made certain from allegations of petition.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 515; Dec. Dig. ¶191(6).]

4. EMINENT DOMAIN ¶191(6) — PROCEEDINGS—PETITION—AREA OF LAND.

Under Rev. Codes, § 7337, the area of the land sought to be acquired by condemnation proceedings is not required to be stated in the petition.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 515; Dec. Dig. ¶191(6).]

5. EMINENT DOMAIN ¶191(3) — PROCEEDINGS—PETITION—SUFFICIENCY.

In condemnation proceedings, petition by a power company alleging the purposes for which the power company was organized, to be the construction of an electric power plant by the use of water power, that the lands sought to be acquired are necessary for that purpose, that the power will be used for pumping water appropriated and to be appropriated on arid and semiarid lands, and also in the operation of industries and to furnish heat, light, and power to the public generally, etc., held sufficient under Rev. Codes, § 7331, without alleging a present or prospective demand for the products of such power company.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 512; Dec. Dig. ¶191(3).]

6. EMINENT DOMAIN ¶203(1) — PROCEEDINGS—EVIDENCE—ADMISSIBILITY.

In proceedings for the condemnation of lands by a power company, evidence as to the practicability of plaintiff's power plant and the method of its installation, held properly excluded as having no bearing on the quantum of damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 542; Dec. Dig. ¶203(1).]

7. EMINENT DOMAIN ¶205—PROCEEDINGS—DAMAGES—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to sustain a verdict which fixed the damages to defendant's lands in condemnation proceedings well within the extremes fixed by conflicting evidence.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 544; Dec. Dig. ¶205.]

8. EMINENT DOMAIN ¶262(4) — REVIEW — VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence for damages in condemnation proceedings which was approved by the trial court's order denying a new trial is conclusive on appeal.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 685; Dec. Dig. ¶262(4).]

Appeal from District Court, Sanders County; Asa S. Duncan, Judge.

Consolidated actions by the Interstate Power Company against the Anaconda Copper Mining Company and another. From a judgment for plaintiff assessing damages in condemnation proceedings, the defendants appeal. Affirmed.

Henry C. Stiff, of Missoula, for appellants. Tolan & Gaines, of Missoula, for respondent.

BRANTLY, C. J. The following statement, which is in part quoted from appellants' brief, will be sufficient to illustrate the contentions made herein in their behalf:

"The respondent, plaintiff below, filed in the district court seven actions, numbered 801, 802, 803, 804, 805, 806, and 808, for the purpose of condemning certain parcels of land along the banks of Clark's fork of the Columbia river, in Sanders county, Mont., the said lands to be flooded because of the proposed construction of a dam or dams across the channel of said stream, 'wherewith to confine and impound the waters of said river, the waters so confined and impounded to be then and thereafter used for the generation of electrical power.' Plaintiff sought to acquire a fee-simple title to the lands asked to be condemned, 'but reserving to defendants and their heirs, personal representatives, successors, and assigns the right of access to the waters of the aforesaid river at any and all times.' The Anaconda Copper Mining Company, one of the appellants, was made a defendant in all of said actions, and the sole defendant in cause No. 808, and the Blackfoot Land Development Company, the other appellant, was made a defendant in one cause only, No. 805. There were other parties made defendants in six of the cases, but awards were made and the causes tried in the district court as to the Anaconda Copper Mining Company and Blackfoot Land Development Company only, and they are the sole appellants in this court. Appellants filed answers in all the cases in which they were made parties, on July 15, 1914, and on that date an 'order of condemnation' was made and filed in each case, and commissioners appointed."

After the commission had made its award, the appellants, being dissatisfied with the amount of damages assessed, appealed therefrom to the district court. The several causes were by stipulation consolidated for the purposes of the trial and further proceedings except for final order and decree. The trial was had by the court sitting with a jury on November 17, 1914. Under the instructions of the court, the jury returned a separate verdict in each case, fixing the amount which they found appellants entitled to have awarded to them, and a separate judgment was rendered for this amount. While the appellant Blackfoot Development Company was made defendant in cause 805 only, it was disclosed during the trial that it had acquired an interest in some of the lands which under the allegations in the pleadings appeared to be owned by the Anaconda Copper Mining Company only. It was thereupon agreed by counsel that in awarding the amounts to which each of these appellants should be found entitled, the jury should make their award as if the ownership of each parcel taken were correctly set forth in the pleadings. Upon the return of the several verdicts, final orders of condemnation and decrees were made and entered in accordance with the stipulation of counsel. Appellants' several motions, for new trial having been denied, they brought the causes to this court by separate appeals from the several judgments and orders denying their motions. All of them have been submitted together upon one brief.

[1] 1. At the commencement of the trial, after argument by counsel, the court directed that the plaintiff assume the burden of proof

as in ordinary cases, and that the trial proceed accordingly. This ruling is made the basis of appellants' first assignment of error. There is a diversity of opinion among the courts as to which party has the right to open and close the trial on the question of damages in this class of cases. Mr. Lewis declares it to be the rule, supported by the great weight of authority, that the owner is entitled to open and close. The cases on the subject are cited in the note to his text. *Lewis on Eminent Domain* (3d Ed.). 645. We are inclined to disagree with Mr. Lewis in his conclusion. But we are not required to examine the cases and announce a rule in this case, for the reason that counsel made no objection to the court's action, stating the grounds thereof, as required by the statute (Rev. Codes, § 6785), in force at the time the trial was had.

[2] But aside from this, if it be conceded that the appellants had the right to open and close, it does not appear, nor does counsel undertake to point out, wherein the appellants suffered prejudice. Counsel is content to rest upon the bare statement that the court denied him the right in question. The course pursued by the court would seem to have been to their advantage rather than the contrary, for it cast upon the respondent the burden of establishing the amount which it must pay appellants, by a preponderance of the evidence. Under these circumstances, appellants' claim that they are entitled to a new trial ought not to be treated with indulgence. Rev. Codes, § 6593; *Copenhaver v. Northern Pac. Ry. Co.*, 42 Mont. 453, 118 Pac. 467; *White v. Chicago, M. & St. P. Ry. Co.*, 49 Mont. 419, 143 Pac. 561.

[3] 2. By his second assignment, counsel questions the sufficiency of the several complaints, on the grounds (a) that they do not contain a sufficient description of the several parcels of land sought to be condemned; and (b) that the facts stated do not show that the lands are sought for a public use. Section 7337 of the Revised Codes declares that "the complaint must contain * * * a description of each piece of land sought to be taken." The description of each piece sought to be taken is set forth in the complaint by metes and bounds on three sides definitely fixed as to length and location by reference to the lot, section, and township of which it is a part, as designated by the public land surveys. For the other boundary, the river merely is designated. The objection made is that the description does not state that this means the line of low or high water, and hence the designated boundaries do not inclose the area sought. This contention is wholly without merit. It is a matter of common knowledge that Clark's fork of the Columbia river is a navigable stream, and that grants of public lands lying along its course are bounded on that side by the line of the stream at low water. Mention of the stream

as the extent of a boundary which terminates in that direction is sufficient to show a connection between such boundary and the line of low water. This is in accord with the rule declared by our statute. Rev. Codes, § 4529. In any event, it meets the requirement of the rule that "that is certain which can be made certain by means of the description or references contained in the petition." *Lewis on Eminent Domain* (3d Ed.) 549.

[4] Counsel suggests also that the description is insufficient because it does not state the area of each piece taken. The statute does not require the area to be stated. Section 7337. Its requirement is met when the description is definite enough to identify the land sought to be taken, even though it be conceded that the statement of the area would materially aid in its identification.

[5] The second ground of criticism stated above proceeds upon the idea that under the requirement of the statute that the complaint contain a "statement of the right of the plaintiff," it was incumbent upon the respondent to allege that there is either a present or prospective demand for the electric current which it proposes to produce. It is alleged that the purpose for which the respondent was organized was, among other things, for the construction of an electric power plant by the use of water in the river; that the lands sought to be condemned are necessary for that purpose; that the current so to be generated will be used to supply power for pumping and distributing to and upon lands arid and semiarid in character, water already appropriated and to be appropriated from the river for the benefit of all persons who shall desire to purchase and use the same; that it is also to be used for the purpose of aiding in the operation of industrial and commercial enterprises in the county and state, and to furnish heat, light, and power to the public generally, etc. This, we think, is sufficient under the decision in *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1035, to show that the proposed use is a public use, as well as that there is a present or prospective demand for the product of the enterprise.

Counsel cites no authorities to sustain his position. In our opinion, it would discourage, if not altogether prevent, the investment of capital in such enterprises, to declare a rule which would require the plaintiff in every case to allege and prove that its product can be profitably disposed of in the markets of the country. Men invest capital upon the hope and expectation of profit by disposing of their product, in whatever form, in the markets where others, who are engaged in like enterprises, dispose of their product. It is not infrequently the case that an enterprise creates its own market by furnishing a product to supply comforts, conveniences, and facilities which were theretofore un-

known or, if known, were of inferior quality or were obtained at greater cost. Whether the founder of a proposed enterprise purposes to enter the market in order to compete for the favor of the public with the owners of other enterprises of the same character, or to furnish a new product which will create a market for itself by supplying a public want not theretofore supplied, is an inquiry which is not determinative of the question whether the enterprise is a public use. The statute declares what are public uses for which lands may be condemned. Among these are power plants to provide electric current for sale or for productive use, or to pump water for the purpose of irrigation, or for sale for other purposes. Rev. Codes, § 7331; *Helena Power Transmission Co. v. Spratt*, supra. It is sufficient to make out a case if the allegations of the complaint disclose that the plaintiff is one of the agencies through which the state has chosen to exercise the power of eminent domain, and that the use to which the property sought to be taken is one of the public uses enumerated in the statute. This is what is meant by the requirement that the complaint must contain a statement of the right of plaintiff. It would be absurd to lay down a rule which would require a railroad company to show that it has a present or prospective market for its potential carrying capacity, as a condition precedent to the exercise of its right to acquire a right of way. So, also, it would be impossible for a mining company seeking to acquire a right of way for a road to its mine or smelter, or land for a dumping ground for its tailings or refuse matter, to show that it could find a demand in the markets of the world for its mineral product.

[8] 3. Several of appellants' assignments question the propriety of the court's rulings in admitting and excluding evidence. We find no error in any of them. Much of the evidence related to the practicability of the plan adopted by the plaintiff for the installation of its plant, and kindred questions which could not in any way aid the jury in ascertaining the amount of damages to which the appellants were entitled—the only inquiry which was before the court for determination. The complaint in this behalf amounts to nothing more than that the court did not permit the appellants to introduce other evidence of the same character, and thus further confuse the issue to be submitted to the jury.

[7, 8] 4. There is no basis for the contention that the evidence is insufficient to justify the several verdicts. Upon the assumption that all the evidence introduced by the appellants upon the question of damages was competent, the most that can be said of it as a whole is that it presents a substantial conflict and that the finding of the jury in each case is well within the extremes fixed by the

different witnesses. This being so, and the court having approved the findings of the jury by denying appellants' motion for a new trial, we must accept the result as conclusive. *Helena & Livingston Smelting & Reduction Co. v. Lynch*, 25 Mont. 497, 65 Pac. 919; *Yellowstone Park Railroad Co. v. Bridger Coal Co.*, 34 Mont. 545, 87 Pac. 963, 115 Am. St. Rep. 546, 9 Ann. Cas. 470.

The several judgments and orders are affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur.

BATCH v. HELENA LIGHT & RY. CO. et al. (No. 3659.)

(Supreme Court of Montana. July 17, 1916.)

1. APPEAL AND ERROR ⇨1060(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE—IRRELEV- VANCY.

Evidence regarding the condition of defendant's street car in other respects than that upon which the case was submitted, did not constitute prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. ⇨1060(2).]

2. APPEAL AND ERROR ⇨171(1)—REVIEW— SCOPE—THEORY IN COURT BELOW.

Where a personal injury case is tried as if governed by common-law principles, and without regard to Rev. Codes, § 5301, requiring common carrier conveyances to be kept in a safe condition, the Supreme Court will dispose of it upon the same theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. ⇨171(1).]

3. CARRIERS ⇨292(2)—STREET RAILROADS— OPERATION—DEFECTS IN CAR—LIABILITY.

A street car company is liable for any defects in its car appliances which a most rigid examination might disclose.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1168, 1177, 1178; Dec. Dig. ⇨292(2).]

4. CARRIERS ⇨316(7)—INJURIES TO PASSENGERS— BURDEN OF PROOF—DEFECTIVE CAR APPLIANCES.

Where a street car passenger is injured by the breaking of a strap, the company has the burden of proving its freedom from negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1290, 1291; Dec. Dig. ⇨316(7).]

5. TRIAL ⇨296(3)—INSTRUCTIONS—CURE BY OTHER INSTRUCTION—NEGLIGENCE.

A new trial will not be ordered in a personal injury action for an erroneous statement of defendant street car company's duties to passengers, where another instruction correctly stated it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ⇨296(3).]

6. CARRIERS ⇨292(2)—INJURIES TO PASSENGERS— DEFECTS IN EQUIPMENT—SUFFICIENCY OF INSPECTION.

Where straps in a street car used for registering fares were inspected by looking at them, but were not tested by ringing fares, the company was liable where a strap broke, causing the conductor to fall upon the plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1168, 1177, 1178; Dec. Dig. ⇨292(2).]

7. APPEAL AND ERROR §1064(1)—HARMLESS ERROR—INSTRUCTION—WHAT CONSTITUTES.

An erroneous instruction on question of liability cannot be disregarded and a verdict for defendant sustained because the evidence would have justified a verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. §1064(1); Trial, Cent. Dig. § 475.]

Holloway, J., dissenting.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by Mary Batch against the Helena Light & Railway Company. From a judgment for defendant, and an order denying a motion for new trial, plaintiff appeals. Reversed and remanded.

Carleton & Carleton, of Helena, for appellant. O. W. McConnell, of Helena, for respondent.

SANNER, J. The plaintiff by this action sought damages for personal injuries which she claims to have sustained while traveling as a passenger for hire on one of the street cars of the defendant Helena Light & Railway Company bound for Kenwood, a suburb of this city. The undisputed facts are: That at the end of the car and just under the roof there was a device for registering fares, worked by means of a bar extending the length of the car, to which, at intervals, straps were attached in pairs, one of such straps being on one side of the bar for tickets, and one on the other side for cash fares. These straps were connected to the bar by means of short, projecting metal levers, through a slit, each strap being riveted so as to form a loop. That while the car approached the curve at Lawrence street and Harrison avenue, the defendant King as conductor was registering fares, and as it entered said curve he pulled one of the ticket straps, which gave way causing him to fall against and upon the plaintiff. Just how the strap gave way, with what violence the conductor fell, and whether as the result the plaintiff sustained any serious injury, are subjects of conflicting evidence. The verdict was for the defendants, and plaintiff has appealed from the judgment entered in consequence, as well as from an order denying her a new trial. The errors assigned comprehend four rulings upon evidence, three given instructions, and the refusal of a new trial.

[1] 1. While the complaint contains several charges of negligence, reliance was placed upon negligence in permitting the registry strap to be and become deficient. As three of the assigned rulings upon evidence relate to the condition of the car in other respects, and as the fourth was waived upon oral argument before us, we find nothing prejudicial in any of these rulings.

[2-4] 2. The position of the defendants was and is that they cannot be held to answer for the plaintiff's injuries, if she sustained any, because the company had performed its

full duty of care towards her by causing the car in question to be inspected within a few hours prior to the accident, which inspection failed to reveal any defect in the equipment. To enforce this view upon the jury, it offered, and the court gave, three instructions numbered 9, 12, and 13, of which the plaintiff here complains. It is perfectly clear that under any possible interpretation of section 5301 of our Codes, these instructions, as well as the view they were offered to express, were erroneous; but as this section was not invoked by either party at the trial and the cause was presented as though governed by the common law, it must be judged here in accordance with that theory. So judged, we think instructions 9 and 12 are still open to criticism, and, if they stood alone, might command a reversal. The responsibility of a street railway company to its passengers for injuries due to defective appliances is not even at the common law confined to cases where such defects are visible or of long standing; nor can it be avoided on the mere showing that some sort of an inspection was made by a person competent to make a proper one. Such responsibility is covered by the rule—as old as the stage coach and applicable alike to all carriers of passengers—found in the text of Story on Bailments, §§ 592, 601a:

"If there is any defect in the original construction of a stage coach, as, for example, in the axletree, although the defect be out of sight and not discoverable upon a mere ordinary examination, yet if the defect might be discovered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor. The same rule will apply to any other latent defect, which might be discovered by a more minute examination and more exact diligence. * * * Where any damage or injury happens to the passengers by the breaking down or overturning of the coach or by any other accident occurring on the road, the presumption prima facie is that it occurred by the negligence of the coachman; and the onus probandi is on the proprietors of the coach, to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and human limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proof, every imputation thereof."

[5] But these instructions do not stand alone; and when they are considered with the other instructions touching the measure of defendants' duty, we are impelled to the view that the jury could not have misunderstood. In the plainest language they were told that proof of the accident cast upon the company the burden of its own exoneration; that it owed to the plaintiff as a passenger the highest degree of care; that such degree of care was required in the inspection of its equipment, including the register strap and involved the duty to keep its equipment in repair, and to anticipate all such results as

might reasonably be expected in view of the conditions under which the equipment might be used. As this correctly expresses the common law of the subject, we are not disposed to order a retrial because of error in the instructions.

[6] 3. The case was submitted to the jury as though the evidence touching inspection was sufficient, if true, to rebut the presumption of negligence which arose on proof of the accident. This was error. So far as the register strap is concerned, the only suggestion of an inspection is made by Vickery, who says:

Direct examination: "That car went out about 12:30 on the 30th in good condition. Q. Were the straps in good condition? A. As far as I could learn and see."

Cross-examination: "I went through to see if any straps were broken out, or missing, or bad straps. I didn't go around and jerk on the straps to see if there was any weak straps in there. I looked at the bell cord and turned the lights on. That was all I did in inspecting the straps. Q. Looked at them? A. Yes, sir."

Redirect: "I worked on and inspected car 4 on April 30, 1913, the day of the accident—in the morning some time. I was inspecting the controllers, and repaired the controllers, and inspected the car in general at that time. Q. Were you in the interior of the car where the straps were? A. Yes, sir. Q. Did you inspect the straps in that particular? A. Yes, sir. Q. Did you find anything wrong with the car? A. No, sir."

Recross-examination: "All of my inspection on the 30th of April was on the controllers, inside of the car. As I remember it my entire inspection was confined to that. * * * I don't remember what I did to the controllers. I remember looking at the brushes and the motor through the car in general. I don't remember anything else. I have told you all that was ever done on this occasion on this car."

Whether the strap broke below the rivet or pulled through the rivet is the subject of some contention; but it is of little consequence. The important fact is that it gave way, caused the conductor to lose his balance and to fall upon the plaintiff, and Vickery, it will be observed, does not intimate that weakened defects, short of actual breakage, could have been discovered by any such inspection as he gave the straps, or could not have been discovered by submitting them to scrutiny or to some practicable test. His inspection as he describes it may have been merely a sweeping glance. The safety and comfort of people who pay for their transportation by a common carrier require something more than this, and something more than this was practicable. In use the straps were to be jerked with sufficient force to work the register, and an obvious test of their efficiency for that purpose was to put them through that operation. That such a test probably would, that even a close and careful scrutiny might have revealed the weakness is to be gathered from the defendants' own case, for King, the conductor in whose hands the strap gave way, says:

"I got hold of this strap and I rang it up in the usual manner, and so far as I could tell the rivet pulled out and the strap pulled loose some

way. I don't know just how, and I lost my balance and fell over toward the side of the car. * * * I could not say that I pulled the strap more than once. * * * I did not use any more force than I ordinarily would in ringing up fares. * * * I have no recollection at all of how many times I pulled. * * * I don't remember anything about the register not working. * * * I don't recall that I pulled it once and it didn't work and got hold of it again and gave it a sudden jerk. * * * I am not positive whether the strap broke in two or whether it pulled off in the rivet."

We have quoted the rule at the common law as stated by Story, and we subjoin a version of the same rule as applied to street railways by a modern authority:

"While street railroads, as common carriers, are not insurers of the absolute safety of their passengers and do not insure them against all hazards incident to their transportation, they are required to exercise, through their servants, a very high degree of care, skill, diligence, and foresight, such as should be exercised by very careful and skillful railroad employees, to avoid injury and loss of life to those whom they undertake to carry as passengers, and for injuries resulting from a failure of duty in this regard they are liable. * * * The inspection of its cars and appliances, roadbed, and machinery must be such as, in the judgment of those who understand the subject, will be sufficient to secure, or such as experience has shown to be sufficient to secure, the safety of its passengers. Where an accident happens to a passenger by the breaking of one of the railway company's appliances, the burden is upon it to show affirmatively a condition of things which would exonerate it from liability." 1 Nellis on Street Railways, §§ 274, 290.

Under this rule, the defendants' showing of care by reason of inspection was insufficient as a matter of law. See *Weir v. Union Ry. Co.*, 112 App. Div. 109, 98 N. Y. Supp. 268; *Leonard v. Brooklyn Heights Ry. Co.*, 57 App. Div. 126, 67 N. Y. Supp. 985; *Smith v. Metropolitan St. Ry. Co.*, 59 App. Div. 60, 69 N. Y. Supp. 177; *Volkmar v. Manhattan Ry. Co.*, 184 N. Y. 418, 81 N. E. 870, 30 Am. St. Rep. 678; *Treadwell v. Whittier*, 80 Cal. 585, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 173; *Texas, etc., Ry. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406; *Palmer v. D. & H. C. Co.*, 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629; *Gerlach v. Detroit United Ry.*, 171 Mich. 474, 137 N. W. 280; *Texas, etc., Ry. Co. v. Allen*, 114 Fed. 177, 52 C. C. A. 133.

[7] What importance this aspect of the case may have assumed in the deliberations of the jury we can only infer from the fact that the evidence and the instructions commanded a verdict for the plaintiff in some amount, unless the defendants, by reason of the so-called inspection, had exonerated themselves from all blame. It is true we may question the extent of plaintiff's injuries attributable to the accident; but that is a pure gratuity, for there was ample evidence to show substantial damage, as there was sufficient to warrant the view that the damage was only nominal. We may not upon this record assert that the correct result was reached because of our doubt upon the question of damages.

According to the theory on which the case

was tried, the defendant King was not at fault, because he had nothing to do with the defective condition of the strap. So far as he is concerned, the judgment must be affirmed; but as to the other defendants, the judgment and order appealed from are reversed, and the cause is remanded for a new trial.

BRANTLY, C. J., concurs.

HOLLOWAY, J. I dissent. Assuming that we are bound by the theory of the case adopted in the trial court and that such theory was erroneous, I am unable to subscribe to the doctrine announced by the majority which furnishes the only ground for a reversal of the judgment.

In negligence cases, inspection is never required for its own sake. It is but a means to an end, and whenever it appears that reasonable inspection would not disclose the latent defect which is ultimately responsible for an injury, a failure to make such inspection does not constitute negligence.

There cannot be any dispute upon this record that the only purpose the strap in question was designed to serve was to operate the lever which in turn caused the registering device to record the fare. It was not intended to sustain the weight of a man or to resist any strain which might be put upon it. Since its purpose was to operate the lever, the utmost that could have been required of an inspector was that he should test it by moving the lever, and had he done so, it would have responded to the test for all that appears from this record, and the company would have been acquitted of the charge of negligence under the theory adopted by the plaintiff. There is not any contention made by plaintiff that the strap broke by reason of the application of such force as ordinarily worked the lever. Plaintiff herself and her witnesses Donaldson and Reeves testified that when the conductor sought to register a fare, something apparently was wrong with the mechanism of the registering device, for it failed to work, and the conductor then gave the strap a second hard pull or jerk, which caused it to give way. If then, according to plaintiff's own theory, the strap broke only because it was subjected to more than the ordinary force, it cannot be said as a matter of law that a proper inspection would have disclosed the defect, if any, in the strap; on the contrary, the evidence tends strongly to negative the idea that any reasonable inspection would have been productive of result.

I am unable to agree with the majority that what the witness Vickery did was not any inspection at all. It was for the jury to say, from all the facts and circumstances, whether an inspection was made, and, if not made, whether the failure to make one, under the circumstances, constituted negligence.

Assuming, further, that plaintiff was entitled to nominal damages, the failure of the jury to make such award is not a ground for a new trial. An appellate court will not reverse a judgment in order that nominal damages may be recovered. *De minimis non curat lex*.

If upon the entire case as presented the correct result was reached, a new trial should not be granted. In denying a new trial the lower court must have passed upon the question of the sufficiency of the evidence to warrant a verdict for substantial damages. If in the opinion of that court such damages should not have been awarded, its order denying a new trial should be upheld, for certainly this court cannot say that the evidence presents a case calling for more than nominal damages.

STATE ex rel. HAUSWALD v. ELLIS et al.,
Board of Com'rs of Carbon County.
(No. 3837.)

(Supreme Court of Montana. July 12, 1916.)
APPEAL AND ERROR \Leftrightarrow 843(2)—DETERMINATION OF CAUSE—NECESSITY OF DECISION.

Where the assessed value of a county is clearly high enough to make it a fifth-class county, and this determination decides the case, it is unnecessary to decide whether certain additions to the assessed value, made by the court below, are proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. \Leftrightarrow 843(2).]

Appeal from District Court, Carbon County; A. O. Spencer, Judge.

Mandamus proceedings by the State of Montana, on relation of F. A. Hauswald, against A. A. Ellis and others, as the Board of County Commissioners of Carbon County. Judgment for plaintiff, and defendants appeal. Affirmed.

Nichols & Wilson, of Billings, for appellants. Walsh, Nolan & Scallon, of Helena, for respondent.

SANNER, J. In September, 1914, there was laid before the board of county commissioners of Carbon county the assessment roll for that year footed to show property within the county of an assessed valuation of \$8,015,072; whereupon, pursuant to the provisions of section 2975 of the Revised Codes, the board made and caused to be spread upon its minutes a formal order declaring Carbon county to be a county of the fifth class. In virtue of this classification, if properly made, there came into existence the office of county auditor for said county, and one F. A. Hauswald was at the general election held in November, 1914, duly elected to such office. A certificate of election was issued to him, he qualified as required by law, and at all times after the first Monday of January, 1915, sought to perform, and held him-

self in readiness to perform, the duties of that office. Meanwhile, and at its regular meeting in December, 1914, the board appointed one G. L. Finley to check the assessment roll for 1914 and report to the board "what the aggregate assessment of said county was," and he, on December 23, 1914, presented his report to the effect that after making certain corrections for supposed errors, supposed double assessments, and certain deductions made by the board itself after December 1, 1914, there remained \$7,862,870 "total valuation from which taxes are collectible." On December 30, 1914, this report was "approved and ordered filed," whereupon the board made and caused to be spread upon its minutes a resolution declaring rescinded the order of September advancing the county of Carbon to the fifth class, because made "under a misapprehension of the facts" due to "errors and double assessments, clerical errors, and other mistakes." In consequence of this action the board declined to recognize Hauswald as county auditor and refused to pay his salary, and he brought this proceeding in mandamus to compel the board to order and sign warrants to him therefor.

The cause was submitted for decision upon an agreed statement of facts, which involved the concession that the resolution of December 30th is nugatory, and the classification made in September must stand, if the assessment roll as then exhibited, but properly corrected and footed, disclosed an assessed valuation greater than \$8,000,000. As evidence pertinent to such corrections, the statement of facts presented two documents: Exhibit A, containing such entries on the assessment roll as the commissioners claim were duplications counted in the total; and Exhibit B, containing such entries on the assessment roll as were omitted by the assessor in footing the same because he deemed them duplications. Upon this data the trial court found that duplications to the amount of \$23,100 were shown by Exhibit A which ought to be deducted from the total; that unjustified omissions to the amount of \$8,225 were shown by Exhibit B which ought to be added to the total; and that the true assessed valuation, as shown by the assessment roll in September, 1914, when the order of classification was made, was \$8,000,177. Upon these findings judgment was entered declaring Carbon county to be a fifth-class county, and commanding that Hauswald be paid as county auditor. From this the commissioners appeal, presenting the naked question whether the findings and judgment are warranted by the evidence.

The cause was determined by the district court wholly upon the evidence furnished by Exhibits A and B; and as this evidence is purely documentary, this court may determine its value without advantage or disadvantage over the learned trial judge. With

regard to the effect of Exhibit A the contention is twofold: By the respondent, that the court was without authority to make any deductions on account of double assessments supposedly shown thereby; by the appellants, that further deductions amounting to \$5,030.70 should have been made. We shall assume, without deciding, that the court had the power to make any deductions for double assessments clearly commanded by the evidence; but, so assuming, we question whether any of the deductions made were thus commanded. As we view the exhibit, not more than \$8,590 of the items shown by it and excluded by the court even seem to be cases of this character; while the evidence as to the remainder is colorless and equivocal or suggests a different conclusion. So, too, a most liberal view of the items which the appellants claim should have been excluded could not justify the exclusion of more than \$3,435.70, and this with very doubtful propriety. Subtracting these amounts from the total of \$8,015,072, as apparent from the roll in September, 1914, we still have a valuation of \$8,008,047.80, which result renders any inquiry into the propriety of the court's additions pursuant to Exhibit B wholly unnecessary.

In our opinion, the final judgment as rendered by the district court was correct, and is therefore affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE v. LEWIS. (No. 3808.)

(Supreme Court of Montana. June 12, 1916.)

1. CRIMINAL LAW \S 1130(2)—APPEAL—RECORD—SUFFICIENCY.

The court will not review sufficiency of evidence further than to examine it generally, where the appellant does not point out particulars as to which he alleges it is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2956, 2966; Dec. Dig. \S 1130(2).]

2. CRIMINAL LAW \S 1048—APPEAL—PRESERVATION OF EXCEPTIONS.

LAWS 1915, c. 135, \S 1, dispensing with necessity of exceptions and enlarging scope of Rev. Codes, \S 6784, stating what shall be deemed to be excepted to, does not apply to criminal cases, in which exceptions must be taken under Rev. Codes, \S 9340, 9346, 9347, 9271.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2656, 2657, 2670; Dec. Dig. \S 1048.]

3. CRIMINAL LAW \S 800(2)—INSTRUCTIONS—DEFINITIONS.

Although some instructions during murder trial used the words "assault" and "assailant," it was not error to refuse to define "assault" whose meaning may be considered to be understood by the average juror, since the court must have some latitude as to such matters.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1806, 1806; Dec. Dig. \S 800(2).]

4. HOMICIDE \Leftrightarrow 307(3) — INCLUDED OFFENSES — MANSLAUGHTER — ASSAULT.

Where defendant killed deceased, but alleged accidental discharge of his revolver, used as a club in a fight in which the two engaged, he was not entitled to a definition of "assault," since he was guilty of unlawful manslaughter, or should have been acquitted entirely.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 640; Dec. Dig. \Leftrightarrow 307(3).]

5. CRIMINAL LAW \Leftrightarrow 789(2)—INSTRUCTIONS—REASONABLE DOUBT.

It is not erroneous to instruct that reasonable doubt is a doubt founded on reason and not arising from caprice or conjecture, since such instruction puts no burden on accused to furnish a reason for doubt, nor is it misleading, although not in the most approved form.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1906, 1907; Dec. Dig. \Leftrightarrow 789(2).]

6. CRIMINAL LAW \Leftrightarrow 804(1)—ORAL INSTRUCTIONS—PROPRIETY.

Oral directions as to conduct of the jury in the jury room and as to form of verdict, informing the jury that verdict must be unanimous, are not erroneous, since they are not instructions on the law of the case, such as are required to be written.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1948, 1951; Dec. Dig. \Leftrightarrow 804(1).]

7. CRIMINAL LAW \Leftrightarrow 1038(1), 1056(2)—APPEAL—PRESERVATION OF EXCEPTIONS.

Error alleged in giving oral instructions does not avail, where no objection was made at the time, nor exception reserved as required by Rev. Code, § 9271.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2646, 2668; Dec. Dig. \Leftrightarrow 1038(1), 1056(2).]

8. CRIMINAL LAW \Leftrightarrow 957(1) — VERDICT — IMPEACHMENT—AFFIDAVITS OF JURORS.

A verdict cannot be impeached by affidavits of jurors that another juror admitted prejudice while in the jury room, but such affidavits may impeach only when the verdict is decided by chance, or by other means preventing free expression, as provided in Rev. Codes, §§ 6794, 9650.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2392; Dec. Dig. \Leftrightarrow 957(1).]

Appeal from District Court, Gallatin County; Ben B. Law, Judge.

George W. Lewis was convicted of manslaughter, and from the judgment and order denying new trial, he appeals. Affirmed.

Geo. D. Pease, of Bozeman, for appellant. H. A. Bolinger, of Bozeman, J. B. Polindexter, Atty. Gen., and J. H. Alvord, Asst. Atty. Gen., for the State.

BRANTLY, C. J. The defendant was tried upon an information charging him with the crime of murder in the first degree. He was found guilty of manslaughter, and sentenced to confinement in the state prison for a term of not less than 7 years and 6 months nor more than 10 years. He has appealed from the judgment and an order denying his motion for a new trial.

The homicide occurred during the afternoon of May 3, 1915, on a farm owned by L. S. Briggs, a few miles from Bozeman in Gal-

latin county. The defendant and deceased, Joseph Ennis, had been in the employment of Briggs, who resided in Bozeman, and had charge of the cattle and horses belonging to him and kept on the farm. A feeling of jealousy had arisen between them as to the extent of the authority conferred upon them, respectively, by Briggs for the management and care of the stock. Blame for the supposed loss of a calf, while the defendant and a young son of the deceased were driving some cows with their calves to the farm from a neighboring farm where they had been kept, was charged by defendant to the son. Understanding that he was charged with a theft of the calf, the son reported the charge to the deceased. The pre-existing jealousy thus ripened into enmity, which found expression in threats by deceased that he would have a settlement with the defendant. On the afternoon of the day above stated, Briggs had gone out from Bozeman to deliver some cattle which he had sold to one Bowles. When the work of separating the cattle had been accomplished, Briggs and other persons present went to inspect a young stallion kept on the place. Defendant and deceased were both present. The former, expecting trouble, had armed himself with a revolver. The latter was not armed. During the course of the inspection the deceased accosted the defendant with reference to the alleged charge against his son. After the exchange of a few words the two began to fight with their fists. In the few moments during which the struggle continued, defendant's revolver was discharged three times, the last shot inflicting upon the deceased a wound which resulted in his death about two hours later. The defense interposed by the defendant was that the revolver was accidentally discharged while he was using it as a club to protect himself from an assault upon him by deceased, he having drawn it for this purpose only.

Error is assigned upon rulings in the admission and exclusion of evidence, upon the giving and refusing to give certain instructions, upon insufficiency of the evidence to justify the verdict, and upon the ground that the verdict is contrary to law. Error is alleged also upon the conduct of the trial judge and county attorney by reason of which the defendant did not have a fair and impartial trial.

[1] I. Counsel does not undertake in his brief to point out any particular in which the evidence is insufficient. We shall therefore pass the assignment without comment, further than to say that we have examined the record with attention and find the evidence amply sufficient to justify the conclusion of the jury. Neither does counsel point out wherein the verdict is contrary to any of the instructions. In our opinion, the charge embodies the law applicable to the

facts disclosed by the evidence, and fully and fairly submits every issue in the case. Questions presented by the refusal of the court to submit requested instructions will be noticed later.

[2] 2. During the trial, counsel seems to have proceeded upon the assumption that chapter 135 of the Laws of 1915 (Laws 1915, p. 298) applies to criminal as well as civil cases, for no formal exceptions were reserved to the rulings upon the admissibility of evidence during the course of the trial. Neither were exceptions reserved to anything said or done by the trial judge or the county attorney. Whatever may have been counsel's view of the law upon the subject, the result is that none of the questions sought to be presented by the assignments in these particulars are before us for review. Section 1 of the act in question, except as therein provided, dispenses with the necessity of formal exceptions in civil cases, but has no application to criminal cases. The purpose of the act, as appears upon its face, was to enlarge the application of section 6784 of the Revised Codes, which relates to exceptions in civil cases only. This being so, the provisions of the Codes, relating to exceptions in criminal cases, were left in full force and are controlling. These are found in sections 9340, 9346, and 9347 of the Revised Codes. It requires only a cursory examination of these, together with section 9271, to understand that in criminal cases specific objection and exception, reserved upon the particular ruling, are necessary to require or permit this court to review it.

[3, 4] 3. Contention is made that the court erred in refusing to submit to the jury a definition of the term "assault." The purpose for which the instruction was offered is not made clear by what transpired at the time the instructions were settled. The argument is that, inasmuch as the terms "assaulted," "assailant," etc., are found in the other instructions, a definition of the term "assault" was necessary to enable the jury to understand the others. While the court might properly have submitted the instruction, we do not think the defendant should be granted a new trial because it refused to do so. The terms in question, like the expression "preponderance of the evidence," are of such common use that their meaning may be regarded as understood by the average juror without specific definition. Some latitude must be accorded to the trial court in such matters, in view of the facts in evidence and the character and apparent intelligence of the jury in the particular case. *Rand v. Butte El. Ry. Co.*, 40 Mont. 398, 107 Pac. 87. Moreover, in view of the defense interposed, the jury, we think, would not have been justified in finding the defendant guilty of the lesser offense of assault. He was guilty of unlawful homicide or should have been acquitted entirely. *State v. McGowan*, 36 Mont.

422, 98 Pac. 552; *State v. McDonald*, 51 Mont. 1, 149 Pac. 279. On neither theory, therefore, do we think the court was in error in refusing the instruction.

[5] 4. On the subject of reasonable doubt the court instructed the jury as follows:

"The term 'reasonable doubt' best defines itself. In a legal sense, however, a reasonable doubt is a doubt which has some reason for its basis; a doubt for which there exists in the minds of the jurors a reason, and not a doubt arising from mere caprice or groundless conjecture."

It is argued that this instruction was prejudicial, in that it put upon the defendant the burden of furnishing to every juror a reason why he should have a reasonable doubt of defendant's guilt; that it required each juror to have a reason which he could express in words, and was calculated to confuse rather than enlighten the jury. It is true, as counsel says, that this court has frequently approved as correct and sufficient to meet all requirements the instruction taken from *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, which counsel requested the court to give in this case. *Territory v. McAndrews*, 3 Mont. 158; *State v. Martin*, 29 Mont. 273, 74 Pac. 725; *State v. De Lea*, 30 Mont. 531, 93 Pac. 814. It does not follow, however, that it must for this reason condemn the instruction submitted. It is not open to the objections urged against it. It did not cast any burden upon the defendant; nor did it require any juror to be able to state a reason for his conclusion; nor can it be said that it was misleading or confusing unless the use of the expression "reasonable doubt" itself imports confusion and uncertainty. On the contrary, like the expression "to a moral certainty," its legal equivalent, it is in common use and well understood by any person of average intelligence. It is for this reason that many courts and text-writers characterize as futile efforts to define or explain it. *Miles v. United States*, 103 U. S. 304, 26 L. Ed. 481; *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; *State v. Davis*, 48 Kan. 1, 28 Pac. 1092; *State v. Killon*, 95 Kan. 371, 148 Pac. 643; *Wigmore on Evidence*, 2497; *Chamberlayne on Modern Law of Evidence*, 996 B. It may well be deemed sufficient, after the court has fully stated to the jury the presumptions of which the law gives the defendant the benefit, as was the case here, if they are told without further explanation that they must acquit him unless they are satisfied of his guilt beyond a reasonable doubt. We have frequently said it is safer for trial courts to use instructions which have been approved by this court (*State v. Gibbs*, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749), instead of formulating new ones. Even so, we do not think error was committed in submitting the instruction in question. Other instructions refused were fully covered by the charge as given.

[6, 7] 5. Contention is made that the court

erred in giving oral instructions to the jury. The record furnishes no ground for this contention. At the close of the argument the court orally directed the jury as to their conduct in the jury room and as to the form in which they might return their verdict, and informed them that their verdict must be unanimous. There was no error. Directions as to such matters are not instructions on the law of the case which must be written. *People v. Bonney*, 19 Cal. 427; *State v. Potter*, 15 Kan. 302. If it be conceded that there was error, no objection was made at the time nor any exception reserved as required by the statute. Rev. Codes, § 9271.

[8] 6. It is said that the defendant did not have a fair trial by reason of the bias and prejudice of Juror Webster. We find in the record an affidavit by Frank P. Van Ausdol, who served as a juror in the case, from which it appears that while the jury were discussing the reputation of Ennis, the deceased, Webster made the statement that the defendant was reputed to be a gambler, and that he had robbed his (Webster's) boy twice, and that, upon being charged with entertaining prejudice against the defendant, he admitted that he did so. There is also an affidavit by Webster in which he denies that he made any such statement. These affidavits cannot be considered for any purpose. The general rule is that a verdict cannot be impeached by the affidavit of jurors who rendered it. The one exception is that where it has been decided by means other than a fair expression of opinion by all the jurors. Rev. Codes, § 9350; *State v. Beesskove*, 34 Mont. 41, 85 Pac. 376; *State v. Wakely*, 43 Mont. 427, 117 Pac. 95. In *State v. Beesskove* it was said:

"This section provides for the one exception, namely, cases where the verdict has been decided by lot, or by any means other than a fair expression on the part of all the jurors. In such case the impeaching affidavit may be made by members of the jury. Code Civ. Proc. § 1171, Rev. Codes, § 6794. This express exception, under the rule 'expressio unius est exclusio alterius,' it would seem excludes all other exceptions."

The judgment and order are affirmed.
Affirmed.

SANNER and HOLLOWAY, JJ., concur.

CANYON CREEK IRR. DIST. v. MARTIN. (No. 3856.)

(Supreme Court of Montana. May 8, 1916.)

1. WATERS AND WATER COURSES ⇨238—IRRIGATION COMPANY—NATURE AS CORPORATION.

Where an irrigation company has commercially valued capital stock and its articles declare its purpose to supply water to the public, it is a corporation for profit, and not a mutual company, so as to give its stockholders the right to easement in the water right which would not be divested by a sale by the corporation.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨238.]

2. CORPORATIONS ⇨8—OBJECTS—HOW DECLARED.

The essential nature of a corporation as general or mutual cannot be affected by statements of its by-laws, but depends on its articles of incorporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 7-10, 133; Dec. Dig. ⇨3.]

3. WATERS AND WATER COURSES ⇨234 — IRRIGATION COMPANIES—RIGHTS OF STOCKHOLDERS.

If a stockholder in an irrigation company objects to alleged fraudulent transfer of its property, he must proceed under Rev. Codes, §§ 3899, 3900, providing the method by which dissenting stockholders may secure review of corporate acts; and, if he fails so to do, the acts are valid as against him, under sections 6419, 6451, declaring the two and five year periods of limitation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 321; Dec. Dig. ⇨234.]

4. WATERS AND WATER COURSES ⇨247(1)—IRRIGATION COMPANIES—DIVERSION OF WATER—LACHES.

Where it is not shown that diversion of water was such as to challenge notice of the irrigation district, it cannot be charged with laches in failing to bring action to enforce its rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. ⇨247(1).]

Appeal from District Court, Ravalli County; J. M. Clements, Judge.

Injunction by the Canyon Creek Irrigation District against Van D. Martin. From a decree that perpetual injunction issue as prayed, defendant appeals. Affirmed.

Wagner & Taylor, of Hamilton, for appellant. E. C. Kurtz, of Hamilton, and Geo. T. Baggs, of Stevensville, for respondent.

SANNER, J. The plaintiff, a duly created irrigation district of the state of Montana, claiming ownership as against the defendant, of certain reservoirs in Ravalli county, with the waters impounded thereby, and alleging that the defendant has interfered and is interfering with its property by diverting and using its said waters, brought this suit to enjoin him from continuing so to do. The answer as filed sought to present a general denial and an affirmative defense to this effect: That the Canyon Creek Reservoir Company, a corporation, acquired a site, and thereon built a reservoir for the storage of water to irrigate the lands of its stockholders; that the reservoir so built is "the same reservoir mentioned in plaintiff's complaint;" that the defendant was and is a stockholder in said corporation, as also were certain other persons named in the answer; that said other persons, on or about June 5, 1909, caused a meeting of the stockholders of said corporation to be held for the purpose of selling and disposing of all its assets, and at said meeting, by voting large amounts of the stock of said corporation theretofore unlawfully issued to them, or to some of them, and against the defendant's protest, adopted

a resolution, by the terms of which Miles Romney and William Tate became the purchasers of all the assets of said corporation; that Romney and Tate conveyed the same to the plaintiff herein; that said sale is void as against the defendant, and did not operate to divest him of his share, as represented by his stock in said company, in its reservoir and waters, which waters are necessary to the irrigation of his lands and have by use since become appurtenant to his lands. A reply was filed, admitting, among other things, the sale to Romney and Tate of all the assets of said reservoir company and the purchase thereof by the plaintiff district from said Romney and Tate, but denying the allegations upon which the illegality of said transactions is sought to be based, and pleading affirmatively that litigation of the matters and things alleged by the defendant is barred by the provisions of sections 6449 and 6451, Revised Codes. The case coming on for trial, the plaintiff moved "for judgment on the pleadings as to the affirmative defenses contained in the defendant's answer," which motion was by the court sustained. Thereupon evidence was introduced, tending to show that the defendant had interfered, and was interfering, as alleged, with the water supplied by plaintiff's reservoirs, including the reservoir which had originally been constructed by the reservoir company, but which in 1909 or 1910 had been reconstructed and made more serviceable by the plaintiff. It also conceded that the defendant owned certain shares of stock in the reservoir company, and that he protested against the sale of its assets. For himself the defendant testified, suggesting that one or two of the members of the plaintiff district had consented to his using the water after the plaintiff's commissioner, by whom he had been forbidden so to do, had left, and he offered, but was not allowed, to support his right, independently of such consent, by offering in evidence the articles of incorporation of the reservoir company and certain of its by-laws. The effect of these by-laws is to limit the right to hold stock in the company to persons owning lands irrigable by its waters, and to such persons only in proportion to the irrigable acreage held by them respectively. At the close of all the evidence the court ordered a perpetual injunction to issue as prayed, and, a decree being entered accordingly, this appeal therefrom was taken.

[1-3] The argument for reversal is this: That the offered evidence shows the reservoir company to have been an organization mutual in character, whose functions were merely those of a carrier of water to its own members exclusively, such members being in law tenants in common of the reservoir, waters, and ditches nominally held by the company; that the defendant's interest in said property was in the nature of an easement appurtenant to his lands, and of it he could

not be divested by any sale of the company's assets made without his consent; that he could not be barred by either of the sections pleaded in the reply, because the plaintiff had, since its organization and alleged purchase of the reservoir company's assets in 1900, permitted the defendant to divert such water, and "so long as his asserted rights were not molested, he had no occasion to institute an action against the district to enforce his rights in the reservoir;" and, finally, that the plaintiff itself is estopped by laches to assert any claims hostile to the defendant. There is no merit in any of this. Whether, if the reservoir company were a mutual concern, with functions only of carriage, the effect of membership in it would be as supposed by the defendant we are not called upon to say, because the articles of incorporation of the reservoir company negative any such notion of its character. They show that it has a capital stock, commercially valued, and they say:

"The purposes and objects for which said company is formed are: To supply water to the public; to construct canals, ditches, flumes and other works for conveying water and reservoirs for storing same; to dig ditches, build flumes and run tunnels; to purchase, hold, develop, improve, use, lease, sell, convey or otherwise dispose of water and water powers and right and the sites thereof and lands necessary or useful therefor, for the industries and habitations arising or growing up or to arise or grow up in connection with or about the same; to carry on any branch of business designated to aid in the industrial and productive interests of the country and the developments thereof, or of one or more of the branches of business herein mentioned in connection with and as a part of the purposes and objects above mentioned for which this company is formed to purchase, develop, acquire, buy by appropriation or otherwise, hold, lease, mortgage, sell and convey water, water rights, water privileges, rights of way, pipes, flumes and all similar property; to construct and operate ditches, dams, flumes, canals, reservoirs and other means of collecting and utilizing water for irrigation, power, transmission of power, transportation and other useful or beneficial purposes; to sell, lease, give and supply water for domestic, mechanical, agricultural, irrigation, power and other purposes."

This fixes and determines the character of the reservoir company; in it there is nothing suggestive of mutuality, nothing to indicate that the functions of the corporation are confined to the carriage of water to its members so as to make them, and not the corporation, the owners of its ostensible assets. If it be supposed, however, that this is made to appear from the by-laws offered but not received in evidence, the answer is that not in this way can the essential nature of a corporation be affected. The reservoir company in which the defendant held or holds shares of stock was an ordinary corporation for profit, with a scope almost as wide as language can make it, with ownership of and title to its assets, and with power to sell them all upon a proper vote of its stockholders (Rev. Codes, §§ 3897-3900). It made such sale, and if as a preliminary, in so doing

frauds, misfeasance, or violations of such of its by-laws as were legal occurred, and these acts constituted an invasion of defendant's right as a stockholder, he could have effectually assailed them if he had acted in time and in a proper proceeding. According to his own pleading, however, he has delayed too long (Rev. Codes, §§ 3899, 3900, 6449, 6451), and the transfer must be considered, as against him entirely valid and efficient.

It results, then, that by the resolution of June 5, 1909, the reservoir company became divested of the reservoir with its site and with any waters impounded, or to be impounded, thereby, and thereafter the plaintiff district became the owner.

[4] There is nothing in either pleading or proof to suggest that during any of the period intervening between that time and August, 1914, the defendant's diversions of the waters, if they occurred, were such as to challenge plaintiff's notice. It, therefore, cannot be charged with laches for, to paraphrase the language of the defendant himself: Until injury occurred, it had no occasion to institute an action against him to enforce its right in the reservoir or in the waters in question.

The decree appealed from is affirmed.

BRANTLY, O. J., and HOLLOWAY, J.,
concur.

**SCHWERIN ESTATE REALTY CO. v.
SLYE et al. (S. F. 6934.)**

(Supreme Court of California. July 26, 1916.
Rehearing Denied Aug. 24, 1916.)

1. VENDOR AND PURCHASER ⇨335—RECOVERY OF PURCHASE MONEY PAID—EFFECT OF PURCHASER'S DEFAULT.

Under a contract terminating the vendor's obligations unless the purchase price was promptly paid, the purchasers cannot recover part payments where they defaulted as to the balance, for such failure terminated their rights without any affirmative act by the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981-983; Dec. Dig. ⇨335.]

2. VENDOR AND PURCHASER ⇨170—PAYMENT OF PURCHASE MONEY—OBLIGATION TO PAY.

Under such a contract, the purchasers must tender payment before the vendor is required to put them in possession, notwithstanding tenants at will occupy part of the land, for their presence does not establish the vendor's inability to deliver possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344-348; Dec. Dig. ⇨170.]

3. VENDOR AND PURCHASER ⇨58 — CONSTRUCTION OF CONTRACT — ACCOUNTING CLAUSE.

The vendor's agreement to render the purchaser an accounting "upon the final consummation of the purchase," according to the contract does not make such accounting a necessary part of the vendor's offer of performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 88; Dec. Dig. ⇨58.]

4. VENDOR AND PURCHASER ⇨336 — PERFORMANCE—WAIVER OF DEFECT.

The purchasers' failure to specify the defects in an accounting rendered by the vendor as part of his offer of performance waived any infirmities therein under Civ. Code, § 1501, providing that objections to the mode of an offer of performance are waived unless stated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 964; Dec. Dig. ⇨336.]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Suit to quiet title by the Schwerin Estate Realty Company against Joseph Slye and L. H. Condon. Judgment for plaintiff, and defendants appeal. Affirmed.

T. W. Hubbard, of San Francisco, for appellants. J. J. Lermen, of San Francisco, for respondent.

MELVIN, J. Plaintiff sued to quiet its title to certain real property in San Mateo county. Defendants answered, setting up certain contracts of sale upon which they had paid to plaintiff \$5,000 on account of the purchase price of the land. In the answer it was averred that the consideration for the \$5,000 wholly failed because plaintiff was not by itself in possession of the land, but that the premises were held by divers persons who had growing crops thereon, and because plaintiff had failed to account for certain receipts and disbursements as stipulated in the contracts. There was a cross-complaint by which the writings between the parties to the action were set up, and the inability of the vendor to give possession of the land on account of the occupancy and use thereof by other persons was pleaded, as well as the failure of plaintiff to account to defendants as provided by the contract. The prayer of the cross-complaint was for \$5,000, and the cross-complainants asked that the amount of any judgment which might be given in their behalf should be made a lien on the property. Issue was joined on all of the allegations of the cross-complaint, and in its answer the Schwerin Estate Realty Company denied that it was not in possession of all of the lands involved, denied its inability to deliver possession thereof, and affirmatively averred that on the 20th of February, 1913, which was the last day for the performance of the contract by the vendees, said vendor was, and had been ever since, and continuously had been up to March 28, 1913, ready, able, and willing to deliver to defendants possession of the whole of the land described in the contracts, if said defendants would keep and perform their part of the agreement. The Schwerin Estate Realty Company also denied the allegation that it had not rendered an account as called for, but, on the contrary, alleged that it had fully kept and performed all of its part of the agreement. Aff-

er trial of the issues the court gave judgment, quieting plaintiff's title to the property and denying any relief under the cross-complaint. Defendants prosecute their appeal from the judgment.

[1] It is admitted that defendants neither alleged nor proved their readiness, willingness, and ability at any time to perform their part of the contracts of sale, and respondent insists that such failure is fatal to their cause of action. The original contract between the vendor and Messrs. Slys and Condon called for a completion of the transaction by November 20, 1912. Appellants not having performed the agreement on their part, another contract was executed extending the time, and appellants paid \$3,000 on the purchase price in addition to the \$1,000 previously deposited. A further extension was granted on payment of an additional sum of \$1,000 and an agreement dated January 18, 1913, was executed. By its terms February 20, 1913, was made the date of final payment. Time was expressly made of the essence of the agreement of January 18, 1913, and failure to perform by defendants, under the terms of said contract, would work a forfeiture of all rights of the vendees, leaving the sums previously paid in the possession of the vendor as liquidated damages. We cannot escape from the conclusion that by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein, the defendants utterly failed to establish their right to any relief. The finding of the court in this behalf is that:

"Said defendants Joseph Slys and L. H. Condon have failed to prove or assert that on the said 20th day of February, 1913, or at any time thereafter, or at any other time, they or either of them offered to perform the obligations of said contracts upon their part to be kept or performed, or that at any of said times they, or either of them, were able or willing to perform the said obligations of the said contracts upon their part to be kept or performed."

Under the terms of the contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited "by the parties of the second part" (Slys and Condon) an automatic termination of all of the vendor's obligations in law and equity. Of this agreement it may be said, just as Mr. Justice Henshaw said in *Glock v Howard*, 123 Cal. 1-16, 55 Pac. 713, 718 (43 L. R. A. 199, 69 Am. St. Rep. 17):

"In the case at bar, the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result."

But respondent as late as March 28, 1913, tendered a deed and offered to put defendants in actual possession of the property upon payment of the balance of the purchase

price. If the vendees had desired to consummate the contract or to recover back their deposit, they should have made a tender of the balance due, and should have demanded performance by the vendor. Not having done this, they are not in a position to demand the relief for which they have prayed. *Griesemer v. Hammond*, 18 Cal. App. 535-540, 123 Pac. 818; *Oursler v. Thacher*, 152 Cal. 739-745, 93 Pac. 1007; *Skooknum Oil Co. v. Thomas*, 162 Cal. 539-544, 123 Pac. 363; *List v. Moore*, 20 Cal. App. 618-622, 129 Pac. 474.

[2] The position taken by defendants seems to be that because a part of plaintiff's land was occupied by tenants at will on February 20, 1913, plaintiff was not in a position to put them in possession of the land, and was therefore in default. But as we have seen, under the terms of the contract defendants were to be the first actors by proffering payment of the balance of the purchase price. Of course, if the vendor had placed the property in such a condition that it could not convey title according to the terms of the contract, the vendees might have been relieved of the necessity of tender of the money or of a showing of willingness on their part to perform, but it is not denied—indeed it is admitted—that plaintiff had title to the land. Persons, admittedly tenants at will, were in occupancy of part of the land, but that did not justify the vendees in saying, in effect, to the vendor, "When you evict these people and present us a deed, then we will talk to you about payment." Since the contract was one by which their rights were automatically terminated by their failure to tender the purchase money, it was of the very essence of their case that the vendees should show an ability and willingness to perform on their part and prevention of performance by the vendor. They showed neither because the mere presence of the tenants at will on the land did not prove the vendor's inability to comply with the terms of the contract of sale.

However, the court found that the tenants were not claiming the right to remain upon the land, and that at all times on and after the 20th of February, 1913, they were ready on demand to surrender possession of the parts of the property which they respectively occupied. This finding was based upon the testimony of *Deferrari*, a witness for defendants, a gardener who with certain associates was engaged in market gardening on the land. These men were working the property on shares, and the enterprise was conducted in the name of the witness who owned the largest interest therein. Without reviewing it in detail we may say that this evidence was sufficient to support the finding.

[3, 4] The finding that plaintiff and cross-defendant complied with the requirement for an accounting was also supported, but in reality the matter of an accounting was -

false quantity in the case. By a supplemental contract of January 20, 1913, it was agreed that "upon the final consummation of the purchase * * * according to the terms of the attached contract" (the agreement of sale), an accounting should be rendered by the vendor to the vendee, showing the moneys collected after November, 1912, by the former from various holders of contracts of purchase of lots, and showing also the amount of the corporation's payments or obligations to pay on account of certain specified indebtedness. The giving of this account was not made a condition precedent to the offer on the part of vendees to perform. However, on February 20, 1913, plaintiff's counsel did send an accounting which was obviously intended to comply with the requirements of the agreement of January 20th. Appellants contend that the account rendered was not in compliance with the supplemental agreement, but in their pleadings they do not specify its infirmities, nor did they allege or prove any objection on their part ever offered to its form or substance. Even if we should regard the accounting as a necessary part of the vendor's offer of performance (and we do not), we should be bound to hold that by failing to offer objections to it the vendees waived its infirmities. Section 1501, Civ. Code.

It follows from the foregoing that the judgment must be affirmed; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

HERDAL v. SHEEHY. (S. F. 6932.)

(Supreme Court of California. July 26, 1916.
Rehearing Denied Aug. 25, 1916.)

1. MECHANICS' LIENS § 291(5) — ENFORCEMENT—VARIANCE BETWEEN PLEADING AND PROOF.

A complaint to foreclose a mechanic's lien alleged performance of the contract, but it appeared that the building was partly erected on other land than that specified in the contract. *Held*, that plaintiff, having pleaded full compliance with the contract, could not recover by showing an excuse for his nonperformance.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 603; Dec. Dig. § 291(5).]

2. CONTRACTS § 295(1)—PERFORMANCE—SUBSTANTIAL PERFORMANCE—BUILDING.

A contract to erect a building for \$3,565 upon certain land is not substantially complied with by erecting it partly upon an adjoining street where the cost of correcting the fault would exceed \$660.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1353, 1356, 1362; Dec. Dig. § 295(1).]

3. CONTRACTS § 303(5)—PERFORMANCE—LIABILITY FOR DEFECTIVE PERFORMANCE.

Where a contractor constructed a building foundation partly in the street and the second contractor erected a building thereon under a contract to build wholly upon the owner's lot, *held*, that the second contractor, rather than

the owner, should bear the loss where both were ignorant of the first contractor's mistake.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1434-1439½; Dec. Dig. § 303(5).]

Department 2. Appeal from Superior Court, City and County of San Francisco; James M. Trout, Judge.

Action to foreclose a mechanic's lien by Andrew Herdal against Minnie Sheehy, substituted in place of William J. Sheehy, deceased. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Stafford & Stafford, of San Francisco, for appellant. Cullinan & Hickey, of San Francisco, for respondent.

MELVIN, J. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The action was one for the foreclosing of a lien upon real property in the city and county of San Francisco. Defendant did not dispute the following facts: William J. Sheehy, her predecessor in interest, entered into a contract with plaintiff's assignors according to the terms of which they were to erect a building upon his land. The contract price was \$3,565, payable in four installments. W. J. Sheehy filed and recorded a written acceptance of the building on March 8, 1910. All of the contract price was paid to plaintiff's assignors, except \$660, the amount for which their lien was filed. The foregoing facts are not disputed, but the defense to the action was based upon the fact, found by the court, that the contractors, contrary to their written agreement with Mr. Sheehy, had erected the building partly upon his land and partly upon an adjacent public street. The court found that the defense was a good one and that the building had not been located in compliance with the terms of the contract because it was not entirely upon the property of William J. Sheehy. There was a further finding that when the formal acceptance was filed this error in the location of the building was unknown to Mr. Sheehy and that he did not waive the failure of the contractors to comply with the terms of their agreement.

Plaintiff had included in his complaint a count in quantum meruit, and upon the issue joined on this cause of action the court found that the reasonable value of the work done and materials furnished was less than the amount actually paid under the contract.

Appellant does not question the finding that the building was partly upon public property. His theory is that an independent contractor prepared the foundations for the building, and that in the execution of their contract for the erection of the superstructure plaintiff's assignors did nothing more

than follow the directions of Mr. Sheehy to use said erroneously located foundations.

[1, 2] Even conceding the status of the builder of the foundations as an independent contractor (although he was paid by the contractors out of the moneys received by them on account of the contract price), plaintiff did not plead failure of complete performance, excused by the mistake in the location of the foundations, but on the contrary he declared on the theory of full compliance by the contractors with the terms of the written agreement. The lot upon which the building was to be erected was particularly described in the contract. Clearly, the placing of the building partly upon other land was not a compliance with the agreement. If appellant relied upon Mr. Sheehy's conduct as an excuse for nonperformance he should have set up both the nonperformance and the excuse. This he failed to do and he may not take advantage of it without pleading. *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867. Appellant denies the application of this doctrine to building contracts because the courts have held that equity will always give judgment in suits on such contracts if there has been substantial performance, deducting from the price the damage on account of defects, citing in this behalf *Marchant v. Hayes*, 117 Cal. 669-672, 49 Pac. 840. It is true that in the opinion in that case it is said, *arguendo*, that:

"It has been sometimes held that where a contractor under a bona fide attempt to perform his contract has unintentionally omitted some trifling particular, he may recover upon the contract, making a reduction for the damage sustained by the omission."

But the general rule is emphatically stated in the opinion. It is that one who has acted by virtue of a written contract has no right of recovery, unless he can show that he had completed the contract on his part or that completion had been waived or excused. In this case appellant failed to show substantial compliance with the contract and he did not plead excuse for his failure to build the house upon the property specified in the contract.

[3] But eliminating all questions of pleading and giving plaintiff the benefit of every equitable right, we cannot see that the trial court committed error. It is not asserted that Mr. Sheehy intentionally misled the builders nor that Hegvold, who constructed the foundations, was intentionally at fault or that he was ever aware of his blunders. The contract specified that the structure was to be upon Mr. Sheehy's lot, not that it was to be erected upon certain prepared foundations. The court found that the cost to Mrs. Sheehy to correct the fault in construction would be more than \$660, the amount claimed by plaintiff. Manifestly it would be unfair to compel the innocent owner to pay the contract price and then a large sum to

have the building moved onto her lot and to allow the assignee of the builders to collect the full contract price for a building not in compliance with the plain terms of the written agreement. Mr. Sheehy and the builders were innocent of intentional wrong, but the latter were violators of substantial terms of the contract and should therefore be the sufferers, rather than the present owner of the land.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

WESTERN GRAIN & SUGAR PRODUCTS CO. et al. v. PILLSBURY et al., Industrial Accident Commission. (S. F. 7598.)

(Supreme Court of California. July 25, 1916. Rehearing Denied Aug. 24, 1916.)

1. MASTER AND SERVANT §417(7)—WORKMEN'S COMPENSATION—APPEAL—SCOPE OF REVIEW.

Where jurisdiction of the Industrial Accident Commission depends on violent death of an employe, the court on review of award of compensation may determine sufficiency of evidence to show such a death.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §417(7).]

2. MASTER AND SERVANT §403, 405(4) — WORKMEN'S COMPENSATION — DEATH OF SERVANT—BURDEN OF PROOF—CHARACTER OF EVIDENCE.

The burden is on the applicant for compensation to establish by competent proof the death of the servant, and he may do so by circumstantial evidence, finding the body not being indispensable to conclusion of violent death.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §403, 405(4).]

3. DEATH §4—PRESUMPTION FROM ABSENCE.

While a person unheard of for a time is presumed to be alive until expiration of 7 years, the absence, coupled with other circumstances, may be sufficient to prove death at a much earlier time.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 5, 6; Dec. Dig. §4.]

4. MASTER AND SERVANT §405(4) — WORKMEN'S COMPENSATION—DEATH OF SERVANT—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support finding of commission that servant met his death by violence, though the body was not found.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §405(4).]

5. MASTER AND SERVANT §405(4)—WORKMEN'S COMPENSATION—DEATH OF SERVANT—EVIDENCE—SUFFICIENCY.

Award of compensation cannot be defeated on the ground that though the evidence warranted finding of violent death by murder, it failed to show that it was accidental and in the course of employment of the watchman, who disappeared while on duty, the traces indicating murder.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §405(4).]

6. MASTER AND SERVANT §403—WORKMEN'S COMPENSATION—DEATH OF SERVANT—EVIDENCE—SUFFICIENCY.

Claimant need not negative claim that night watchman's death was result of conflict brought

on by himself, when circumstances point to his murder.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §403.]

In Bank. Application for writ of review by the Western Grain & Sugar Products Company, Employer, and the Fidelity & Casualty Company of New York, Insurer, to review the award of compensation by A. J. Pillsbury and others as the Industrial Accident Commission, to the personal representative of Edward Shea, employé. Award affirmed.

Chickering & Gregory, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, and W. H. Pillsbury, of Oakland, for respondents.

MELVIN, J. Certiorari to review the award of the Industrial Accident Commission to the personal representative of one Edward Shea, upon the finding that the said Shea, who was a night watchman employed by Western Grain & Sugar Products Company, had met his death at the hands of persons unknown who had entered upon the property of his said employer. The findings and decision were made by a majority of the commissioners, Mr. Commissioner Weinstock writing a dissenting opinion.

Western Grain & Sugar Products Company had a warehouse in the town of Crockett, Contra Costa county. The property was bounded on one side by the straits of Carquinez and on all the other sides was inclosed either by buildings or by a fence about 8 feet in height. For some time prior to November 12, 1914, and on that day Edward Shea had been employed as night watchman on the premises by the said company. On that night he entered upon his customary duties at about 10 o'clock. On the following morning he had disappeared and he has not been seen since. The facts and conditions upon which the majority of the commissioners founded their conclusion that Shea had been murdered were as follows: On the morning of the 13th of November three pools of fluid partly reddish and partly gray were found on the wharf on the property of the Sugar Products Company. There were drops of fluid staining the wharf to its edge. There were marks such as might have been made by dragging a body from these pools over the edge of the wharf and into the water. Shea's cap was found in or near one of these pools. It was torn and crumpled, the tear, however, not extending through the lining. The tear was in the back part of the cap at a place which, when the cap was worn, would be near the base of the skull. Shea's unopened knife lay just at the edge of the wharf. In the engine room, where he made his headquarters, were found the card on which he checked off his hourly rounds, the entries indicating that he had made his last tour of duty about midnight. On the outside of the fence, which partially surrounded

the property, were marks which might have been made by the feet of persons endeavoring to climb over. The fence was 8 feet high, but these marks only extended 3 feet 6 inches from the ground. Just opposite the marks inside the fence were found footprints in the earth. It was the theory of the claimant that these had been made by some man or men jumping from the top of the fence, but one witness Fox, the only person who spoke regarding their depth, said that the footprints were not deep enough to have been so produced. Early on the evening of the 12th of November two rough-appearing men had been seen in a saloon at Crockett. One of them had been heard talking with a third person about the advisability of going armed and had said that he always carried a weapon. About 7 o'clock on that evening and again at a time near midnight two men were seen at a point on the Southern Pacific right of way not far from the fence which we have described. One of these men was positively identified as one of the two who had visited the saloon at Crockett earlier in the evening. It was also in evidence that a door near the boiler room was found open on the morning after the watchman's disappearance. This door might be unfastened from the outside only with a key, but from the inside by a latch. It had a typical Yale lock. There was evidence also which tended to show that Shea's cap was not torn nor mutilated in any way when he left his home to go to his work at 9 o'clock on the evening of his disappearance. It was also shown by the uncontradicted evidence that Shea was sober, industrious, and apparently well satisfied with life, that he had no known enemies, and that his family relations were pleasant.

The water near the wharf was thoroughly dragged after Shea's absence was discovered, but no trace of the body of the missing man was found. Nothing was stolen from the premises, and there was no evidence of the absence of any articles which might have been used to weight a dead body. The testimony regarding the blood is well summed up in the dissenting opinion of Mr. Commissioner Weinstock as follows:

"If it were a fact that the large pools of blood were human blood or spinal fluid, it would lend color to the assumption that it was the blood of the deceased, and that he had been murdered. Under date of May 26, 1915, Dr. Victor, the bacteriologist to whom had been sent the blood in the possession of Sheriff Veale, reported thereon to the effect that the material which was actually blood was not human blood, and that of the two specimens sent, the one giving positive evidence of being animal blood was positively not human blood, and the other material, not having the visual characteristics of blood, gave one reaction indicating that it was human blood, and one reaction which is testimony against the theory that the fluid emanated from a human being."

[1] The first attack of petitioners is upon the finding that Shea was murdered. As the jurisdiction of the Industrial Accident Commission to act at all depends upon this ul-

timate fact as found, we are not precluded from examining the evidence upon which it is based. If that evidence is not sufficient in any view to justify the finding of death by violence we will be compelled to nullify the award made by the Industrial Accident Commission. *Del Mar Water, Light & Power Co. v. Eashleman*, 167 Cal. 689, 140 Pac. 591, 948; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 688, 151 Pac. 398. We shall determine whether or not there was substantial evidence that Edward Shea was murdered.

[2] The burden was upon the applicant to establish by competent proof the death of Shea. Doubtless such proof may be made by circumstantial evidence, and the actual finding of the body is not an indispensable requisite to a conclusion, in a civil case, that one has met his death by violence.

[3] While a person unheard of for a time is presumed to be alive until the expiration of 7 years (*Benjamin v. District Grand Lodge*, etc., 152 Pac. 731; *Rogers v. Manhattan Life Insurance Co.*, 138 Cal. 285-294, 71 Pac. 348), the absence, coupled with other circumstances, may be sufficient to prove death at a much earlier time. The case last cited is one in which the disappearance of a passenger from a steamer between ports and the finding of a note in which he declared his intention of drowning himself, together with other circumstances, were held sufficient to "quicken the time" so as to raise the presumption of death before the expiration of the statutory period fixed by subdivision 26 of section 1963 of the Code of Civil Procedure.

[4] Petitioner contends that the test to be applied in such a case as this is whether or not there is substantial evidence which would render death more probable than a continuation of life, citing in support of that rule such cases as *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348, *The San Rafael*, 141 Fed. 270, 72 C. C. A. 388, and *Fidelity Mutual Life Association Co. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922. Measured by such authorities the facts presented by the testimony given before the Industrial Accident Commission are sufficient to justify the finding of death by violence. Indeed the circumstances are quite as convincing as those reviewed in any of the opinions cited. Even if we eliminate the marks on the fence and footprints on the ground there is left substantial evidence of violence. The wharf was accessible from the water and the assailant or assailants of the night watchman might have come by boat. The open door might indicate that at least one person went out through it and the condition of the door would fit either the theory of murder or that of a fabricated appearance intended to create the idea that Shea had been killed. But nevertheless we cannot say

that there was not sufficient evidence to support the finding which is attacked. Undeniedly if there was blood of one of the lower animals on the wharf that fact would lend strength to the suspicion that Shea might have invented the circumstantial evidence. The expert who examined the specimens of fluid taken from the wharf did not testify before the commission personally, and it does not appear from the record before us by what method he reached his conclusions. If he had reported that all of the specimens were of other than human origin and if the commissioners had felt themselves bound to accept his deductions there would be very strong ground for suspecting that Shea had fabricated the appearances of violence. But his report was that some of the fluid gave a reaction indicating that it was human blood. The specimens were taken from the same vicinity. The surroundings indicated that they came from the same source. The mixed result of the expert's experiments, therefore, would indicate that his method of examination was faulty. It was evidently some chemical process because "reactions" are mentioned. It does not appear that microscopy was resorted to and that the usual method of measuring corpuscles by use of a micrometer was followed. But whatever the process adopted, the result was such as would justify the commissioners in placing small weight upon the statement that the blood of one of the lower animals was in the pool. As counsel for respondent well expresses it: "The only effect of the test was to prove its own inconclusiveness."

The other circumstances speak most eloquently against the theories of suicide or flight and in support of that of death by violence. The torn cap which had been intact when Shea put it on, the marks on the wharf as of a body dragged to the edge, the location of the knife indicating that it probably dropped from a pocket as the body was lifted for its disposition either in the water or a waiting boat, the burning lantern, the coat left in the boiler room, the happy nature of the man, and his home life—all of these things indicate that his disappearance was due to his death by violence and not to an intentional desertion of his wife and minor children. He had been married for 33 years and had a family of 9 children, 4 of them still minors and 3 of these wholly dependent upon him for support. It is highly improbable that such a man would desert his family, and it is reasonably certain that he was killed just as the circumstances indicate that he was. We conclude therefore that the finding as to the death of Shea and the manner thereof must stand.

[5, 6] Petitioners make the further contention that even if the fact of death by violence be conceded the evidence does not warrant the finding that it was accidental and in the course of the watchman's employment.

Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175, is cited as authority for the proposition that the possibility of Shea's death as a result of a conflict brought on by himself should have been negated by the claimant. There is no merit in the contention and the cited case does not support it. In the Price Case it was merely decided that where death from a bullet wound caused by the discharge of a revolver in the hands of another is alleged a finding that death was not caused by accidental means is to be sustained upon a showing that it resulted from a conflict brought on by the person who was afterwards killed. The rule has no application to the facts in the proceeding under review. Shea was on the property which he was employed to watch and the circumstances indicate that he was slain at the post of duty and in its performance. A schoolmaster killed while trying to subdue two rebellious students was held to have met his death from "accident" within the meaning of the compensation law. *Trim Joint District School v. Kelly, W. C. & Ins.*, Rep. 359. An assault upon a foreman by a vicious employé has been similarly classified by this court (*Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 703, 151 Pac. 398), and in the recent case of *Western Metal Supply Co. v. Pillsbury*, 156 Pac. 491, 496, it was held that the surviving dependents of a night watchman, who was murdered while on duty, were entitled to compensation under the statute of California.

Other contentions were made by petitioners, but these have been settled by decisions of this court filed since the briefs herein were written. Therefore we will not discuss the said contentions.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

In re ANDERSON'S ESTATE. (S. F. 7877.) (Supreme Court of California. July 29, 1916. Rehearing Denied Aug. 24, 1916.)

WILLS ⇨72—TESTAMENTARY INTENT.

A writing, signed by deceased, held to show no intent to make a disposition of her property after her death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 189; Dec. Dig. ⇨72.]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Ameli Anderson. From a judgment holding a document not to be a will, appeal is taken. Affirmed.

H. A. Blanchard, of San Jose, for appellant. R. M. Wright and F. Q. Wilson, both of San Jose, for respondent.

At the close of the argument, SHAW, J., delivered the opinion of the court, SLOSS, J., and LAWLOR, J., concurring.

There does not seem to be any merit in this appeal. The document offered as the will of decedent reads as follows:

"Aug 8th 14

"Mr Swartz 228 N 6 St San Jose In having occupied your room for 5 days I want to pay you \$10 Please sign your name Maybe you will think there is a something in the hereafter reading this At any rate when you and Ingersoll meet you can talk it over I had my mind made up to keep your wife out of misery and waited for the crises it has come and she is a free woman so you can for an affinity she will go to the sanitorium today and I pay the bill She will send that cable to her son today that she will come as soon as she is able to start for the hotel. I will give her the money.

"Ameli Anderson."

There is nothing in the letter that tends in any way to show an intent by the decedent to make a disposition of her property after her death.

The judgment is affirmed.

McDONALD v. McDONALD. (S. F. 6925.)

(Supreme Court of California. July 27, 1916. Rehearing Denied Aug. 24, 1916.)

1. **JUDGMENT** ⇨163 — **OPENING DEFAULT — AFFIDAVIT OF MERITS.**

Generally on motion to open default courts will not examine into the truth of a defense, where an affidavit of merits contains a statement of facts sufficient to constitute a defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. ⇨163.]

2. **DIVORCE** ⇨184(4) — **APPEAL — REVIEW — PRESUMPTIONS.**

On appeal from a divorce judgment based on denial of motion to open default, the bill of exceptions containing no record of oral testimony, given at the hearing of the motion, and the order reciting that the court was "fully advised in the premises," it was presumed that the undisclosed testimony supported the order, although the order also recited that it appeared from the testimony introduced that the claim of the defendant that she had a meritorious defense was untrue, since it would not be presumed from such record that the falsity of the affidavit of merits was the sole ground for denying such motion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 570; Dec. Dig. ⇨184(4).]

3. **JUDGMENT** ⇨162(1) — **OPENING DEFAULT JUDGMENT—PROCEEDINGS—EVIDENCE.**

While it is not competent to try the merits of a defense upon the hearing of a motion to open default, the plaintiff may always rebut, if possible, the excuse offered by the defaulting party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 319; Dec. Dig. ⇨162(1).]

4. **APPEAL AND ERROR** ⇨957(1)—**REVIEW—DISCRETION—OPENING DEFAULT.**

Discretion of the trial court, on an application to open default in granting or denying it, is not reviewable unless a clear abuse of discretion is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. ⇨957(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Suit by George McDonald against Annie McDonald. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 168 Cal. 483, 149 Pac. 726.

Arthur Crane, of San Francisco, for appellant. James M. Hanley, of San Francisco, for respondent.

MELVIN, J. Defendant appeals from an adverse judgment. The action was one in which plaintiff sued for divorce on the ground of cruelty. On October 7, 1913, the default of defendant, Annie McDonald, was entered. Thereafter she gave notice of motion for an order setting aside the default and for a further order dismissing the action, announcing that the motion for the order opening the default would be based upon the ground of her excusable neglect, inadvertence, and surprise, while the other relief would be demanded upon a showing of condonation occurring since the commencement of the action. The notice of motion was accompanied by an affidavit of Annie McDonald, in which she deposed that she and the plaintiff had lived together after the commencement of the suit for divorce, and had agreed to dismiss said action; that depending upon plaintiff's promise to dismiss the suit, she did not cause an answer to be filed; and that she had "fully and fairly stated the facts" in the "action" to her counsel, who advised her that she had "a good and meritorious defense to said action." The motion came on for hearing on October 15, 1913. Defendant was called and examined upon her affidavit, and plaintiff and another witness were called and examined, and the court made an order denying the motion to set aside the default. To this defendant excepted upon the grounds that said order was an abuse of the court's discretion; that it was in excess of jurisdiction; and that it was against law. On October 20, 1913, the cause came on regularly for trial, both parties to the action being represented by counsel and the defendant being personally in court. Judgment was given for plaintiff as prayed, and an interlocutory decree was made and entered.

[1-3] Defendant insists that upon a motion to open a default it is not permissible to inquire into the truth of an affidavit of merits, citing *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53; *Douglass v. Todd*, 46 Cal. 655.¹ Undoubtedly courts will, not, as a general rule, examine into the truth of a defense where an affidavit of merits contains a statement of facts sufficient to constitute a defense, but this rule does not aid appellant in the case at bar, because it does not appear from the record that the falsity of the defense asserted by defendant was the only ground upon which the court refused to set

aside the default. The bill of exceptions contains no word of the oral testimony given at the hearing. So far as the record shows, this testimony went in without objection, and appellant questions its admissibility for the first time on appeal. The order made by the court may have been supported by ample proof that defendant's asserted excuses for permitting the entry of the default were in fact utterly nonexistent. It is true that the transcript does contain this language:

"It appearing to the court from the testimony introduced that the claim of said defendant that she has a meritorious defense to said action is untrue."

But the quoted words are followed by this statement:

"And the court being fully advised in the premises made and entered its order."

The order itself is in general language; and, in view of the presumption in favor of the regularity of all proceedings of a court of record, we are bound to hold that the undisclosed testimony was sufficient to support the order. While it is not competent to try the merits of a defense upon the hearing of such a motion as this, it is always within the rights of the plaintiff to rebut, if possible, the excuse offered by the litigant against whom the default has been taken. That testimony was offered at the hearing by both parties to the proceedings appears in the record. It does not appear, however, what that testimony was, and we are bound to decide that it supported the conclusion reached by the court.

[4] An application of this kind is addressed to the sound legal discretion of the court, and its action in granting or denying the prayer of the petitioner will not be disturbed on appeal, unless a clear abuse of such discretion is shown. *Morton v. Morton*, 117 Cal. 443-446, 49 Pac. 557. Appellant having failed to show abuse of discretion, the order as made by the court below must stand.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

WOODS CENTRAL IRRIGATING DITCH CO. v. PORTER SLOUGH DITCH CO. et al. (Sac. 2224.)

(Supreme Court of California. July 26, 1916. Rehearing Denied Aug. 25, 1916.)

1. WATERS AND WATER COURSES §247(1)—APPROPRIATION — ACTION — RELIEF — FINDINGS — WITHIN SCOPE OF ISSUES RAISED.

In suit to quiet title to a portion of river water, an answer not only asserting defendant's right to take water from one of two natural channels of a river, but that for 30 years defendant and its predecessors had been accustomed to keep that channel free from obstructions, to divert its alleged share of water of the river into that channel and to conduct the water so diverted through the channel to the head of its ditch, brought within the issues the prop-

¹ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ 31 Pac. 623, 31 Am. St. Rep. 247.

er division of the waters of the river between the channels so that the court properly determined and found exactly how much water defendant might take from the river at the point where defendant's right to the water attached.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. ¶247(1).]

2. JUDGMENT ¶252(2)—TRIAL OF ISSUES—EXTENT OF RELIEF.

Under Code Civ. Proc. § 580, providing that if there be no answer the relief granted plaintiff may not exceed his demands, but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issues, defendant, by answering, may enlarge the scope of the relief to any extent consistent with the pleadings and embraced within the issue.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 441; Dec. Dig. ¶252(2).]

3. WATERS AND WATER COURSES ¶138—APPROPRIATION—ADVERSE CHARACTER.

Mere taking of the natural flow of a stream into a slough will not vest in a claimant of river waters the right to alter the course of nature and artificially cause a greater flow into that slough.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 150, 151; Dec. Dig. ¶138.]

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Suit by the Woods Central Irrigating Ditch Company against the Porter Slough Ditch Company and others. From a judgment for plaintiff, and order denying new trial, the named defendant appeals. Affirmed.

Power & McFadzean, of Visalia, and Murry & Knupp, of Porterville, for appellant. Bradley & Bradley, N. O. Bradley, and E. C. Farnsworth, all of Visalia, for respondents.

MELVIN, J. Defendant appeals from an adverse judgment and from an order denying its motion for a new trial.

The action was brought to quiet plaintiff's title to a portion of the waters of Tule river. Defendant, by its answer, admitted that it did claim an estate and interest in the waters of Tule river and Porter slough, but denied that such claim was without right. There were other allegations in the answer which we will discuss later.

The court found that plaintiff was entitled to 80 cubic feet per second (the amount to which plaintiff asserted title) whenever that quantity of water was running in Tule river at the point of diversion of plaintiff's ditch, and that defendant was entitled to 67.6 cubic feet per second (the amount claimed) when that quantity of water was flowing in Porter slough. Defendant, however, objects to a priority improperly granted (so it is asserted) to plaintiff and contends further, that certain findings are entirely without the issues.

The court found that Tule river is and has been from time immemorial a natural water course, having its source in the Sierra Nevada Mountains and flowing thence in a gen-

eral westerly direction; that from a point on or near section 4, township 22 south, range 28 east, Mt. Diablo base and meridian, in Tulare county, said stream was until 1862 accustomed to flow in two or more natural channels, one of which was called Porter slough and the other Tule river—the former flowing through the town of Porterville, and the latter to the north of said town; that in 1862 the channel changed so that the stream which formerly ran north of the town became dry and a new channel was formed, which runs south of Porterville and has ever since been called Tule river. The court further found:

"That from time immemorial the said Porter slough has been and still is a natural stream, channel, and water course, having its source at Tule river at or near said section 4, and that from time immemorial a portion of the waters of said Tule river have been accustomed to run and flow in said channel of Porter slough westerly through the town of Porterville and thence in a westerly and northwesterly direction, when there was sufficient water in said Tule river to enable the same to naturally flow from said Tule river into said Porter slough as in these findings stated; that 140 cubic feet of water per second of the waters of Tule river naturally flow, and should be allowed to flow, on down Tule river below the point where the Porter slough leads therefrom before any of the waters of said Tule river naturally flow, or should be allowed to flow, in said Porter slough; that the next 40 cubic feet per second of the waters of Tule river naturally flow, and should be allowed to flow, from said Tule river into said Porter slough, and that all waters of the Tule river naturally flowing in said Tule river over and above 180 cubic feet per second at the point where Porter slough leads therefrom naturally divide, and should be divided, between said Tule river and said Porter slough at the ratio of 100 to said Tule river and 40 to said Porter slough—that is to say, when the waters of said Tule river at the point where said Porter slough leads therefrom, exceed in amount 180 cubic feet of water per second, then five-sevenths of such excess naturally flow and should be allowed to flow on down said Tule river, and two-sevenths of such excess naturally flow and should be allowed to flow into and down said Porter slough, and that proper appliances should be constructed and maintained in Tule river, at the point where Porter slough leads therefrom, so that the waters of said Tule river shall flow in Tule river below said point and in said Porter slough below said point, in the respective quantities herein determined, and not otherwise."

There were other findings to the effect that the plaintiff corporation was at the time of the commencement of the action and at the time of the trial the owner in fee of a certain irrigating ditch which leads out of Tule river at a specified point below the source of Porter slough, and that said plaintiff was the owner of and entitled to divert for beneficial purposes 80 cubic feet per second of the water of said stream when there was that quantity flowing thereon; that ever since 1837, first the predecessors in interest of defendant and afterwards defendant itself had by means of a ditch and by dams in the channel and headgate in the ditch diverted from Porter slough at a point near Porterville

\$7.6 cubic feet of water per second whenever that quantity was flowing in the slough at the head of defendant's ditch; that said water had always been used for irrigation and other beneficial purposes; and that defendant was entitled to the quantity of water claimed when Porter slough carried that amount at the head of its ditch. But it was found that defendant's use of the water was not at all times open, exclusive, peaceable, continuous, under claim of right or hostile to plaintiff or its predecessors in interest or to the whole world. There were findings that defendant and its predecessors had been accustomed to keep the channel of Porter slough cleaned out and in condition to receive and carry its waters, and that they had been accustomed annually to remove from the head of Porter slough the gravel and boulders washed in by the high waters of Tule river. It was found that the owners of the Porter slough ditch had conducted the waters of the Porter slough from Tule river to the head of their ditch for more than 30 years, but that the diversion of water into Porter slough had not interfered with the rights of plaintiff until within 5 years next before the commencement of the action, and that the defendant was entitled to its demanded quantum of water only when that volume would naturally flow into Porter slough.

Appellant calls our attention to the fact that the complaint merely asks for a decree quieting plaintiff's title to a portion of the waters of Tule river, and that the elaborate findings regarding the proportion of the water flowing naturally by and beyond the source of Porter slough in Tule river and that running into said slough at the point where it takes its rise are outside of any issue possibly raised or triable in a simple suit to quiet title to water. Defendant's position is that the only issues before the court are: (1) The title of plaintiff to the waters of Tule river; (2) defendant's right to divert water from Tule river into Porter slough; and (3) the question of priority of the rights of the respective parties to divert water from the Tule river. Appellant earnestly insists that the court's finding which divided and apportioned the waters of Tule river between two natural water channels—Tule river and Porter slough—was entirely without the issues and beyond the province of the court in determining the rights of the contending parties. It is said that the complaint fails to allege that Wood Central Irrigating Ditch Company ever claimed the flow of any specific quantity of water past the head of Porter slough, and that for that reason there was no basis for the apportionment. In this behalf appellant cites such cases as *Schirmer v. Drexler*, 134 Cal. 124, 66 Pac. 180, *Wallace v. Farmers' Ditch Company*, 130 Cal. 578, 62 Pac. 1078, *Reed v. Norton*, 99 Cal. 617, 34

Pac. 333, and *Kredo v. Phelps*, 145 Cal. 526, 78 Pac. 1044. Respondent's counsel concede the existence of the rule invoked, but take the position that defendant's amended answer made all of the matters upon which the court found both relevant and absolutely necessary to a just determination of the cause. In its amended answer and also in its original answer (the two differing in this respect only in the amount of water claimed) defendant not only asserted its right to take water from Porter slough, but averred that for more than 30 years it and its predecessors had been accustomed to keep the channel of Porter slough free from obstructions, to divert its alleged share of the waters of Tule river into Porter slough, and to conduct the water so diverted through the channel of said Porter slough to the head of the Porter slough ditch.

[1] We think this pleading brought squarely within the issues the proper division of the waters of Tule river and Porter slough. In effect defendant pleaded and proved that by using Porter slough as an artificial channel, cleared of the accumulations brought down by flood waters, its right to diversion began at Tule river. It was therefore entirely proper for the court to determine exactly how much water defendant might take from Tule river at the very point where, according to the answer, defendant's right to the water attached.

[2] Section 580, Code of Civil Procedure, provides that if there be no answer the relief granted plaintiff may not exceed his demands, but in any other case the court may grant any relief consistent with the case made by the complaint and embraced within the issues.

Defendant, by answering, may enlarge the scope of the relief to any extent consistent with the pleadings and "embraced within the issue." *Cassinella v. Allen*, 168 Cal. 677-680, 144 Pac. 746; *Nathan v. Dierssen*, 164 Cal. 607-611, 130 Pac. 12.

[3] It does not appear from the findings that defendant's right to a portion of the waters of Tule river antedated that of plaintiff, but even if it were apparent the mere matter of prior appropriation was not relevant. The reason for this is obvious and is seen in the finding that only within 5 years before the commencement of the action had defendant interfered with the natural division of the water flowing down Tule river to the head of Porter slough. Mere taking of the natural flow into Porter slough would not vest in defendant any right to alter the course of nature and by artificial means cause a greater flow into the slough. No other matters demand analysis.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

ATCHISON, T. & S. F. RY. CO. v. RECLAMATION DIST. NO. 404, et al.
(Sac. 2267.)

(Supreme Court of California. July 22, 1916.
Rehearing Denied Aug. 21, 1916.)

1. WATERS AND WATER COURSES — 222 — IRRIGATION — RECLAMATION ASSESSMENT — COLLECTION.

Reclamation assessments have not the character of a tax so as to be collectible by execution or levy upon the general property of the owner of the land against which the assessment is made.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. — 222.]

2. WATERS AND WATER COURSES — 222 — IRRIGATION — "RECLAMATION DISTRICT."

A reclamation district is an agency of the state, or local public corporation, for purposes of local improvement, similar in that respect to an irrigation district.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. — 222.]

For other definitions, see *Words and Phrases*, Second Series, *Reclamation District*.]

3. WATERS AND WATER COURSES — 222 — IRRIGATION — ASSESSMENT BY RECLAMATION DISTRICT — COLLECTION — STATUTE.

The law authorizing assessments by reclamation districts does not provide that the district may collect the same by ordinary judgment and execution against the person owning the land assessed; Pol. Code, § 3466, prescribing the only method of collection.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. — 222.]

4. WATERS AND WATER COURSES — 216 — IRRIGATION — COLLECTION OF RECLAMATION ASSESSMENT — CONSTITUTIONALITY.

A law, authorizing the collection of assessments by reclamation districts by ordinary judgment and execution against the person owning the land assessed would be unconstitutional, since no property can be subjected to the burden of paying the cost of such local improvement except property which is specially benefited, while resort to a personal judgment would impose a burden on property not benefited.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 305; Dec. Dig. — 216.]

5. WATERS AND WATER COURSES — 222 — IRRIGATION — RECLAMATION ASSESSMENT — ENFORCEMENT AGAINST RAILROAD — STATUTE.

Under Pol. Code, § 3466, prescribing mode of collecting reclamation assessments, not expressly authorizing the sale of part of the right of way of a railroad to satisfy an assessment, the courts cannot allow the ordinary remedy of an action at law for the recovery of a personal judgment for the amount of an assessment merely because a part of an easement or franchise of a road used for its right of way cannot be sold under such a special assessment.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. — 222.]

Department 1. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action to annul a reclamation assessment by Atchison, Topeka & Santa Fé Railway Company against Reclamation District No. 404 and others. From a judgment declaring

the assessment valid, defendants appeal. Judgment affirmed.

A. H. Ashley, of Stockton, for appellants. E. W. Camp, U. T. Clotfelter, and M. W. Reed, all of Los Angeles, for respondent.

SHAW, J. The complaint in this case states a cause of action to annul an assessment levied by the reclamation district to pay the cost of certain reclamation work of the district. The ground of the action was that for various reasons, not necessary here to mention, the assessment was invalid. Issues were formed, there was a trial by the court, and findings of fact were made showing that the assessment was valid. As conclusions of law the court held that the assessment should not be annulled, but should be approved; that the same was a lien on the land against which it was assessed, but that defendants were not entitled to a personal judgment therefor against the plaintiff. Judgment was given accordingly, declaring the assessment valid and that the same constituted a lien on the land described, but "that the defendants have no other or further relief herein except the right to apply, and to act under, the provisions of section 8466 of the Political Code of the State of California; and that the said defendants be, and hereby are, remitted to said special proceedings provided for in said section for any and all other relief."

The defendants appeal from the portion of the judgment above quoted. The individual defendants, it may be remarked, are the trustees of said reclamation district. The only question presented for decision upon the appeal is whether or not the reclamation district has the right and power to collect a delinquent assessment by an ordinary action for the recovery of a personal judgment for money.

[1-4] Assessments of the kind here involved do not have the character of a tax so as to be collectible by execution or levy upon the general property of the owner of the land against which the assessment is made. Such assessments may be made upon the particular property because the improvement to be made with the money raised in that manner is presumed to benefit the property assessed to an amount at least equal to the charge against it. A reclamation district is an agency of the state, or local public corporation, for purposes of local improvement, similar in that respect to an irrigation district. That such a charge imposed by a local public corporation of that character is an assessment and not a tax was directly decided in *San Diego v. Linda Vista I. D.*, 108 Cal. 193, 41 Pac. 291, 35 L. R. A. 33. The law, authorizing such assessments by reclamation districts, does not provide that the district may collect the same by ordinary judgment and execution against the person own-

ing the land assessed. Section 3466 of the Political Code prescribes the method of collection, and as no other method is authorized, it follows that the method prescribed must be followed, and is the only remedy for the failure to pay the assessment when due. Even if the statute had provided that a personal judgment could be recovered, it would have been to that extent unconstitutional. This was decided after elaborate discussion in *Taylor v. Palmer*, 31 Cal. 254. The principle decided is that no property can be subjected to the burden of paying the cost of such local improvement except the property which is specially benefited thereby, and that to allow a resort to a personal judgment to enforce payment would, in effect, impose the burden upon property not benefited. The decision was adhered to in a number of cases immediately following it and it has become a well-established rule. *Beaudry v. Valdez*, 82 Cal. 279; *Guerin v. Reese*, 33 Cal. 296; *Gaffney v. Gough*, 36 Cal. 104; *Coniff v. Hastings*, 36 Cal. 292; *Himmelman v. Stelner*, 38 Cal. 179; *Gillis v. Cleveland*, 87 Cal. 217, 25 Pac. 351; *Manning v. Den*, 90 Cal. 617, 27 Pac. 435; *Santa Cruz v. Bowie*, 104 Cal. 286, 37 Pac. 934; *Williams, Belser & Co. v. Rowell*, 145 Cal. 261, 78 Pac. 725.

[8] The appellants refer to the finding that the land in controversy is used by the plaintiff as a way upon which it has constructed and is maintaining and operating its railroad, and to the decisions of this court holding that a part of the easement or franchise of such railroad used for its right of way cannot be sold under a special assessment of this character. *Southern C. R. Co. v. Workman*, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79, 2 Ann. Cas. 583; *Fox v. Workman*, 155 Cal. 201, 100 Pac. 246; *Miller & Lux v. Enterprise, etc., Co.*, 169 Cal. 429, 147 Pac. 567; *Schaffer v. Smith*, 169 Cal. 769, 147 Pac. 976. They assert that the fee, subject to the easement, is worthless, and would bring nothing if sold separately. The court so found. Upon these premises they base the argument that the effect of the decision, denying the right to a personal judgment, is to deny to the district any remedy for an admitted right, and that therefore the court should, in such a case, allow the ordinary remedy of an action at law for the recovery of a personal judgment, or some equivalent thereof. The answer is that the state is the sole judge of the remedies it will afford to a reclamation district to raise money with which to make the improvements. If the state sees fit to withhold the means necessary to enable such district to collect an assessment, the courts are powerless to interfere. They can only enforce the remedies provided by the law governing the subject. The statute does not expressly authorize the sale of a part of the

right of way through a railroad for a special assessment, and therefore, under the rule established by the cases above cited, such sale cannot be made. This is a matter of policy within legislative control, and it is for that body, and not for the courts, to authorize such sale to enforce payment. The court below could not do otherwise than render the judgment above quoted.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

MICHELSON v. CITY OF SACRAMENTO. (Sac. 2422.)

(Supreme Court of California. July 24, 1916.)

1. MUNICIPAL CORPORATIONS §120—ORDINANCE—FALSE DECLARATION OF URGENCY—EFFECT.

Under St. Sp. Sess. 1911, p. 400, § 270, charter of Sacramento, providing that no ordinance shall take effect until 30 days after its passage, except a tax ordinance and one for the immediate preservation of the public peace, health, and safety, containing a statement of its urgency, and passed by a four-fifths vote of the city commission, the effect of declaring an urgency, when there is none, is not to void the ordinance, but merely to postpone its taking effect until 30 days have elapsed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. §120.]

2. APPEAL AND ERROR §411—NOTICE TO CLERK TO PREPARE RECORD—SUFFICIENCY.

Notice to the clerk to prepare a record, under Code Civ. Proc. § 953a, stating that defendant desires to appeal, but nowhere that it does appeal, is ineffectual to constitute an appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2100; Dec. Dig. §411.]

In Bank. Appeal from Superior Court, Sacramento County; Peter Shields, Judge.

Action by A. P. Michelson against the City of Sacramento. From a judgment for plaintiff, the City appeals. Appeal dismissed.

Archibald Yell, of Sacramento, for appellant. J. M. Inman, of Sacramento, Wm. B. Bosley, of San Francisco, and L. T. Hatfield, of Sacramento, for respondent.

SHAW, J. The charter of Sacramento provides that no ordinance shall take effect until 30 days after its passage, except a tax ordinance and "except an ordinance for the immediate preservation of the public peace, health, or safety, which contains a statement of its urgency and is passed by a four-fifths vote of the city commission." Section 270, Stats. Sp. Sess. 1911, p. 400. On June 30, 1915, the commission passed an ordinance, section 30 of which declared that it was for the immediate preservation of the public safety, and a matter of urgency, and should take effect 15 days after its passage. On July 15, 1915, the plaintiff sued to enjoin the city from enforcing said ordinance on the ground that there was no urgency and that the declaration that there was an urgency

when none existed had the effect of making the ordinance void. On July 28, 1915, the court made a preliminary order of injunction in the case purporting to restrain the city from enforcing the ordinance until further order.

[1] The law of the case is settled by the decision of this court in the Hoffman Case, 155 Cal. 120, 99 Pac. 517, 132 Am. St. Rep. 75, with which we are entirely satisfied, holding, with respect to Los Angeles, having an identical provision in its charter, that the effect of declaring an urgency when there was none is not to avoid the ordinance, but merely to postpone the taking effect thereof until the period of 30 days has elapsed.

[2] We are, however, without power to determine the validity of the preliminary injunction in this case, for no effectual appeal has been taken. The record contains a notice to the clerk to prepare a record under section 953a of the Code of Civil Procedure. This notice states that the defendant desires to appeal, but nowhere declares that it does appeal. No other notice was given. The case comes within the decisions in *Bolling v. Alton*, 162 Cal. 297, 122 Pac. 461; *Marcucci v. Vowinkel*, 164 Cal. 693, 130 Pac. 430; and *Estate of Faber*, 168 Cal. 492, 143 Pac. 737, holding that such a notice is ineffectual to constitute an appeal. The matter is of slight importance since the case is still pending on the merits, and the court below is not bound by its preliminary order.

The appeal is dismissed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAW-LOR, J.

REAS v. CLEMENCE et al. (L. A. 3773.)
(Supreme Court of California. July 24, 1916.)

1. PARTITION ~~653~~ — RECEIVER — PROPRIETY OF APPOINTMENT.

In a partition suit by plaintiff against a number of tenants in common with him of land and a well and pumping plant, where it did not appear that any of the tenants in common was in exclusive possession of the plant, or preventing any other tenant from operating the same, there being nothing to indicate that plaintiff was not able to operate the plant for his own use and thereby obtain whatever water he desired, appointment of a receiver was not justified by the facts that plaintiff and many defendants were dependent upon water from the pumping plant for irrigation, that the owners of the tract could not agree on the management and operation of the plant, that it had not been operated during the 10 days preceding the filing of the complaint, and that unless water was soon supplied plaintiff's crops and those of other parties would be wholly lost, since a receiver cannot be appointed where no tenant in common is attempting to oust plaintiff or in any way interfering with the use of the property or otherwise endangering his rights.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 147; Dec. Dig. ~~653~~.]

2. PARTITION ~~653~~ — RECEIVER — PARTITION SUIT.

A receiver may be appointed in a partition suit whenever facts appear which justify such appointment.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 147; Dec. Dig. ~~653~~.]

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by C. B. Reas against Victor Clemence and others, and J. W. Barnes and others. From an ex parte order appointing a receiver upon plaintiff's application, Barnes and others appeal. Order reversed.

Kendrick & Ardis, of Los Angeles, for appellants. Ben S. Hunter and J. B. Randall, both of Los Angeles, for respondent.

SHAW, J. This is an appeal from an ex parte order appointing a receiver upon the application of the plaintiff, and based solely upon the allegations of the complaint. The appellants claim that the facts stated do not justify the appointment of a receiver.

The complaint stated a cause of action for partition of a tract of land. It is alleged that the plaintiff and defendants own, as tenants in common, the land, together with the well, pumping plant, and pipe line used in connection therewith, situated upon the premises, and that they are now in possession thereof. The order appointing the receiver authorized him to take possession of the premises, operate the pumping plant, distribute the water obtained therefrom, and incur such indebtedness as should be necessary for said purposes. According to the allegations of the complaint, there are 168 persons interested as tenants in common in the land, each owning a small interest therein. The area of the land is not stated. The facts upon which the order appointing the receiver is based are that the plaintiff and many of the defendants are dependent upon the water from the aforesaid pumping plant for irrigation and domestic use; that the plaintiff has 10 acres in vegetables and fruit which must be irrigated to keep them alive, and that his only source of water is from said well and pumping plant; that the owners of the tract cannot agree among themselves for the management and operation of the pumping plant; that it had not been operated during the 10 days preceding the filing of the complaint, during which time the plaintiff and many other parties had been wholly deprived of the water for domestic use and irrigation, whereby their crops have been injured; and that they will continue to be injured and, unless water is supplied soon, will be wholly lost.

[1, 2] We do not think the facts stated justify the extraordinary remedy of the appointment of a receiver. It appears that the parties are in possession of the property, including the pumping plant, and it does not

appear that any one of the tenants in common is in exclusive possession of the pumping plant, or is hindering or preventing any other tenant in common from operating the same. There is nothing to indicate that the plaintiff is not abundantly able to operate the pumping plant for his own use, or that it is so situated that he cannot do so and thereby obtain whatever water he desires. It is true that a receiver may be appointed in a partition suit whenever facts appear which justify such appointment. *Goodale v. 15th Dist. Court*, 56 Cal. 26. But, as that case abundantly shows, there is no precedent for the appointment of a receiver in a partition suit where no tenant in common is attempting to oust the plaintiff or is in any way interfering with his common possession and use of the property, or otherwise endangering the rights of the plaintiff therein.

The order is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

In re PUSEY'S ESTATE. (L. A. 4377.)

(Supreme Court of California. July 25, 1916.)

1. MARRIAGE \S 50(1) — PRESUMPTIONS — DEATH OF PRIOR SPOUSE.

The will of wife being contested by husband as revoked by her subsequent marriage to him by direct provision of Civ. Code, \S 1300, invalidity of this marriage was not shown by evidence of two prior marriages, from which alleged invalid divorces were secured, respectively, 20 and 7 years before the marriage attacked, without evidence that either former wife was alive at time of marriage attacked, irrespective of validity of the divorces.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. $\S\S$ 79, 83, 85, 89; Dec. Dig. \S 50(1).]

2. MARRIAGE \S 40(1, 11) — PRESUMPTIONS AND BURDEN OF PROOF.

There is a strong presumption of the legality of marriage, and, when a marriage has been shown, one attacking it has the burden of proving it illegal and void.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. $\S\S$ 58, 68; Dec. Dig. \S 40(1, 11).]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

In the matter of the estate of Gertrude C. Pusey, deceased. Henry F. Pusey nominated M. M. Crookshank as administrator, and the nominee applied for letters of administration. A will of decedent was offered for probate by S. H. Finley and contested by Henry F. Pusey. M. M. Crookshank appeals from an order denying his application for letters; and Henry F. Pusey appeals from the judgment sustaining the will and from an order denying his motion for new trial. Reversed.

C. D. Latourette, of Oregon City, Or., and Williams & Rutan, of Santa Ana, for appellants. Steele Finley, of Santa Ana, and E. J. Fleming and B. F. Woodard, both of Los Angeles, for respondent.

MELVIN, J. Henry F. Pusey, who asserts that he is the surviving husband of Gertrude C. Pusey, deceased, nominated M. M. Crookshank as administrator of her estate, which consists of property, real and personal, in Orange county. His nominee applied for letters of administration. The application was denied on the ground that Henry F. Pusey was not the surviving husband of Gertrude C. Pusey, and that she did not die intestate. A will executed by her prior to her alleged marriage to Pusey was offered for probate by S. H. Finley. This alleged will was contested by Pusey on the ground that the testatrix was his wife, and that the instrument, having been executed prior to the marriage, was revoked thereby under the law as declared by section 1300 of the Civil Code. The will was upheld on the ground that two purported divorces, apparently granted in the state of Oregon, each seemingly releasing Pusey from the bonds of matrimony, were void, and that he had never been legally married to the decedent. Both matters were heard together. M. M. Crookshank appeals from the order denying his application for letters of administration, and Henry F. Pusey prosecutes appeals from the judgment sustaining the will and from an order denying his motion for a new trial.

It is not disputed that a ceremony of marriage between Henry F. Pusey and Gertrude C. Finley was performed by a minister of the gospel at Berkeley, Cal., on the 15th day of June, 1914, after a license in due form had been issued by the county clerk of Alameda county; that the parties to the alleged marriage immediately went to Oregon City, Or., where Mr. Pusey was engaged in business; and that they there lived together as husband and wife until the time of Mrs. Pusey's death, which occurred on October 1, 1914. The deceased left no issue, but is survived by brothers and sisters who reside in this state.

[1, 2] The proponent of the will offered in evidence the judgment rolls and some other papers in two cases, tried in the circuit court of the county of Clackamas, state of Oregon, and entitled, respectively, "Henry Franklin Pusey v. Julia Pusey," and "Kittie E. Pusey v. F. H. Pusey." The judgment in the first case was rendered on November 13, 1893, and in the second suit the decree was given on May 7, 1907. At the time of the hearing herein more than 20 years had elapsed since the rendering of the first decrees of divorce, and more than 7 years had followed that in the second action. Respondent produced no evidence tending to show whether or not Julia Pusey or Kittie E. Pusey was alive at the date of the marriage of Henry Franklin Pusey to Gertrude C. Finley. It was therefore error on the part of the probate court to find that the said marriage was invalid, no matter whether or not the purported divorces

granted in Oregon were or either of them was void for any technical reasons, because it is well settled in this state that when a marriage has been shown in evidence, the law raises a strong presumption of its legality, casting the burden of proof upon the person attacking it, and requiring him to show that it is illegal and void. This burden was not met in the matters at bar.

This subject has been so recently and so thoroughly discussed in the opinion of this court written by Mr. Chief Justice Angellotti, in the case of *Wilcox v. Wilcox*, 155 Pac. 95, that we need not devote any further space to it. That case and the authorities cited in the opinion furnish complete support to the conclusion which we have reached in relation to the appeals now before us.

The judgment and the two orders from which these appeals are prosecuted are reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

BRANDT BROS. v. FRESNO HOTEL CO. et al. (S. F. 6915.)

(Supreme Court of California. July 27, 1916.
Rehearing Denied Aug. 26, 1916.)

MECHANICS' LIENS. §281(4) — REASONABLE VALUE—EVIDENCE.

Evidence that, pursuant to contract between subcontractor and contractor that 75 per cent. of the value of the work done and materials furnished by the subcontractor was to be paid for each month, and that the estimates of these values were to be adjudged by the architect, the subcontractor each month put in bills, so adjudged by the architect, and received payments thereon without complaint, held sufficient to sustain a finding that the reasonable value was no more, as against contention of subcontractor seeking mechanic's lien for reasonable value of its work and material; the contract between owner and contractor having been void and been abandoned.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 571; Dec. Dig. §281(4).]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Mechanics' lien proceeding by Brandt Bros., a copartnership composed of F. C. Brandt and another, against Fresno Hotel Company and others. From the judgment awarding lien for less than claimed, plaintiff appeals. Affirmed.

C. W. Miller, of Stockton, and Johnston & Jones, of Fresno, for appellant. Frank H. Short, Short & Sutherland, and F. E. Cook, all of Fresno (Carl E. Lindsay, of Fresno, of counsel), for respondents.

HENSHAW, J. The Fresno Hotel Company entered into a contract with H. C. Farley for the erection of a hotel, on property belonging to the Hotel Company in the city of

Fresno, for the sum of \$199,500. Plaintiff contracted with Farley to do all the plumbing, ventilating, steam heating, etc., for the aggregate sum of \$29,800, payments to be made at the rate of 75 per cent. of the value of the work installed each month. Much work was done, when finally Farley abandoned his contract. At the time of this abandonment plaintiff had presented bills month by month, itemizing the amount and value of the labor performed and materials furnished during the preceding month. The value of the amount of the work done and materials furnished by plaintiff as evidenced by its own bills was \$14,532.30, with extra work amounting to \$320.35, or a total of \$14,852.65. There had been paid 75 per cent. of this, or the sum of \$9,267.62. The court awarded Brandt Bros. a lien for the difference, amounting to \$5,585.65.

The court held the original contract between the owner and Farley to be void for reasons not here under consideration. Appellant's contention is that under section 1183, Code of Civil Procedure, as it read at the time of this trial it was entitled to the reasonable value "of the labor and materials furnished," notwithstanding its contract; that this value was not the value evidenced by its bills; that its bills were evidences merely of the "wholesale" cost; and that as a retailer in plumbers' supplies and work it was entitled to an addition of at least 20 per cent. above the amount of the bills presented and allowed. Appellant argues that the evidence shows that this added charge of from 20 to 35 per cent. over the wholesale price is reasonable and in accordance with the current course of business, and that the court should have awarded it this increased amount accordingly.

But, narrowing this consideration to the single proposition of conflicting evidence, it cannot be said that the court's finding of the reasonable value upon which it based its award is unsupported by the evidence, and if it be supported by the evidence there is an end to appellant's complaint. That evidence, as above outlined, indicates that month by month this appellant presented its bills, showing the reasonable value of the work performed and materials furnished. In addition to this the claim of lien and the complaint show, in accordance with the actual transaction between appellant and Farley, that 75 per cent. of the value of the labor done and material furnished were to be paid for each month. Moreover, the estimates of these values were by the terms of the contract to be adjudged by the architect, and they were so adjudged, and appellant accepted them uncomplainingly until at the time of this trial, when he seeks to recover 20 per cent more, not only more than it had contracted for, but more than it had declared

month by month was the value of its work and material.

The judgment appealed from so far as concerns the present ground of attack on it is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

W. R. RIDEOUT CO. v. PILLSBURY et al.,
Industrial Accident Commission.
(S. F. 7657.)

(Supreme Court of California. July 25, 1916.)

1. MASTER AND SERVANT §405(1)—WORKMEN'S COMPENSATION — SUFFICIENCY OF EVIDENCE — VIOLATION OF EMPLOYER'S RULE.

Evidence held to sustain a finding of the Industrial Commission that the employer had no specific rule requiring barge deck hands to remain within the cabin during the trip between wharves.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §405(1).]

2. MASTER AND SERVANT §373—WORKMEN'S COMPENSATION—GROUNDS OF LIABILITY—INJURY IN COURSE OF EMPLOYMENT.

A deck hand who helped load and unload a barge at its terminus held to have drowned in the course of his employment, where he fell off on a trip between such termini, although he had no duties to perform during the trip.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §373.]

3. MASTER AND SERVANT §380—WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—WHAT CONSTITUTES.

Where the deck hand was last seen leaning against a post near the barge's edge, apparently asleep, held he was not guilty of willful misconduct barring recovery under the Workmen's Compensation Act (St. 1911, p. 796).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §380.]

4. EVIDENCE §59—PRESUMPTIONS—SUICIDE.

An applicant under the Workmen's Compensation Act is entitled to the presumption that a deceased employé did not commit suicide where the circumstances are consistent with accidental death and there is nothing to suggest suicide.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 79; Dec. Dig. §59.]

In Bank. Proceedings under the Workmen's Compensation Act against the W. R. Rideout Company, to recover compensation for the death of Francisco Coelho. From an award of compensation the W. R. Rideout Company brings certiorari proceedings. Award confirmed.

O'Neill & O'Neill, of Oakland, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari to review the action of the Industrial Accident Commission in awarding compensation for the death of one Francisco Coelho who, on June 27, 1914, fell from a barge which was being towed up the Oakland estuary and was drowned. Coelho was a deck hand on a barge operated

by the W. R. Rideout Company. His duties consisted in helping to load and unload the barge. On the day in question he went to work in San Francisco at 6 o'clock, and shortly after that hour the barge was started on its trip to Oakland. Coelho had no duties to perform during the voyage. There was a house provided for the men on board the barge, and the evidence tended to show that some of them were in that place amusing themselves by playing cards during the trip. There was testimony to the fact that a breeze was blowing, but nothing to indicate that the weather was unusually stormy. Some of the witnesses said that the bay and the estuary were "a little rough," but explained that the disturbance of the water was about that which might result from the passing of a steamer. Set into the deck were six or seven posts each 3½ feet high and 12 or 15 inches from the edge of the barge. After the barge had entered the estuary, one of the men went out on deck to get the lunch baskets for himself and his fellow workmen. He observed Coelho leaning against one of the posts. He was, as this man testified, "inside of the post," meaning doubtless on the side of the post farthest from the edge of the barge. Coelho was apparently asleep. The man, Rodrigues, pulled Coelho's coat and said: "Frank, you crazy? Come on inside." To which Coelho answered: "No. Leave me alone." Rodrigues then left him, and he was never again seen alive. His body was afterwards washed ashore at a point near the place where the conversation between Rodrigues and Coelho took place. The majority of the Industrial Accident Commission found that Coelho's death was accidental; that it happened while he was performing a service growing out of incidental to and in the course of his employment, and was not caused by the willful misconduct or intoxication of the employé. There was an attempt at the hearing before the commission to prove that Coelho was intoxicated, but it was without success, and the finding that death was not due to intoxication was the only one proper under the circumstances.

[1] Petitioner insists that Coelho was violating a well-established rule by which the employés were required to remain in the house or cabin of the barge during the trips. There was some testimony to the effect that the man in charge of the barge frequently told the other employés to stay inside of the house, but it was not shown that Coelho, who had worked on the barge but a few days, had ever been told of any rule prohibiting him from occupying any portion of the deck while the barge was in motion. On the contrary, it appears that during the very trip on which the tragedy occurred some of the men had been playing cards out on deck, and Martinez, who was in command, joined

in their game. Under this condition of the evidence we may not disturb the finding that Coelho was not violating any specific rule of his employer by leaning against the stout post or bitt.

[2-4] Nor can we say that his position was so perilous that he displayed a spirit of bravado and reckless foolhardiness by occupying it. Taking the trip from San Francisco to Oakland on that barge, so that upon arrival at the latter city he might be ready to assist in removing the cargo, was a part of Coelho's duty. Therefore he was in the course of his employment when the accident occurred if he was not either recklessly or in defiance of orders occupying a place of great peril. While his conduct was not careful and was not characterized by such caution as would be entirely commendable in one afloat upon such a craft, we cannot say that it amounted to willful misconduct.

There is some suggestion on the part of the petitioner that it was incumbent upon the applicant before the commission to negative the possibility of suicide. While the burden of proof is upon the applicant, it is not necessary that every possibility of death by other than accidental means should be negatived. The circumstances in evidence are entirely consistent with death by accident, and there is no word of testimony tending to suggest either suicide or homicide. Without such evidence the claimant was entitled to the presumption that a sane man probably would not commit suicide. There was no showing and no attempt to prove that Coelho was laboring under any great mental strain. The finding of death by accident was therefore fully sustained.

As Coelho was going on his employer's business by the very conveyance furnished by the employer for that purpose, there can be no question of the correctness of the finding that the accident occurred in the course of and arose out of his employment. In re Donovan, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778.

No other contentions of petitioner demand discussion.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

MEYER et ux. v. McNUTT HOSPITAL.
(S. F. 6960.)

(Supreme Court of California. July 26, 1916.)

1. HOSPITALS \S 8 — CARE REQUIRED — INJURIES TO PATIENTS — EVIDENCE — SUFFICIENCY.

Evidence held to justify the jury in finding that burns were inflicted on patient while unconscious and under exclusive care of defendant's nurses.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. § 14; Dec. Dig. \S 8.]

2. NEGLIGENCE \S 134(2) — HOW ESTABLISHED — CIRCUMSTANTIAL EVIDENCE.

Negligence may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 272; Dec. Dig. \S 134(2).]

3. WITNESSES \S 330(1) — CROSS-EXAMINATION.

Where a physician testified that unless nervous collapse occurred, there was no necessity for making hot or cold applications to the patient, it was competent to cross-examine him as to custom in making such applications; plaintiff having alleged that she was burned by such applications while unconscious preceding an operation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. \S 330(1).]

4. WITNESSES \S 330(1) — CROSS-EXAMINATION.

Where a nurse testified that she put no hot applications in the patient's bed, it was competent for counsel to cross-examine her on the custom of the hospital as to warming beds after operations, for the purpose of testing the truth of her statement that no artificial heat was applied to the patient, who was burned during an operation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. \S 330(1).]

5. HOSPITALS \S 8 — CARE REQUIRED — INJURIES TO PATIENTS — EVIDENCE — ADMISSIBILITY — PRESUMPTIONS.

Under contract of hospital with patient, the corporation owes her a duty of protection, which it violates by use of any instrumentality producing painful burns, so that proof of such accident carries with it the presumption of negligence, and the doctrine *res ipsa loquitur* applies, regardless of whether the injury was caused by carelessness of competent nurses or negligence in selecting incompetent nurses.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. § 14; Dec. Dig. \S 8.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Trout, Judge.

Action by A. E. Meyer and wife against the McNutt Hospital. From judgment for plaintiffs, and order denying new trial, defendant appeals. Affirmed.

Maxwell McNutt, Joseph C. Meyerstein, and Asher, Meyerstein & McNutt, all of San Francisco, for appellant. Wilder Wight, of Oakland, and I. F. Chapman, of San Francisco, for respondents.

MELVIN, J. Plaintiffs sued on account of injuries caused, as alleged, by the carelessness of defendant's employees in allowing Bessie Meyer to be badly burned upon the legs by a hot water bottle while she was unconscious from the effects of an anæsthetic administered to her before a surgical operation was performed upon her. A. E. Meyer is the husband of Bessie Meyer. Judgment for \$750 was given in favor of plaintiffs, and defendant appeals therefrom, as well as from an order denying its motion for a new trial.

[1-4] It appears from the evidence that Mrs. Meyer, upon the advice of her physician, went to the defendant's hospital. She was

put to bed; subsequently was taken to the operating room; was placed under an anæsthetic; was subjected to an operation; and did not regain consciousness until after she had been returned to her bed. Mrs. Meyer testified that there were no burns or injuries of any sort upon her legs when she entered the hospital, nor up to the time when she lost consciousness. When she regained her senses she suffered pain and complained to her nurse, who found blisters upon the patient's legs. The injuries were treated as burns usually are and yielded to the treatment. The surgeon who performed the operation testified that she was not burned while in his presence; and, while there was no direct testimony to the effect that any servant of McNutt Hospital had applied hot water bags or any other instrumentality to produce the injuries upon Mrs. Meyer, we think the jury was justified in determining from all of the circumstances that the burns were inflicted while the patient was unconscious and under the exclusive care of defendant's nurses. The nature of the injuries themselves tends strongly to support this conclusion. Areas of 24 square inches on one leg and 15 on the other were affected, and it seems hardly possible that one could be so burned while conscious without realizing it. Negligence like almost any other fact may be established by circumstantial evidence. 29 Cyc. 622. Miss Smith, a nurse, who had charge of Mrs. Meyer before and after the operation, testified that sometimes hot water bags were put in the beds of patients before they were brought back from the operating room. This testimony was given upon cross-examination over defendant's objection. Dr. Johansen, after like objection, testified that within his experience it was customary to have the bed warmed, and that he had abundant experience. He said that a bed was usually warmed by using hot water bottles. Defendant assigns as error the rulings of the court in admitting this testimony. In the examination of Dr. Johansen plaintiff was clearly entitled to cross-examine regarding custom, for the physician had testified, as a witness for the defendant, that unless a collapse occurred, there was no necessity for making hot or cold applications to the patient. The evident purpose of such testimony was to furnish counsel for defendant with the argument that, as no reason for applying heat to Mrs. Meyer's body existed, probably no hot water bottle was used. It was clearly competent, therefore, for plaintiff to prove by this hostile witness that in spite of the lack of necessity for hot applications, they were, as matter of fact, generally used. In the direct testimony of Miss Smith she had said that she put no hot water bag or anything of the sort in Mrs. Meyer's bed. It was proper for counsel to cross-examine her upon the custom of the hospital with reference to warming beds. Such ques-

tioning was allowable for the purpose of testing the probability of her statement that in this case no artificial heat had been applied to the patient.

[5] The doctrine *res ipsa loquitur* is properly applied to the facts of this case. The patient was unconscious. Under its contract with her the defendant corporation owed her a duty of protection which was violated by the use of an instrumentality which produced the painful results which were made manifest when she came out from the influence of the anæsthetic. Proof of the accident carried with it the presumption of negligence. *Judson v. Giant Powder Co.*, 107 Cal. 549-555, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; *Housel v. Pacific Electric Ry. Co.*, 167 Cal. 245, 139 Pac. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665. And this is the rule whether the liability be ascribed to the carelessness of experienced nurses or to defendant's negligence in selecting nurses who were not competent. That is the true rule as announced in *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453, a case very like the one at bar.

No other assignments of alleged error require notice.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

WORTHINGTON SCHOOL DIST. v. EUREKA SCHOOL DIST. (S. F. 6983.)

(Supreme Court of California. July 26, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS §37(1)—ALTERATION—SETTING ASIDE—COMPLAINT.

The complaint for restoration of territory, by ordinance of the county board of supervisors taken from plaintiff school district and attached to defendant school district, does not sufficiently contradict the presumption that the board acted with authority and according to proper procedure, it merely alleging its act was illegal and without authority of law and in excess of power, but not specifying how any jurisdiction elements were missing, and not showing that it did not act according to provisions of Pol. Code, § 1576, and, while alleging that a majority of the heads of families in plaintiff district protested, not showing that any of protestants resided in the territory taken.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 60-62; Dec. Dig. §87(1).]

2. CONSTITUTIONAL LAW §63(3)—SCHOOLS AND SCHOOL DISTRICTS §22—ALTERATION—DELEGATION OF POWER.

The power of the Legislature over school districts is plenary; and it may divide, change, or abolish them at pleasure, and delegate to boards of supervisors powers of annexation under certain conditions.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 110-112, 114; Dec. Dig. §63(3); *Schools and School Districts*, Cent. Dig. §41; Dec. Dig. §22.]

Department 2. Appeal from Superior Court, Humboldt County; Gen. D. Murray, Judge.

Action by the Worthington School District

against the Eureka School District. From an adverse judgment, plaintiff appeals. Affirmed.

E. M. Frost and A. J. Monroe, both of Eureka, for appellant. P. H. Ryan and A. W. Hill, both of Eureka, for respondent.

MELVIN, J. Defendant demurred successfully to plaintiff's amended complaint, and the latter, failing to file a new pleading within the time allowed by the court, an order was made dismissing the action, and judgment in favor of defendant was entered accordingly. From said judgment plaintiff appeals.

Both parties to the action are school districts, having adjoining territories. In the amended complaint it was alleged that on November 14, 1912, the board of supervisors of Humboldt county, in which both districts are situated, passed an ordinance, whereby said board "took from" the Worthington school district and attached to the Eureka school district a certain described area. It was further averred in said amended complaint that prior to the passing of the ordinance changing the boundaries of the districts "a majority of the resident taxpayers and heads of families residing within said Worthington school district filed a remonstrance and protest with said board of supervisors, remonstrating and protesting against said change being made, and appeared before said board of supervisors and protested and remonstrated against the making of said change of the said boundaries of said school district," but that, notwithstanding these protests and remonstrances, the board of supervisors "took said premises" from the territory of the Worthington district and attached them to Eureka school district. There was further pleading that the territory so taken was less than two miles from the schoolhouse of the Worthington district, that no part of it had ever been any portion of Eureka district, and that the Worthington district had been injured by the act of the board of supervisors because of decreased daily attendance upon its school sessions, by reason of consequent loss of school funds, and also because of diminution of taxable property in the Worthington district. The prayer was for annulment of the ordinance, the restoration of the former boundaries of Worthington school district, and that the Eureka district be enjoined from exercising any control over the disputed territory.

[1] The demurrer was both general and special, and was properly sustained. There is an averment in the amended complaint that the board of supervisors "took" certain territory from one district and annexed it to the other, but there is no statement regarding the procedure followed. It is a presumption of law that legislative bodies act with authority and in accordance with proper pro-

cedure, and there is no statement that sufficiently contradicts such presumption. It is alleged that the act of the board was "illegal and without authority of law," was without jurisdiction and in excess of power, but the pleading does not specify how any jurisdictional elements were missing from the acts of the board. The county legislators may have acted in strict compliance with section 1576 of the Political Code. Nothing to contradict such a possibility is set up in the pleading. There is no allegation that the supervisors acted upon an insufficient petition nor any averment in which their failure to comply with the law is in any manner specified. There is an allegation that a majority of the heads of families in the Worthington district protested, but there is no statement that any number of the persons so protesting resided in the territory taken from that district.

[2] The power of the Legislature over school districts is plenary. *Pass School District v. Hollywood City School District*, 156 Cal. 416, 105 Pac. 122, 26 L. R. A. (N. S.) 485, 20 Ann. Cas. 87; *Reclamation District v. Birks*, 159 Cal. 238-238, 113 Pac. 170. It may divide, change, or abolish such districts at pleasure, and may delegate to boards of supervisors powers of annexation under certain conditions. *Kramm v. Bogue*, 127 Cal. 122-125, 59 Pac. 864.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

LEE et al. v. LEVISON et al. (S. F. 6948.) (Supreme Court of California. July 26, 1916.)

1. MALICIOUS PROSECUTION \S 56—ACTIONS—BURDEN OF PROOF.

The burden is upon plaintiff in malicious prosecution to prove both malice and want of probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 112-116; Dec. Dig. \S 56.]

2. MALICIOUS PROSECUTION \S 15—"PROBABLE CAUSE."

"Probable cause" is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 18; Dec. Dig. \S 15.]

For other definitions, see *Words and Phrases*, First and Second Series, *Probable Cause*.]

3. MALICIOUS PROSECUTION \S 18(1)—WANT OF PROBABLE CAUSE—EVIDENCE—SUFFICIENCY.

Evidence held to warrant ruling as a matter of law that the facts did not establish want of probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 23, 24, 38; Dec. Dig. \S 18(1).]

4. MALICIOUS PROSECUTION \S 71(2)—PROBABLE CAUSE.

Where the plaintiff in an action for malicious prosecution fails as a matter of law to

establish want of probable cause, the court is justified in granting nonsuit.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 161, 162; Dec. Dig. § 71(2).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Emma C. Lee and husband against Alexander Levison and others. The action was dismissed as to defendants other than Alexander Levison and National Surety Company of New York, and as to them the court granted a nonsuit. From such judgment and from order denying motion for new trial, plaintiffs appeal. Affirmed.

Wm. M. Cannon, of San Francisco, for appellants. Heller, Powers & Ehrman and M. H. Wascowitz, all of San Francisco, for respondents.

MELVIN, J. Action to recover damages for malicious prosecution of Emma C. Lee on a charge of embezzlement. The trial court granted a nonsuit on the motions of Alexander Levison and National Surety Company of New York. The action was dismissed as to the other defendants. From the judgment following the nonsuit and from an order denying their motion for a new trial, Emma C. Lee and H. Lee (her husband) appeal.

The Levisons and Mary Ostroski owned an apartment house, and in July, 1908, Mr. Levison employed Mrs. Lee as manager thereof and as housekeeper. A few months later the National Surety Company executed a bond to Mr. Levison indemnifying him against loss on account of any personal dishonesty of Mrs. Lee "amounting to larceny or embezzlement." As manager Mrs. Lee collected the rents, made certain expenditures, and accounted monthly to Mr. Levison. On April 19, 1909, Mr. Levison wrote her that beginning May 1st of that year he preferred to pay all bills of the apartment house at his office. He instructed her to get together and send to him any unpaid bills up to that time. She was authorized to pay bills for removing garbage and other similar items of less than \$5, making reports of such expenditures at the next settlement with him. Plaintiff continued her practice of rendering monthly accounts until her discharge, which occurred on June 11, 1909. After her discharge difficulties arose between Mrs. Lee and Mr. Levison because of their disagreement regarding the balance of their accounts and also because of her refusal to vacate the premises. She did leave the apartment house, after an interview with some one connected with the district attorney's office. Mr. Levison then authorized Mr. J. W. Bernstein, who had acted as his broker in obtaining the surety bond, to take up with the surety company Mrs. Lee's alleged default in payment of sums due to the owners

of the apartment house. Mr. Bernstein examined her books and after a conference with her wrote to the surety company a letter in which he charged that she had collected and failed to account for various rents, amounting in the aggregate to \$158. He also stated that there were "other irregularities" which Mr. Levison was investigating. After a personal interview between Mr. Bernstein and the manager of the surety company the matter was turned over to Mr. Sayers, adjuster for that corporation, and he with Mr. Bernstein conducted the subsequent negotiations with Mrs. Lee. In their conferences Mrs. Lee submitted an itemized demand for credits amounting to something more than \$200. About half of this sum was made up of alleged expenditures made after May 1, 1909, of amounts greater than \$5. Plaintiff told Mr. Sayers and Mr. Bernstein that she had made payments of all of the sums shown by her itemized bill. Mr. Levison disallowed certain of these charges and Mr. Bernstein and Mr. Sayers demanded payment from Mrs. Lee of \$51.25, asserting that she owed Mr. Levison that balance. She declined to settle on the proposed terms. Mr. Sayers then told Mr. Bernstein to have Mrs. Lee arrested. It was in evidence that Mr. Levison, informed of the proposed arrest, refused to sanction it or to have anything to do with it. However, Mr. Bernstein swore to a complaint, charging Mrs. Lee with embezzlement of \$82.50. She was tried and acquitted.

Appellant contends that Mr. Sayers and Mr. Bernstein acted within the scope of their agencies respectively for the surety company and the owners of the apartment house; that there was no "probable cause" for believing Mrs. Lee guilty of embezzlement; and that Mrs. Lee's arrest was inspired by malice on the part of all concerned in it. We will not discuss the questions of agency, because we believe that, even assuming the correctness of appellants' theories on that subject, they failed at the trial to establish want of "probable cause" for the arrest and the existence of malice on the part of those persons who caused it.

[1] It is contended by appellants that since Mrs. Lee's retention of moneys collected by her was open and with claim of right, there was no basis for a charge of embezzlement. Section 511, Pen. Code. But while it is true that Mrs. Lee openly charged her employers with certain sums when she did submit an alleged accounting, the collected funds were retained to offset demands against them which should have been included, if genuine, in previous monthly accounts. A reasonable man might well conclude that some of the offsets were fabricated. For example, the item "Paid * * * Miss Phillips tending door for 3 months \$30," might well create such a suspicion as might also the item of \$9 charged for car fare and an alleged in-

debtedness for "cleaning curtains—9 months." There were other charges which were open to a like suspicion regarding their genuineness, but which we will not take time to review in detail. It is incumbent upon the plaintiff in a case of this sort to prove both malice and want of probable cause. The burden of proof was upon the plaintiffs in the action at bar to establish both of these elements of their alleged cause of action. *Davis v. Pacific Telephone & Telegraph Co.*, 127 Cal. 312-319, 57 Pac. 764, 59 Pac. 696; *Potter v. Seale*, 8 Cal. 217-221; *Grant v. Moore*, 29 Cal. 644-656; *Anderson v. Coleman*, 53 Cal. 188.

[2] This court from the earliest history of the state has adopted the definition for "probable cause" derived from the discussion in Greenleaf's treatise on Evidence: "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." 2 Greenleaf, §§ 458-457.

[3] While there is some conflict in the testimony there is no denial of the receipt by Mrs. Lee of the letter forbidding the expenditure of sums greater than \$5 by her on account of the management of the apartment house, nor of the fact that she made monthly reports nor of the demands made by her after her discharge for items of indebtedness greater than \$5 each, which, if proper charges, should have appeared in her monthly reports. In other words, the essentials were undisputed and the court properly determined, as matter of law, that the facts did not establish want of probable cause.

[4] Under the circumstances revealed the court was justified in granting the motion for nonsuit. *Booraem v. Potter Hotel Co.*, 154 Cal. 99, 97 Pac. 65. This conclusion relieves us of the necessity of discussing the question of malice attributed to defendants, although we are of the opinion that plaintiff failed to show the existence of malice on the part of any of them.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

In re LEW CHOY FOON. (S. F. 7413.)
(Supreme Court of California. July 26, 1916.)

1. APPEAL AND ERROR—1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Finding of the lower court on conflicting evidence as to the fitness of persons for guardians of an infant is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. 1011(1).]

2. GUARDIAN AND WARD—13(4)—APPOINTMENT—BENEFITS TO INFANT.

While a child will not be taken from its parents and given to custody of guardians on considerations of comparative luxury or poverty, the comparative benefits to the child in respect to its temporal, mental, and moral welfare from

residence in the surroundings of the one or the other are, under Civ. Code, § 246, to be considered.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23-33; Dec. Dig. 10.]

3. GUARDIAN AND WARD—13(4)—APPOINTMENT—ABANDONED CHILD—EVIDENCE.

Evidence in a proceeding for appointment of a guardian of an infant held to support a finding that it was an abandoned child.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 45; Dec. Dig. 13(4).]

4. INFANTS—19—ABANDONED CHILD—CONCLUSIVENESS OF FINDINGS.

Decision of the juvenile court, in a proceeding to have an infant declared an abandoned child, that it was not such is not binding on the superior court in a subsequent proceeding in guardianship.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 6, 8-15; Dec. Dig. 19.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the guardianship of Lew Choy Foon, a minor. From an order of appointment, the mother appeals. Affirmed.

Harding & Monroe, of San Francisco, for appellant. Costello & Costello, of San Francisco, for respondent.

MELVIN, J. Yoke Won, mother of a minor child, Lew Choy Foon, appeals from an order appointing Lew Get and Mar Shee guardians of the person of said minor.

[1] The appellant insists that there was no evidence to support the finding that the mother was an unfit person to have the custody of the child, and that the unfitness of Lew Get and his wife, Mar Shee, was amply established. An examination of the record discloses a sharp conflict of evidence on almost every material point in issue. Certain matters, however, appear without denial. One is that when the child was born the mother was living the life of a prostitute. There was evidence tending to show that she was a slave girl and an unwilling inmate of the brothel in which her baby was born. It is undisputed that Mar Shee took the baby when she was three days old; that ever since that time the little girl has lived with Lew Get and Mar Shee; that they have provided for her; that the foster parents have been married according to American custom since the child went to live with them; and that they have exhibited at all times a deep affection for the little one. There was evidence tending to show that after living for some time in the house in which her baby had been born, Yoke Won was redeemed by a man named Lee Suey, and after living with him as his second wife or concubine for some time, part of that period away from San Francisco, she heard of the Presbyterian Mission, situated at No. 920 Sacramento street, in the city and county of San Francisco. She took refuge there, and resided at

the mission at the time when the guardianship matter was heard.

It was undisputed that the mother was possessed of no means of her own, but the charitable people in charge of the mission were willing to take the child until such time as the mother might marry some good man or secure some employment whereby she might support herself and the little girl. It is evident that Miss Cameron, the superintendent of the Presbyterian Mission, sincerely believed in the full and permanent reformation of Yoke Won and in the unworthiness of the foster parents. Moved by such belief, she sought to rescue the little one from such environment, but it was the peculiar function of the learned judge of the superior court before whom the hearing took place to pass upon the questions of fact in dispute upon which there was a conflict of testimony, and we cannot, of course, interfere with his conclusions, adopted after a full and patient hearing of the evidence. It would be hard to find in any record a more radical conflict. According to witnesses who appeared on behalf of the mother, Lew Get and Mar Shee were absolutely unworthy and unfit to be intrusted with the care and nurture of a little girl. On the other hand, witnesses produced by the petitioner described Lew Get as a prosperous merchant of good character, his wife as an excellent woman, and their home as one of refinement. Indeed, there seems to have been no doubt of the ample material comforts which they were able to give the child, but the mother and her sponsors were apparently concerned about the moral welfare of the little one. This question was, as we have indicated, one which the lower court could solve, but one which we cannot determine by reference to the conflicting evidence.

[2] But we are reminded of this court's frequent refusals to deprive parents of the custody of children merely because of comparative poverty, and it is argued that this young mother, rescued from a life of degradation, should be permitted to rear her daughter even though she could not give the child the material comforts bestowed by Lew Get and Mar Shee. This court has resolutely refused to deprive parents of their children upon considerations of comparative luxury or poverty, but the learned judge of the superior court, who had an opportunity to observe the young mother and to hear her testimony and that of the other witnesses, was in a position to decide whether or not her reformation was complete. He could, and doubtless did, also weigh the comparative benefit to the child, in respect to her temporal, mental, and moral welfare, which might result from residence in an eleemosynary institution or a continuance of the life with the foster parents. This was his duty under section 246 of the Civil Code, and he resolved

the question before him in favor of the petitioners.

[3] There is a square conflict of evidence on the question of abandonment. The mother testified that the baby was given to Mar Shee by the keeper of the house in which she resided, and that she, being a slave girl, had no voice in the matter. Mar Shee, on the contrary, testified that the young mother gave her the child and asked her to raise it. She promised to take and support the infant. Dr. Lafontaine testified she attended Yoke Won when the child was born. The mother refused to have anything to do with the infant, would not nurse it, and said, in Chinese, "I don't like it." There was also evidence to the effect that while she was living with Lee Suey the mother made no effort to see her child, although she was on friendly terms with Lew Get and Mar Shee. This testimony was sufficient to support the finding of the court that the minor was abandoned and cast off by the mother.

[4] Appellant introduced in evidence an opinion written by the learned judge of the juvenile court in a proceeding to have Lew Choy Foon declared an abandoned child. He held that she was not an abandoned child, but such decision was not binding upon the superior court in a subsequent proceeding in guardianship. In *re* Guardianship of Michels, 170 Cal. 339, 149 Pac. 587.

It follows that the order from which the appeal is taken must be affirmed; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

ROBINSON v. OTIS, Mayor, et al.
(Civ. 1878.)

(District Court of Appeal, First District, California. June 16, 1916. Rehearing Denied by Supreme Court Aug. 15, 1916.)

1. MUNICIPAL CORPORATIONS § 703(1) — REGULATING USE OF STREETS—POWER TO REGULATE HOUSE MOVING BY ORDINANCE.

Under St. 1907, p. 1059, and Const. art. 11, § 11, authorizing the city of Alameda to permit, regulate, or prohibit the placing of obstructions on streets, and authorizing any city to make and enforce police regulations not conflicting with general laws, an ordinance under the police power regulating the moving of buildings upon streets, providing for the issuance of a permit upon written application showing the consent of certain property owners, the filing of a bond and the character of building to be removed, and prohibiting such removal in the absence of the required permission is valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509; Dec. Dig. § 703(1).]

2. MANDAMUS § 90(3) — REVIEW OF DISCRETION OF COUNCIL — REFUSING PERMIT TO MOVE HOUSE.

Where a council refused permission to move a house through the streets, after public hearing at a regular session and receiving evidence for and against the permission, no dishonesty or arbitrary action being shown, its action was

conclusive upon application for writ of mandate.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 142; Dec. Dig. ¶ 98(3).]

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Action by W. P. Robinson against Frank Otis, as Mayor of the City of Alameda, and others. From a judgment for plaintiff, defendants appeal. Reversed.

A. F. St. Sure, of Alameda, for appellants. J. A. Elston, of Berkeley, and George Clark, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment awarding a writ of mandate. The respondent herein petitioned the superior court of the county of Alameda for a writ of mandamus commanding the mayor and members of the council of said city of Alameda to issue a permit to him to move a certain building over the streets of the city. The petition shows that there exists an ordinance of the city of Alameda regulating the moving of buildings upon its streets, which in substance provides for the issuance of a permit upon written application showing the consent of certain property owners, the filing of a bond, and the character of building to be removed, and prohibits such removal in the absence of the required permission. The plaintiff made application, and the matter came on for hearing in regular session of the council; and after receiving evidence for and against the issuance of the permit the council denied the application, whereupon plaintiff filed his petition for the writ aforesaid. Defendants demurred to the petition, and upon the overruling of such demurrer declined to answer, whereupon judgment was entered against them, awarding to the plaintiff the writ of mandamus as prayed for. From this judgment, the defendants appeal.

The only questions involved in the appeal are, whether or not the council had the power to enact the ordinance in question, and if, having such power, its refusal to issue a permit was such an abuse of discretion as to warrant the granting of the relief here sought.

[1] The city of Alameda by its charter is given authority as a municipal corporation to manage and control the streets, roads and highways, and to permit, regulate or prohibit the placing of obstructions thereon, and to ordain, make and enforce within the limits of the city all necessary, police, sanitary and other laws and regulations. Stats. 1907, p. 1059; Const. art. 11, § 11. Under this grant of power there can be no question but that the city has the right to pass an ordinance of the character mentioned. The authority of municipalities to enact ordinances under its police power has received consideration in a great many cases in numerous jurisdictions. It would be a useless task to review

those authorities, and a mere reference to a case where the power was exercised under facts similar to those here will be sufficient. In *Eureka City v. Wilson*, 15 Utah, 53, 48 Pac. 41, an ordinance required the issuance of a permit for the removal of buildings, and it was held that the city council could prohibit by ordinance the moving of a building into and upon the streets of a municipality without first obtaining a permit, and that such right comes within the police power of the state. This case was affirmed by the Supreme Court of the United States. *Wilson v. Eureka City*, 173 U. S. 82, 19 Sup. Ct. 317, 43 L. Ed. 603.

[2] Having the power to pass the ordinance, it only remains to be determined whether or not the permit in this instance was rightfully refused. A certain discretion in matters of this character must necessarily be vested in the governing body of a municipality; and its conclusion on the subject, in the absence of fraud or circumstances disclosing a manifest abuse of such discretion, is conclusive and not open to question by the courts. *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267. No such abuse of discretion is here shown. The council had a public hearing, and having considered the evidence denied the application; and it cannot be said that it arbitrarily or dishonestly exercised its power. On the contrary, there is nothing contained in the record to show but that it acted with good motives and in the interests of the public welfare.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

PEOPLE v. WEIR. (Cr. 635.)

(District Court of Appeal, First District, California. June 15, 1916. Rehearing Denied by Supreme Court Aug. 14, 1916.)

1. BANKS AND BANKING ¶ 21—WORTHLESS CHECKS—OFFENSES—ELEMENTS—INFORMATION AND PROOF.

In charging commission of a felony under Pen. Code, § 476a, making it a crime willfully and with intent to defraud to make, draw, utter, or deliver a bank check knowing that there are insufficient funds, the information need not allege that the check was presented to the bank, nor need such fact be proved.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 25; Dec. Dig. ¶ 21.]

2. CRIMINAL LAW ¶ 371(1)—INTENT—EVIDENCE—OTHER ACTS—ADMISSIBILITY.

Criminal intent being an essential of such offense, proof of other similar acts, before or after that charged, is relevant and competent to show intent, where accused admits the act, but denies felonious intent.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 830, 881; Dec. Dig. ¶ 371(1).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Robert J. Weir was convicted of a crime.

and from the judgment and order denying new trial, he appeals. Affirmed.

R. W. Hays and B. W. Gearhart, both of Fresno, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. [1] In charging the commission of the felony defined by section 476a of the Penal Code it is not essential to a statement of the facts constituting such offense that the information should allege that the check drawn by the person charged with the offense was presented to the bank. Such in effect was the ruling in the case of *People v. Mohr*, 157 Cal. 732, 109 Pac. 476. It follows logically that if such fact was not required to be pleaded against the defendant, it was not necessary to be established against him in order to secure and sustain his conviction.

[2] The criminal intent of the defendant when making and drawing the check in question was an essential element of the offense with which he was charged; and he admitting the act but defending in part upon the ground that it was free from felonious intent, proof of the commission of similar acts, even though they be independent and disconnected, and were committed either before or after the perpetration of the crime charged, was relevant and competent for the purpose of showing guilty intent. *People v. King*, 23 Cal. App. 259, 137 Pac. 1076.

The evidence upon the whole sustains the verdict and judgment. The judgment and order denying a new trial are affirmed.

PEOPLE v. BRADFIELD. (Cr. 463.)

(District Court of Appeal, Second District, California. June 14, 1916. Rehearing Denied July 10, 1916. Rehearing Denied by Supreme Court Aug. 7, 1916.)

1. CRIMINAL LAW § 747—APPEAL—REVIEW—CONFLICTING EVIDENCE.

In a prosecution for crime, wherever there was a conflict of testimony, the jury had the right to exclusively judge as to the fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727; Dec. Dig. § 747.]

2. CRIMINAL LAW § 1168(4)—APPEAL—HARMLESS ERROR.

In a prosecution for assault with intent to murder, the striking of testimony that upon a prior meeting of the parties a third party told defendant what the other prosecuting witness had said, and that the wife of the other prosecuting witness had defendant covered with a shotgun loaded with lead clippings during the meeting, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3144; Dec. Dig. § 1168(4).]

3. HOMICIDE § 300(3)—SELF-DEFENSE—INSTRUCTION—MODIFICATION.

In a prosecution for assault with intent to murder, an instruction that one who has received information of threats against his life or person, made by another is justified in acting more quickly for his own protection in

event of assault, either actual or threatened, than would be a person who had not received such threats, and, if the prosecuting witness made threats against the defendant and the defendant, because of such threats made previously, had reasonable cause to fear, such threats, should be considered in passing on his acts, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300(3).]

4. CRIMINAL LAW § 1137(3)—APPEAL AND ERROR—INVITED ERROR.

Appellant cannot complain of error in an instruction which he himself has prepared and asked the court to present to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137(3).]

5. HOMICIDE § 300(3)—ASSAULT WITH INTENT—INSTRUCTION.

In a prosecution for assault with intent to murder, the court properly instructed that if the jury believed that there had been previous difficulties between the parties, they should consider such fact only to determine the state of mind of the parties at the time of the alleged assault, and to show malice, if any, that defendant had at the time.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300(3).]

6. HOMICIDE § 286(2)—ASSAULT WITH INTENT—INSTRUCTION.

In a prosecution for assault with intent to murder, it was proper to advise the jury that evidence of former difficulties between the parties might be considered to show malice on defendant's part against complainant; malice being a material ingredient of the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 587-590; Dec. Dig. § 286(2).]

7. HOMICIDE § 116(3)—SELF-DEFENSE.

A person acting in self-defense and resorting to the use of a deadly weapon must believe that it is absolutely necessary for him to so act in order to justify under the law.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 160; Dec. Dig. § 116(3).]

8. HOMICIDE § 300(3)—SELF-DEFENSE—INSTRUCTION.

In a prosecution for assault with intent to murder, an instruction that, to justify a person for attempting to kill another on the ground of self-defense, the attempt must be made under the well-founded belief that it was absolutely necessary for such person to kill the other to save himself from great bodily harm, the danger being present, apparent, and imminent, was not improper as declaring that it need appear that it was absolutely necessary for the assaulted person to resort to the means of self-defense adopted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300(3).]

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Mason Bradfield was convicted of assault with a deadly weapon, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Earl Rogers and Velitch & Richardson, all of Los Angeles, E. E. Moss, of Ventura, and O. G. Kuklinski and Milton M. Cohen, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

JAMES, J. The defendant was charged by the information of the district attorney with having, on the 1st day of July, 1915, committed an assault with a deadly weapon with the intent to murder George J. Henley. The jury by its verdict convicted the defendant of the crime of assault with a deadly weapon only. This appeal is taken from the judgment of the court which followed, and from an order denying the defendant's motion for a new trial.

The alleged assault occurred in the daytime on a street in the town of Fillmore, Ventura county. The complainant Henley occupied a tract of land in a canyon near Fillmore, across which and leading to more remote sections of the mountains was a road. This road was located on the ground which Henley claimed to own, and he objected to persons traveling over it without first paying for the privilege. A corporation of which defendant was manager or superintendent was operating, either for water or oil, at a point above the Henley place. In order to reach the land of the corporation it was necessary, or at least desirable, to travel over the Henley road. Henley objecting, a suit was brought, and finally a stipulation was made by which the right to travel upon this road was conceded to the corporation. Henley either raised some question about this right so conferred later, or at least insisted that the privilege granted be strictly construed as not allowing the corporation or its agents upon any portion of the ground claimed by him outside of the roadway. While Henley and the appellant had been friends in former years, this dispute over the right to use the road engendered some bad feeling. According to the claim of appellant, which is given color by the evidence, Henley attributed to Bradfield all of the difficulty which he had had with the corporation which was under the management of Bradfield. At a time about three years prior to the occasion of the assault, Henley met Bradfield as the latter was traveling down the canyon on the road, and his attitude at that time was abusive and threatening. However, he made no attack upon Bradfield and showed no weapons. On this occasion Bradfield testified that while he was engaged with his parley with Henley he glanced over by a building, and there saw Mrs. Henley armed with a double-barreled shotgun, which was leveled in his direction. Bradfield testified that he walked about so as to keep Henley between him and the gun until a man named Snow drove down, when he (Bradfield) left the canyon, to which he had never returned. The corporation, however, through their agents and under the direction of Bradfield, had continued to prosecute some work on their property above the Henley place. As before mentioned, this wordy encounter took place three years prior to the date when the alleged assault was committed.

On the 1st day of July, 1915, Henley came

to the town of Fillmore to transact some business. He testified that he went to the office of the justice of the peace to look up the question of his rights regarding trespassers on his property, and later walked up the street; that in front of a real estate office, where Bradfield's company had its headquarters, he saw Bradfield; that Bradfield bowed, and that Henley returned the salutation; that Bradfield then came toward him; that he (Henley) stopped, thinking that Bradfield wanted to talk with him, and that he addressed Bradfield, asking him how he was getting along and where he was surveying at that time.

Henley testified that he noticed some expression passing over the face of Bradfield, and that he ran his eyes up and down the form of the latter; that he noticed a motion, and as he raised his eyes he found that he was looking into a gun which Bradfield held aimed at him; that the next expression of Bradfield was, "Are you heeled?" that he (Henley) turned and said "No," and that as he turned he bowed his head, thinking that he was to receive a shot; that one shot was fired, striking him back of the shoulder, and then after a little intermission two more shots were fired, both of which took effect in his back; that he had started to go away as soon as he saw the gun in the hand of Bradfield, but that as he swung around and started, all of the shots had been fired. Henley testified that he was totally unarmed, except for a pocketknife, which was in his pocket, and none of the several witnesses, who were almost immediately at the scene of the shooting, saw any weapon, although Bradfield, the defendant, made the claim that Henley was carrying a gun. Henley, after being shot, staggered down the street some little distance, and then fell to the ground from loss of blood. He was immediately picked up and attended by a physician. This physician testified that he found two wounds of entrance in the man's back; one bullet had entered at an oblique angle at about the center of the left shoulder blade and proceeded across the man's back under the skin and lodged at some point over the right shoulder blade. Another bullet had entered at the lower tip of the right shoulder blade, had progressed to the right and around the man's body and came out in front. A number of blood vessels were severed by the bullet which occasioned this last wound, and profuse bleeding resulted. What appears to have been the first bullet fired did not enter the body of Henley, but passed through his clothing at the back from left to right.

The appellant, in giving his version of the shooting, testified that on the day in question Henley passed his office several times and motioned for him (Bradfield) to come out; that, being busy, he paid no attention at first, but upon the second or third time that Henley passed he did go out and speak

to him; that Henley asked him why he did not come up into the canyon any more, and upon his replying that he had no occasion to, that he could have what he needed done by others, Henley had cursed him and told him he was afraid to go into the canyon; that Henley had made some motion which disclosed to the view of appellant the butt of a revolver in Henley's pocket; that appellant, knowing of Henley's proficiency both in the handling of a gun and knife, considered that he was about to be attacked, and drew his own weapon and fired. He testified that he fired three shots in rapid succession, aiming at the right shoulder blade of Henley, with the idea of "crippling" him only. He did not contend that Henley had actually drawn a revolver, and at one point in his testimony said Henley reached for a gun, and at another point said that he was "looking for a knife from him." When asked as to whether he saw the revolver of Henley again that day, he said that he thought that he saw one of the witnesses who testified in the case take the gun from Henley after the latter had staggered away down the street. The witness referred to gave no testimony as to finding any gun upon or in the hands of Henley.

[1, 2] Of course, it is enough to say that wherever there was a conflict of testimony the jury had the right to exclusively judge as to the fact. There was a great deal of testimony admitted touching the statements made by Henley to various persons respecting his rights in the canyon and his hostile feeling toward those who contended for the privilege of passing over his property. This testimony was introduced as tending to show ground for a reasonable fear in the mind of the appellant that at the time of the alleged assault he believed his life to be in danger, or that he was likely to suffer great bodily injury at the hands of Henley. Counsel for appellant at great length argue that the trial judge committed error prejudicial to the defendant when he struck out certain testimony of Bradfield, and in the giving of an instruction touching the question of prior threats made by a person who is afterwards injured at the hands of the one threatened. Bradfield testified that the man Snow, who had approached at the time of his wordy encounter with Henley in the canyon three years prior to the shooting, had talked to him about that occurrence. The record shows that the matter was presented in this way, Bradfield being on the witness stand:

"Q. Subsequently did Snow have a conversation in which he purported to tell you the statements made by Mr. Henley respecting you and what should have or would have happened to you on that particular morning? A. Yes; in 10 or fifteen days. Q. What did he tell you? A. He told me that Mrs. Henley had told him that George (Henley) had stopped me in the road and gave me a good roast, that I quit and got out of the canyon, and she did not think would ever come back again. Q. Did Mr. Snow tell you whether the Henleys said anything

about the gun? A. Yes; she said she had her double-barreled shot-gun filled up with pieces of lead pipe. She had whittled them off, and if I had made a move of any kind she would have torn me in two."

Counsel say that they were entitled to have this testimony considered by the jury as indicating the character of Henley and the state of mind of appellant at the time of the shooting, as showing reasonable ground for the belief that the latter was about to be attacked when approached by Henley on the 1st day of July in Fillmore. It will be noted that not a word of this testimony referred to any threat made by Henley. Bradfield testified that he had, on the occasion referred to, observed the double-barreled shotgun leveled at him by Mrs. Henley; but he made no claim that Henley at that time exhibited any deadly weapon or threatened to use one. Counsel say it is "hard to realize a woman loading a shotgun with lead clippings," and likens the case to that of Kipling's grenadier who held a cocked rifle to the head of a wounded Afghan while the officer gave the injured a drink of water, in order to prevent the wounded man from shooting the officer as one had just done, and he says that Bradfield had the right to follow Mulvaney's example and take extraordinary precaution against such cruelty as would recommend a woman to load a shotgun with lead clippings. Remembering that the encounter was between Bradfield and Henley, and not Mrs. Henley, the relevancy of testimony showing what Mrs. Henley did or might do, is not apparent. We might quote a couplet by the same distinguished author to whom counsel has referred:

"When Nag, the cobra, hears the careless steps of man,
He sometimes wriggles sideways to avoid him if he can;
But his mate makes no such motion as she camps beside the trail,
For the female of the species is more deadly than the male."

The fact that the trial judge struck out this testimony on the ground that it was hearsay, in that Snow was not produced, and it was in no wise made to appear that Mrs. Henley had actually made the statements communicated, does not present error of which appellant is entitled to complain, because the testimony, as we view it, was not relevant in the aspect which the case presents.

[3, 4] The court, at the request of defendant, gave the following instruction, with the modification embodied in the phrase and word which we have shown in parentheses:

"One who has received information of threats against his life or person made by another is justified in acting more quickly and taking harsher measures for his own protection in event of assault, either actual or threatened, than would be a person who had not received such threats; and if in this case you believe from the evidence (that the prosecuting wit-

ness made threats against the defendant and) that the defendant, because of (such) threats made previously to the transaction complained of by the prosecuting witness and communicated to the defendant either by the prosecuting witness or some other person, had reasonable cause to fear greater peril in event of an altercation with the prosecuting witness than he would have otherwise, you are to take such facts and circumstances into your consideration in determining whether defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety."

The instruction as modified, when properly analyzed, means nothing more or less than it did in the form in which the appellant presented it to the court. In that form it stated quite clearly that threats such as would furnish ground in the appellant's mind for the belief that his life or person were in danger, were those which had been "made previously * * * by the prosecuting witness." Appellant is not entitled to complain of error in an instruction which he himself has prepared and asked the court to present to the jury. An examination of other instructions offered by the defendant shows that in their phraseology it was assumed as a prerequisite that the threats which were communicated had actually been made by the prosecutor. Instruction 26, found in the clerk's transcript, contains language of that meaning. It may be conceded that it is not the law that it must appear that such threats were actually made by the prosecutor, and that it is sufficient that it has been stated to the person who acts thereon that such threats were made and that such statements were believed and relied upon by the person charged with the assault. The trial judge allowed to be shown on behalf of the defendant very fully the attitude and disposition of Henley, as manifested by his words and acts touching the question of trespassers upon the property which he claimed to own. The objections which were sustained to questions tending to further emphasize the disposition of Henley in that regard we think were in the main properly determined. The contentions urged in this direction are rather hypercritical and the argument in support thereof attenuated.

[5, 6] It is complained very earnestly that the court erred in giving this instruction to the jury:

"I instruct you that if you believe from the testimony in this cause that said defendant, Mason Bradfield, and the prosecuting witness, George J. Henley, prior to the 1st day of July, 1915, had certain difficulties and troubles, then, in that event, you are only to consider such testimony for the sole purpose of determining the state of mind of said defendant, Mason Bradfield, and said prosecuting witness, George J. Henley, at the time of the alleged assault, if any there was, and for the further purpose of showing malice, if any, the defendant had at such time."

Counsel argue that the evidence of the previous difficulties between Henley and Bradfield was to be considered for the pur-

pose of showing malice in the mind of Henley, the prosecutor. We make no distinction between the meaning of the expressions contained in the instruction, where the court told the jury that such testimony was admissible for the purpose of determining the state of mind of the two men, and had the instruction advised the jury that such testimony should also be considered for the purpose of showing malice of Henley. By the instruction the jury was entitled to view the evidence as indicating whatever it might in the direction of explaining the whole state of mind of the two men. It was proper, too, to advise that evidence of the difficulties might be considered for the purpose of showing malice, if any, that the defendant had against the complainant, for under the charge as made, to wit, assault with intent to commit murder, malice was a material ingredient. The jury, however, did not find the defendant guilty of that crime, but convicted him of the lesser offense which involved no specific malice on his part.

[7, 8] It is also declared that the following instruction misstates the law:

"To justify a person for attempting to kill another upon the ground of self-defense, the attempt must be made under well-founded belief that it was absolutely necessary for such person to kill the other at the time to save himself from great bodily harm. The danger or harm must be present, apparent, and imminent."

Counsel's whole argument on this proposition is that in proving justification for an attack it need not appear that it was absolutely necessary for the person to resort to the means adopted and kill another. The instruction does not so declare. It does state, and properly, that the person acting in self-defense and resorting to the use of a deadly weapon must believe that it is absolutely necessary for him to so act in order to justify under the law. The jury was not told that it must find as a fact that the necessity did "absolutely" exist, but only that defendant so believed. The case of *People v. Webster*, 13 Cal. App. 348, 109 Pac. 637, is not contrary in its holding to this conclusion. Examining the whole body of the instructions, we find that the court sedulously and with great care defined to the jury the rights of a person charged with an assault who claims to have acted in self-defense. It was fully explained that the conduct of such person was only such as would be determined by the mind of a reasonable man, and that he might act upon appearances, and that even though the danger was apparent, and not real, he would be justified.

The main contentions advanced by the appellant in his claim for a reversal have been carefully considered, and the evidence, as disclosed by the lengthy transcript, thoroughly examined. We believe that the defendant in this case has been protected by the court in his right to have a fair trial,

and that the verdict of the jury is fully sustained by the evidence.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

SOULE v. WYATT et al. (Civ. 1515.)

(District Court of Appeal, Third District, California. June 19, 1916.)

DEEDS — 211(4) — EVIDENCE — VALIDITY — FRAUD AND UNDUE INFLUENCE.

In action by father to set aside a deed to his daughter, alleged to have been procured by fraud and misrepresentation and by undue influence upon him when feeble and incompetent, evidence that at time of making the deed he was 77 years old, feeble and suffering grievously with eye disease and heart trouble, that he had recently lost his wife and his household was broken up, that defendant falsely represented that his other children had boasted that they were going to get his property, that she promised if he made the deed to her he could sell the property at any time, and that he had repeatedly expressed his desire that his children should share equally—supported finding for plaintiff.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 641, 642; Dec. Dig. 211(4).]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Suit by John A. Soule against Lottie M. Wyatt and another. From judgment for plaintiff, defendants appeal. Affirmed.

E. S. Bell, of Napa, for appellants. George Clark, of San Francisco, and W. A. Anderson, of Woodland, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action to set aside and have declared void a certain deed conveying to his daughter, Lottie M. Wyatt, one of the defendants, certain real property situated in the town of Washington, Yolo county, on the ground that:

"Said deed was procured to be executed by the said defendants through the frauds and misrepresentations of said defendants and by the undue influence exerted by the said defendants upon the said plaintiff at a time when he was enfeebled in mind and health and incompetent to make a deed or to dispose of his property," and that "plaintiff's title to said property be quieted against said defendants and each of them."

The cause was tried by the court, and plaintiff had judgment in his favor, from which defendants appeal.

The court made the following findings of fact:

"(1) The court finds all and singular the allegations of the plaintiff's complaint to be true. (2) That the attorney who prepared the deed for the signature of the plaintiff was in no manner a party to the plan under which the said defendants procured the making of said deed and the said attorney acted wholly without knowledge of the manner in which defendants did procure the making of the said deed by the said plaintiff."

Plaintiff was a pensioner of the Southern Pacific Company in 1911, residing on the premises in question in the town of Washington, sometimes called Broderick. His family

consisted of his wife and grandchild, Flossie Conrad, daughter of defendant Lottie Wyatt by her first husband. When Flossie was an infant she was taken into plaintiff's family and reared as their own child. Plaintiff was 77 years old and was suffering grievously with a painful disease of the eyes and finally lost the sight of one of them. He was feeble from the infirmities of age and was afflicted with heart trouble, which at unexpected moments would cause him to lose consciousness and fall to the ground as in a fit, lying there rigid "and as though dead," as one witness described his condition. On July 13, 1911, his wife died and Flossie's mother took Flossie away to her own home at Rutherford, Napa county, and plaintiff went to the home of his son, Charles C. Soule, in Broderick. The loss of his wife, the taking from him his grandchild, Flossie, to whom he was devotedly attached, together with the excruciating pain caused by the disease of his eyes and his general weak physical condition, so affected plaintiff as to make him an object of pity and commiseration. He was ill for some time after the death of his wife. He testified:

"I lost my eyesight, then worrying about my wife and my baby" (he called Flossie "his baby") "that I thought a good deal of took away from me, and all things together made me sick; that is about all I can remember at the present. * * * Q. What effect, if any, on your feelings or your mind did the death of your wife and the breaking up of your family have? A. Well, it made me what you might say crazy, in fact I think I am so yet."

He visited his daughter, Mrs. Wyatt, occasionally for some time after his wife's death.

"Q. What took you down there, what was the cause of your going? A. Well, in the first place I didn't want to go down; I rather be at my old home, it is natural, but they took my baby away and caused me to go down there, my daughter did; thought if I would come down there I would be better off where Flossie was and so I made up my mind I would go down there; I like to be where she was so I went down and stayed there awhile and came back awhile and kept going."

The deed in question was executed on July 30, 1912, three weeks after he went to Rutherford to live with defendants. He testified as to his then physical condition as follows:

"I was pretty sick; I was weakened down, discouraged, my eyesight was failing, and I felt weak; one-half of the time I couldn't rest nights; they gave me whisky with some stuff in it to make me sleep; one thing and another, so therefore I got pretty weak for quite a while, but I got better."

Several witnesses testified to his weakened condition; that his eyes gave him great pain; that he was subject to fainting spells from heart trouble; that he constantly grieved "and was brooding" over the loss of his wife and having his granddaughter taken from him. Besides defendant Mrs. Wyatt, his children were Mrs. Annie Lindsay and two sons, Charles C. and John G. Plaintiff

testified that after he came to Rutherford and before the deed was made, defendant Mrs. Wyatt told him she learned through two letters written to Mrs. Addie Barry, residing at Rutherford, sister to plaintiff's deceased wife, that his son John and Mrs. Lindsay were going to get all his property.

"She (Mrs. Wyatt) said they were going to have it all, them two, and I remarked I didn't want them to have it all. I wanted to divide it amongst the four of them."

Mrs. Barry testified that this representation by Mrs. Wyatt was false and that Mrs. Lindsay had not written any such letter. Plaintiff testified:

"Q. What did she keep saying to you? A. She say they made their brags they were going to have it all because they done the most work on it. I admitted they did, but at the same time I didn't think it was right for them to have it all. Q. What did you say on the subject of dividing your property? A. I say I wanted to divide it, want it equally divided. Q. What way? A. Each one of them to have their share. Q. Where and when did you tell her that? A. Well, about the time we were talking about it; I don't know exactly when it was. Q. But it was before the deed was made? A. It was before the deed was made. Q. Was anything said by her when you stated you wanted to divide it up among them all? A. Well, she said I couldn't do it, because they were going to have it all, Annie and John was; of course, I couldn't divide it if them two going to get it all, and I didn't like that idea. Q. Was anything said about a will? A. Yes, sir; I did. Q. What did you say? A. I said, 'Well, then I will fool them, I will make a will, then they can't get any more than the others,' and she said, 'A will can be broke.' Q. Where was her husband during the talk? A. One time we were talking about it I couldn't say at the dinner table or supper table, talking about the will, and she turned around and says to Harry—'we call him Harry—'a will can be broke, can't it?' and he says, 'Yes.' That finished it for that evening. Q. At that time you were living down there? A. At that time I was living down there. Q. That was before the deed was made? A. That was before the deed was made. Q. At the time of that talk about saying a will could be broke, was anything said about a deed? A. Yes. Q. Who said it? A. She said a deed—no, he said a deed would be the best because can't break a deed. Q. What did she say, if anything? A. I don't remember she said anything, in reply to that or not at that time, but talked about it afterwards, but not at that time. * * * Q. After these talks you have referred to, was there any further talk between you and them regarding your property and disposing of it in any way? A. Why, about making the deed? Q. Yes. A. Well, she said—I said, 'Well, if a will can be broke, I would like to have Charlie and you and Flossie have a share of it, because if the rest want it all that looks kind of hog-gish to me, they so mean probably they won't get any of it.' So she says, 'Well, you can't mention Flossie because what belongs to me belongs to Flossie.' 'Then I will make it in your and Charles' name.' 'Well, you can't make it in two names, have to make it in one, make it in my name, then I can give Charlie his share.' 'What is his share?' 'Well, I will give him \$1,000.' 'Well, he ought to have more than that.' 'Well, but I have to take care of you.' 'Take care of me? I don't want any care. I will go to the county hospital if the worst comes to the worst.' Q. You stated she said something about making out a deed in more than one name? A. She said you couldn't make it in more than one name. Q. Did you believe

these statements? A. I believe it; yes, sir; I didn't know any better. Q. How long before you went up to Mr. Bell's office was it this talk occurred that you mentioned? A. How long before? Q. Yes. A. It might have been, well, I will say about three weeks, I don't know if it was quite as much as that, but say three weeks; I can't remember these things right up to a date. Q. How often was the matter of deeding your property talked over? A. Oh, every little while get to talking about it until at last I got tired; I say I never had anything; in fact I aint got nothing, I couldn't handle it to suit myself, I was getting tired and sick bearing them talk about it. Q. When the talk occurred or the talks occurred about the making of a deed, was there anything said regarding disposing of the property after the deed was made? A. Yes. Q. What was said? A. She says, 'Papa, you make it in my name; you know you are pretty sharp on a bargain and you can sell it any time you like and all I have got to do is sign the papers,' so, of course, I thought I could have that privilege. Q. How long before you actually signed the deed did she make that statement to you? A. How long before? Q. Yes; the first time she made that statement to you. A. Well, I don't remember that; I would like to tell it as near as I can remember. Q. But you know it was before the deed—you know it was before the deed was made? A. Yes; it was before the deed was made; then after the deed was made, Mr. Joe Harbinson, a wholesale liquor man in Sacramento, wrote me a letter, of course I can't read—he would have given me \$2,500 cash for my property, and I laughed about it, and I said, 'Flossie,' or at least 'Lottie'—I got Flossie on the brain, no wonder—'Lottie, write a few lines to Mr. Harbinson and I will tell him what I will take for the property,' and she jumped up and she commenced cussing and swearing 'To hell with him, I don't want to sell it, I don't want to sell it,' says I, 'If he gives me what I ask for it, isn't that satisfactory?' 'No; I won't sell it.' I says, 'Write a few lines anyhow.' 'No.' Wouldn't do it. * * * Q. When this statement was made to you about making the deed to one person only did you make any statement to your daughter about the fact that you might want to sell this property? A. Yes. Q. What did you say to her in regard to that matter? A. I told her I would like to sell it; she said I could sell it any time I liked because I was pretty sharp on a bargain. Q. I will ask leave to ask this question though it is leading. Did you say to her, 'I said I didn't like to deed it because then I can't sell it'? A. Yes, sir; that is what I am coming at, and she said, 'Yes; I could. Q. She stated, 'Yes, you could? A. Yes. Q. Did you believe that statement she made to you. A. Well, I never dealt much with buying and selling, of course. Q. What I mean is this, did you rely on the statement she made to you? A. Certainly. Q. Believed it? A. Certainly; I thought she meant what she said at the time; if I didn't I wouldn't have done it. Q. Was the getting of an attorney to fix up the deed mentioned? A. She says she get Mr. Bell, he was a good hand to do anything like that because he done all the work for her husband when his mother died, and he understood it thoroughly, so Mr. Bell did do it. Q. Did you still believe and rely on those statements when you signed that deed? A. Yes, sir; I believed what she told me; I believed she thought she was telling what she meant."

Mrs. Soule, wife of Charles, with whom plaintiff lived after the death of his wife, testified:

"Q. Do you know whether while the old gentleman was living there in the town of Washington, he was worried or grieved? A. He grieved all the time; every minute of his life

he grieved from the time he would get up, over his wife's death, and being left without his baby, as he called Flossie."

She testified to his being kept in a dark room on account of his eyes—

"he was suffering terrible day and night, got up at all hours of the night; that was just before he went to Rutherford. * * * Q. Did any one coming from Rutherford make any requests that he go down there? A. Yes; Flossie came for him, begged him to go down to mother, when he was sick, begged him, says, 'Mam told me to tell you to come, come down to her, that is the place,' he said, 'No; I don't want to go; I want to stay here,' nobody could take care of him like Madge; he imagined I could take care of his eyes because I had been doing it, I guess. Q. Did you have any talk with Lottie M. Wyatt about the time of his going down there? A. Oh, yes; she would talk—the time when she came to get him after he went down for the short visit then she came up to take his things down. Q. Did you have any talk with her, particularly with reference to any dealings she might have with him, what she might accomplish with him? A. She was talking to me, she said, 'They think they are going to get it all, but wait until I get him down there, you bet I'll get it.' Q. When was it she said that to you? A. When they were taking the furniture, the day before. Q. Did she ever say anything to you about any particularly scientific way of handling the old gentleman? A. No; only just when the other daughter was talking to him; they were fussing; she said, 'You can't ruffle his feathers; you have to smooth him down the right way and you can do anything you want with him.' Q. She said that to you? A. Yes. Q. In the town of Washington? A. Yes. Q. Before he went down there to live? A. Yes; when he was getting ready to go. Q. Did the old gentleman in his talks with you ever make any statement before he went down there as to the way in which he wanted to leave his property? A. It seemed like that was on his mind all the time; yes, he wanted share and share alike, 'They are all my children.' Q. Did they write any letters to Washington asking him to come down there? A. Yes; she wrote about every day when he was so bad, begged him to come down."

On cross-examination she testified:

"Q. Didn't you tell any one she had told you this? A. No; they all seemed—I wasn't interested in it; it was nothing to me; they never took me much into their affairs; she was talking to me in bed; she wanted to know if father would give Charlie anything—what do you think he would do with it? I says, 'I don't know.' She says, 'I bet if he did give him anything he would blow it in.' I says, 'I don't know.' She says, 'I'll tell you what I think he would do, he would take a long trip.' Q. She said if she got him down to Rutherford she would have it all? A. She was speaking of the other two; she said they wanted it, the other two, the daughter and son, they wanted it because they helped make it—'If he lives a week after I get him, I'll see they don't get it.'"

A letter written by defendant Mrs. Wyatt was identified by the witness. This letter was addressed to "Charles C. Soule, Broderick, Yolo Co., Cal.," also postmarked Broderick. It was dated three days after the deed in question was executed and was as follows:

"burn this. Rutherford, Aug. 2, 1912. Dear Brother: I just received your most welcome letter. We are always glad to hear from you. Pa seems to think he ought to hear from you every day now we are all fine and hope you are all the same well we are not surprised to know that she comes every day but Charley.

you don't have to put up with that you can do just as you like in that house and make her stay away and I would do so to I would not let her come there and worry Mady so I know she must get tired hearing her tongue run and she has got so she lies pretty good to now, Charley don't do anything to give her a chance to get you in any trouble you know she would only be to glad to see you in trouble and I guess that is what she is trying to do she said all she could to get me started but I was to smart for her she tells everybody I am crazy but she will soon think I am about as smart as she is when she finds how things are now Charley I don't want you to worry you will get what belongs to you some day we went to Napa Tuesday and the deeds are made so it is you and I for it we got one they cant brake to the only way they could is to prove he was not in his right mind when he did it now that Pa is a resident of Napa Co all they could do would have to be done here and they can never prove that he aint in his right mind Pa says he dont want you to worry about anything he say you are his and you shall have what is yours say he wants you to bring him the two canes they stand in his room up stairs and the hook Polly had to hang his cage on so don't forget it he talks about them so much now I guess she wants to make trouble between Madge and I but if Madge listens to her she will have plenty to do she can lie pretty good well I have got the flower picture ready to send to John Pa changed his mind about keeping it so I will send it to him Annie will get left if she thinks the things I brought will ever be sent back I guess you will hear her all over town when she sees the deeds published in the Woodland paper I guess Mrs. Snider takes it they will say to you yes Lott got it and you will get left but Charley dont believe all you hear I want you to know you have one who will do right by you and I must say Madge treated me very nice and Pa says he will never forget how good she was to him he eats good and sleeps good and seems to be so happy we do all we can to please him and we always will he is a good old father he had beans for breakfast this morning well I will go to bed it is late and I am tired now write soon love to all dont get in trouble with that devil your loving sister Lottie. When you hear about the deeds just say Lot said she thought she would bye it as it was her old home."

A fragment of another letter written by defendant Mrs. Wyatt to Charles Soule read:

"He thinks he will come home sunday I sent the picture to him so his Polly can have it to look at I fixed Pa room up and it looks fine he eats good and sleeps good well Kid I don't know what could be rong with my last letter you say you don't understand it I told you he deeded it to me at least I intended to tell you so I know you must feel lonesome at time not seeing mother or father there but Father can go there to see you but our dear old mother we must give up we cant have her any more in this life I would not be suprised to see John and Annie try to brake the deeds but they will have a hard time doing it they would have to prove Pa was not in his right mind when he did it that would have to be done here so I am not afraid of it now if you dont come sunday why write and tell us the news love to you both Your loveing sister Lottie."

It appeared that plaintiff went to Napa with Flossie on July 3d and returned with her mother after the 4th, when they packed the furniture and returned shortly afterwards to Rutherford. The deed, as we have seen, was executed on July 30th. As to the circumstances attending the execution of the deed plaintiff testified:

"Q. Who accompanied you to Mr. Bell's office, when you went there; who went with you? A. Her husband, Harry Wyatt. Q. How did you get up the steps? A. She and him went together; he took me by the arm; helped me upstairs and downstairs through a hall; that is all I can remember about it. Q. At this time did you have anything over your eyes? A. Yes, sir. Q. What? A. I had my specs, I had a shade, and I had the rim of my hat over my eyes because the light bothered me a good deal. I got the same shade now at home. Q. Tell us as near as you can remember what occurred in Mr. Bell's office. A. Well, as near as I can remember, come there, says I come there to make a deed out, deed my property over to my daughter; of course, Mr. Bell knew it; it was all understood beforehand, him being there, talked about it, had to go get Mr. Bell, ready to attend to business. Mr. Bell: I move to strike out what Mr. Bell knew. Mr. Clark: We consent. The Court: Stricken out. Mr. Clark: Q. Was the deed made out when you got there or made out afterwards, do you know? A. Made right away, right there while we were there. Q. Do you remember whether it was read over to you? A. Read over to me? Q. Yes. A. No, sir; I don't remember any such thing. I didn't know it was sold for \$10; that was never mentioned to me. If they did I think I would have kicked; I would have thought there was something kind of funny. Q. did you sign your own name? A. Yes; I signed it myself; I made a cross with a pen. Q. What was done with the deed afterwards? A. Well, as near as I can remember, I think Mr. Bell kept it and sent it to Woodland to get it recorded; I think that is about the way it went. Q. Did you know it was going to be recorded at the time? A. I know it was going to be recorded; yes, sir."

He testified further:

"Q. What was the manner of their treatment towards you, Mr. Soule, before you made this deed, the family; what way were you treated in the Wyatt family before you made this deed? A. The reason I didn't what? Q. What was the manner of their conduct towards you before you made this deed; how did they treat you when you were down there? A. They treat me very kind; they couldn't do enough for me; treat me very kind; very kind indeed; I felt so sick I was like a child; you take a child if he sick you pet it, make over it, that is just what he likes, that is just like me. Q. How far was the little room you slept in from the house? A. The room I slept in joined the saloon, I should judge about 15 feet from the house, about that. Q. How was it about calling you to your meals, before the deed was made? A. The bell would ring; I didn't very often hear the bell; I am a little hard of hearing, but they tell me, we go along like two good friends so with us, open the screen door, open the other door, I go in ahead of him, he come in behind, shut it, sit down at the table, he wait on me, everything I had nice. Q. How was their treatment of you after the deed was made? A. Well, I commenced thinking that things didn't go quite so sociable didn't look exactly right—'Did you hear the bell?' 'No; I didn't hear it.' 'Well, dinner ready. Aint you going?' 'I be there pretty soon.' Some time he go when I did, sometime he didn't. When I got in the house his wife waited on me; I see he knocked off waiting on me; I thought it kind of funny; I thought all that but said nothing, but I noticed it. I was getting quite smart at that time, wasn't quite so sick; I was noticing things a little mite more. Q. How did you spend your time over there? A. Sitting in front of the saloon. I was figurehead for the saloon, had nowhere else to stay unless I stay in the house. Q. The saloon was a short distance from the house? A. Saloon just about—the front door of the saloon and the front door

of the house was about 60 or 70 feet off, say 60 or 70 feet from the saloon door. Q. Mr. Wyatt was running this saloon there? A. Mr. Wyatt was running this saloon there. Q. Your room was built on to the saloon? A. My room was built on to the saloon one door open into the saloon, and one door open out in the back yard, one door open out in the street, three doors to the room. Q. Before the deed was made would they read to you? A. Well, I used to buy a paper called the Yolo Independent; I didn't buy it for me, bought it for my granddaughter; she wanted to hear the news from home where she was brought up and so on, but I wanted to hear the news, and they took the Bee, and they used to read the news right away as soon as they would get it, and I was anxious to have it read, but somehow or other afterwards, they were not so anxious to read it to me, 'I aint got time now, Pa.' 'I seen so and so happened in Washington.' 'Where did you see that?' 'I saw it in the paper.' 'Why didn't you read it to me last night?' 'I seen it since,' and that is all I know about it. Q. Did you ever suggest to them that they read to you? A. I used to ask them; yes, sir. Q. Was this expression ever used, 'Oh, to hell with you, I haven't time to read the paper'? A. No; she didn't say, 'To hell with me.' Q. What did she say? A. 'Oh, to hell with the paper, I aint got time to read it.' Q. That was after the deed was made? A. After the deed was made. Q. How about writing for you? A. My son-in-law, when he go anywhere, always very kind to ask me to go with him; sometimes I go, sometimes I didn't, but I don't remember—he might—but I don't remember him asking me to take a ride with him after the deed was made. Q. I mean writing, how about their writing for you? A. Why, she wouldn't write for me. Q. What did she say? A. One time they were raising the old Harry in Washington, the West Land Company made a fence on the line—my boy was running the house; he keeps writing down, so I says to my daughter one night, I says, 'Lot, write me a few lines to Charley and tell him to put the fence wherd it belongs; let him put it himself and take the fence there; that is mine; I bought it; that will do for firewood.' She jumped up and threw up her hands and cussed and God-damned—'God damn the place, I wish I never seen it; it is a damned bother to me; write to Charley, write to Charley; I am God damned tired writing, writing.' I said, 'Well, I says, 'for God's sake, did your mother learn you that?' 'I don't give a God damn; all I can hear is write to Charley, write to Charley; I am going to sell the damned place.' 'Well, I says, 'if you don't want it, if it is a bother to you, give it back to me.' 'Not by a God damned sight; what am I going to have for taking care of you?' I says, 'It never cost you anything; you needn't take care of me; I can take care of myself or the county hospital can, but the place never cost you a nickel and you know it.' I paid all the taxes on that place since I owned it, up to this year, up to date."

There is but little if any conflict as to the physical condition of plaintiff prior to and after his wife's death and the making of the deed. There is no direct testimony that he was so weak-minded as to be incapable of understanding such a transaction as that of conveying his property to another, except as such an inference might be indulged from his physical and mental sufferings as testified to by many witnesses. Attorney Bell testified that plaintiff came to his office with defendants unsolicited by him. He had been attorney for defendant Harry Wyatt, but had never before seen plaintiff. Defendant Harry Wyatt telephoned him that plaintiff

wanted him to transact some business and was told to bring him to witness' office, which defendants did in the afternoon of July 30th. Witness testified that plaintiff was introduced to him by defendants, and he thereupon stated his business, which was that he wanted to convey his property to Mrs. Wyatt; that witness explained to him fully what a deed meant and that if he signed it he would lose all control of the property; that he had no form of gift deed and used the ordinary bargain and sale form; that he asked plaintiff if he knew what he was doing, if he had any other children and what other property he had; that plaintiff told him he wanted to give the property to Mrs. Wyatt; that he said he could not write but he touched the pen and Mr. Bell and a clerk in an adjoining office witnessed the signature. He testified:

"I said to Mr. Soule, 'What do you want done with the deed, Mr. Soule?' He says, 'I want you to give it to Lottie, my daughter.' She was still sitting here at the corner of the desk. I reached it over to her. She says to him, 'Do you want me to record this, Pa?' something to that effect. He said, 'Yes, I do.'"

Mr. Bell had the deed recorded and later sent it to Mrs. Wyatt. Plaintiff testified that he had no recollection definitely of what took place at Mr. Bell's office except as shown above. There is nothing in the record to cast doubt upon the truthfulness of Mr. Bell's testimony. It is quite conceivable, however, that plaintiff did not fully comprehend the effect of what he was doing and was not impressed by what was told him. His understanding was, as he testified, that he was not parting with control of the property or with the title, and that he knew nothing to the contrary until some time after the deed was made when his daughter claimed to own the property. He received one offer for the lot by letter and spoke to his daughter about selling it and was then told it belonged to her and he could not sell it. This was all the property he had and he repeatedly expressed his desire that his children should share it equally.

Appellants rely upon *Soberantes v. Soberantes*, 97 Cal. 140, 81 Pac. 910, "in which," it is claimed, "the circumstantial facts are almost identical with those in the instant case." The court said in that case, among other things:

"The transfer of an aged mother, by way of gift, of all her estate to one of her sons, to the exclusion of all her other children, will not be set aside as constructively fraudulent, where it appears that the gift was made freely and voluntarily, and with full knowledge of all the facts and comprehension of the nature and effect of the transfer, and in the execution of a purpose long entertained by her, originating in a desire to show her appreciation of the son's devotion and services, and without any undue influence or fraud upon his part, although, by reason of her illiteracy and want of experience

and knowledge of business affairs, she was not able, unassisted, to take care of her property, and by reason thereof was liable to be deceived and imposed upon by designing persons in the transaction of her business."

The testimony in the case now here presents a state of facts quite unlike those in the case cited. The deed was not only not made "in the execution of a purpose long entertained" by plaintiff, but in direct opposition to his frequently expressed desire—expressed, indeed, at the very time defendants were suggesting that he convey the property to his daughter; nor was the deed made in appreciation of the daughter's "devotion and services," for no such consideration appears. And it may be doubted whether the deed was made "with full knowledge of all the facts and comprehension of the nature and effect of the transfer." There was testimony, accepted by the court as the findings show, from which it appeared that defendant Mrs. Wyatt conceived the plan of possessing herself of plaintiff's property before she urged him to take up his home with defendants. She said to Mrs. Charles Soule:

"They think they are going to get it all, but wait until I get him down there; if he lives a week you bet I'll get it."

To this same witness, speaking of how to manage plaintiff, she said:

"You can't ruffle his feathers; you have to smooth him down the right way and you can do anything with him. Q. Did the old gentleman in his talks with you ever make any statement before he went down there as to the way he wanted to leave his property? A. It seems like that was on his mind all the time; yes, he always wanted share and share alike. 'They are all my children.' Q. Did they write any letters to Washington asking him to come down there? A. Yes; she wrote about every day when he was so bad; begged him to come down."

It appeared that soon after plaintiff took up his residence with defendants the question of disposing of his property was brought up by his daughter, and it was she who proposed that it should be conveyed to her alone, but, as plaintiff testified, with the understanding that he retained the right to sell or dispose of it. She did not accomplish her purpose quite as soon as she said she would, but did so in about two or three weeks. The letter she wrote to her brother three days after the deed had been executed harks back to her original purpose and tends strongly to show her design in bringing her father under her own roof to live.

The complaint sets forth with much particularity the facts brought out by the evidence, and the averments were by the court found to be true. We think there was evidence sufficient to support the findings.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

MacGILLIVRAY v. OWEN. (Civ. 1656.)

(District Court of Appeal, First District, California. June 15, 1916.)

JUDGMENT \Leftrightarrow 143(17)—DEFAULT JUDGMENT—SETTING ASIDE ORAL AGREEMENT WITH COUNSEL.

Setting aside a default judgment is within the court's discretion, where there was no direct denial of defendant's claim that he orally stipulated with an attorney for plaintiff, now deceased, that no judgment would be entered against him, and, in fact, none was entered for several years after such attorney's death.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 290; Dec. Dig. \Leftrightarrow 143(17).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. H. MacGillivray against A. D. Owen. Order setting aside defendant's default and vacating a judgment entered upon such default, and plaintiff appeals. Affirmed.

Royle A. Carter and Thos. F. Lopez, both of Fresno, for appellant. M. B. Harris and E. M. Harris, both of Fresno, for respondent.

PER CURIAM. This is an appeal from an order setting aside the default of the defendant and vacating a judgment entered upon such default.

The grounds of the defendant's motion for such relief consisted of the showing made by him that in the month of March, 1908, shortly after the commencement of the action, an oral stipulation had been entered into between himself and Stanton L. Carter, Esq., one of the attorneys for the plaintiff in the action, to the effect that it would not be necessary for said defendant to appear in the action, and that no judgment would be taken against him, and upon the further showing that for a period of more than six years thereafter, during which the defendant had made no appearance, relying upon such stipulation, no default was entered and no judgment taken against him, but that in the month of September, 1914, the action was dismissed against the other defendants therein, and default and judgment entered against this defendant, which he made this motion to have set aside immediately after his discovery of the fact and within a few days after the entry of the judgment. Upon the hearing of the motion the affidavit of defendant with certain evidence was offered, strongly tending to prove the existence of such stipulation and of the defendant's reliance thereon. It further appeared that Stanton L. Carter, Esq., had died in the meantime, and hence no affidavit could be presented from him denying the existence of said stipulation. The plaintiff did, however, present some evidence—mostly hearsay—having some tendency toward proving that such an oral stipulation had not been made; but in so far as the defendant's affidavit positively asserted the existence of the stipulation, it

was undenied, except upon information and belief. The trial court found that such stipulation existed, and thereupon set aside the default and judgment taken and entered in contravention thereof.

We find no error in such ruling. While it is true, as the appellant asserts, that the courts of this state have early and often applied the rule that verbal stipulations as to pleadings and evidence will not ordinarily be regarded and enforced in the courts, except when admitted by the parties against whom they are invoked, the courts have been indisposed to give this otherwise general rule application to default judgment (*Johnson v. Sweeney*, 95 Cal. 306, 30 Pac. 540); and in such cases have allowed to the trial courts a wide discretion in determining whether the defendant should not be relieved from such default and allowed to defend upon the merits. (*Craig v. San Bernardino Inv. Co.*, 101 Cal. 124, 35 Pac. 558; *Reclamation Dist. v. Hamilton*, 112 Cal. 610, 44 Pac. 1074; *Durbrow v. Chesley*, 24 Cal. App. 418, 141 Pac. 631; *Jergins v. Schenck*, 162 Cal. 747, 124 Pac. 428.

In the case at bar the direct proof of the defendant as to the existence of the oral stipulation is unmet by an equally direct denial of its existence for the reason, as the appellant contends, that Stanton L. Carter, Esq., with whom it is claimed by the defendant to have been made, is dead. But, on the other hand, it is shown by the record that Mr. Carter lived for several years after the time when the entry of the default might properly have been made and judgment taken against him if such stipulation to the contrary did not exist, and that during the lifetime of Mr. Carter no such steps were taken. Under these circumstances we are of the opinion that the court did not abuse its discretion in setting aside the default and judgment, and in permitting the respondent to defend this case upon the merits.

We see no force in the other points presented by the appellant.

Judgment affirmed.

Ex parte JUNE. (Cr. 359.)

(District Court of Appeal, Third District, California. June 15, 1916.)

INDICTMENT AND INFORMATION \Leftrightarrow 153—ALLOWANCE OF DEMURRER—FURTHER PROCEEDINGS—STATUTE.

Where, on demurrer to the information, the court made an order that the demurrer was sustained, and directed that the district attorney file a new information on the proceedings had, or any other proceedings that he might elect, as prescribed by Pen. Code, § 1008, such order was sufficient to justify the district attorney's proceeding further in the matter by procuring an indictment by the grand jury; the only discretion given the district attorney by the order being the making of an election as to

which of the courses pointed out by the Code he should take.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 500; Dec. Dig. ¶153.]

In the matter of the application of John June for writ of habeas corpus. Writ discharged, and prisoner remanded to custody.

R. L. Thompson and Phil Ware, both of Santa Rosa, for petitioner. G. W. Hoyle, Asst. Dist. Atty., of Santa Rosa, for respondent.

CHIPMAN, C. J., and HART, J. Petitioner was informed against by the district attorney of Sonoma county for the crime of obtaining money under false pretenses. Upon demurrer to the information the court made the following order, January 10, 1916:

"This cause came on regularly for the defendant to plead. The district attorney and Phil Ware and R. L. Thompson, Esq., being present, it being agreed that defendant was present; whereupon it is ordered by the court that the demurrer filed herein be and the same is hereby sustained, and the court directs that the district attorney may file a new information on the proceedings heretofore had, or any other proceedings that the district attorney may elect, as prescribed by section 1008 of the Penal Code."

Pursuant to said order the district attorney procured the indictment of petitioner by the grand jury for the same offense as that charged in the information, and petitioner was thereupon arrested upon a bench warrant and taken into custody by the sheriff and is now held in imprisonment thereunder.

Petitioner seeks his discharge by writ of habeas corpus on the ground that said order was insufficient to justify the district attorney to proceed further in the action for the reason that said order left the matter wholly in his discretion, whereas section 1008 of the Penal Code requires, as has frequently been held by the Supreme Court and the district courts of appeal, that such order should be mandatory, leaving no discretion whatever with the district attorney.

We think the order in question, fairly construed, was sufficient authority to justify the further proceedings taken by the district attorney.

The court filed an opinion, on January 10, 1916, giving its reasons for sustaining the demurrer. The concluding paragraph reads:

"The court will sustain the demurrer to the information. I will make an order provided by section 1008 of the Penal Code. If the district attorney desires to amend it, he may, or take such other course as he may be advised. The court directs that a new information be filed in this case upon the examination already had, if the district attorney desires, or the defendant may be re-examined by a magistrate or the matter may be submitted to a grand jury, or such course as the district attorney may elect to take, as provided by section 1008 of the Penal Code of this state."

As we understand the record, the order entered was that first above quoted. But whether that be treated as the order in the

case or the statement made in the opinion be the order, we still think that the district attorney was directed by the court to proceed further under section 1008 of the Penal Code, and the discretion given him, if any, was merely to make an election as to which one of the courses pointed out in the section he should take.

The writ is discharged, and the prisoner remanded to the custody of the sheriff.

ALBERS v. SUPERIOR COURT IN AND FOR HUMBOLDT COUNTY et al.

(Civ. 1563.)

(District Court of Appeal, Third District, California. June 17, 1916.)

1. CRIMINAL LAW ¶1014—CERTIORARI—REVIEW OF JUSTICE'S JUDGMENT—AFFIRMANCE BY SUPERIOR COURT.

Judgment of a justice appealed to and affirmed by the superior court cannot be reviewed on certiorari by the Supreme Court, so long as the judgment of the superior court stands.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2571; Dec. Dig. ¶1014.]

2. CRIMINAL LAW ¶1018 — APPEAL FROM JUSTICE—JURISDICTION.

Appeal to the superior court in criminal cases of which justices are given jurisdiction, being authorized by Pen. Code, § 1466, the only grounds on which the jurisdiction of the superior court in a case so appealed can be impeached are that the case is one of which the justice had no jurisdiction, or that he, while having jurisdiction of the offense, in some way acted beyond his jurisdiction in entering the judgment, or that in taking the appeal some vital and necessary rule of practice or procedure had not been observed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2577; Dec. Dig. ¶1018.]

3. CERTIORARI ¶1—OFFICE OF WRIT.

The sole office of the writ of certiorari is to test the question of jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. ¶1.]

4. CRIMINAL LAW ¶252(1)—JUSTICE'S JURISDICTION—DEFECTIVE COMPLAINT.

A justice acquires jurisdiction of a prosecution for a misdemeanor, though the complaint be not what it ought to be as a criminal pleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526, 530, 534-536; Dec. Dig. ¶252(1).]

5. CRIMINAL LAW ¶252(1) — JUSTICE OF PEACE—LOSS OF JURISDICTION.

A justice is not ousted of jurisdiction of a prosecution by allowing motions of the district attorney to dismiss the first and second complaints for purpose of amending them, even if improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526, 530, 534-536; Dec. Dig. ¶252(1).]

6. CRIMINAL LAW ¶252(4) — JUSTICES OF PEACE—LOSS OF JURISDICTION.

A justice was not ousted of jurisdiction because the complaint in a prosecution was duplicitous, and he erred in refusing to strike out one of the counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 533; Dec. Dig. ¶252(4).]

7. CRIMINAL LAW § 257—JUSTICE OF PEACE
—LOSS OF JURISDICTION.

A justice was not ousted of jurisdiction because of the jury's failure to find on the plea of former jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 544; Dec. Dig. § 257.]

8. CRIMINAL LAW § 254—JUSTICES OF PEACE
—LOSS OF JURISDICTION.

A justice did not lose jurisdiction because of failure to bring the prosecution to trial within the period after filing of complaint provided by Pen. Code, § 1382, that being applicable only to criminal cases prosecuted by indictment or information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 537, 538, 543; Dec. Dig. § 254.]

Proceeding by Herman Albers against the Superior Court in and for Humboldt County, and others, for certiorari. Application denied.

Pierce H. Ryan, of Eureka, for petitioner.
J. Charles Jones, of Sacramento, for respondents.

HART, J. This is an original application for a writ of certiorari, and the question here is whether the petition herein states facts sufficient to warrant this court in making an order requiring the above-named respondents to certify to this court their respective records in the case of the People v. Albers (the petitioner), and thus show cause why the judgment of conviction of the petitioner of a misdemeanor rendered by the above-named justice's court and the judgment rendered by the above-named superior court on appeal in said cause, affirming the judgment of the said justice's court therein, should not be vacated, set aside, and annulled.

The petition shows that petitioner was, on October 21, 1915, charged in the justice's court of Union township, Humboldt county, with violating the state law making it a misdemeanor to drive an automobile over a highway in said county in excess of the speed prescribed by said law; that, on the 18th day of November, 1915, and after the defendant had entered a plea of not guilty to the charge, the district attorney moved to dismiss the action for the purpose of amending the complaint (Pen. Code, § 1387), and on the same day filed a new complaint, purporting to charge the same offense; that, on February 26, 1916, the petitioner was tried on the complaint as so amended before a jury, that the jury disagreed and were discharged without arriving at a verdict; that, on the 7th day of March, 1916, the action was again dismissed on the motion of the district attorney for the purpose of further amendment of the complaint and on the same day a new complaint was filed charging the petitioner with precisely the same offense as that charged in the two complaints previously filed and dismissed.

The complaint last filed and upon which the petitioner was tried, convicted, and sen-

tenced, charged the offense in two separate counts, each being precisely in the same language, as follows:

"* * * That said Herman Albers, on the 21st day of October, 1915, at and in the said county of Humboldt, * * * did then and there willfully and unlawfully drive and operate a motor vehicle, to wit, an automobile, at a rate of speed in excess of thirty miles an hour upon a public highway in said county," etc.

The petitioner moved to strike out the second count, which was introduced into the complaint with the language:

"And for a further, separate, and second count, affiant alleges," etc.

The motion was denied and the petitioner then objected to the court proceeding with the trial of the case and moved to dismiss the same on the ground that the action had not been brought to trial within 60 days after the filing of the first complaint, nor within 60 days after the filing of the second or first amended complaint. The objection and the motion were overruled, and the petitioner thereupon entered a plea of not guilty, and also a plea of once in jeopardy. The jury found the petitioner guilty under the second count of the complaint, but made no finding upon the plea of jeopardy and none as to the first count.

The petitioner, after verdict, moved the justice's court for a new trial, the motion was denied, and judgment thereupon rendered that he pay a fine of \$75, and that in default of the payment of said fine he be imprisoned in the county jail for one day for each dollar of so much of said fine as might remain unpaid, and that he be imprisoned in the county jail for the period of 25 days. The petitioner then appealed to the superior court from said judgment upon questions of law alone, and said court modified the same by striking therefrom so much thereof as would have required the petitioner to suffer imprisonment in default of the payment of the fine of \$75, and, as so modified, the judgment was affirmed and the appeal dismissed.

The points made in support of the application for the writ are: (1) That the justice's court exceeded its jurisdiction in permitting the district attorney to add a second count to the complaint, and that, therefore, the conviction and the judgment "had and entered on such added count are clearly void"; (2) that, the petitioner having interposed a plea of "once in jeopardy," it was the duty of the jury to make a direct and specific finding on said plea, and their failure to do so rendered their verdict and the judgment thereupon entered absolutely void; (3) that the complaint last filed did not in fact or in law constitute an amendment, but amounted in both substance and form to an entirely new complaint. And it is further declared, though the point does not appear to be pressed, that the justice's court exceeded its jurisdiction in the imposition of a penalty in that when said court imposed a fine of \$75

with the alternative of one day's imprisonment for each dollar of the fine, it exhausted its jurisdiction, and therefore had no jurisdiction to impose an additional punishment.

[1] It is first to be remarked that, since the whole "controversy here presented for review was presented to the superior court, and by the judgment of that court of general jurisdiction was determined adversely to the petitioner's contention," the judgment of the latter court operates as an estoppel and the matter so adjudicated becomes *res adjudicata*, "with all the binding force and effect by way of estoppel which attaches to every such judgment. * * * So long as the judgment of the superior court stands unassailed, that judgment formally decreeing the validity of the judgment of the justice's court cannot be ignored nor in another proceeding swept aside. The appeal from the judgment of the justice's court, heard and determined by the superior court, was in all respects the equivalent of a writ of error, and the application to this court for certiorari is but an attempt to obtain a second writ of error directed, not against the appellate judgment, but against the judgment of the justice's court upon matters adjudicated by a court of general jurisdiction under the first appeal or writ of error. It is well settled that this cannot be done." *Olcese v. Justice's Court*, 156 Cal. 82, 86, 103 Pac. 317. See, also, *Hayes v. Collins*, 114 Mass. 54; *State v. Water Commissioners*, 30 N. J. Law, 247; *Illingworth v. Rich*, 58 N. J. Law, 507, 34 Atl. 757. It follows that the writ here applied for cannot be granted for the purpose of reviewing the judgment of the justice's court.

The remaining question, then, is whether the respondent, superior court, was without jurisdiction to review and enter a judgment on appeal in this case.

[2] It is manifest that, since the law authorizes appeals to the superior courts in criminal cases of which the justices' and police courts are by law invested with jurisdiction (Pen. Code, § 1466), the only ground upon which the jurisdiction of the superior court may legally be impeached and denied in any such case is either that the case is one of which the justices' courts have no jurisdiction and in which, therefore, they have no power or authority to enter a valid or any judgment; or that the justice's court, while having jurisdiction of the offense, in some way acted beyond its jurisdiction in entering its judgment, or that the superior court had failed to acquire jurisdiction of the appeal because, in taking the appeal or attempting to do so, there had been a failure to observe some vital and necessary rule of practice or procedure in the matter of taking appeals to such courts. In this case there is no claim that jurisdiction was not acquired by reason of the omission to observe or follow in a material respect the procedure prescribed for taking appeals to the superior courts; but the whole theory is that in no event did or could the superior court

have jurisdiction to hear and determine the appeal because the justice's court in the first instance was wholly without jurisdiction of the action for the reasons above stated, and was therefore without authority to render the judgment which was reviewed and affirmed by the superior court.

[3, 4] That the sole office of the writ applied for here is to test the question of jurisdiction is well understood. And the jurisdiction of the justice's court of the offense of which the petitioner was convicted will not and, indeed, cannot be questioned. Section 82, act regulating motor vehicles, St. 1915, p. 413. And it is equally clear that said court acquired jurisdiction of the action, even though the complaint might not be what it ought to be as a criminal pleading.

[5, 6] Conceding that the justice's court improperly allowed the motions of the district attorney to dismiss the first and second complaints filed for the purpose of amending the same and conceding that the last complaint filed and upon which the petitioner was tried, convicted, and sentenced was faulty because it stated the offense of which the petitioner was convicted in two separate and distinct counts, and that the court erred in not granting the petitioner's motion to strike out one of the counts, still none of these matters affected the question of jurisdiction or divested the justice's court of jurisdiction of the action. They involved or amounted to mere error, reviewable and correctible only by appeal. It cannot, of course, be doubted that, notwithstanding the alleged duplicity of the complaint, it nevertheless stated a public offense known to the law of this state; nor is there any possible logical ground for holding that, merely because a criminal pleading is amenable to the charge of duplicity, the jurisdiction of the court of the action is ousted. The law provides a remedy for the correction of the defects of a complaint or an information or an indictment, and where the court fails or refuses to heed the objections and so to correct the defects, the action of the court in that regard is error, correctible, as before stated, not through the instrumentality of a jurisdictional writ, but by review on appeal.

[7] What is thus said applies with equal force and pertinency to the point that the jury failed to find upon the special plea of "once in jeopardy" interposed by the petitioner.

[8] As to the point that the justice's court lost jurisdiction of the action because there was a failure to bring the case to trial within 60 days after the filing of the first or original complaint or after the filing of the purported first amended complaint, a reply thereto is that section 1382 of the Penal Code, upon the terms of which the petitioner bases his claim in that particular, is applicable alone to criminal cases prosecuted by indictment or information and has no reference to the trial of low-grade misdemeanor cases cognizable in justices and police courts.

It thus being shown that the justice's court had the authority to render judgment against the petitioner in the action before it, there is, obviously, no ground upon which it can be maintained that the respondent, superior court, was without jurisdiction to review said judgment on appeal.

The application for the alternative writ is accordingly denied.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

HUFFMAN v. KNAPP et al. (Civ. 1843.)

(District Court of Appeal, First District, California. June 15, 1916.)

PRINCIPAL AND AGENT—§171(4)—RATIFICATION—ACCEPTANCE OF BENEFITS—KNOWLEDGE OF FACTS.

Where O., in promoting, without any authority, an exchange of properties between plaintiffs and defendant, which they, when brought together, negotiated on terms fixed by themselves, made misrepresentations to defendant as to plaintiff's property, of which plaintiff never knew, plaintiff is not liable therefor on the theory of ratification; mere acceptance of the fruits of a transaction neither constituting, nor by itself being evidence of, ratification, but knowledge of the material facts of the transaction being necessary.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 648; Dec. Dig. § 171(4).]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Kate Huffman against Peter Knapp and another. From an adverse judgment and order, defendants appeal. Affirmed.

Gallaher, Aten & Devaul, of Fresno, for appellants. Harris & Hayhurst, of Fresno, for respondent.

PER CURIAM. This is an appeal from an order denying the defendants a new trial and from a judgment entered in favor of the plaintiff in an action to foreclose a mortgage executed by the defendants in the usual and ordinary form to plaintiff's assignor, as security for the satisfaction of three promissory notes of the defendants aggregating the sum of \$7,700.

The notes, contemporaneously with the mortgage, were executed by the defendants to plaintiff's assignor as payment for the difference due under the terms of an exchange agreement, wherein and whereby plaintiff's assignor transferred to the defendants some 40 acres of land situated near Clovis, Fresno county, in consideration of the notes and mortgage and the transfer by the defendants to plaintiff's assignor of a 5-acre orange grove subject to a \$1,000 mortgage, situated near the town of Glendora, Cal. The defendants having defaulted in the payments due under the mortgage, plaintiff elected, as the mortgage permitted,

to declare the whole debt due and payable, and accordingly instituted foreclosure proceedings. The defendants Knapp, answering and cross-complaining, admitted the making of the exchange agreement and the execution of the notes and mortgage as alleged in the complaint, but pleaded that they were induced to enter into and execute the same by false and fraudulent representations made to them by the agent of plaintiff's assignor concerning the character, quality, and value of the land covered by the mortgage, the age of the trees and vines growing thereon, and the annual income which the land had produced and would produce. Upon the trial of the case the evidence disclosed that the alleged false representations were made by one W. L. Chappel; and it was the contention of the defendants that he was the agent by direct authority of the plaintiff's assignor in the negotiations which culminated in the exchange of the properties, and that in any event the subsequent ratification of his conduct by plaintiff's assignor made the latter responsible to the defendants. The record discloses evidence sufficient to support the finding of the trial court that the relation of principal and agent did not exist prior to and at the time of the exchange between plaintiff's assignor and Chappel; indeed, it was in effect conceded by defendants' counsel during the progress of the trial that the agency, if any, relied upon to support the defense pleaded was not created by previous authorization, but if it existed at all, resulted from subsequent ratification. Upon the assumption that such ratification had been established the defendants endeavored to introduce evidence of the false representations alleged to have been made to them by Chappel. The trial court, however, upon the objection of the plaintiff, rejected such evidence upon the ground that no proper foundation therefor had been laid, in this, that it was not shown that the relation of principal and agent existed between plaintiff's assignor and Chappel, or that the former accepted the fruits of the exchange with knowledge of the fact that the alleged fraudulent representations were the inducing cause of the defendants entering into the exchange agreement and subsequently executing the notes and mortgage. Undoubtedly it was incumbent upon the defendants to establish the existence of the relation of principal and agent between plaintiff's assignor and Chappel before evidence as to what the latter had stated and done during the negotiations would be admissible for any purpose; and, failing in this, it was an essential prerequisite to the admissibility of the proof proffered in support of the theory of ratification to show that plaintiff's assignor accepted the fruits of the transaction with knowledge of its material facts. This is elementary; and the rule is thus because

ratification necessarily presupposes a knowledge of the thing ratified. Manifestly the alleged fraudulent representations sought to be shown in evidence in the present case were, in so far as the defense pleaded was concerned, the material facts of the transaction. The mere acceptance of its fruits did not constitute ratification, nor was such acceptance, standing alone, any evidence of ratification. Upon this phase of the case the evidence at its best shows that Chappel was nothing more than a mere go-between for the defendants and plaintiff's assignor, who, when brought together, proceeded to make, and did make, their own bargain for the exchange of their respective properties; and it is not claimed, nor does the evidence show, that plaintiff's assignor had at any time prior or subsequent to the making of the exchange agreement any knowledge whatsoever of the character of the representations made by Chappel when promoting the exchange. This being so, the trial court rightly rejected the evidence referred to.

The judgment and order are affirmed.

PEOPLE v. DAY. (Cr. 622.)

(District Court of Appeal, First District, California. June 15, 1916.)

1. RECEIVING STOLEN GOODS \S 6—GUILT OF OTHER OFFENSE.

Where the proof would warrant conviction of burglary as an accessory, and also of receiving stolen property, defendant cannot complain that he was charged with the latter rather than with burglary.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. \S 8; Dec. Dig. \S 6.]

2. RECEIVING STOLEN GOODS \S 1—ELEMENTS OF OFFENSE.

One who receives the fruits of a burglary from the actual perpetrator thereof, knowing them to be stolen, is guilty of receiving stolen goods.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. \S 1-3; Dec. Dig. \S 1.]

For other definitions, see Words and Phrases, First and Second Series, Receiving Stolen Goods.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Ralph Day was charged with a crime, and from the judgment rendered both he and the People appeal. Affirmed.

B. V. Sargent and John Rutledge, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. [1, 2] We find from a review of the record that the evidence in this case sufficiently supports the verdict; that even if the evidence warranted and would have supported a charge of burglary upon the theory that the defendant was an accessory thereto, nevertheless it also shows that

the defendant subsequently received the fruits of the burglary from the actual perpetrator thereof knowing them to be stolen; that as a consequence he was guilty of receiving stolen goods; that therefore he cannot be heard to complain that the people elected to charge him with the latter offense rather than with the former. We further find that the testimony of the admitted accomplice of the defendant in the commission of the crime charged was amply corroborated by other and independent evidence, and that there was no error in the charge of the court or in its refusal to give certain instructions requested upon behalf of the defendant.

Upon these grounds the judgment and order appealed from are affirmed.

ROULLARD v. GRAY. (Civ. 1920.)

(District Court of Appeal, First District, California. June 15, 1916.)

1. HUSBAND AND WIFE \S 23½—LIABILITY OF HUSBAND ON WIFE'S CONTRACT—ACTIONS—EVIDENCE.

Where defendant's wife gave her note as part of the price of an automobile purchased by and delivered to her, the balance thereon, as evidenced by the note, being charged to her personally upon vendor's books, the vendor could not hold the husband upon the contract, in view of Civ. Code, \S 158, providing that a husband or a wife may enter into any engagement with the other or with another person respecting property, which either might if unmarried, where the only evidence tending to show that she was acting as authorized agent of her husband consisted of inferences to be drawn from a letter written by him and from an alleged admission, and an offer to compromise the claim, which were no more than slight evidence insufficient to support the findings, under Code Civ. Proc. \S 1886, defining slight evidence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 145, 146; Dec. Dig. \S 23½.]

2. PRINCIPAL AND AGENT \S 22(1)—AGENCY OF HUSBAND FOR WIFE—EVIDENCE.

The agency of a wife for a husband in the purchase of goods not necessities cannot be proved by evidence of what the wife said in making such purchases.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 40; Dec. Dig. \S 22(1).]

3. PLEADING \S 248(4)—AMENDMENT—NEW CAUSE OF ACTION.

Changing a complaint upon a note, by amendment, to one for goods sold and delivered, does not set up a different and new cause of action, where the note was given for the purchase price of the goods.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 701-706, 706½; Dec. Dig. \S 248(4).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Joel Roullard against Donly C. Gray. From a judgment for plaintiff, defendant appeals. Reversed.

Larkins & Bailey, of Visalia, for appellant. Kitt Gould, of Clovis, and C. K. Bonestell, of Fresno, for respondent.

PER CURIAM. This is an action to recover the balance due on account of the sale of an automobile alleged to have been made by the Roullard-Brown Auto Co., to the defendant, the account having been assigned to the plaintiff.

The transaction for the purchase of the automobile was conducted by Hazel I. Gray, the wife of the defendant, and as part of the purchase price the sellers took her promissory note for \$440; the machine was delivered to her, and the balance due thereon, as evidenced by the note, was charged to her personally upon their books. Notwithstanding these facts the plaintiff seeks to hold the defendant upon the contract.

[1, 2] A husband or wife may enter into any engagement with the other or with any other person respecting property which either might if unmarried. Civ. Code, § 158. It would appear from what is above narrated that the transaction was one between defendant's wife and the vendors of the automobile for which she alone was responsible. The only evidence in the case tending to show that Mrs. Gray was acting on behalf of the defendant in the transaction consists of two inferences to be drawn, one from a letter written by him, and the other from an admission claimed to have been made by him to one of the plaintiff's assignors, and an offer on the part of the defendant to compromise the claim. Evidence of this offer went in without objection, and was made, according to a declaration imputed to the defendant, with a view to help reach a settlement of domestic troubles which he was having at the time with his wife. As to the inferences just referred to, they are as consistent with the claim that the automobile was the property of Mrs. Gray as with any other theory; but assuming that the court was warranted in construing the offer to compromise and claimed admissions against the defendant, still we think they amounted to no more than slight evidence insufficient to support the findings. Code Civ. Proc. § 1835. There was no evidence introduced at the trial that there was any delegation of authority from the defendant to his wife to represent him generally or in this particular transaction; and as, under the circumstances of this case, an automobile cannot be deemed one of those necessities that a wife is authorized to purchase upon her husband's responsibility, it follows that she had no implied authority to represent him; hence evidence of what she said when she purchased the machine was hearsay and inadmissible as against the defendant.

[3] With regard to the original complaint, considering it as being founded upon the promissory note alone, still it will not be held that plaintiff, in setting forth in the amended complaint an action for goods sold and delivered, has declared upon a different and

new cause of action. A declaration counting on a specialty, as a note, may be substituted for one in the form of a common count; the cause of action being the same. *Vaughn v. Rugg*, 52 Vt. 235; *Schleffelin v. Whipple*, 10 Wis. 81; *Nelson v. Webb*, 54 Ala. 436; *Gray v. Bass*, 42 Ga. 271; *Clarkson v. Morrison*, Adm'r, 24 Mo. 134; *Born v. Castle*, 22 Cal. App. 282, 134 Pac. 347; *Redington v. Cornwall*, 90 Cal. 49, 27 Pac. 40; *Vancleef v. Therasson*, 20 Mass. [3 Pick.] 12; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164. In a suit on a written contract for the construction of a building, the plaintiff may be allowed to amend at the trial by adding a quantum meruit count for labor and materials furnished. *School Dist., etc., v. Boyer*, 46 Kan. 54, 26 Pac. 484. In New York it has been held that in an action on a note an amendment of the complaint by inserting a count for goods sold and delivered, which formed the consideration of the note, may properly be allowed at the trial; it being in furtherance of justice and not changing substantially the plaintiff's claim. *Vilbard v. Roderick*, 51 Barb. (N. Y.) 616.

The judgment is reversed.

BURR v. BOARD OF SUPRS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1783.)

(District Court of Appeal, First District, California. June 15, 1916.)

1. MANDAMUS §154(7)—PROCEEDING—COMPLAINT—CERTAINTY.

In mandamus proceedings to compel allowance of claim for taxes illegally collected, a complaint, outlining the history and nature of the claim and alleging that plaintiff presented his claim to defendants, sufficiently shows that the described claim was presented to them.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 308; Dec. Dig. §154(7).]

2. MUNICIPAL CORPORATIONS §864(1)—LIMITATION OF EXPENDITURES—EXPENDITURES SUBJECT TO LIMITATION—TAX REVENUE.

A claim to recover taxes illegally exacted, held not required to be paid out of a particular year's revenue, and therefore not affected by the San Francisco charter provision limiting payment of claims to the city's current revenue.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1828; Dec. Dig. §864(1).]

3. MANDAMUS §101—ACTS OF PUBLIC OFFICERS—ALLOWANCE OF CLAIMS.

Where the usual procedure involves allowance of a claim by the board of supervisors, mandamus will lie to compel their observance of the usual custom, although their action may not be necessary.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 211-216; Dec. Dig. §101.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Mandamus proceedings by Clarence C. Burr against the Board of Supervisors of the City and County of San Francisco and others. From a judgment directing the issuance of a peremptory writ, defendants appeal. Affirmed.

Percy V. Long, City Atty., and Harry G. McKannay, Asst. City Atty., both of San Francisco, for appellants. Drown, Leicester & Drown, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment directing the issuance of a peremptory writ of mandate, commanding the defendants, as members of the board of supervisors of the city and county of San Francisco, to approve and allow the claim and demand filed with said board by the plaintiff, for the payment by said city and county of a judgment for the recovery from said corporation of certain taxes illegally collected by it.

[1] It is the contention of the appellants that its demurrer to the complaint upon the ground of uncertainty should have been sustained, said uncertainty consisting in the absence from said complaint, as appellants insist, of a statement of the nature of the claim and demand the detail of which was presented to the board of supervisors. An examination of the complaint, however, shows that the pleader set forth with great circumstantiality the history and nature of his claim, and after doing so averred that "he presented his claim and demand to said board." We think this statement sufficiently shows that it was the detailed claim and demand of the plaintiff which was before the board for its approval, and that the complaint was therefore sufficient as against either a general or special demurrer.

[2] We are of the opinion also that the claim and demand of the plaintiff was one which was not required to be payable out of the revenues of any particular year or fund, but was a claim that the board of supervisors was bound to audit and approve, and that the city was required to pay, irrespective of the provisions of the charter relative to the incurring of indebtedness or payment of claims in excess of the revenues of the city for any particular year.

[3] The final contention of the appellants is that this claim being of that nature, was not one which it was requisite should be presented to the board of supervisors at all, and hence that they were not called upon to act upon or approve it. It is conceded, however, that the usual procedure in said city with reference to the allowance and payment of claims is that they shall first be presented to the board of supervisors for its approval, and that the plaintiff herein was pursuing such procedure. This being so, he was entitled to have the writ issued requiring the board to follow the usual custom in respect

to the approval and payment of claims against said city.

Judgment affirmed.

SCHNEIDER et al. v. MONCUR, Superior Court Judge. (Civ. 1537.)

(District Court of Appeal, Third District, California. June 14, 1916.)

1. JUDGMENT ¶564(2) — **CONCLUSIVENESS—FINALITY—INTERLOCUTORY DECREES—ACCOUNTING.**

An interlocutory decree finding that plaintiff was not entitled to an accounting nor to have trustees removed, but that defendants held property as trustees for plaintiff, is not a final adjudication of the rights of the parties or conclusive against right to accounting two years later.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1016; Dec. Dig. ¶564(2).]

2. TRUSTS ¶327—**DUTY TO ACCOUNT—ACTIONS—DECREE.**

Since from the very nature of a trust there is implied a duty to account, if the court intends to declare that there is no such duty the decree should specifically so find.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 487; Dec. Dig. ¶327.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS ¶364—**DUTY TO ACCOUNT—PRESUMPTIONS.**

It cannot be presumed that, in the absence of any provision for accounting in the instrument creating the trust for creditors, the trustee could hold and enjoy the use and incomes of trust property for an indefinite period and account to no one; it being his duty to account to the trustee as well as to the creditors whom he represents.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 1104; Dec. Dig. ¶364.]

Prohibition by B. Schneider and another against the Superior Court of Plumas County and J. O. Moncur, Judge thereof. Writ denied.

H. B. Wolfe, of Quincy, for petitioner. L. N. Peter, of Quincy, U. S. Webb, Atty. Gen., and Robert T. McKistick, Deputy Atty. Gen., for respondent.

CHIPMAN, P. J. Plaintiffs bring the action to prohibit defendant from "compelling defendants or either of them to render an account of receipts and disbursements of and pertaining to a saloon and hotel business carried on by defendants since the 14th day of February, 1910, in a certain action pending in the superior court of Plumas county and entitled 'Della R. Edwards, sometimes known as Della R. Harding, plaintiff, v. B. Schneider and Mrs. Abble Schneider, defendants.'"

It appears from the petition that, on January 4, 1913, respondent, as judge of said superior court, made and entered findings of fact and conclusions of law in the action above referred to and, on January 4, 1913, filed a decree therein. Among other facts it was found: That on February 14, 1910, plaintiff, Mrs. Edwards, was the owner of

certain real estate (full description given) which included certain hotel property "and all furniture and fixtures therein and all personal property connected therewith used in the conduct and operation of the hotel on said property." That on said day, plaintiff, Mrs. Edwards, conveyed said property, by deed duly executed and delivered, to defendant Mrs. Abbie Schneider, one of the petitioners herein. That immediately after said conveyance was made, defendant in said action, B. Schneider, agreed with plaintiff, Mrs. Edwards, "to hold said property in trust for the plaintiff, and to sell the same, and then to pay to plaintiff the residue of the amount obtained at said sale after deducting the plaintiff's indebtedness to said defendant B. Schneider, and such sums as were paid by said B. Schneider to discharge the debts owed by plaintiff to divers other parties. * * * That said trust was, after the said conveyance and prior to the 1st day of May, 1910, declared by several written instruments subscribed by the said defendant B. Schneider." (These instruments do not appear in the petition.) It was further found:

"That it is not true that defendant B. Schneider agreed with plaintiff to sell the said property for any given sum, or at any given time; and it is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues and profits of said property during the continuance of the said trust."

It was also found:

"Sixth. That the said property was conveyed by plaintiff to the defendant Mrs. Abbie Schneider at the request of the defendant B. Schneider, who then represented to plaintiff that that course would be safer than a conveyance direct to the said last-named defendant; and the said conveyance was made with the understanding that the said Mrs. Abbie Schneider should acquire no title to said property in her own right, and that the said property should be held in her name subject to the control of said defendant B. Schneider. That the said defendant Mrs. Annie Schneider, at the time of the execution of the said conveyance had full notice and knowledge of the conditions under which said conveyance was made."

It was then found that defendant B. Schneider took possession of said property "and has since managed the same and has made no sale of said property or any part thereof." That on or about October 15, 1911, "the said defendant B. Schneider repudiated the said trust." As conclusions of law the court found that defendants, the Schneiders, "should, be declared trustees of said property, to have and to hold the same in trust for the plaintiff (Mrs. Edwards); that defendants should be required to sell the same at the earliest practicable date, and for the best available price, and after said sale to pay to plaintiff the residue * * * after deducting plaintiff's indebtedness to said B. Schneider and such other indebtedness as he had assumed, owed by plaintiff to other parties."

The court directed and entered what is termed an interlocutory decree in accordance

with the findings of fact and conclusions of law. It will be observed that no accounting by the trustees was ordered by this decree.

It further appears that, on February 19, 1915, on the petition of plaintiff Mrs. Edwards, and in the same action, for an order "requiring defendants to render an account herein and for the recovery herein of the value of the use of the property described in the petition" and the "said matter having been submitted to the court and taken under advisement," the court found "all the allegations of the first, second, third, and sixth paragraphs of said petition are true." (The petition does not appear in the record.) Further:

"That the said trust was created and the defendants accepted the same on the 14th day of February, 1910, and ever since that said last-named date said defendants have continued to and do now hold possession of the said trust property, but it is not true that such possession has been held without the consent of plaintiff, and it is not true that said defendants have dealt with and used the same for their own personal profit and advancement, or appropriated to their own use the rents, issues, and profits thereof. It is true that defendants have neglected to account to plaintiff or to this court for any rents, issues, and profits of said property; that it is not true that the interests of defendants in said trust property are antagonistic to the interests of plaintiff therein, or that said defendants have taken no interest in said trust except for the purpose of obtaining from said property the amount of their own financial interest therein, or have taken no interest whatever in the right of plaintiff in said property. That it is true that defendants have endeavored to sell and dispose of said property in accordance with the terms of said judgment, and that they have been unable to sell or dispose of the same for a sufficient sum of money to enable them to recover the amount paid out by them in connection therewith as set forth in said judgment, and it is true that they have at all times used due and reasonable diligence and have used all possible efforts to sell and dispose of the said trust property."

Further:

"That the court is unable to determine from the evidence herein the value of the use of said property from February 14, 1910. That it is true that the cost for taxes and insurance on said property since February 14, 1910, is \$1-120 per annum; that it is not true that said property does now or since said 14th day of February, 1910, has paid a profit over all expenses connected with the same of \$450 per annum.

"As conclusions of law from the foregoing facts, the court finds: (1) That the defendants should be required to render to this court within fifteen days, a full, true, and correct account of all matters pertaining to said trust from February 14, 1910, to the date of the filing of said petition. (2) That the defendants should not be removed from said trust at this time. (3) That plaintiff should recover nothing from defendants at this time for the use of said property. Let a decree be entered accordingly."

No further proceedings appear until November 8, 1915, when an order was made by the court reciting that:

"The defendants having filed an account herein pursuant to the decision and decree made and filed in said matter on the 23d day of February, 1915 (the date of said order elsewhere

appears to have been February 19th), and plaintiff having filed a contest and objection to said account, and said matters coming on regularly to be heard upon the said account * * * and evidence having been introduced and it appearing to the court, from said evidence and from said account, that no sufficient or any account has been filed herein in accordance with the decision and decree of this court heretofore made herein. Now, therefore, it is ordered: That said account be, and the same is, hereby declared to be an insufficient accounting of the receipts and disbursements, rents, issues, and profits resulting from the carrying on of said trust, as referred to in said decision and decree. It is further ordered that said defendants be, and they are, hereby ordered to account to the court for all the receipts and disbursements, rents, issues and profits resulting from the operation of the said trust and that said defendants return to and produce before this court, on Thursday, the 11th day of November, 1915, at 10 o'clock a. m. at the courtroom of said court, all the books, accounts, checks, receipts and other evidences of the receipts or expenditures in any wise relating to or bearing upon the carrying on of said trust from the 14th day of February, 1910, to the date of the filing of plaintiff's petition herein for an accounting. Done in open court, this 8th day of November, 1915."

[1] The ground upon which petitioners base their application for the writ is:

"That the decree set forth in the application as of date January 4, 1913, * * * is a final adjudication of the matter and finally settles the rights of the parties; that this decree is not elastic and cannot be enlarged for the benefit of plaintiff nor can it be reduced or made effective for the benefit of defendants."

The instruments creating the trust are not set forth in the application for the writ. We know nothing of the nature and extent of the trust except as we learn the facts from the findings and decree entered January 4, 1913, and the subsequent proceedings. Petitioners rely upon the following finding:

"It is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues, and profits of said property during the continuance of said trust."

The concluding paragraph of the findings is as follows:

"Let an interlocutory decree be entered accordingly."

In the decree, which is entitled "Interlocutory Decree," the court adjudged and decreed:

"That the defendants be and they are hereby declared to be trustees of the property in plaintiff's complaint and herein described, to have and to hold the same in trust for the plaintiff and to sell the same at the earliest practicable date," and to discharge the debts owing by plaintiff, and to pay plaintiff any residue remaining after such payment; "that plaintiff is entitled to have such trust enforced by this court in this action."

A full description of the property follows:

"Together also with all and singular the tenements * * * and the rents, issues and profits thereof, * * * also all the water, water rights, ditches, flumes, pipe lines, reservoirs, easements, and appurtenances therewith belonging or used and enjoyed in connection therewith, together also with all improvements thereon or any part thereof and all furnishings and fixtures therein and all personal property connect-

ed therewith used in the conduct and operation of the hotel on said property."

The petition or complaint, and answer if any there was, in the action in which the findings and decree of January 4, 1913, were made, do not appear. It is only by inference drawn from the findings that the liability of the trustees to account for the rents, issues, and profits of the property confided to their control and custody was a question then before the court. The property consisted in part of an equipped hotel and saloon, concededly an income-producing property, which was taken possession of and operated by the trustee. The court found:

"That immediately after the execution of said conveyance (the trust instruments) the said defendant B. Schneider took possession of said property, and has since been managing the same, and has made no sale of said property or any part thereof."

The finding now relied upon is not an explicit or express finding that no liability of the trustees to account for the rents, issues, and profits of the property arose from the trust. The finding is:

"And it is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues, and profits of said property during the continuance of the said trust."

This may mean that the trust conveyance contained no express agreement to pay to plaintiff the rents, issues, and profits. The court, by its subsequent orders, seems to have treated the issue as undetermined. In its decree following this finding no mention is made of the rents, issues, and profits of the property.

[2, 3] If the court had intended to adjudge finally that the trustee named was relieved from any liability to account for rents, issues, and profits during his trusteeship, the decree should have so adjudged, for upon every principle governing trusteeship there would be an implied duty so to account. It cannot be presumed that, in the absence of any provision in the instrument creating the trust so to account, the trustee could hold and enjoy the use and incomes of trust property for an indefinite period and account to no one. Distinctly, the duty of the trustee was to manage the property in the interest of the trustor as well as of all the creditors whom the trustee represented. Nothing short of an adjudication by the court that no such duty rested upon the trustee could relieve him therefrom. All the proceedings show that the trust was a continuing trust over which the court retained its power of direction and control when properly invoked. The decree shows that, for reasons then no doubt appearing, the trustee should not be removed; that he was not blameful for not having sold the property during the three intervening years. Why an accounting for rents, issues, and profits was not then ordered we do not know. We must presume that the court then found no necessity for so or-

dering. It will be observed that the property, the subject of the trust, is fully set forth in the decree and therein are mentioned, as part of the property, "the rents, issues, and profits." The next step taken, so far as the record shows, was on February 19, 1915, on which date findings of fact and conclusions of law were made and entered and decree entered in accordance therewith. These proceedings seem to have been taken in the same action as that in which the findings and decree of January 4, 1913, were made but apparently by a further petition. The pleadings are not set forth, but it appeared from recitals in the findings of fact that:

"A petition for an order requiring defendants to render an account herein" was heard, "upon testimony produced by plaintiff and defendants."

The court found that:

"All the allegations of the first, second, third, and sixth paragraphs of said petition are true."

What these paragraphs set forth does not appear. The court found further that:

"The said trust was created and the defendants accepted the same on the 14th day of February, 1910, and ever since said last-named date said defendants have continued to and do now hold possession of the said trust property."

The findings are set forth in full upon an earlier page of this opinion. It was found that:

"Defendants have neglected to account to plaintiff or to this court for any rents, issues, and profits of said property."

And as conclusions of law, among others, it was found:

"That the defendants should be required to render to this court within fifteen days a full, true, and correct account of all matters pertaining to said trust from February 14, 1910, to the date of the filing of said petition; * * * that plaintiff should recover nothing from defendants at this time for the use of said property."

The decree ordered:

"That defendants render to this court within fifteen days from the date herein a full, true, and correct account of all matters pertaining to said trust," etc.

On November 8, 1915, the court made and entered the order hereinabove set forth and is the order the enforcement of which petitioners now ask to have this court prohibit. The court therein recited that:

"Defendants having filed an account in obedience to the order of February 23, 1915, * * * that no sufficient, or any account has been filed herein in accordance with the decision and decree of this court heretofore made herein. Now, therefore, it is ordered * * * that said defendants be and they are hereby ordered to account to the court for all the receipts and disbursements, rents, issues, and profits resulting from the operation of said trust * * * and to return to and produce before this court * * * all the books, accounts, checks, receipts and other evidences of the receipts and expenditures in any wise relating to or bearing upon the carrying out of said trust from the 14th day of February, 1910, to the date of the

filing of plaintiff's petition herein for an accounting."

The point now urged in support of the petition for the writ is that the court was without jurisdiction to make the order last above referred to for the reason that by its order of January 4, 1913, it adjudged that the trust did not require an accounting of the rents, issues, and profits of the property; that such order was final and the court thereby lost jurisdiction to impose upon the trustees the duty of rendering such account.

We cannot accede to this construction of the decree referred to or of the proceedings of the court in the matter. Apparently the principal purpose of the trust was to bring about a sale of the property and thereby the payment of the trustor's liabilities. In January, 1913, no sale had been effected and the court refused to remove the trustees, being satisfied that they had used all proper efforts to effect a sale. In 1915 no sale had yet been made and the court still retained its confidence in the trustees and continued their trusteeship by refusing to remove them. But the court now believed that, after holding the property for five years, it was due to all parties interested that the trustees should render an account of receipts and disbursements, as we think the court had the power to do. We cannot assume, as petitioners seem to fear, that they will be unnecessarily annoyed in being obliged to bring into court the evidences of their transactions respecting the property. It must be presumed that at the hearing the court will hold the scales of justice at equipoise and accord to all the parties alike the equal protection of the law. Petitioners may have adjudicated all their rights involved at the hearing and fully preserved, for review if necessary, by the record therein made. It may turn out that the necessary expenses and disbursements and just compensation to the trustees in administering the trust will exceed the receipts, but with the result, whatever it may be, the court cannot now concern itself.

The writ is denied.

We concur: HART, J.; ELLISON, Judge pro tem.

GOLDNER v. SPENCER et al. (Civ. 1822.)

(District Court of Appeal, First District, California. June 27, 1916. Rehearing Denied by Supreme Court, Aug. 26, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 1099(7)—DECISION ON PRIOR APPEAL—LAW OF CASE.

Where evidence on a certain point has been held insufficient on a prior appeal, if the evidence on second trial on the same point is practically the same, the same ruling will be applied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4876; Dec. Dig. \Leftrightarrow 1099(7).]

2. APPEAL AND ERROR §=1071(1)—HARMLESS ERROR—FINDINGS—TRIVIAL DEFECTS.

An error in foreclosure in finding that a small separate tract of land of no value has been released from the mortgage held not injurious and therefore not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig. §=1071 (1).]

Appeal from Superior Court, City and County of San Francisco; John E. Richards, Judge.

Suit by Edward C. Goldner against William Crane Spencer and others. From a decree for complainant, defendant Thomas E. Curran, administrator, appeals. Affirmed.

Henry N. Beatty, Francis Dunn, and Thomas E. Curran, all of San Francisco, for appellant. L. W. Lovey and Walter E. Dora, both of San Francisco, for respondent. Walter H. Robinson, of San Francisco, for defendants Spencer and Estorff.

KERRIGAN, J. This is an appeal by the defendant, Thos. E. Curran, as administrator of the estate of Elizabeth Cullen, deceased, from a judgment in plaintiff's favor, and from an order denying said defendant's motion for a new trial. The facts of the case as disclosed by the record are these: In the month of November, 1904, the defendant, William Crane Spencer, borrowed the sum of \$3,000 from Elizabeth Cullen, giving his promissory note therefor. In the month of December of the same year, he received the additional sum of \$7,000 which he was to invest for her. Mrs. Cullen died in the year 1906, and the defendant, Thos. E. Curran, was appointed her administrator with the will annexed, and in that capacity brought an action against William Crane Spencer to recover both the money he had borrowed and the sum which had been intrusted to him. In that action judgment was rendered in favor of the administrator for the sum of \$10,946.46 with interest and costs, on March 22, 1908. A transcript of this judgment was recorded in the county of Placer, on the 6th day of April, 1908, and it then became a lien upon whatever interest said Spencer then had in the property lying in said county and being the subject of the present action.

In the meantime, and in the early part of the year 1907, William Crane Spencer had gone to Paris, France, and there and during that year had executed his note and mortgage for the sum of \$21,000, covering the Placer county property, to Edward C. Goldner, plaintiff in this action, who was a half-brother of Spencer, and a resident of Paris. The mortgage was recorded in the county of Placer on March 16, 1908, prior to the recording there of the transcript of the judgment obtained by Curran. The present action to foreclose said mortgage was commenced in the month of September, 1909, in the county of Placer. The defendant, Curran,

appeared in said action and set up the issue of fraud in the transaction between the plaintiff, Goldner, and William Crane Spencer, invalidating said note and mortgage, or at least subordinating the same to the Curran judgment. The trial court found upon this issue in Curran's favor, but, upon appeal to the Supreme Court, this finding was held to be unsupported by sufficient evidence and the judgment was reversed. The case is reported in *Goldner v. Spencer*, 163 Cal. 317, 125 Pac. 347. The cause was then transferred to the city and county of San Francisco for a second trial, and from the judgment therein rendered in the plaintiff's favor, and from the order denying a new trial, the defendant Curran prosecutes this appeal.

[1] The first contention made by the appellant, Curran, is that the evidence is insufficient to sustain the judgment against his contention upon the issue of fraud. It is conceded, however, that the trial court upon the second trial of the cause had before it practically the same evidence which was before the trial court of Placer county upon the first trial of the cause, and also before the Supreme Court upon the first appeal. This being so, we are bound by the views expressed by the Supreme Court as to the weight, sufficiency, and effect of this evidence upon the former appeal; and, as we have seen, the Supreme Court has held such evidence insufficient to sustain the issue tendered by the defendant, Curran as to the fraudulent character of the transaction between the plaintiff, Edward C. Goldner, and William Crane Spencer. No further comment upon this phase of the present appeal is necessary than merely to call attention to the language of the Supreme Court upon the former appeal. *Goldner v. Spencer*, supra.

[2] The next contention of the appellant is that the court, in its findings upon the second trial of the cause, committed an error in finding that a certain small, irregular portion of the premises in question amounting to less than one-third of an acre, and separated from the balance of the tract by a turn in the county road, had been released from the operation and effect of the Goldner mortgage, when in fact there was no evidence of such release. The injury, which the defendant Curran claims to have suffered from this alleged error, is that, having sold the interest of said Spencer in the entire tract upon an execution issued upon the Curran judgment, and having become the purchaser thereof by said sale, he has thereby become entitled to be a redemptioner of the property to be sold under the decree of foreclosure and sale in the present action, and that, since the court has erroneously found that this small fraction of an acre has been released from the effect of said mortgage and sale, his burden as a redemptioner has been thereby increased as to the bal-

ance of the property. While the record appears to be wanting in the evidence of the release of this small piece of land, sufficient to sustain this particular finding of the court, it does appear that the court has expressly found that this fraction of an acre of land is of practically no value. There is enough evidence in the record to sustain this finding; and, this being so, the court's error in finding the fact of its release from the effect of the Goldner mortgage and sale was an error without injury to the appellant, and was therefore not sufficiently material to justify a reversal of the case.

There are no other material contentions of the appellant upon this appeal, which are not disposed of in the decision of the former appeal.

Judgment and order affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

WEIS v. SUPERIOR COURT OF SAN DIEGO COUNTY et al. (Civ. 2084.)

(District Court of Appeal, Second District, California. June 14, 1916.)

1. NUISANCE §80—INJUNCTION—CRIMINAL PROSECUTIONS.

Where threatened acts, if committed, in addition to being indictable, will constitute a public nuisance, courts of equity may interpose injunctive process to prevent injury which will result from maintenance thereof.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. §80.]

2. NUISANCE §80—INJUNCTION—CRIMINAL PROSECUTIONS.

The act of causing women to exhibit their naked persons to the public for a general admission fee, although a crime, is so detrimental to public morals and offensive to the senses as to constitute a public nuisance within Civ. Code, §§ 3479, 3480, defining public nuisance, and may be restrained by injunction.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. §80.]

Prohibition by Joseph Weis against the Superior Court of San Diego County and another. The temporary writ issued. Application for peremptory writ denied, and proceeding dismissed.

Wm. E. Ginder, of San Diego, for petitioner. Spencer M. Marsh, Dist. Atty., of San Diego, and F. F. Schuermeyer, Asst. Dist. Atty., of San Diego, for respondents.

SHAW, J. Prohibition. Respondents have interposed a general demurrer to a petition in compliance with which this court issued an alternative writ of prohibition directed to the superior court of San Diego county, commanding it to refrain from further proceedings in a certain matter there pending, entitled "The People of the State of California, Plaintiff, v. Joseph Weis, Jane Doe and Mary Roe, Defendants."

As shown by the petition, the district at-

torney of San Diego county, on April 27, 1916, pursuant to the provisions of section 731 of the Code of Civil Procedure, commenced an action in the superior court of San Diego county entitled as above, the purpose of which was to secure an injunction against the doing of certain acts by defendants alleged to constitute a public nuisance, and thus abate the same.

[1, 2] In substance, the complaint filed in that action and made a part of the petition for the writ alleges that under a concession granted to defendant Joseph Weis by the Panama-California International Exposition, said defendant is conducting upon what is known as the "Isthmus" in the exposition grounds, a public resort and place of amusement and entertainment designated and known as the "Sultan's Harem," which for an admission is open to the general public; that since about March 18, 1916, to the time of filing the complaint, said defendant Joseph Weis, as a part of the entertainment so given in said Sultan's Harem, has employed Jane Doe and Mary Roe as such employes to make, and who do make, in the presence of a large number of men, women, and children, a public exhibition and exposure of their naked persons and private parts thereof to those attending said place, and which exhibition, as alleged, is indecent and offensive to the senses; that such exhibition constitutes a public nuisance and will continue to constitute such nuisance, unless restrained by the court—followed by a prayer for an injunction.

The demurrer interposed to this complaint was overruled by the court which, as alleged in the petition, threatens to and will, unless restrained by this court, grant an injunction as prayed for in the complaint.

The contention of petitioner is based upon the ground that a court of equity has no jurisdiction to enforce the criminal laws by injunction. We agree with counsel that the threatened acts described in the complaint, when committed, would constitute the crime of indecent exposure, as defined in section 311 of the Penal Code, for which, upon conviction, the law prescribes a penalty; and it is likewise true, as claimed, that courts of equity have no jurisdiction to enjoin the commission of acts merely because such acts when committed would constitute a crime. Where, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof. *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183. As well said in a concurring opinion by Judge Valliant in the case of *State ex rel. Attorney General v. Canty*, 207 Mo. 439, 105 S. W. 1078, 15 L. R.

A. (N. S.) 747, 123 Am. St. Rep. 333, 13 Ann. Cas. 787:

"A court of equity will not undertake to enforce the criminal law; therefore it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which, for other reasons, it has jurisdiction merely because the act when committed would be a crime. An act displayed before a public audience which is debasing in its character, debauching in its influence on public morals and brutalizing in its effect on the spectators is a public nuisance, which a court of equity has jurisdiction to enjoin and the court is not robbed of its jurisdiction merely because the act besides being a nuisance is also a crime."

While the acts here complained of clearly constitute a crime, they also constitute a nuisance within the meaning of section 3479 of the Civil Code, which defines a nuisance as:

"Anything which is * * * indecent or offensive to the senses, * * * so as to interfere with the comfortable enjoyment of life or property. * * *"

And section 3480 of the same Code defines a public nuisance as:

"One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

Mr. Joyce in his work on Nuisances, § 409, says:

"A disorderly and disreputable theater may be enjoined, although a common nuisance."

To the same effect is Wood on Nuisances, § 68, where it is said:

"A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included * * * obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious * * * and disorderly members of society."

Says the Supreme Court of Indiana, in *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627:

"Every place where a public statute is openly, publicly, repeatedly, continuously, consistently and intentionally violated, is a public nuisance."

See, also, *Reaves v. Territory*, 13 Okl. 396, 74 Pac. 951; *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280; *People v. Doris*, 14 App. Div. 117, 43 N. Y. Supp. 571; *Farmer v. Behmer*, 9 Cal. App. 773, 100 Pac. 901; *People v. Wing*, 147 Cal. 379, 81 Pac. 1103; *State ex rel. Vance v. Crawford*, 28 Kan. 518, 42 Am. Rep. 182.

Not only as thus defined by text-writers and supported by decisions, but as declared in section 3479 of the Civil Code, any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance, and under the provisions of section 781, Code of Civil Procedure, the district attorney is authorized to

bring a civil action in the name of the people of the state to abate the same. That defendants are conducting and will continue to conduct before a public audience of men, women, and children, an indecent exhibition, debasing in character, and well calculated to offend the senses and debauch the public morals of those who witness it, clearly appears. Why should the public be subjected to such baseful influence, when it can be protected by the preventive remedy of the court? Conceding that the injunctive process of the court should not issue to restrain the women there employed from making an indecent exhibition of themselves, since the threatened acts will be but a crime, nevertheless the defendant Joseph Wells, who is proprietor and conducts the place and employs them so to do, is subject to such process. The threatened acts if permitted will not only constitute a public nuisance, to be dealt with by the courts having jurisdiction over crimes, but will constitute a public nuisance, injurious to public morals and the good order of society, to prevent which a court of equity has jurisdiction in a civil action brought by the district attorney in the name of the people of the state, thus subserving the public morals and protecting men, women, and children attending this public resort as spectators from being subjected to witnessing the offensive and indecent exhibition which petitioner is conducting and will as alleged continue to conduct, unless restrained by order of the court.

The application for a peremptory writ is denied, and the proceeding is dismissed.

We concur: CONREY, P. J.; JAMES, J.

ROBERTS v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR STANISLAUS COUNTY. (Civ. 1536.)

(District Court of Appeal, Third District, California. June 13, 1916.)

1. JUSTICES OF THE PEACE §53, 72—JURISDICTION—RESIDENCE OF PARTIES.

Code Civ. Proc. § 832, provides that actions in justices' courts must be tried, when one has contracted to perform an obligation at a particular place, but resides elsewhere, in the place of performance or of his residence. Section 848 provides that a justice's summons cannot be served outside the county wherein the action is brought, unless defendant resided in the county when the action was brought or the obligation incurred, and thereafter removed. *Held*, that if the obligation was incurred in the county of defendant's residence and he later removed, there being no written contract, suit in a justice court of such county was proper, and summons issued therefrom was valid, though served in another county.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 56, 143-145, 147, 235; Dec. Dig. §53, 72.]

2. DISMISSAL AND NONSUIT §57—PROCESS §157—DEFECTIVE PROCESS—REMEDY.

The remedy in case of alleged improper service is by motion to quash the summons, and not

by motion for dismissal of the complaint for want of jurisdiction of the parties and the subject-matter.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 129-133; Dec. Dig. § 57; Process, Cent. Dig. §§ 212-217; Dec. Dig. § 157.]

3. APPEARANCE § 9(5)—SPECIAL APPEARANCE—MOTION TO DISMISS—EFFECT.

Since a motion to dismiss on the ground of want of jurisdiction of the subject-matter necessarily calls for relief, which may be demanded only by a party to the record, such a motion constitutes a general appearance, and brings the moving party within the jurisdiction of the court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 47-49; Dec. Dig. § 9(5).]

Petition for writ of review by J. William Roberts against the Superior Court of the State of California, in and for Stanislaus County. Writ discharged.

Walter E. Burke, of Los Angeles, for petitioner. Francis O. Hoover, of Modesto, for respondent.

HART, J. The facts as shown by the petition are: On the 19th day of August, 1915, one S. N. McBride instituted an action in the justice's court of Modesto township, county of Stanislaus, jointly against the petitioner herein and his wife, Louise C. Roberts, for the recovery of the sum of \$222.29, alleged to be due the plaintiff from the defendants in said action for services alleged to have been performed by the plaintiff "at the special instance and request of defendants and each of them in checking, leveling, cultivating, farming, and irrigating a tract of land belonging to the said defendants and located in the said township, county, and state." The complaint was in three different counts, each setting out the same cause of action in different forms and in each of which it was alleged:

"That at the time defendants employed plaintiff to do said work and labor and at the time said obligation was incurred the said defendants and each of them resided in the said township, county, and state."

The petition here alleges that, upon the filing of the complaint in said action "process issued, and petitioner, who was one of the defendants in said complaint named, was served in the county of Los Angeles, state of California, on or about the 26th day of August, 1915."

It is further likewise alleged:

That "the defendants are not, and never were, residents of the township of Modesto, county of Stanislaus"; that thereafter, to wit, on the 3d day of September, 1915, counsel for the defendants in said action made what is termed in his written motion a special appearance for said defendants "only for the purpose of objecting to the jurisdiction of the court over the persons of the defendants and the subject-matter of the litigation herein," and moved for a dismissal of the complaint "on the ground that prior to and at the time of the issuance of the summons herein, the defendants were and still are residents of Los Angeles, in the state of California, and

that any contract to perform any obligation to the plaintiff herein was to be performed in the said county of Los Angeles, and that there is no special contract in writing to the contrary."

The said motion was supported by the affidavit of each of the defendants, deposing that they and each of them were residents of Los Angeles at and prior to the commencement of said action and the issuance of summons therein and are still residents of said place, and "that any contract to perform any obligation to the plaintiff herein was to be performed in the county of Los Angeles, and there is no special contract in writing to the contrary."

In opposition to said motion and the affidavits of the defendants, the plaintiff in said action filed an affidavit in which he declared, as his complaint in effect alleged, that:

"The obligation sued upon herein was incurred in Modesto township, county of Stanislaus, * * * that all work therein referred to was performed in said township, * * * and that there is not, and never was, a special or any contract to the effect that said contract or the obligation herein sued upon was to be performed in any other place than the said Modesto township, * * * or that the money herein sued for should be paid in any other place."

On the 15th day of October, 1915, having overruled the motion to dismiss the action, and the defendants failing to answer the complaint, the justice's court rendered and entered judgment by default in favor of the plaintiff and against the defendants for the sum sued for, with interest and costs. Thereafter and within due time, the defendants took an appeal to the superior court of Stanislaus county from the judgment so entered. The appeal was upon questions of law alone and was supported by a statement of the case.

On the 9th day of February, 1916, having heard the appeal, the superior court rendered its judgment affirming the judgment of the justice's court and directed the justice of the peace to proceed to issue execution upon said judgment or to take such other action in the premises as might be legal and proper.

It is the judgment so rendered by the superior court which it is the object of this proceeding to have annulled and set aside on the ground that said court, in rendering it, acted in excess of its jurisdiction; the specific point being that (so it is contended) inasmuch as the defendants resided in Los Angeles county and did not contract in writing to perform the obligation sued on at the place where the action was brought, the service of summons upon the defendants in Los Angeles county or outside the county where in the action was instituted was void and of no effect; that, therefore, the justice's court never acquired jurisdiction of the persons of the defendants, and that, as a consequence, the judgment entered against them by said court was coram non iudice; that,

of necessity, since the judgment appealed from was void, the superior court did not and could not acquire jurisdiction to review the case and enter a judgment therein.

[1] The place of trial of actions commenced in justices' courts is fixed by section 832 of the Code of Civil Procedure. Therein it is provided, *inter alia*:

"Actions in justices' courts must be commenced, and (subject to the right to change the place of trial, as elsewhere provided in said Code) must be tried: * * * 7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary."

Section 848 of said Code contains, among other provisions, the following:

"The summons cannot be served out of the county wherein the action is brought, except in the following cases: * * * 4. In all cases where the defendant was a resident of the county when the action was brought, or when the obligation was incurred and thereafter departed therefrom, in which event he may be served wherever he may be found."

Reading the foregoing sections together, in the light of the facts as they are presented by the record certified to this court, there is but one permissible conclusion to be arrived at here, *viz.* that the action was properly brought in the justice's court of Modesto township, in Stanislaus county, and that the summons was properly served on the defendants in Los Angeles county.

These facts are expressly and plainly made to appear by the complaint in the action and were nowhere or in no manner denied: That the obligation sued on was incurred in Modesto township, Stanislaus county; that the defendants, at the time the obligation was incurred, resided in said township and county, and (by necessary inference) if they resided in Los Angeles county at the time the action was brought, departed from said township and county after the obligation was incurred; that there is or was no special or other agreement in writing that the obligation was to be performed in any other place than in Modesto township, in Stanislaus county, wherein it was incurred.

It follows, from those facts and the Code sections above mentioned, that the justice's court not only had jurisdiction of the action, but, as above suggested, that the summons was properly and legally served upon the defendants in Los Angeles county. If this be not true under the facts as stated and as they appear here, then the provisions of the Code to which we have referred are meaningless.

We do not believe that the court, in *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 817, intended to say anything which may be construed as in conflict with the conclusion ar-

rived at here with respect to the meaning of the sections of the Code above referred to. In that case, the action was brought in one of the judicial townships of Contra Costa county and service of summons upon the defendant had in the city and county of San Francisco. The plaintiff, in the service of summons, proceeded upon the theory of subdivision 2 of section 848, *supra*, and undertook to defend the service upon the terms of said subdivision, which provides that "when the action is against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county," summons may be served in the county wherein he is found. The complaint in that case, however, did not allege that the contract upon which the action was brought was in writing, and the court held that, while jurisdiction of the subject-matter of the action was in the justice's court (Code Civ. Proc. § 832, subd. 7), "yet, by the provisions of section 848 of the Code of Civil Procedure, as amended in 1907, service upon the defendant may not be had outside of the county in which the action is brought, unless the contract be in writing." The opinion in that case, so far as the question of the service of summons is concerned, merely deals with subdivision 2 of section 848, and does not declare and we are sure did not intend to say that if the defendant was a resident of the county wherein the action was brought at the time the obligation sued on was incurred and thereafter departed therefrom, service upon him could not be had unless the contract from which such obligation arose was in writing.

[2] There is, however, another answer to the petition for the relief sought herein in that the defendants made a general appearance and so submitted themselves to the jurisdiction of the court. Their motion, as will be noted, was not to quash the summons, which was their proper remedy, but for a dismissal of the complaint on the ground that the court was without jurisdiction "over the persons of the defendants and the subject-matter of the litigation."

[3] The motion to dismiss the complaint on the ground that the court was without jurisdiction of the subject-matter of the action amounted, substantially or in legal effect, to a demurrer to the complaint on that ground. At all events, a motion to dismiss on the ground of want of jurisdiction of the subject-matter of the action necessarily calls for relief which may be demanded only by a party to the record. It has been uniformly so held, as logically it could not, otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he

had legally been served with process. In re Clarke, 125 Cal. 388, 58 Pac. 22; Security Loan & Trust Co., etc., v. Boston & South R. F. Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; Macley Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364; Olcese v. Justice's Court, 156 Cal. 82, 108 Pac. 317.

"It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material." 2 Ency. Pl. & Pr. 625, notes and cases; In re Clarke, supra, 125 Cal. 388, 392, 58 Pac. 22.

In Security Loan & Trust Co. v. Boston & South R. F. Co., above cited, it is said:

"If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. If he raises any other question, or asks for any relief, which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons."

In the Olcese Case, the court, by Mr. Justice Henshaw, says:

"Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement and find no special favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea, and when a defendant seeks to avail himself of it, he must, for very obvious reasons, stand upon his naked legal right and seek nothing further from the court than the enforcement of that right. He will not be heard to ask of the court anything further than an adjudication upon his plea, and if he does ask anything further, then, by logic of the fact, he must necessarily have waived the irregularity of his summons before the court."

For the reasons herein stated, the writ is discharged.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

KEENER v. BUTTLER. (No. 7146.)
(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR §362(2)—JURISDICTION—SUFFICIENCY OF ASSIGNMENTS.

Where the statutory period within which a proceeding in error may be begun has elapsed, and the only errors sought to be presented by the petition in error are those alleged to have occurred on the trial, and no assignment is made that the trial court erred in its action on the motion for a new trial, this court is without jurisdiction or authority to review the case, or to allow an amendment of the petition in error setting up such assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1961; Dec. Dig. § 362(2).]

Error from District Court, Cherokee County; John H. Pitchford, Judge.

Action between Jeff Keener and Charles Buttler. From the judgment, Keener brings error. Writ of error dismissed.

Asbery Burkhead, of Tahlequah, for plaintiff in error. J. I. Coursey, of Tahlequah, for defendant in error.

KANE, C. J. This cause comes on to be heard upon a motion by the defendant in error to dismiss the appeal, and the motion of the plaintiff in error for leave to file an amended petition in error. The ground for dismissal is that there was no assignments of error that could be urged, except those which occurred at the trial, and that these could not be considered, because in the petition in error it was not assigned as error that the trial court erred in overruling the motion for new trial. This is a good ground for dismissal (Avery et al. v. Hays, 44 Okl. 71, 144 Pac. 624), and the motion to dismiss must be sustained, unless the plaintiff in error is permitted to amend his petition in error, pursuant to his motion, by adding thereto the following assignment:

"The court erred in overruling plaintiff in error's motion for new trial."

The petition in error filed in this court shows that on the 2d day of October, 1914, the judgment appealed from was rendered. As the application to amend petition in error was not filed until the 20th day of April, 1916, it is apparent that more than six months expired between the rendition of the judgment and the filing of the motion for leave to amend the petition in error. In McConnell v. Cory, 33 Okl. 607, 127 Pac. 259, it was held:

"Where the statutory period within which a proceeding in error may be begun has elapsed, and the only errors sought to be presented by the petition in error are those alleged to have occurred on the trial, and no assignment is made that the trial court erred in its action on the motion for a new trial, this court is without jurisdiction or authority to review the case, or to allow an amendment of the petition in error setting up such assignment."

As counsel presents nothing for review, except errors occurring at the trial, it follows that the motion for leave to amend the petition in error must be overruled, and the motion to dismiss sustained. It is so ordered. All the Justices concur.

HANEY v. DE LONG, Justice of the Peace.
(No. 7916.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE §53—PROCEDURE—SERVICE OF PROCESS.

A justice of the peace for one county of the state is without jurisdiction to issue summons to be served upon a defendant in another county, in an action wherein both plaintiff and defendant are residents of the latter county,

wherein service was had; and judgment rendered upon such service is absolutely void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 147; Dec. Dig. ¶58.]

2 JUSTICES OF THE PEACE ¶161(3)—APPEARANCE — PROCEEDINGS CONSTITUTING — NOTICE OF APPEAL.

Upon the rendition of such judgment, counsel for defendant, who appeared specially for the purpose only of objecting to the jurisdiction of the court, did not enter an appearance upon nonjurisdictional grounds by merely giving notice of appeal in open court, such notice not being a necessary step in perfecting an appeal in this jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 596; Dec. Dig. ¶¶161(3).]

Original application by Rose Haney for writ of certiorari to Henry De Long, Justice of the Peace in and for the city of Pawnee, Pawnee county. Writ granted.

Johnston, Robinson, & Rice, of Perry, for petitioner. McNeill & McNeill, of Pawnee, for respondent.

KANE, C. J. This was an original application for a writ of certiorari, wherein the petitioner prays that said respondent, Henry De Long, justice of the peace as aforesaid, be commanded to certify and return to this court all the records and proceedings had in a certain action before him, with all things pertaining thereto, including all objections, rulings, exceptions, orders, and all other proceedings, that the judgment therein may be reviewed by this court.

Upon the filing of the petition, a rule to show cause was issued, and in response thereto the respondent certified to this court all the proceedings had before him as a justice of the peace in a certain action entitled, "Walter D. Sullins, plaintiff, v. Rosa Haney, defendant, and Arkansas Valley National Bank, garnishee." Now the cause comes on to be heard upon a motion by the petitioner for judgment upon the record, for the reason that the return to the rule to show cause made and filed by said respondent substantiates all and singular the allegations of her petition, and shows, as a matter of law, that all the acts, proceedings, and judgment of said justice of the peace had, done, and entered in the case here under review, to wit, Walter D. Sullins, plaintiff, v. Rosa Haney, defendant, and Arkansas Valley National Bank, garnishee, were had, done, and entered without authority of law by the said justice of the peace, and were and are void and have no effect, and should be so declared, and adjudged by this court.

The motion for judgment upon the record must be sustained. The undisputed facts show that Walter D. Sullins, a resident of Noble county, commenced said action at law in Pawnee county for the recovery of money against Rosa Haney, who was also a resident of Noble county; that upon filing said bill of particulars the respondent issued sum-

mons against said Rosa Haney and addressed the same to the sheriff of Noble county for service upon her; that said summons was by said sheriff of Noble county served upon said Rosa Haney in said Noble county, and the same returned to the respondent's court in Pawnee county; that, at the time of the commencement of said action, said Walter D. Sullins also filed his affidavit in garnishment without bond, wherein he alleged that the Arkansas Valley National Bank of the city of Pawnee, in Pawnee county, is indebted to said Rosa Haney; that thereafter said bank filed its written answer, admitting certain indebtedness to said Rosa Haney; that, on the return day of the summons issued against Rosa Haney, she made special appearance by her counsel and filed her motion to quash the summons upon the ground that said justice of the peace had no jurisdiction to issue the same against her, to be served in the county of her residence, and therefore he acquired no jurisdiction over the person of the defendant by service upon her of said summons. The petition and the return also show that, upon the overruling of said motion to quash, said petitioner by her counsel specially appeared and filed an answer controverting the jurisdiction of the court to try and determine the cause, and presented no other defense. That this motion was overruled and, defendant declining to further appear in said action, personal judgment was rendered against her for the amount claimed in the bill of particulars, and the Arkansas Valley National Bank was ordered to pay into court certain moneys belonging to the defendant to be applied upon said judgment.

[1, 2] It is conceded by the attorneys for the respective parties that the service of the summons upon her in the county of her residence was absolutely void, and that the action of the justice of the peace thereunder would be ineffective for any purpose, if it were not for the following recital which constitutes the last few lines of the judgment rendered by the justice of the peace, to wit:

"To which the defendant gave notice of appeal to the district court in open court, and execution is stayed for a period of 10 days in which to file a supersedeas bond in double the amount of judgment and costs."

This counsel for respondent says, brings the instant case within the well-settled rule that, where no valid service of process is had upon the defendant in the justice of the peace court and a motion to quash service filed by him in this court is overruled and judgment goes against him, and he files a bond for appeal to the county or district court, which is duly approved, by taking the appeal and filing the appeal bond, he waives all defects in the service of process in the justice court, and a motion made by him in the appellate court to quash the service of process is properly overruled. *Cohn v. Clark*, 150 Pac. 467, L. R. A. 1916B, 686, not yet officially report-

ed; Gulf Pipe Line Co. v. Vanderberg, 28 Okl. 637, 115 Pac. 782, 34 L. R. A. (N. S.) 661, Ann. Cas. 1912D, 407; Fee v. Big Sand Co., 13 Ohio St. 563.

We do not believe these cases are in point. Section 5467, Rev. Laws 1910, provides that an appeal from the justice court shall be complete upon the filing and approval of an undertaking by the party aggrieved. And it further provides that no notice of appeal shall be filed or served. Section 5466, Rev. Laws 1910, provides that a party appealing shall give a bond to the adverse party, and this constitutes the procedure for taking an appeal from a judgment rendered by a justice of the peace. As no appeal bond was given and there is no provision for giving notice of appeal, it is apparent at a glance that the respondent took no necessary preliminary steps toward taking an appeal. The record before us clearly shows a settled purpose on her part to resist the rendition of any judgment against her by the justice of the peace upon solely jurisdictional grounds, and that when it developed that the provisions of sections 5455, 5456, and 5457, Rev. Laws 1910, which provide for a writ of error whereby rulings by a justice of the peace upon questions of law may be reviewed (Cullen v. Sloniker, 39 Okl. 353, 135 Pac. 341; Patten v. Cagle, 32 Okl. 499, 122 Pac. 154), nothing further was done by the respondent until this original proceeding was commenced.

In our judgment, the justice of the peace was entirely without jurisdiction over the person of the defendant in the cause brought before him, and that the judgment entered against defendant, and the order requiring the garnishee to pay money into court, are wholly void and of no force and effect, and should be quashed and set aside. It is so ordered. All the Justices concur.

STATE v. METCALF et al. (No. 5670.)
(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

BAIL \Leftrightarrow 89(2)—FORFEITURE—ACTION TO ENFORCE—PLEADING.

In an action on an appearance bond, where a forfeiture is alleged, and the answer denies such forfeiture, a demurrer to such answer was properly overruled.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 394, 395; Dec. Dig. \Leftrightarrow 89(2).]

Commissioners' Opinion, Division No. 3. Error from County Court, Ellis County; A. L. Squire, Judge.

Action by the State against R. A. Metcalf and others. Judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 156 Pac. 306.

Frank E. Ransdell, of Arnett, for plaintiff in error. Charles Swindall, of Woodward, and C. B. Leedy, of Arnett, for defendants in error.

RITTENHOUSE, C. This is an action to recover upon an appearance bond signed by R. A. Metcalf as principal and C. A. Greene and E. C. Sherman as sureties. It is alleged that R. A. Metcalf was charged by information in the county court of Ellis county with the crime of selling, giving away, and otherwise furnishing intoxicating liquors in said county; that after his arrest he was released upon executing bond to the state in the sum of \$500; that default was made, and on December 4, 1911, the court ordered that the bond be forfeited, and suit brought thereon. To this petition the defendants filed an answer, wherein the execution of the bond was admitted; but the other allegations of the petition were denied. There were also several specific defenses which it is unnecessary to discuss. The state demurred to the answer on the ground that it did not state facts sufficient to constitute a defense, which was overruled, the state electing to stand upon the demurrer.

It will be observed that the petition alleged a forfeiture of the bond; the answer, while admitting the execution of the bond denies the forfeiture. This was an issue of fact to be determined by the jury, and the court properly overruled the demurrer.

It is very unfortunate that the county attorney elected to stand upon the demurrer, as we sustained the forfeiture of this appearance bond in the case of Metcalf et al. v. State of Oklahoma (No. 4031) 156 Pac. 305 (not yet officially reported), and it would have been a very simple matter to have proven such forfeiture.

In this court relief is granted on account of errors of law, properly excepted to, but the record in this case does not show any errors of law, but a mistake of judgment on the part of the county attorney in electing to stand upon his demurrer to the answer.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

BOARD OF COM'RS OF MUSKOGEE COUNTY et al. v. FINK et al. (No. 5481.)

(Supreme Court of Oklahoma. Feb. 8, 1916.
Rehearing Denied July 25, 1916.)

(Syllabus by the Court.)

1. TAXATION \Leftrightarrow 210—INDIAN LANDS—EXEMPTION AFTER ALIENATION.

Grantees of a Creek homestead allotment, conveyed under authority of the act of Congress of May 27, 1908, c. 199, 35 Stat. 312, take their title to such allotment under the terms of said act, and cannot go behind it and claim the exemption of such allotment from taxation under the provisions of the act of Congress of June 30, 1902, c. 1323, 32 Stat. 500.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 334-337; Dec. Dig. \Leftrightarrow 210.]

2. TAXATION \S 210—INDIAN LANDS—EXEMPTION AFTER ALIENATION.

Section 4 of the act of Congress of May 27, 1908, providing that all lands from which restrictions have been removed or shall be removed shall be subject to taxation, is a condition attached by Congress to the alienation of the allotments authorized by said act, and, upon alienation by the allottee, such lands are thereafter subject to taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 334-337; Dec. Dig. \S 210.]

3. TAXATION \S 210—INDIAN LANDS—EXEMPTION AFTER ALIENATION.

A Creek homestead made alienable by the terms of the act of Congress of May 27, 1908, upon its alienation by the allottee, ceases to be exempt from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 334-337; Dec. Dig. \S 210.]

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by D. N. Fink and another against the Board of County Commissioners of Muskogee County, Okl., and another. From an order overruling a demurrer to the petition of plaintiffs, the defendants bring error. Reversed and remanded.

See, also, 145 Pac. 413.

Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and W. E. Disney, Co. Atty., of Muskogee, for plaintiffs in error. W. C. Franklin, of Muskogee, and W. O. Cromwell, and Geo. W. Buckner, both of Enid, for defendants in error.

RUMMONS, C. Plaintiffs in error, herein-after styled the defendants, appeal from an order of the district court of Muskogee county, overruling their demurrer to the petition of defendants in error, hereinafter styled the plaintiffs.

The plaintiffs commenced this action against the defendants seeking to restrain and enjoin them from demanding, collecting, or enforcing the collection of any taxes upon certain lots in Cromwell Heights addition to Muskogee, which are a part of lands allotted as a homestead to Eliza J. Murphy, a member of the Creek Tribe of Indians, and of which plaintiffs are the purchasers. Defendants interposed a demurrer to the petition of plaintiffs which was submitted to the court upon the following stipulation:

"The defendants appeared in person and by W. E. Disney, county attorney of Muskogee county, Okl., and plaintiffs appeared by their attorneys W. O. Cromwell and W. C. Franklin, and thereupon said demurrer was argued and presented by counsel upon the ground contained in the petition of plaintiffs, which alone seeks relief by way of injunction restraining the defendants from collecting taxes now or hereafter assessed against the lots and lands of the plaintiffs described in the petition, for the reason that said lots and lands are a part of the homestead of Eliza J. Murphy, a Creek Indian allottee, and a citizen and member of the Creek Tribe or Nation of Creek and Muskogee Indians, and for this reason the said lots and lands described in plaintiffs' petition are nontaxable for the period of 21 years from the date of the

deed or patent to said allottee for said homestead; by agreement of counsel the demurrer was urged and submitted solely upon the above question, and said demurrer was reserved and not passed upon as to any other cause for relief set up in plaintiff's petition."

It seems, under this stipulation, the only question considered by the trial court in passing upon the demurrer was whether or not the lots in question were exempt from taxation because they were a part of lands originally allotted as a homestead to a member of the Creek Tribe. The sufficiency of the other allegations of the petition does not seem to have been argued to the court below, nor is it raised or argued in this court. We will therefore consider this case alone upon the question presented by the stipulation to the trial court.

The land, of which the lots in controversy are a part, was allotted to Eliza J. Murphy, a citizen of the Creek Tribe, as a homestead, by virtue of the act of Congress of March 1, 1901 (31 Stats. 861, c. 676), and the act of Congress of June 30, 1902 (32 Stats. 500, c. 1823). The act of June 30, 1902, known as the Creek Supplemental Agreement, in section 18 provides:

"18. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

As provided by the act of June 30, 1902, the deed, conveying the homestead allotted, to Eliza J. Murphy, executed April 20, 1903, provides:

"That said land shall be nontaxable and inalienable and free from any incumbrances whatever for 21 years."

Section 1 of the Enabling Act, under which our Constitution was drawn, provides:

"Provided, that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed." Section 413, Williams' Constitution.

The provisions of the Enabling Act were adopted by Ordinance Irrevocable of the Constitutional Convention. Section 408, Williams' Constitution. Section 6, article 10, of the Constitution, relating to exemption from taxation provides, "and such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United

States government, or by federal laws." Under the acts of Congress and the constitutional provisions above quoted, and under the provisions contained in the homestead deed to Eliza J. Murphy, the plaintiffs contend that the lots sought to be taxed are exempt from taxation until the year 1924.

The act of Congress of May 27, 1908 (35 Stats. 312), § 4, provides:

" * * * That all land, from which restrictions have been or shall be removed, shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

Plaintiffs are the grantees of the allottee, Eliza J. Murphy, having purchased her homestead allotment, and are not members of the Creek Tribe. It is contended for the defendants that, because of the provision above quoted in the act of Congress of May 27, 1908, and because title to the homestead allotment is no longer in the allottee, the lots in question have ceased to be exempt and are now subject to taxation.

The plaintiffs rely upon the authority of *Choate v. Trapp*, 224 U. S. 664, 32 Sup. Ct. 565, 58 L. Ed. 941, and *English v. Richardson*, 224 U. S. 685, 32 Sup. Ct. 571, 58 L. Ed. 949. In *Choate v. Trapp*, supra, it was held by the Supreme Court of the United States that the exemption from taxation of the Five Civilized Tribes provided for in the various acts of Congress relating to the allotment of the lands of said tribes constituted a vested right in the allottees, of which they could not be deprived without their consent by any subsequent act of Congress; and that such exemption was not a mere personal privilege of the Indians, but was a property right attached to their land, of which they could not be deprived without their consent. It was further held that the provisions quoted above of section 4 of the act of Congress of May 27, 1908, was inoperative to subject the lands allotted to members of the Choctaw and Chickasaw Tribes to taxation, while the title to such lands remained in the original allottee. The case of *English v. Richardson*, supra, involving the taxation of a Creek homestead, held that a Creek homestead allottee who received a homestead allotment which was, by the act of Congress providing for the allotment, to be nontaxable and inalienable for a specified period, acquired a vested right to exemption from state taxation, protected against abrogation by Congress during that period. This case was a companion case to *Choate v. Trapp*, supra, and was determined by the same opinion. These two cases were determined upon the authority of *New Jersey v. Wilson*, 7 Cranch, 165, 8 L. Ed. 303.

It was held by Chief Justice Marshall in *New Jersey v. Wilson*, supra, that:

"A legislative act, declaring that certain lands, which should be purchased for the Indians, should not thereafter be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act."

The Delaware Indians, in consideration of the purchase for them by the colony of New Jersey of the tract of land, ceded to the colony of New Jersey all their claims upon other lands in said colony. The act of the Legislature providing for the purchase of the lands for the Indians restricted them from granting leases or making sales, and provided that the lands to be purchased should not thereafter be subject "to any tax, any law, usage, or custom to the contrary thereof, in any wise notwithstanding." Thereafter, the Delawares desiring to sell the lands so purchased for them, the Legislature of the state of New Jersey passed an act authorizing the sale by the Indians of such lands. In this act no provision was made as to the subject of taxation. Later, the state of New Jersey sought to tax these lands, but were restrained at the suit of the grantees of the Indians. Chief Justice Marshall in his opinion says:

"The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it."

"It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

Plaintiffs contend, on the authority of *New Jersey v. Wilson*, supra, *Choate v. Trapp*, supra, and *English v. Richardson*, supra, that the exemption from taxation of the homestead of a Creek allottee, by virtue of the Creek Supplemental Agreement, for a period of 21 years runs with the land, and that the land cannot be subjected to taxation during the prescribed period of exemption, even though the Creek allottee has alienated the lands, and title to the same stands in a person not a citizen of the Creek Tribe.

By the Ordinance of 1787, two townships of land in the state of Ohio were reserved for the purposes of a university. When the state of Ohio came into the Union, an act was passed establishing a university, vesting the lands in a corporation consisting of the president and trustees "for the sole use, benefit, and support of the university forever." The act also provided that the lands should be forever exempt from all state taxes. Thereafter, the Legislature authorized the board of trustees to sell these lands, and pursuant to that statute the lands were sold to individuals, who took title in fee. No exemption from taxation was mentioned in the statute authorizing the sale or in the deeds conveying the lands to the individuals. The grantees claimed the lands to be exempt from taxation by virtue of the first act of the Legislature.

The Supreme Court of the United States, in *Armstrong v. Athens County*, 16 Pet. 281, 10 L. Ed. 985, denied the claim of the grantees. Mr. Justice Catron, writing the opinion of the court, says:

"But what was the policy of the Act of 1826? An entire change of the fund from real estate to a capital in money, vested by loan in the state treasury, was determined on by the corporation. Leave was asked and granted by the Legislature to sell the lands, and convey them in fee simple to purchasers; giving the tenants a preference, in cases where there were existing leases. As regarded the management and nature of the fund to sustain the university, the act of 1804 was to a great extent repealed; by that act the lessees of the corporation were governed; their contracts were founded on it; but with it the purchasers in fee had no concern, their contracts originated in a different policy, and are sanctioned by a different statute; the complainants actually claim, and could only claim, by force of the act of 1826. This act secures the payment of no taxes to the university as the substitute of the state. It simply authorized the corporation to sell, as an individual might sell, and the respective purchasers took title as from an individual; they were strangers to the act of 1804, with the exception of those provided for by the third section of the act of 1826, the value of whose lands were to be governed by the assessment of their rents under the former act, and who were entitled to have deeds in fee on the payment of \$100 for every \$8 of annual rent assessed upon them, disregarding the taxes they were bound by the act of 1804 to pay to the corporation. The mode of ascertaining the value makes no difference; all the purchasers hold under the act of 1826, and cannot go behind it; and are subject, like other persons holding lands in fee, to be taxed by the state."

[1] The reasoning of this case is peculiarly applicable to the case at bar. Congress by various acts after the allotment acts, and particularly by the act of May 27, 1908, evidenced a determination to adopt an entirely new plan in dealing with the lands of certain classes of allottees. These classes were to be permitted to deal with their lands as any other citizen of the state might. The free right of alienation was granted to these allottees under the terms of the act of May 27, 1908. We feel convinced that, as the plaintiffs in this case took their title to the lots they are seeking to exempt from taxation by virtue of the terms of this act, they cannot go behind it. But for that act, they could not have purchased the lands in question. They took subject to all the conditions of that act, and they cannot now claim the benefits of the exemption from taxation granted to the allottee by the Creek Supplemental Agreement. *Goudy v. Meath*, 203 U. S. 148, 27 Sup. Ct. 48, 51 L. Ed. 130.

The act of Congress of May 27, 1908, is a comprehensive revision of the laws relating to the Five Civilized Tribes and their lands and the title thereto, which should be construed so as to give effect to the intent of Congress as evidenced therein. It seems evident from the act that Congress, in the exercise of its plenary power to control the Indians and their affairs, determined that certain classes of citizens should be relieved from their tutelage, and left free to deal with

and control their lands as they might see fit. The grantor of plaintiffs was one of the citizens so enfranchised and permitted to alienate her lands at will. Was it the intention of Congress to grant this right of unrestricted alienation to these classes of Indian citizens without condition? It was held in *Choate v. Trapp*, supra, that the restriction upon alienation and the exemption from taxation were independent of each other, and not so related that the removal of one destroyed the other. In *New Jersey v. Wilson*, supra, Chief Justice Marshall said:

"It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as a sole condition on which a sale of the property should be allowed. But this condition has not been insisted on."

It is clear that Congress could not enact a law depriving the citizens of the Five Civilized Tribes of the exemption from taxation granted them by the acts under which they took their allotments. Nor could Congress compel the allottee to alienate his lands. As a ward of the government, he was subject to the control of Congress in the matter of the alienation of his lands, and we see no reason to prevent Congress from granting the right of unrestricted alienation upon condition; and, if the allottee accepted the privilege of alienation, he would also accept the conditions imposed upon such privilege.

[2] Can section 4 of the act of May 27, 1908, be construed as imposing a condition upon the right of alienation granted in the act to certain classes of citizens? The primary thing to be considered in the construction of a statute is the intent of the Legislature, and that intent may be arrived at by considering the purpose of the legislation, the subject thereof, and the history of other legislation relating to the same subject.

"A statute should be so construed as to give a sensible and intelligent meaning to every part, to avoid absurd and unjust consequences, and, if possible, so as to make it valid and effective." 2 Lewis' Sutherland, *Statutory Construction* (2d Ed.) § 516.

"The meaning of the Legislature must be gathered from all they have said, as well from that which is ineffective from want of power, as from that which is authorized by law." *Baird v. Hutchinson*, 179 Ill. 435, at page 440, 53 N. E. 567, at page 568.

"In construing an act it is a principle of interpretation that the object must be borne in mind, and language susceptible of more than one construction should receive that which will effect its purpose rather than defeat it. * * * A presumption is always indulged in favor of the constitutionality of an act, and that construction will be adopted which will sustain the act, where the language used will permit such interpretation. * * * In construction, words may be restricted or enlarged, according to the intent with which they were used, and their meaning as used may be gathered from the purpose of the enactment. * * * And, when necessary, that which is implied as well as that which is expressed may be held to be included within a statute." *People v. Hinrichsen*, 161 Ill. 223, at page 226, 43 N. E. 973, at page 974.

"The natural import of words is their literal sense; but this may be greatly varied to give effect to the fundamental purpose of statutes."

2 Lewis' Sutherland, Statutory Construction (2d Ed.) § 374.

"In the exposition of a statute, the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context, from the occasion and the necessity of the law, from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion." 1 Kent's Commentaries, 461.

[3] Under these canons of construction, taking into consideration the subject of the act of Congress of May 27, 1908, and the long history of legislation by Congress as to the Five Civilized Tribes and their lands, we are convinced that the purpose of Congress in exempting the homestead allotments of the Creek Tribe from taxation, and requiring the state of Oklahoma in its Constitution to give effect to the exemption so granted, was solely for the protection of the members of the Creek Tribe; that Congress intended by the Supplemental Agreement to convey to the members of the tribe homesteads which could not be taken from them for the payment of taxes. The constitutional provision of the state of Oklahoma quoted above gives full effect to the purpose of Congress. But can it be said that, when Congress determined that certain classes of Creek citizens were competent to attend to their own affairs and to alienate their lands at will, it also intended that such lands should continue to escape the burdens of government after they had passed from the hands of the Creek citizen? Such a conclusion would lead to the greatest discrimination and injustice between citizens and would so derogate from the power of taxation essential to the maintenance of government that we do not think that the act of Congress of May 27, 1908, is open to this interpretation. As was said by the Supreme Court of the United States, the exemption from taxation of the lands of the Indians is a valuable right; but is not the right to freely alienate one's lands also a valuable right? We think there can be no doubt that it is a right of the highest value. The history of the law of tenures of real estate in England, and the shifts and devices invented and used by the English lawyers of the middle ages, such as fine and recovery, to evade the statute de donis and to enable English landowners to break the entail and freely convey their lands, show that, at all times under our system of real estate law, the right to alienate one's real estate unrestricted has been most highly prized by the landowner. We think the intent of Congress by that act was to say to the Creek citizen, "We have given you lands which are nontaxable and inalienable for 21 years; the exemption from taxation adds value to your lands; the restriction upon alienation impairs that value; we will now offer you the privilege of unrestricted alienation, but, if you elect to avail yourself of this privilege, your lands

will, upon alienation, become subject to taxation in the hands of your grantee." We think Congress clearly had authority to remove the restrictions upon alienation upon such a condition, and, if the Creek citizen undertook to avail himself of the privilege of alienation, the subjection of his homestead to taxation thereafter would not deprive either him or his grantee of any vested right, nor would it be in contravention of the Fifth Amendment to the Constitution of the United States. We are not without authority on this question from our own court. The act of Congress of April 26, 1906 (34 Stats. 144, c. 1876), § 19, provides:

"Provided further, that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

In the case of Schock v. Sweet, 145 Pac. 388, this court held that the homestead conveyed by an allottee, whose restrictions were removed under the provisions of the act of Congress of March 3, 1903 (32 Stats. 996, c. 994), after the taking effect of the act of April 26, 1906, was subject to taxation after alienation by the allottee. Mr. Justice Riddle, delivering the opinion of the court, says:

"The purpose for which the exemption was made has ceased to exist, and the exemption itself must fall. In construing all laws, it is the cardinal rule to ascertain the intent of the lawmakers. There is nothing in this provision of the agreement, or in any prior or subsequent acts of Congress dealing with these Indian tribes, that evidences a purpose in Congress to grant an exemption from taxation of the property in question in the hands of third parties, who are not members of said Indian tribes. On the contrary, the provision of the act of April 26, 1906, expressly provides that the homesteads shall be nontaxable so long as the title remains in the allottee, which is equivalent to saying that, when the title passes out of such allottee, the land shall be subject to taxation. * * *

"It was upon her application that the restrictions upon her alienation of said land were removed. At the time this application was made, the act of Congress of April 26, 1906, was in full force and effect. Except under the act of Congress of March 3, 1903, supra, the allottee could not have alienated the lands in question; neither could plaintiffs have obtained any title to the land. Hence it may well be said that it is by virtue of and through this act of Congress that plaintiffs obtained their title. There is no exemption from taxation contained in this law; neither is any contained in the conveyances made to plaintiffs. The law is well settled that, where land is granted by a particular act, a tax exemption asserted under a prior act will not be upheld." Rider v. Helms, 150 Pac. 154; Rogers v. Herndon, 154 Pac. 1185, No. 4827, decided January 24, 1916.

The only distinction between the case of Schock v. Sweet and the case at bar lies in the fact that, in that case, the restrictions of the allottee were removed by order of the Secretary of the Interior upon application of the allottee, while in the case at bar the restrictions were removed by virtue of the act of Congress of May 27, 1908. We think the case of Schock v. Sweet, supra, settles the law

of this state adversely to the contention of plaintiffs.

We therefore conclude that the trial court erred in overruling the demurrer of defendants to the petition of plaintiffs, and that this cause should be reversed, with directions to the trial court to sustain such demurrer.

PER CURIAM. Adopted in whole.

KREMKE v. RADAMAKER et al. (No. 6086.)

(Supreme Court of Oklahoma. June 20, 1916.
Rehearing Denied Aug. 8, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY §104(1) — DISCHARGE OF SURETY—EXTENSION OF TIME.

An extension of the time of payment of a note for a definite period by an agreement between the holder and the principal therein, without the consent of the surety supported by a valid consideration, will have the effect of discharging the surety from his obligation to pay the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 186; Dec. Dig. §104(1).]

2. PRINCIPAL AND SURETY §128(2) — DISCHARGE OF SURETY—EXTENSION OF TIME.

Where by the stipulation in the note the time of payment may be extended without notice the provisions therein with reference to the extension are met and satisfied by one extension, and if more than one extension be given for a valid consideration and without the consent of the surety, the surety is thereby discharged from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 359-362; Dec. Dig. §128(2).]

3. PRINCIPAL AND SURETY §129(4) — DISCHARGE OF SURETY—EXTENSION OF TIME—WAIVER.

If, after extensions have been granted by the payee under a contract with the principal for a valuable consideration, and for a definite time without the consent of the surety, the surety accepts security to protect himself against liability by reason of his suretyship upon said note, he waives the extensions of time, and when action is instituted against him, he is estopped from asserting his release by virtue of extensions without his consent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 368; Dec. Dig. §129(4).]

Commissioners' Opinion, Division No. 3. Error from District Court, Kingfisher County; James B. Cullison, Judge.

Action by M. Radamaker against John F. Kremke and another. Judgment for plaintiff, and defendant Kremke brings error. Reversed and remanded as to defendant Kremke, and affirmed as to defendant Frans F. Marth.

F. L. Boynton, of Kingfisher, for plaintiff in error. D. K. Cunningham, of Kingfisher, for defendants in error.

HOOKER, C. Radamaker commenced suit in the district court of Kingfisher county,

February 15, 1913, to recover a judgment against John F. Kremke and Frans F. Marth, upon a promissory note of date May 15, 1907, for \$1,000 due two years after date, with 7 per cent. interest from date, payable annually. The last clause of said note is as follows:

"The makers, indorsers and guarantors waive presentment, notice of nonpayment, protest and notice of protest, diligence in bringing suit against any party thereto, and consent that the time of payment be extended without notice thereof. If collected by an attorney a fee of 10 per cent. will be paid. Exemption and appraisal laws waived."

The answer of Kremke was: (1) A general denial; (2) that he signed the note as surety, receiving no consideration therefor himself, and that the note had been extended by Radamaker under a contract with Marth without his knowledge or consent; and it is further contended that this suit was instituted before the maturity of the instrument, in view of the fact that the interest had been paid until May 15, 1913, and the time of payment extended until then, and this suit, having been instituted in February, 1913, was prematurely brought. Upon these issues the evidence was introduced, and the court rendered a judgment in favor of Radamaker against Marth and Kremke upon said note, and to reverse which an appeal is had to this court.

[1-3] This court in Adams v. Ferguson, 44 Okl. 544, 147 Pac. 772, said:

"An agreement to pay interest for the time of extension is a sufficient consideration to support a contract of extension"

—and if the extension for a definite time be given without consent of the surety, the surety is discharged. In case of Lambert v. Shetler, 71 Iowa, 463, 32 N. W. 424, it is held:

"If an extension of time is granted the principal, the surety is discharged unless he consents thereto. Mere knowledge of such extension, without more, is immaterial."

In the case of Bank v. Mallett, 34 Me. 547, 56 Am. Dec. 673, it is said:

"Surety on promissory note is discharged by binding extension of time given to the maker by the holder, without the surety's consent, although he may have consented to a previous contract of the same kind."

In Rochester Sav. Bank v. Chick et al., 64 N. H. 410, 13 Atl. 872, held:

"The extension of the time of payment of the note by the plaintiff, by a valid and binding contract with the principal makers, and with knowledge that the defendant Clark signed the note as surety, had the effect of discharging Clark, unless he assented to the extension. Bank v. Woodward, 5 N. H. 99, 105 [20 Am. Dec. 566]; Wheat v. Kendall, 6 N. H. 504; Watrous v. Pierce & Co., 32 N. H. 560. The agreement between the plaintiffs and defendants Chick & Co. for an extension of time, in the absence of anything in the case to the contrary, must be taken to be a valid agreement, and one upon a good consideration, and binding upon the parties making it. Such an agreement,

made without the consent of the surety, Clark, was a discharge of him from further liability. Clark had no knowledge of any of the extensions, and did not consent to any of them, except by the agreement in the note. That agreement could not have been intended for an indefinite extension of the time of payment, nor for a series of extensions from time to time, indefinitely, so that the creditors and principal makers could, at their pleasure, always keep the surety liable, and forever prevent his enforcing payment against the principal, or using the statute of limitations as a defense. Such a construction of the agreement in the note with such consequences cannot be adopted without a clearly expressed intention to that effect in the agreement itself. The time of payment fixed upon in the note is six months, and the agreement 'to be holden should the time of payment be extended,' naturally, and by the ordinary force of language and taken in connection with the first part of the note, means a reasonable extension for a definite time, and not a series of extensions indefinite in number and endless in repetition. When the plaintiff, at the end of six months from the date of the note, extended the time of payment for a definite period of time, the extension was in accordance with the agreement of all parties; all parties were bound by it, and the defendant Clark was not thereby discharged. But the agreement in the note was met and satisfied by such an extension. Any further extension, upon a valid consideration and binding upon the plaintiff, made without the consent of the surety, had the effect of discharging him. Clark being discharged from liability as surety, his subsequent promise to pay the note, with no knowledge of the extension by which he was discharged nor of the circumstances under which the agreements for extension were made, did not have the effect to renew or re-establish his liability without a new and valid consideration. *Bank v. Colcord*, 15 N. H. 119, 125 (41 Am. Dec. 685); *Edwards v. Tandy*, 36 N. H. 540; *Norris v. Ward*, 59 N. H. 487. The defendant Clark is entitled to judgment."

Also in 7 Cyc. 887, it is said:

"The consent of an indorser or surety to extensions of the time of payment cannot be extended beyond its terms."

Also in *Matchett v. Machine Works*, 29 Ind. App. 407, 64 N. E. 229, 94 Am. St. Rep. 272, it is said:

"(6) An indefinite extension of the time of payment, or more than one extension is not justified by a provision in a note waiving all defenses of the extension of the time of payment given the drawers or indorsers."

From these authorities above quoted, we are of the opinion that the law is conclusively established that, although by the provisions of the note an extension of time may be waived, or more than one extension may be authorized, yet, it must clearly appear from the instrument itself that such was the case. By an examination of the note in question it is apparent that the language used was intended to apply only to one extension of the time of payment and no more. Hence, if more than one extension of time were given, then the plaintiff in error would be entitled to be discharged unless he consented thereto. Upon this question of consent the lower court made no finding of fact, but expressly held that it was unnecessary for

plaintiff in error to have had any notice of such extension. The court finds from this evidence that the plaintiff in error was the surety of Marth. That being true, the plaintiff in error must have consented to an extension of time beyond that expressed in the note, and if he had no notice thereof, he is released from obligation unless by his subsequent conduct in accepting security from the principal to indemnify him against loss he recognized his liability upon this note, and thereby estopped himself from relying upon his release by virtue of the extension of time of payment without his consent. This we are unable to determine for the reasons aforesaid.

The court should have said whether plaintiff in error had notice of or consented to these extensions.

This judgment is therefore reversed, and the cause remanded as to the plaintiff in error, John F. Kremke, and affirmed as to Frans F. Marth.

PER CURIAM. Adopted in whole.

BARTLESVILLE ZINC CO. v. FISHER. (No. 7493.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Aug. 8, 1916.)

(Syllabus by the Court.)

EVIDENCE §380—X-RAY PLATES—IDENTIFICATION.

Before X-ray plates are admissible in evidence, they must be identified and their accuracy established.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1657; Dec. Dig. §380.]

Commissioners' Opinion, Division No. 3. Error from District Court, Rogers County; T. L. Brown, Judge.

Action by L. H. Fisher against the Bartlesville Zinc Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

C. B. Holtzendorff, of Claremore, V. C. Mieber, of Tulsa, and Rowland, Talbott & Nyce, of Bartlesville, for plaintiff in error. H. B. Martin and A. F. Moss, both of Tulsa, and R. K. Dumbell, of Claremore, for defendant in error.

RITTENHOUSE, C. This action was brought to recover damages on account of personal injuries received by L. H. Fisher on August 5, 1913, while employed at the zinc smelting plant of the Bartlesville Zinc Company. It is alleged in the petition that the plaintiff was rendered unconscious, through the negligence of the defendant, by being struck on the head with a quantity of brick

fire plate, and as a result his nervous system was permanently injured.

It is assigned as error that the court improperly admitted in evidence certain X-ray plates tending to prove the existence of certain physical defects in and about the bony structure of the plaintiff's head; it being contended that such plates were not properly identified as true representations of the object they purport to represent. The admission of X-ray plates in evidence rests fundamentally on the theory that they are the pictorial communication of a qualified witness who uses this method of conveying to the jury a reproduction of the object of which he is testifying; this being true, the X-ray plates must be made a part of some qualified witness' testimony and the witness should qualify himself by showing that the process is known to himself to give correct representations, and that it is a true representation of such object.

The rule has been well considered and illustrated in numerous decisions upon this subject, and the result of the case is well stated in *Watthaus & Becker, Medical Jurisprudence*, vol. 3, p. 779:

"The mere introduction of a negative, however, should not be sufficient. The ability of the operator to produce as well as to interpret the same should be questioned. The operator himself should be required to testify as to the technique employed, as well as to the developing, especially as to the use of any means whereby the plate had been artificially changed to bring into relief certain features."

See, also, *Greenleaf on Evidence* (16th Ed.) § 439; *Stewart on Legal Medicine*, § 13; *Wigmore on Evidence*, § 795; 17 Cyc. 420; *Lupton v. Southern Express Co.*, 160 N. C. 671, 86 S. E. 614; *Griffith v. American Coal Co.*, 75 W. Va. 686, 84 S. E. 621, L. R. A. 1915F, 803; *Eckels et al. v. Boylan*, 136 Ill. App. 258; *Prescott & N. W. B. Ry. Co. v. Franks*, 111 Ark. 83, 163 S. W. 180, Ann. Cas. 1916A, 773; *Pecos & N. T. Ry. Co. et al. v. Winkler* (Tex. Civ. App.) 179 S. W. 691; *De Forge v. New York, N. H. & H. R. R.*, 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464; *Doyle v. Singer Sewing Machine Co.*, 220 Mass. 327, 107 N. E. 949; *Ligon v. Allen*, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842.

In the last case supra, it is said:

"To render an X-ray photograph admissible in evidence, its accuracy must be established."

The evidence afforded to identify the X-ray plates was given by Dr. Mortimer A. Houser, who testified that from an examination of the plaintiff, based upon symptoms related to him, he was unable to find the cause of the plaintiff's trouble; that he sent the patient to Dr. Butler to have an X-ray plate made; that he was not present when Dr. Butler made the plates. His testimony in this respect is as follows:

"Q. You were there when the picture was taken? A. No, sir. Q. When did you see them? A. I went there shortly after. Q. You

didn't see them take the picture? A. No, sir. Q. You don't know that this is an X-ray plate of this man's head? A. Well, I know as well as anything of that kind I have done. Q. You don't know whether he ever had any X-ray picture of his head taken, do you? * * * Q. You don't know whether he ever had any X-ray picture of his head taken, do you? A. No; I didn't see it done. Q. So, so far as you know, that may be a picture of somebody else's head? A. So far as I know of my own knowledge; I didn't see it taken."

The witness further testified that his evidence, relative to the plaintiff's injuries, was based upon the information divulged by these plates. Dr. Butler, the expert who made the plates, did not testify, nor did any one who was present at the time the plates were made. The plates were not admissible in evidence, nor could they be, until they were properly identified or shown to have been made by trustworthy instruments properly used by a person skilled in making, reading, and interpreting such plates and further shown to be correct representations of the bony structure of the plaintiff's head.

The cause should therefore be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

PIONEER TELEPHONE & TELEGRAPH CO. v. TULSA VITRIFIED BRICK & TILE CO. (No. 6247.)

(Supreme Court of Oklahoma. June 6, 1916. Rehearing Denied Aug. 8, 1916.)

(Syllabus by the Court.)

1. **ELECTRICITY** §14(1) — **CASE REQUIRED — SAGGING WIRES.**

Where the wires of a telephone company are so constructed and maintained that they are apt to sag and come in contact with the wires of a traction company, charged with a high current of electricity, whereby the same may be transmitted to its line, the telephone company owes to its subscribers the highest degree of care to prevent injury to the property or the life of its subscribers, and if it fails so to do and injury results proximately therefrom, the company is liable.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. §14(1).]

2. **ELECTRICITY** §19(3) — **INJURIES — PRESUMPTIONS—RES IPSE LOQUITUR.**

The record in this case examined, and it is held that the doctrine of *res ipse loquitur* does not apply.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. §19(3).]

3. **APPEAL AND ERROR** §215(1)—**PRESENTATION OF OBJECTIONS—INSTRUCTIONS.**

Errors in the giving of instructions are waived unless saved in manner and form provided by statute, and if an exception be not saved to an instruction in the court below, no error can be assigned in this court by reason of the same having been given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1309, 1310; Dec. Dig. §215(1); Trial, Cent. Dig. § 683.]

Commissioners' Opinion, Division No. 3. Appeal from District Court, Tulsa County; L. M. Poe, Judge.

Action by the Tulsa Vitrified Brick & Tile Company against the Pioneer Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harris, Nowlin & Singleton and J. R. Spielman, all of Oklahoma City, for plaintiff in error. Randolph, Haver & Shirk, of Tulsa, for defendant in error.

HOOKER, C. It is claimed here that on April 30, 1910, at a certain point on Maybelle street in the city of Tulsa, the plaintiff in error was the owner of and had in its use and under its control a certain telephone wire, which was stretched upon its poles, and at the same place the Oklahoma Union Traction Company was the owner of and had in its use and under its control a trolley wire stretched upon its poles; that the wire of the telephone company was not taut at said place, but was permitted to sag, which fact was known to both of said companies; that on said date the traction company had stretched and placed said trolley wire at said place, so that it came in contact with the telephone wire and so that the telephone wire rested upon the trolley wire, but that before the traction company turned the electric current on its trolley wire, it notified the telephone company of that fact and requested it to examine its lines, and that the telephone company agreed to do so, but carelessly and negligently failed, and that both the telephone and traction company, knowing that said wires were in contact, negligently and carelessly turned the current thereon, and that the trolley wire was charged with a dangerous current of electricity, and that both companies carelessly and negligently permitted and caused said wires to come in contact, whereby the telephone wire set fire to the house of the defendant in error, and destroyed the same, together with the property therein contained.

The evidence introduced here established the following state of facts: That the defendant in error was a subscriber or user of one of the phones of the plaintiff in error, and that the wire attached to said phone in the building of the defendant in error where said wire crossed Maybelle street was suspended over a trolley wire of the Oklahoma Union Traction Company, and that on this date the line of the telephone company was in such close proximity to the trolley wire that a very strong current of electricity passed from the trolley wire to the telephone line, and as a result of which a fire was caused in the building of the defendant in error, and damage to its property thereby inflicted.

The evidence further established that the telephone company knew that the traction company was constructing its line in this vicinity and before the day of the fire there had been some controversy between the traction company and the telephone company in regard to the telephone wires being raised so that the trolley wires could be erected, and

it is further shown that before the traction company turned the current on its wire, it notified the telephone company and gave to it an opportunity to inspect its lines so as to avoid injury to the property or lives of its patrons, but that it failed so to do, but notified the traction company that it was ready for the current to be turned on.

From the pleadings and the evidence it is apparent that the gist of this action is the negligence of the telephone company in permitting its line to sag and to come in contact with the trolley wire, whereby the current of electricity was transmitted from the trolley wire to the telephone line, and as a result of which the property of the defendant in error was destroyed.

Actionable negligence has often been defined by this court to consist of a duty, a failure to perform that duty, and the injury or damage resulting by reason of such failure. Measuring the liability of the plaintiff in error by this rule, is the defendant in error entitled to recover in this case? Telephone wires in themselves may be harmless, but where they are permitted to come in contact with trolley wires charged with a high current of electricity, they oftentimes prove dangerous to property and fatal to life. It cannot be gainsaid that telephone companies, where its wires are so constructed and maintained that they are apt to sag and come in contact with the wires of a traction company, charged with a high current of electricity, whereby a dangerous current of electricity is apt to be transmitted to its lines, owe to its subscribers the duty to use the highest degree of care upon its part in order to prevent injury to the property or the life of its subscribers; and in the event of a failure to use that degree of care which the law imposes, the company is liable should injury occur. In the case of Shawnee Light & Power Co. v. Sears, 21 Okl. 22, 95 Pac. 453, this court said:

"The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire it gives no warning or knowledge of its deadly presence. Vision cannot detect it. It is without color, motion, or body. Latently and without sound it exists, and, being odorless, the only means of its discovery lie in the senses of feeling communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition."

The rule is well laid down in the case of Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, as follows:

"An electric company, in using the dangerous force of electricity not generally used, is required to use very great care to prevent injury to person or property, and it is sufficient proof of negligence for it not to raise its wires so high above a roof on which they are placed that those having occasion to go there will not come in contact with them."

Speaking on this point, the Supreme Court of Colorado, in the case of *Denver Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566, says:

"A person carrying on a business perilous to the public is bound to exercise that reasonable care and caution which would be exercised by reasonably prudent and cautious persons under the same or similar circumstances. The care should increase as the danger does, and when the business is attended with great peril to the public, the care to be exercised is commensurate with the increased danger."

The Supreme Court of Kentucky goes even further than either of these in the case of *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, and says:

"At places where people have the right to go for work, business, or pleasure, electric light companies are required to afford them perfect protection from its wires, by having them perfectly insulated."

Also the Supreme Court of Kentucky, in the case of *Paducah Light & Power Co. v. Parkman*, reported in 156 Ky. 197, 160 S. W. 931, held:

"There is no distinction between the measure of care that should be exercised by an electric company in the management and care of its wires to prevent danger to those coming directly in contact with them and the measure of care that should be exercised to prevent the wires of a telephone company from becoming charged therefrom with a dangerous current of electricity; the uttermost care being required in both instances."

Also in *Cumberland Telephone & Telegraph Co. v. Cosnahan*, 105 Miss. 615, 62 South. 824, it is held:

"A telephone company which strings its wires so that they could come in contact with the electric light wires if they should fall is bound to exercise the highest degree of care in order to prevent their doing so."

Also in *Delahunt v. U. T. & T. Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958, it is held that:

"It is the duty of a telephone company to its patrons to exercise at all times the highest degree of care and vigilance to protect them from a dangerous electric current over its wires from any source."

And the Court of Civil Appeals of the State of Texas, in the case of *Citizens' Telephone Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879, said:

"The owner of a telephone wire so constructed as to render it probable that in falling it will fall upon or across the wire of a lighting and power company and become charged with a sufficient current of electricity from that

source to make it dangerous is held to the same degree of care as though its own wire was charged originally with such current."

In the instant case the court instructed the jury that the only act of negligence chargeable to the telephone company was its failure to reconstruct its wire after it had knowledge that the trolley wire which was to be charged with electricity was to be constructed in close proximity to its line, and that if the jury found from the evidence that the company had failed to reconstruct its wires or left its wire in a position so as to come in contact with the trolley wire charged with electricity after it had such knowledge, and as a result of that failure injury was inflicted to the property of one of its patrons the company was liable.

The jury under these instructions and under the evidence presented in the case concluded that the telephone company had failed to perform the duty that it owed to its patrons to protect its property from injury by reason of electricity passing over its wires thereto, and destroying the same, and that as a result of the violation of that duty upon the part of the company that the plaintiff in the case below had been damaged and a verdict was rendered in accordance therewith.

It is unnecessary to discuss the instructions to the jury at length further than to say that the question of negligence was fairly presented to the jury, and the jury weighed the evidence and returned a verdict against the telephone company. No objection was taken, nor was any exception saved to any instruction given by the court in the trial of this cause; and, if the court committed error in the giving of any instruction, the same cannot be assigned as error here for the above reasons.

We agree with the plaintiff in error that the doctrine of *res ipsa loquitur* does not apply to this cause, and if the instruction complained of has the effect of applying the same, the plaintiff in error is not in a position to complain thereof, for the reason that it did not object nor except thereto when this instruction was given in the lower court, and, having failed so to do, it waived any error in the giving of this instruction.

We have carefully considered the instructions offered by the plaintiff in error which were refused by the trial court, and we are of the opinion that no prejudicial error resulted to the plaintiff in error by reason of the refusal of the court to give said instructions.

It is therefore ordered that this case be affirmed.

PER CURIAM. Adopted in whole.

WOLFF v. GERMAN-AMERICAN FARMERS' MUT. INS. CO. (No. 7423.)

(Supreme Court of Oklahoma. July 25, 1916.)

*(Syllabus by the Court.)***1. INSURANCE — 645(3) — PLEADING — ESTOPPEL.**

An estoppel or waiver of the conditions in a benefit certificate, in order to be available to the beneficiary in an action thereon, must be specifically and distinctly pleaded, and, if not so pleaded, evidence of such estoppel or waiver is not admissible at the trial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1637, 1640; Dec. Dig. 645(3).]

2. INSURANCE — 360(1) — ACTION — EVIDENCE OF WAIVER.

Where the by-laws of a mutual farmers' fire insurance company, made a part of the contract of insurance, by the terms of the policy, provides, "In case of damage by fire or lightning a member is not entitled to compensation if he has not paid dues within 30 days after notification," and notice of dues on account of an assessment was given the member August 4, 1913, and the fire occurred November 24, 1913, and the dues were not paid until after the fire, and were paid into the bank, the company's depository, without notice of the fire, and the officers of the company, when notified of the payment, refused to accept the dues for the reason that a loss had occurred while the member was in default, and notified the member that the company would not accept the payment, and did not accept it, *held*, (a) That evidence of a waiver of this condition in the contract was incompetent because a waiver had not been pleaded; and (b) the evidence set out in the record, if competent, was insufficient to show a waiver of this condition; and (c) the order of the trial court sustaining a demurrer to the evidence was not error.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 916; Dec. Dig. 360(1).]

Commissioners' Opinion, Division No. 2. Error from District Court, Noble County; W. M. Boles, Judge.

Action by George Wolff against the German-American Farmers' Mutual Insurance Company. From judgment for defendant, plaintiff appeals. Affirmed.

Cress & St. Clair, of Perry, for plaintiff in error. H. A. Johnson, of Perry, for defendant in error.

GALBRAITH, C. The defendant in error, a mutual farmers' insurance association, organized and operated by certain residents of Noble county, under the laws of the state of Oklahoma, was sued in the trial court by George Wolff, one of its members, on a policy of insurance issued to him. The form of the policy is peculiar. The pertinent parts of it are as follows:

"This policy of insurance witnesseth: That George Wolff on the S. E. quarter of section 23, township 20, range 2 west, in Noble county, Oklahoma, a member of the German-American Farmers' Mutual Insurance Association, of Perry, Oklahoma, is entitled, according to the constitution and by-laws of said association by actual loss or damage by fire and lightning, to indemnification of all actual loss of the following described property."

Then follows a description of the property, and the respective amounts of insurance on each item, aggregating \$1,925. The contract then proceeds:

"The length of time of this insurance policy is assigned for five years, but may before the expiration of this time be revoked by the president of the association, or expire by voluntarily leaving the association of the insured party, if such leaving is done after fulfillment of the conditions contained in the constitution and by-laws of the association.

"I, the undersigned, a member of the German-American Farmers' Fire Insurance Association, at Perry, Oklahoma, do hereby oblige by my signature to submit to this constitution, these by-laws and decisions, and to acquit myself precisely to all its determination.

"George Wolff."

Dated at Perry, Okl., the 4th day of June, 1909.

The constitution (article 15) makes loss by fire payable within 60 days, and article 16 provides that when the loss is sustained the assured shall notify one of the directors at once, and this director—

"shall in community with another appointed by him, and a member appointed by the sufferer, as soon as possible proceed to estimate the loss."

Article 17 of the constitution reads:

"In case of damage by fire or lightning a member is not entitled to compensation, if he has not paid dues within thirty days after notification; he is also not entitled to compensation if he caused the fire himself malevolently or lightly. All members must have paid dues within thirty days after the notification, otherwise they are suspended."

Section 17 of the by-laws reads as follows:

"(a) All loss and running expenses must be paid out of the main treasury. When the treasury is exhausted the secretary will make an assessment answering the necessities.

"(b) If a member neglects to pay his contribution within the time, the treasurer has to admonish same by registered letter. In case the member does not perform his obligations within fifteen (15) days after date of the admonishment, the directory may take judicial steps for recovery of the sum with ten per cent. and fees.

"(c) The name of the member is to be stricken from the list of members. Should such former member again make application for initiation, it must be treated like a new member."

The petition alleged the issuance of the policy and the loss, and the ownership of the property destroyed, and the furnishing of proofs of loss, and the refusal to pay. The answer was a general denial, and stated that the company was not liable, for the reason that plaintiff was in default and "had not paid dues within 30 days after notification," and for that reason he was not entitled to recover on his policy under the by-laws and the constitution of the association, made a part of the policy. The reply was a general denial. A jury was waived and the cause submitted to the court for trial. At the close of the plaintiff's evidence a demurrer was interposed thereto, which was sustained. A motion for new trial was overruled, and judgment entered, dismissing the cause and for costs against the plaintiff. An appeal from that judgment has been taken to this court,

and the error assigned is the ruling sustaining the demurrer to the evidence.

The plaintiff's evidence, in brief, was to the effect that the policy in suit was written at the solicitation of the secretary of the association, who called on the plaintiff, in person, and solicited the policy, and that the plaintiff objected at that time to the provision of the by-laws making a member in default for a failure to pay the assessment in 30 days, and that the secretary told the plaintiff that this provision of the policy was not strictly enforced, but if the member did not pay the assessment within 30 days he could pay it as soon as he could, and the company would accept it, and that this membership in the company would not be canceled until the notice by registered letter was sent him, and that there had been an assessment made on August 4, 1913, and notice thereof given to the plaintiff, and that he had not paid the assessment on the 24th day of November, when his loss occurred, but that he was absent from the state at the time, and his brother on that day paid the amount of the assessment in at the bank, the depository of the association, and where all the assessments were payable; that when this assessment was paid on the 24th day of November, 1913, after the fire, and accepted by the depository, nothing was said about the loss having occurred, and that as soon as the secretary of the company was notified of the payment, he immediately said that he would not accept it; that the member was in default in his assessment when the fire occurred, and could not recover on his policy, and that the association would not accept the assessment paid after the fire. It does not appear that the assessment was actually returned to Wolff, or that it was accepted by the association, or what became of it. It also appears that when notice of the fire was given to the president of the association, he said the member was in default and could not recover on his policy, and that he would have nothing to do with this loss, but on solicitation he organized a committee to assess the loss in order that it might be presented to the annual meeting of the association for payment or such action as might then be authorized. It also appears that the plaintiff, Wolff, was treated as a member of the association and permitted to sign the articles of incorporation, wherein the association incorporated on the 15th day of October, 1913, after he was in default on the payment of the August assessment. The officers of the association explained the practice of the association in receiving dues after the limitation of 30 days had run, after notice of assessment, and retaining the names of such parties on the roll of members of the association, by saying that it was the practice to treat them as members, although in default in paying assessments, and to take the money when they could get it, but if there was a fire, there was no protection to such member, and that

no claim for loss occurring when the member was in default had ever been recognized by the association.

It is argued on behalf of the plaintiff in error that this evidence was sufficient to establish a custom on the part of the association by which the penalty prescribed in the constitution and by-laws for failure to pay an assessment within 30 days after notification was waived, and to work an estoppel on the part of the association to deny liability on the policy in suit.

At least two satisfactory reasons appear why this contention is not well taken:

[1] First. All the evidence admitted at the trial tending to prove the custom and waiver was incompetent for the reason that no predicate had been laid therefor in the pleadings. In the petition the plaintiff declared upon the policy, alleging the loss and furnishing proof of loss, and that he had complied with all the conditions on his part to be performed. The answer denied that the terms of the policy had been complied with, and set out specifically that the member had not paid the last assessment at the time of the fire, within 30 days after notice thereof, and for that reason the company was not liable. The reply to this was a general denial, and hence, under the pleadings, there was no issue of waiver, and, of course, no evidence as to custom establishing a waiver was competent. In *Modern Woodmen of America v. Weekley*, 42 Okl. 25, 139 Pac. 1138, the third paragraph of the syllabus reads:

"An estoppel or waiver of the conditions in a benefit certificate, in order to be available to the beneficiary in an action thereon, must be specifically and distinctly pleaded, and, if not so pleaded, evidence of such estoppel or waiver is not admissible at the trial."

See, also, *Holt v. Holt*, 23 Okl. 639, 102 Pac. 187; *Blakemore v. Johnson*, 24 Okl. 544, 103 Pac. 554; *American Jobbing Ass'n v. James*, 24 Okl. 460, 103 Pac. 670; *Cooper v. Flesner*, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; *Nance v. Oklahoma Fire Ins. Co.*, 31 Okl. 208, 120 Pac. 948, 38 L. R. A. (N. S.) 426; *C. R. I. & P. R. Co. v. Spears*, 31 Okl. 469, 122 Pac. 228; *Chambers v. Van Wagner*, 32 Okl. 774, 123 Pac. 1117.

[2] Second. If the evidence tending to establish a custom was competent, it was not sufficient to show a waiver of the provision of the contract, to the effect that:

"In case of damage by fire or lightning a member is not entitled to compensation, if he has not paid dues within thirty days after notification."

The proof admitted tended to show that the company did not strike the names of members from its rolls for failure to pay assessments within 30 days, and that they still treated them as members of the association, although they were in default and had not paid the last assessment within 30 days "after notification," but there was no evidence

that showed, or tended to show, that the association ever recognized its liability on a policy where the fire and loss occurred when the member was in default in paying an assessment. This fact distinguishes the instant case from that of *Pacific Mutual Life Ins. Co. v. McDowell*, 42 Okl. 300, 141 Pac. 273, relied upon by plaintiff in error to sustain his contentions. In the *McDowell* Case the evidence showed that the company had established a custom and waived the provisions of its contract calling for the payment of dues on the first of each month, and had accepted them from the fifteenth to the twenty-fifth, and had recognized a loss and paid the same where it occurred when the member was in default in the payment of his dues.

Again, the fact that the payment of the assessment was made to the bank, the depository of the association, after the fire, and without notice that a loss had occurred, does not bring the instant case within the rule announced in *American Bankers' Insurance Co. v. Thomas*, 154 Pac. 44, inasmuch as in the instant case the testimony did not show that the association ever accepted the assessment or received it. The depository had no right to waive any conditions of the contract on behalf of the association, and the evidence in the instant case shows that the secretary and president of the association, as soon as they were notified of the payment of the assessment after the fire, immediately announced that they would not take it, and told the member that he might go and get it, and that the association would not accept it, and that the association was not liable for the loss, and the testimony failed to show that the association ever did accept the assessment paid by Wolff.

The ruling of the trial court in sustaining the demurrer to the evidence seems to have been correct, and the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

LAMBERT v. SLOOP et al. (No. 7176.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

PLEADING §347—JUDGMENT ON PLEADING—REPLY—SUFFICIENCY.

In an action upon a promissory note the petition was substantially in the statutory form, alleging briefly the execution of the note, that certain payments had been made, which were indorsed thereon, and that there was still due and owing the plaintiff from the defendant a certain stated sum. The answer of the defendant admitted the execution of the note, and by way of affirmative defense alleged in substance that subsequent to the execution and delivery of the note, and prior to the commencement of the action, the plaintiff, for a valuable consideration, entered into an oral agreement with the defendant and other joint and several makers

of the note, to the effect that, each of said makers should be liable severally for a certain specified and definite amount of said note, and that upon payment of such amount by any of said makers the liability of such maker should cease and be extinguished. That the defendant upon the date shown by the indorsement of payments upon a copy of the note attached to plaintiff's petition made payment in full according to the terms of the latter agreement and thereby became discharged from any further liability upon said note. The reply is in words and figures as follows: "Plaintiff for reply to the answer of Sam C. Lambert denies each and every allegation therein contained inconsistent with the allegations of plaintiff's petition, and alleges that the matters and things set up therein are no defense to plaintiff's cause of action." Thereafter motion for judgment on the pleadings was filed by the defendant, upon the ground that neither the answer filed by the defendant nor the reply filed by the plaintiff thereto raise or join any issue to be tried in this case, which motion on the same day was overruled by the court. Thereafter, and on the same day, said cause came on for trial by the court, the plaintiff offering in evidence the original note sued on in said action, and which was the only evidence offered or introduced at said trial. Said defendant electing to stand upon his motion for judgment upon the pleadings, offering no evidence in support of the allegations contained in his answer, the court rendered judgment in favor of the plaintiff and embodied in the journal entry of judgment his ruling upon the motion for judgment on the pleadings. Held, that the reply, in the absence of a motion to make more definite and certain, or other attack which, if sustained, would afford the pleader an opportunity to amend, was sufficient to put in issue the allegations of defensive new matter contained in the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1052; Dec. Dig. § 347.]

Error from District Court, Alfalfa County; James B. Cullison, Judge.

Action by B. Sloop against Sam C. Lambert and another. Judgment for plaintiff, and named defendant brings error. Affirmed.

Titus & Talbot, of Cherokee, for plaintiff in error. H. C. Kirkendall, of Cherokee, and E. C. Wilcox, of Anthony, Kan., for defendants in error.

KANE, C. J. This was an action upon a promissory note, commenced by the defendant in error B. Sloop, against the plaintiffs in error Sam C. Lambert, S. H. Blackburn, B. P. McKee, and F. O. Ceideburg. The jurisdiction of Ceideburg and Blackburn was not obtained by process, appearance, or otherwise, and no judgment was rendered as to them. The defendant McKee, although duly served with summons, took no part in the proceeding in the trial court, and judgment was therefore entered against him.

The questions for review being wholly between the plaintiff Sloop, and the defendant Lambert, no reference hereafter will be made to the other defendants and the remaining parties. Sloop and Lambert will be designated as "plaintiff" and "defendant," respectively, as they appeared in the court below.

The petition was substantially in the stat-

tory form, stating briefly the execution of the note, that certain payments had been made thereon, and that there was due and owing the plaintiff a certain sum. The answer of the defendant was to the effect that, subsequent to the execution and delivery of the note, and prior to the institution of this action, the plaintiff and each and all of the defendants entered into an agreement with each other, for mutual valuable considerations, whereby said defendants and each of them should be liable severally for a specified and definite amount of said note, and that upon the payment by any of the defendants of such amount the liability of such defendant should thereupon cease and be extinguished. That the defendant upon the date shown by the indorsement of payments upon the copy of said note attached to plaintiff's petition, made payment in full, in pursuance to the terms of said latter agreement and thereby became discharged from any further liability upon said note.

Plaintiff's reply, omitting formal parts, is as follows:

"Plaintiff for reply to the answer of Sam C. Lambert denies each and every allegation therein contained inconsistent with the allegations of plaintiff's petition, and alleges that the matters and things set up therein are no defense to plaintiff's cause of action."

Thereafter motion for judgment on the pleadings was filed by the defendant, upon the ground that neither the answer filed by the defendant, nor the reply filed by the plaintiff thereto, raise or join any issue to be tried in this case, which motion on the same day was overruled by the court. Thereafter, and on the same day, said cause came on for trial by the court, the plaintiff offering in evidence the original note sued on in this action, and which was the only evidence offered or introduced at said trial. Said plaintiff electing to stand upon his motion for judgment upon the pleadings, offering no evidence in support of the allegations contained in his answer, the court rendered judgment in favor of the plaintiff and embodied in the journal entry of judgment his ruling upon the motion for judgment on the pleadings.

It is obvious at a glance that the only question which the defendant relied upon for a reversal is the action of the court in overruling the motion for judgment on the pleadings. As we understand it, the contention of counsel for defendant is, that because the reply contains the words, "inconsistent with the allegations of plaintiff's petition," it does not tend to join an issue of fact upon the affirmative defensive matter stated in the answer of the defendant. This contention seems to us to be extremely technical. If these words were objectionable to the plaintiff, he should have moved the trial court to strike them from the reply, or attacked the reply in such other manner as

would have afforded an opportunity for amendment if sustained by the court, and not obscured the specific defect by a motion for judgment upon the pleadings, which called into question all the pleadings filed in the case.

The reply probably cannot be commended as a model for challenging the new matter set up as a defense in the answer, but as no motion was filed which challenged its sufficiency upon any specific ground, we would not be justified in reversing the judgment of the trial court upon an objection which to us seems to be the merest technicality. Moreover, as the answer admitted the execution of the note and set up payments in a manner different from the terms of the note sued on, and pursuant to a subsequent contract between the same parties, this, in a sense, is inconsistent with the averment in the petition to the effect that defendant was indebted to plaintiff in accordance with the terms of the note.

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

Ex parte WOOD. (No. 8127.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

HABEAS CORPUS \S 73½—PROCEEDINGS—ANSWER BY RESPONDENT.

Where an officer, charged with an unlawful restraint, neglects to make a return to a writ of habeas corpus, or offer an excuse for his failing so to do, and the petition, duly verified on its face, shows that the petitioner is by said officer illegally restrained of his liberty, no legal cause for the restraint appearing, such petitioner is entitled to his discharge.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. \S 73½.]

Original application by S. G. Wood for writ of habeas corpus. Petitioner discharged.

Sigler & Howard, of Ardmore, for petitioner.

SHARP, J. March 28, 1916, S. G. Wood filed in this court his petition, wherein he alleged that he was illegally restrained of his liberty by Buck Garrett, sheriff of Carter county, and in which he prayed for a writ of habeas corpus to be directed to said sheriff. On the presentation of the petition, the writ was issued and made returnable on April 4th thereafter. No return thereto has ever been made.

Section 4889, Rev. Laws 1910, requires that the sheriff or other person to whom a writ of habeas corpus is directed shall make immediate return thereof, and that if such officer neglect or refuse to make return, after due service, or shall refuse or neglect to obey the writ by producing the party named therein, and no sufficient excuse be shown for such neglect or refusal, the court shall order obedience by attachment. Section 4890

provides that the return shall be signed and verified by the person making it, who shall state: First, the authority or cause of restraint of the party in his custody; second, if the authority be in writing he shall return a copy and produce the original on the hearing; third, if he has had the party in his custody, or under his restraint, and has transferred him to another, he shall state to whom, the time, place, and cause of the transfer. Said section also requires that the person making the return shall produce the party on the hearing, unless prevented by sickness or infirmity, which fact must be shown in the return. Section 4891 provides that the plaintiff may except to the sufficiency of or controvert the return or any part thereof, with other provisions not necessary to here mention. Section 4892 is to the effect that upon issues joined the court or judge shall proceed in a summary way to hear and determine the action, and if no legal cause be shown for the restraint, or for the continuance thereof, shall discharge the petitioner.

The petition duly verified on its face shows that Wood, on the date thereof, was illegally confined in the county jail of Carter county, and as the sheriff in whose custody he was confined has failed to make any return, or offer an excuse for a failure so to do, the petitioner should be discharged. While the court has ample power to enforce obedience to its order by attachment, and require that the sheriff shall make a return to the writ, we are not required to do so, but may proceed in a summary way to determine the cause upon the verified and undenied petition.

From a consideration of the petition and numerous exhibits attached thereto, it is obvious that the petitioner was on the date complained of unlawfully restrained of his liberty, and should be discharged; and it is so ordered. All the Justices concur.

CHICAGO, R. I. & P. RY. CO. v. SWINNEY
et al. (No. 7238.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. DAMAGES \S 174(3) — FIRES — EVIDENCE — VALUE OF TREES.

In an action against a railway company to recover damages for permitting fire to escape from a railway locomotive, resulting in the destruction and injury of growing fruit trees upon the land of plaintiff, evidence as to the value of the trees while growing on the land is competent for the purpose of showing the amount of plaintiff's damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 464, 467; Dec. Dig. \S 174(3).]

2. APPEAL AND ERROR \S 237(3)—GROUNDS OF REVIEW—SUFFICIENCY OF EVIDENCE.

In the absence of a demurrer to the evidence or a motion for a directed verdict, the sufficiency of the evidence to sustain the verdict of the jury is not presented to this court on appeal, except as to excessive damages appearing to

have been given under the influence of passion and prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 237(3).]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by W. R. Swinney and John Surbeck against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

O. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, and K. W. Shartel, of Oklahoma City, for plaintiff in error. Wilson, Tomerlin & Buckholts, of Oklahoma City, for defendants in error.

RUMMONS, C. This action was commenced by defendants in error, plaintiffs below, and hereinafter so designated, against the plaintiff in error, herein styled the defendant, to recover the sum of \$304 for the destruction of 16 peach trees, 8 apple trees, 6 walnut trees, 28 fence posts, and 120 rods of fence, and for damage to 8 peach trees, resulting from a fire set by a locomotive of defendant. The case was tried to a jury, resulting in a verdict for plaintiffs in the sum of \$175. The court overruled the motion of defendant for a new trial, and entered judgment upon the verdict, to which defendant excepted, and brings this proceeding in error to reverse such judgment.

[1] The defendant makes three specifications of error, which will be considered in their order. It is first urged that the court erred in admitting, over the objection of defendant, incompetent, irrelevant, and immaterial testimony. The testimony of which defendant complains under this specification of error consists of the evidence of the witnesses of plaintiff as to the value of the trees destroyed and injured by the fire. It is insisted by defendant that this testimony was incompetent for the reason that the true measure of damages for the injury sustained by plaintiffs is the difference in value of their farm immediately before the fire and immediately after the fire, and that therefore the only competent testimony to show the damage suffered by plaintiffs would be evidence as to the value of their land immediately preceding the fire and immediately succeeding it. It is true that the rule as to the measure of damages for this class of injuries as contended for by defendant is supported by most of the courts of last resort in the United States. However, there are several courts of high standing who lay down the rule that the true measure of damages for this character of injury is the fair and reasonable value of the trees destroyed and the difference in value of those injured before and after the injury. The Kentucky Court of Appeals, in the case of Louisville & Nash-

ville Ry. Co. v. Beeler, 128 Ky. 328, 103 S. W. 300, 11 L. R. A. (N. S.) 930, 128 Am. St. Rep. 291, 15 Ann. Cas. 913, says:

"Ordinarily, where one person has negligently destroyed the property of another, he is required to compensate the person injured for the fair value of the property destroyed; and it does not lie in his mouth to say that, 'In destroying your property, which represented a large investment, I did you a service rather than an injury.' The owner of an estate is entitled to have his estate in such condition as he wants it, and to keep upon it such things as he pleases. An aviary, a skating rink, a dance pavilion, or the like, might in the judgment of the average person add very little to the value of an estate of land; and yet these things might represent a considerable investment of money. An orchard cannot be grown in a day. It requires patience and an outlay of money or labor to produce an orchard. Yet there are not a few persons who would think that the land without the fruit trees would be worth more than with them. Still the person who wants an orchard, and has invested his money in it cannot be deprived of his property by the act of the wrongdoer, and left without remedy for the loss sustained, simply because his land for other purposes or to other people might be worth as much without the orchard as with it. The railroad company here did not take the land. It simply destroyed the trees growing upon the land. We cannot see the sound distinction between the destruction of a house and the destruction of a peach tree. The question in both cases is the same: What is the value of the thing destroyed?"

The same doctrine is announced in *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653, 67 N. W. 602; *Missouri P. R. Co. v. Tipton*, 61 Neb. 49, 84 N. W. 416; *Gilman v. Brown*, 115 Wis. 1, 91 N. W. 227.

In a number of states in which the rule that the measure of damages is the difference in the value of the land before and after the fire is followed, it has been held, nevertheless, that evidence of the value of the trees destroyed and injured is competent for the purpose of aiding the jury in arriving at the difference in the value of the land. In *Missouri, K. & T. Ry. Co. v. Lycan*, 57 Kan. 635, 47 Pac. 526, the Supreme Court of Kansas says:

"The defendant also objected to witnesses being allowed to state the value of the trees and other things destroyed as a part of the freehold, on the ground that this was allowing them to assume the province of the jury and fix the plaintiff's damages. It is contended that the question should have been confined to the value of the farm as a whole before and after the injury, leaving the jury to compute the damages by deducting one from the other. While this is undoubtedly the regular and proper method of arriving at such damages as cannot be itemized and definitely measured in detail, it does not preclude the use of the best evidence which the nature of the case affords. Where a thing, whether it be a building, a tree, or a shrub, is destroyed by a wrongdoer, the most natural and best measure of the damage is the value of the thing destroyed as appertenant to, or part of, the realty; and ordinarily the value of the thing destroyed would be the measure of the injury to the freehold. If for any reason the injury to the realty should be in fact less than the value of the thing destroyed, the plaintiff's recovery would be limited to the actual diminution in value of the realty. While this might be shown, either on

cross-examination of plaintiffs' witnesses or as a matter of defense, it does not prevent proof by the plaintiff of the value of the thing destroyed as a part of the realty, as was done in this case."

The doctrine announced in the case last cited has been since followed in *Kansas*. *Kansas City, F. S. & M. R. Co. v. Perry*, 65 Kan. 792, 70 Pac. 876; *Atchison, T. & S. F. R. Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68, 1 Ann. Cas. 812; *St. Louis & S. F. R. Co. v. Noland*, 75 Kan. 691, 90 Pac. 273; *Chicago, R. I. & P. R. Co. v. Mosher*, 78 Kan. 599, 92 Pac. 554; *Atchison, T. & S. F. R. Co. v. Arthurs*, 63 Kan. 404, 65 Pac. 651.

We think the competency of the testimony complained of by defendant has been upheld by our own court in *St. Louis, I. M. & S. R. Co. v. Weldon*, 39 Okl. 369, 135 Pac. 8. Commissioner Robertson, who wrote the opinion of the court, says:

"It is next urged that the court erred in admitting incompetent evidence as to the value of the property destroyed. * * * The value of the trees destroyed was searchingly investigated by expert witness for the company. The testimony on all the items of damage was competent, and was properly submitted to the jury."

We do not consider it necessary for us to determine in this case whether the true measure of damages is based upon the value of the trees destroyed and injured or solely upon the difference in value of the land before and after the fire, since, under the authorities above quoted, the evidence offered by plaintiffs was clearly competent, and the court committed no error in overruling the objections of defendant thereto.

[2] The second specification of error alleged by the defendant is that there was not sufficient evidence to support the amount of the recovery. The defendant did not demur to the evidence of plaintiffs, and requested no instructions of the court, nor did it except to the instructions given by the court. We do not think this assignment of error is well taken, since, as we have held before, there was competent evidence before the jury from which they might have arrived at a verdict for even a larger amount. It is argued at some length that from the evidence before the court and jury the amount of damages found by the jury was considerably greater than the damage to the land measured by the rule of inquiring into its value immediately before the fire and immediately after the fire, but the defendant asked no instruction from the court upon this point, and cannot now complain, for the first time in this court, that the jury did not apply the true measure of damages to this case. *St. L. & S. F. R. Co. v. Noland*, 75 Kan. 691, 90 Pac. 273; *Muskogee Electric Traction Co. v. Reed*, 35 Okl. 335, 130 Pac. 157; *Reed v. Scott*, 151 Pac. 486.

After the jury had returned its verdict, the defendant moved the court to reduce the judgment to \$75, as being the maximum amount justified by the evidence, which mo-

tion was overruled. Upon the overruling of this motion the defendant rests its third specification of error. The defendant, having elected to go to the jury with this case upon the evidence submitted by the plaintiffs, without a request for instructions covering its view of the law applicable to the case, cannot, after an adverse verdict, ask the court to substitute its judgment for the judgment of the jury as to the damage sustained by the plaintiffs, except as to excessive damages appearing to have been given under the influence of passion and prejudice. Having concluded that the evidence as to the damages to the trees of plaintiffs was competent, and that there was competent evidence before the jury under the instructions given by the court to justify the verdict rendered, we find no merit in this third assignment of error.

The judgment of the trial court should therefore be affirmed.

PER CURIAM. Adopted in whole.

MUNSON v. FIRST NAT. BANK OF OKMULGEE. (No. 7186.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.
Record examined and *held*, that the verdict is supported by the evidence.

2. PLEADING \S 418(1)—DEMURRER—WAIVER OF ERROR.

Where the trial court, upon overruling a demurrer to the petition of the plaintiff, grants the defendant time to file an answer and he does so within the time granted, he thereby waives any error the court may have committed in overruling his demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1399, 1403; Dec. Dig. \S 418(1).]

3. STATES \S 9—TERRITORIAL COURTS—TRANSFER OF JURISDICTION ON ADMISSION OF STATE.

The county courts of the state of Oklahoma must be deemed to be the successors of the probate courts of the territory of Oklahoma.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 4; Dec. Dig. \S 9.]

4. GARNISHMENT \S 195—UNDERTAKING BY DEFENDANT—EFFECT.

Where an undertaking is executed by the defendant pursuant to the provisions of section 4838, Rev. Laws 1910, by virtue of which a garnishment proceeding against him is discontinued, he is thereby estopped from questioning the regularity of the garnishment proceeding.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 385; Dec. Dig. \S 195.]

5. STATES \S 9—COUNTY COURT—JURISDICTION.

A creditor is entitled to proceed by garnishment in the county courts of the state, under section 4822, Rev. Laws 1910, said section being applicable by virtue of section 1563, Stat. Okl. 1893, which was extended over and put in force in the state by section 2, art. 25, of the Schedule to the Constitution.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 4; Dec. Dig. \S 9.]

6. INSTRUCTIONS NOT ERRONEOUS.

Record examined, and *held*, that no reversible error was committed by the trial court in the instructions given or in refusing to give certain instructions requested.

Error from County Court, Okmulgee County; Mark L. Bozarth, Judge.

Action by the First National Bank of Okmulgee against W. A. Munson, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

D. P. Farrell, of Okmulgee, for plaintiff in error. Joe S. Eaton and L. L. Cowley, both of Okmulgee, for defendant in error.

KANE, C. J. This was an action on a promissory note, commenced by the defendant in error, plaintiff below, against plaintiff in error, defendant below. The petition was in the usual statutory form. The answer was a general denial, and an allegation to the effect that there was fraud in the procurement of the note, and a counterclaim, wherein the defendant prayed affirmative relief against the plaintiff. Upon trial to the jury there was verdict in favor of the plaintiff, upon which judgment was entered, to reverse which this proceeding in error was commenced.

[1, 2] As there was sufficient evidence to support the verdict of the jury, no questions directly pertaining to the merits of the case are subject to review. The first ground of reversal is that the trial court erred in overruling the defendant's demurrer to the plaintiff's petition. The record shows that upon overruling the demurrer, the court allowed the defendant 20 days within which to file an answer, and that in pursuance of said order the defendant filed his answer and counterclaim as above stated. By this action the defendant waived any error the trial court may have committed in overruling the demurrer. *Campbell et al. v. Thornburgh et al.*, 154 Pac. 574, not yet officially reported.

At the commencement of this action the plaintiff filed his affidavit in garnishment, pursuant to which a summons was issued against the Bank of Commerce of Okmulgee, garnishee, which answered that the defendant had certain moneys on deposit therein.

[3-5] The next assignment of error is to the effect that, the county court, the court in which the action was commenced, has no jurisdiction in garnishment proceedings. This contention is based upon the theory that, inasmuch as section 4822, Rev. Laws 1910, the section upon which the plaintiff relies for authority to proceed by garnishment in the county court, provides, "Any creditor shall be entitled to proceed by garnishment in the district court of the proper county," etc., this branch of the case must fail, because the section does not purport to grant authority to proceed by garnishment in the county court, but in the district court of the proper

county. This contention is untenable. The county courts of the state must be deemed to be the successors of the probate courts of the territory. Section 19, Enabling Act. Section 23, art. 25, of the Schedule provides that,

"When this Constitution shall go into effect, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration and guardianship, and other matters pending therein, shall be transferred to the county court of such county. * * *"

There never has been, in this jurisdiction, a separate code of procedure for the probate courts prior to statehood, nor for the county courts subsequent to statehood. Section 1563, Statutes of Oklahoma 1893, which was in force at the time of the adoption of the Constitution, provides:

"In all cases commenced in said probate courts wherein the sum exceeds the jurisdiction of justices of the peace the pleadings and practice and proceedings in said court both before and after judgment shall be governed by the chapter on civil procedure of the territory governing pleading and practice and proceedings in the district court. * * *"

This provision was extended over and put in force in the state by section 2, art. 25, of the Schedule, which provides:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

In discussing a somewhat similar question, in *Lindley v. Hill*, No. 3327, 158 Pac. 356, not yet officially reported, this court said:

"It is true that in this, as well as many other instances, the laws in force in the territory prior to statehood were not always precisely applicable to the situations created by the adoption of the Constitution; but where no greater repugnancy between them is apparent than the change in the name or style of a court having a particular jurisdiction, the courts have had very little difficulty in accommodating in a practical manner the old law to such slightly changed conditions."

In the next assignment of error counsel for plaintiff in error attacks the sufficiency of the garnishment affidavit. The record shows that on the 27th day of October, 1913, the plaintiff in error filed an undertaking for the discharge of the garnishee, as provided by section 4838, Rev. Laws 1910; that pursuant thereto, on the same day, there was made and entered an order in said cause releasing the money garnished. In *St. L. Cordage Mills v. Western Supply Co.*, 154 Pac. 646 (not yet officially reported), it was held:

"That the execution, filing, and approval of a bond in compliance with these statutes estops the defendant from questioning the regularity of the garnishment proceedings, and renders the obligors on the bond absolutely liable for the amount of any judgment the plaintiff may recover in the action, without regard to whether the garnishment proceedings were regular or not."

[8] As the balance of the assignments of error relate to exceptions to instructions given or refused by the trial court, which do not constitute reversible error, unless it appears that they probably resulted in a miscarriage of justice (section 6005, Rev. Laws 1910), it is sufficient to say of them collectively that we have examined the instructions given as a whole, and are of the opinion that they fairly and fully cover all the points of law upon which it was necessary for the trial court to advise the jury by instructions. On the whole record, we are satisfied that the cause was fairly and impartially tried, and that substantial justice has been done between the parties by the judgment rendered.

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

SAND SPRINGS RY. CO. v. BALDRIDGE.
(No. 7306.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. NEGLIGENCE — 116 — PLEADING — DEFENSE — ACT OF GOD.

The defense of an "act of God" is a special defense in actions of negligence, and to be available must be pleaded.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 194; Dec. Dig. — 116.]

2. TRIAL — 251(1) — INSTRUCTIONS — APPLICABILITY.

It is not error for the court to refuse to instruct upon an issue not within the pleadings.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587, 588, 594, 596; Dec. Dig. — 251(1).]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Tulsa County; M. A. Breckenridge, Judge.

Action by Kate Baldridge against the Sand Springs Railway Company, a corporation. From a judgment for plaintiff, defendant brings error. Affirmed.

Poe, Hindman & Lundy, of Tulsa, for plaintiff in error. William J. Gregg, of Tulsa, for defendant in error.

RUMMONS, C. This action was commenced in the superior court of Tulsa county, by the defendant in error, to recover damages from the plaintiff in error for the death of her husband, George F. Baldridge. The petition alleges that the deceased was employed by the plaintiff in error as a motorman upon its trolley line between Tulsa and Sand Springs; that on the morning of January 19th, the deceased was operating a motor car upon the line of plaintiff in error and was approaching the home station at Sand Springs, upon the schedule time of his car; that the plaintiff in error's servants and employees negligently ran another car out from a switch at said home station, upon the main line of track, without giving any warning or

signal of such movement or without any flagman being stationed to give any signal or other warning to the approaching car, operated by the deceased; that the weather on said morning was foggy and dark and the track wet and slippery, and that by reason thereof the deceased was unable to discover the other car upon the main line or track of plaintiff in error in time to bring his car under control and prevent the collision from which his death resulted; that the collision which caused the death of said George F. Baldridge occurred without fault, negligence, or carelessness upon his part, but was due wholly to the fault, negligence, and carelessness of plaintiff in error, its servants and employes, in the careless and negligent manner of their operation of said other car.

Plaintiff in error filed the following answer:

"Now comes the defendant in the above-entitled cause and denies each and every fact, matter, and thing in plaintiffs' petition alleged, and says that if said George F. Baldridge came to his death while in the employ of the defendant, that said death was caused by the negligence of said George F. Baldridge directly or by such contributory negligence as amounted to the proximate cause of said injury and death, and that the plaintiff assumed the risk of said injury, same being incident to his employment. "Wherefore defendant prays that plaintiffs take nothing by this action, and that defendant be warranted its costs."

The cause was tried to a jury, resulting in a verdict for defendant in error, upon which judgment was entered. The motion of plaintiff in error for a new trial having been overruled, it brings this proceeding in error to reverse said judgment.

The only assignment of error argued in the brief of plaintiff in error is that the court erred in refusing instruction No. 8 requested by plaintiff in error, which is as follows:

"You are instructed that the defendant had a full right under its franchise to operate its railway for the transportation of freight, and had a right incident thereto to switch cars on and off of its main line at the point near what is known as the 'Home' station on said line of railway; that if you find that under ordinary and usual circumstances said defendant could have switched said freight cars from and off said line at the point where said accident occurred without sending a flagman or switchman to warn approaching motor cars of their presence on said track, and if you find that said accident would not have occurred except for the heavy fog, and if you find that said fog was unusual and unprecedented, then you will find that said accident was caused by the act of God, and that defendant is not liable."

[1] It is insisted by plaintiff in error that the court erred in refusing said instruction, because the accident which resulted in the injury complained of was occasioned by an unprecedented fog which could not have been foreseen, and therefore was the result of an "act of God." We think this assignment of error is without merit, for the reason that the plaintiff in error, in its answer, did not plead that the accident was occasioned by an act of God. The defense of an "act of God,"

or vis major, is a special defense in actions for negligence, and, to be available, must be pleaded. 29 Cyc. 580; 2 Bates Pl. & Pr. 1201; Orient Ins. Co. v. Northern P. Ry. Co., 31 Mont. 502, 78 Pac. 1036; New Haven, etc., Co. v. Quintard, 6 Abb. Prac. N. S. (N. Y.) 128.

[2] It is true that evidence was offered by the defendant in error to show the foggy condition of the morning, but this evidence was offered upon the issue of the contributory negligence of the deceased, pleaded by plaintiff in error, to show that because of the fog and the wet and slippery condition of the track that the deceased was not guilty of contributory negligence in not discovering the presence of the other car upon the track in time to avoid the collision. The defense that the collision was occasioned by an act of God appears to be presented in this case, for the first time, by the requested instruction. It has been repeatedly held by this court that it is not error to refuse to instruct the jury upon matters not put in issue by the pleadings. First Nat. Bank v. Walworth, 22 Okl. 878, 98 Pac. 917; Ft. Smith & W. R. Co. v. Collins, 26 Okl. 82, 108 Pac. 550; Finch v. Brown, 27 Okl. 217, 111 Pac. 391; Redus v. Mattison, 30 Okl. 720, 121 Pac. 253; Chambers v. Van Wagner, 32 Okl. 774, 123 Pac. 1117; Kennedy v. Goodman, 39 Okl. 470, 135 Pac. 936. It necessarily follows, therefore, that the court did not err in refusing the requested instruction.

This being the only error complained of by plaintiff in error, the judgment of the court below should be affirmed.

PER CURIAM. Adopted in whole.

PINKSTON et al. v. MARLOW. (No. 7195.) (Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 977(3)—REVIEW—DISCRETION OF TRIAL COURT — GRANT OF NEW TRIAL.

In this jurisdiction, "the discretion of the trial court in granting a new trial is so broad that its action in so doing will not be disturbed on appeal, unless the record shows clearly that the court has erred in its view of some pure and unmixed question of law, and that the order granting a new trial is based upon such erroneous view of the law."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3862; Dec. Dig. \S 977(3).]

2. NEW TRIAL \S 5—MOTION—WAIVER.

Record examined, and held, that it does not show clearly that the action of the trial court in granting a new trial is based upon an erroneous view of a pure and unmixed question of law. Held, further, that the defendant did not waive his motion for a new trial, filed in due time, by subsequently filing an unauthorized supplemental motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 8, 13; Dec. Dig. \S 5.]

Error from District Court, Carter County A. Eddleman, Judge.

Action by Geo. E. Pinkston and others against J. W. Marlow. Judgment for defendant, and plaintiffs bring error. Affirmed.

T. G. Haile, of Kiowa, and M. C. Haile, of Atoka, for plaintiffs in error. H. A. Ledbetter, of Ardmore, for defendant in error.

KANE, C. J. This was a suit to quiet title, commenced by the plaintiffs in error, plaintiffs below, against the defendant in error, defendant below.

Hereafter the parties will be designated as "plaintiffs" and "defendant," respectively, as they appeared in the trial court.

Upon trial to the court there was judgment for the plaintiffs, whereupon the defendant, in due time, filed a motion for new trial. During the same term at which the judgment was rendered the motion for new trial came on to be heard, which, upon motion of the defendant, was continued until the next term of the said court. During the next term the motion for new trial coming on again to be heard, and the court, upon motion of the defendant, continued said hearing until the following September, 1914, term of said court. During the September term of said court the defendant filed in said court his supplemental motion for new trial. Thereafter, on the 9th day of September, 1914, the cause came on for hearing upon the motion of the defendant for a new trial and the supplemental motion of the defendant for new trial, and the court, after hearing the said motions, and being sufficiently advised in the premises, sustained the motion for new trial.

The only assignment of error contained in the petition in error presents for review the action of the trial court in sustaining the motion for new trial. The contentions of counsel for plaintiffs, as stated in their brief, are as follows:

"(1) That the defendant in error waived his original motion for a new trial by filing a supplemental motion which set up new grounds for a new trial and in direct conflict with defendant in error's theory of the case on the original trial.

"(2) That a supplemental motion is not permissible under our Code in any case, but in order for a court to grant a new trial upon newly discovered evidence the application must be made upon petition, and the procedure taken as provided by section 5037 of the Revised Laws of Oklahoma 1910."

We are unable to gather from the record before us that the court sustained, or, indeed, took any action on the supplemental motion for new trial. The order sustaining the motion for new trial recites that:

"On this 9th day of September, 1914, came on for hearing the original motion for new trial herein and supplemental motion for new trial, and it appearing to the court that this cause was tried before the Hon. Stillwell H. Russell and judgment rendered by him for the plaintiff, Geo. E. Pinkston, and it being necessary that

the testimony heard at the trial aforesaid to be transcribed before this court could intelligently pass upon said motion, the testimony taken at the trial of this cause was transcribed by the court reporter in order that the court may have the same before him on the motion for new trial, and the court, after having heard the testimony offered at the former trial, the argument of counsel thereon and being well and sufficiently advised in the premises, is of the opinion that the motion for new trial herein is well taken and that the defendant should be granted a new trial herein."

[2] Obviously the court acted upon the motion for new trial and not upon the supplemental motion based upon newly discovered evidence. We may assume then, as counsel contends, that such supplemental motion is not permissible under the Code, except as stated by them; and still we are at a loss to understand why the action of the court upon the motion for new trial should be disturbed. Counsel for plaintiffs seem to contend that by filing a supplemental motion for new trial the plaintiff waived his motion for new trial, and in support thereof cite authorities to the effect that:

"It is a familiar rule that when a party has the choice of two remedies he must make his election between them, and after he has made such election he cannot pursue the other remedy. This election may be made by actions amounting in themselves to a choice of remedies."

This rule is inapplicable to the case at bar. In this case the defendant, according to the statement of counsel for plaintiff, had but one remedy, and that was his motion for new trial. Filing an unauthorized motion, which the trial court seems to have disregarded, certainly would not deprive him of having his motion for new trial acted upon by the trial court.

[1] In this jurisdiction—

"the discretion of the trial court in granting a new trial is so broad that its action in so doing will not be disturbed on appeal, unless the record shows clearly that the court has erred in its view of some pure and unmixed question of law, and that the order granting a new trial is based upon such erroneous view of the law." *St. L. & S. F. R. Co. v. Wooten*, 37 Okl. 444, 132 Pac. 479; *Shawnee F. Ins. Co. v. Board*, 44 Okl. 3, 143 Pac. 194.

In the case at bar the motion for new trial contains all the statutory grounds for a new trial, and this court is unable to say upon what ground the court below sustained it. It is quite apparent though, from the excerpt from the order overruling the motion for new trial hereinbefore set out, that he weighed the evidence very carefully, as he declined to pass upon the motion until the evidence taken at the trial was transcribed by the court reporter. In such circumstances it cannot be said that the record shows clearly that the court has erred in its view of some clear and unmixed question of law.

For the reason stated, the judgment of the court below is affirmed. All the Justices concur.

GAFFORD v. DAVIS et al. (No. 4208.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 197(3)—HARMLESS ERROR—VARIANCE.

Though there be a variance between the allegations of a petition and the facts proven without objection at the trial, yet, if it is a case where an amendment to conform to the proof should have been allowed, the judgment will not be reversed solely because of such variance.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 197(3); Pleading, Cent. Dig. \S 1438.]

2. APPEAL AND ERROR \S 233(2)—GROUNDS OF REVIEW—RECEPTION OF EVIDENCE—WAIVER OF RIGHT TO OBJECT.

A party cannot complain of the admission of evidence over his objection to a single question, where he permits like evidence of other witnesses to be admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 233(2); Trial, Cent. Dig. \S 192.]

3. QUIETING TITLE \S 12(1)—POSSESSION BY COMPLAINANT—NECESSITY.

Though the plaintiffs in a suit for the cancellation of certain deeds and to quiet title were not in possession of the lands, the title to which was involved, and could not for that reason maintain the suit, yet where the defendant seeks affirmative relief, and asks to have his own title quieted, this gives the court jurisdiction of the whole controversy.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. \S 8; Dec. Dig. \S 12(1).]

4. CANCELLATION OF INSTRUMENTS \S 47—EVIDENCE.

Evidence examined, and held to sufficiently support the decree.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. \S 102, 103; Dec. Dig. \S 47.]

Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action by Richmond Davis and others against J. A. Gafford. Judgment for plaintiffs, and defendant brings error. Affirmed.

C. Guy Cutlip, of Wewoka, for plaintiff in error. J. A. Baker, of Wewoka, for defendants in error.

SHARP, J. This case presents error from the district court of Seminole county, and involves the title to the allotment of Scipio Davis, a Seminole freedman. The action was brought by Scipio's heirs to cancel a deed to said land, purporting to have been executed by Scipio during his lifetime, and in which deed one Charles O. Tate was named as grantee. Some weeks after the purported execution of said deed by Scipio to Tate, the latter conveyed by warranty deed to the plaintiff in error, J. A. Gafford. The court in its decree found for the plaintiffs and ordered canceled each of the deeds named.

Two principal points for reversal are urged by counsel for plaintiff in error: (1) That the judgment is contrary to the law and the evidence; (2) that plaintiffs were not in posses-

sion of the lands involved, either by themselves or tenants, at the institution of the action. The main contention under the first assignment is that as the petition charged that the purported deed from Scipio to Tate was invalid for the reason that Scipio never at any time executed, acknowledged, or delivered said deed, nor did he authorize any one else to sign, execute, or deliver such deed for him, but that said deed was a forgery and conveyed no title to said land or any part thereof, the finding of the court that Scipio was incompetent to make a deed was not within the issues and was contrary to the law and the evidence.

[1, 2, 4] Plaintiffs introduced as witnesses Dilsey Holt, a granddaughter, Jane Washington, a daughter, Hannah Davis, a granddaughter of Scipio and daughter of Jane Washington, and Willie Holt, husband of Dilsey Holt—each of whom testified that on the occasion of the visit of R. M. Tate and Bud Carter at the home of Scipio, at the time the deed was claimed to have been given, that Tate at no time entered the house where Scipio was, though all testified that Bud Carter, a distant relative of the plaintiffs, was in the room with him for a short time; and, further, that no deed in fact was ever executed. The only material evidence on the part of the defendant was that of R. M. Tate, who testified that together with Bud Carter he witnessed Scipio's mark, and as a notary public took his acknowledgment. R. M. Tate was a brother of Charles O. Tate, and according to the testimony was representing the latter in the purchase of the land. At the time the deed was said to have been executed, Scipio Davis was a very old man—one of the witnesses testifying that he was 105 years old. All testified that at the time he was helpless as a child, and had to be constantly cared for and looked after by his children and grandchildren, who lived with him, or in nearby cabins. R. M. Tate admitted that on account of the transaction he had been arrested, but testified that he thought the case against him had been dismissed. Don Campbell, a witness for defendant on an immaterial point, being asked on cross-examination in respect to R. M. Tate's general reputation for truth and veracity in the community, having qualified, stated that he did not think it was "very bad." The deed from Scipio to Charles O. Tate recites on its face a consideration of \$1 and other good and valuable considerations, but R. M. Tate testified that he gave Scipio \$20 for his 40-acre allotment. What the other good and valuable considerations were does not appear, though two of Scipio's kinsmen testified that Bud Carter left with either Dilsey or Scipio a box of ginger snaps. However that may be, we are not called upon to pass upon the question of the sufficiency of the consideration, for we are convinced from the evidence

in the record that no deed was ever executed by the sick, helpless, ignorant centenarian. Whether the execution was in fact a forgery, either in the first or second degree under the statute, need not be considered, for the reason that the testimony offered by plaintiffs, tending to show the utter incompetency of Scipio Davis to understand or comprehend the nature of the transaction, was introduced without objection on the part of the defendant, except as to one question. The rule is well recognized, in this jurisdiction, that where no sufficient objection is made that the evidence offered is not within the issues, and proof is submitted which may tend to enlarge the issues, if the case be one where the amendment of the petition ought to have been allowed to conform it to the facts proved, the judgment will not be reversed solely on the ground of a variance between the facts proved and the allegations of the petition. *Mulhall v. Mulhall*, 3 Okl. 304, 41 Pac. 109; *Love v. Kirkbride Drilling & Oil Co.*, 37 Okl. 804, 129 Pac. 858; *Homeland Realty Co. v. Robinson*, 39 Okl. 591, 136 Pac. 585; *Missouri, O. & G. Ry. Co. v. Collins*, 150 Pac. 142. It is true, upon the direct examination of *Richmond Davis*, counsel for defendant objected to one question touching the competency of Scipio to make a deed. All other evidence of like character was admitted without any form of objection. In such circumstances, error in permitting the witness to answer the question will not be sufficient ground for a reversal of the judgment. It has frequently been held that a party cannot complain of the admission of evidence over his objection, where other evidence of the same tenor was admitted without objection. 3 C. J. 815; *Douglas Land Co. v. T. W. Thayer Co.*, 107 Va. 292, 58 S. E. 1101; *McPherson v. Andes*, 75 Mo. App. 204; *Gulf, C. & S. F. R. Co. v. John*, 9 Tex. Civ. App. 342, 29 S. W. 558; *San Antonio v. Potter*, 31 Tex. Civ. App. 263, 71 S. W. 764. For the reasons stated, we do not think the first assignment well taken.

[3] The assignment that the plaintiffs were not in possession of the lands in controversy, either by themselves or tenants, at the institution of the action, overlooks the fact that the defendant in his answer, after setting up title in himself to the land in question, asked that judgment be entered decreeing the valid title to said land to be in him, and quieting his title to said premises as against plaintiffs' claims and demands. Such being the case, the court had jurisdiction without regard to whether in fact the plaintiffs were or were not in possession. The precise question was involved in *Davenport v. Wolf et al.*, 158 Pac. 882, recently decided by this court, and not yet officially reported, where it was said that it is no objection to the jurisdiction of the court, in an action to quiet title, that plaintiff is not in possession, where defendant files a cross-petition, asking

that his own title be established and quieted, as the court is thereby given jurisdiction of the entire controversy. The opinion is well fortified by authorities, and the rule announced is decisive of the question.

The other points urged for a reversal are without sufficient merit to call for a further consideration of the case.

The judgment of the trial court is affirmed. All the Justices concur.

LUSK et al. v. EDDINGTON. (No. 7638.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

RAILROADS. §265.—OPERATION—COMPANIES
LIABLE—LICENSEE.

Where the receivers of a railroad company, by mere license or permission of another railroad company, without being the lessees of such company, run trains over a road owned and operated by such other company, and in so doing, kill live stock on such road, which injury occurs, not from any negligence in the operation of the particular train, but in consequence of the omission to inclose the road with a good and lawful fence, such receivers are not liable.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 838-853; Dec. Dig. §265.]

Commissioners' Opinion, Division No. 4. Error from County Court, Carter County; Thomas W. Champion, Judge.

Action by S. P. Eddington against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiffs in error. J. B. Champion, of Ardmore, for defendant in error.

EDWARDS, C. As a matter of convenience, the parties will be referred to as plaintiff and defendants, according to their position in the lower court.

This action was instituted by the plaintiff, in the justice court of Carter county, and from the judgment rendered for the plaintiff in that court was appealed to the county court, and there tried and judgment again rendered for the plaintiff, and the defendants appeal to this court. The record discloses that on the 11th day of July, 1914, a yearling bull, the property of plaintiff, was killed upon the railroad right of way at Mullen's Crossing, four miles east of Ardmore, and that on the 7th day of July a cow, the property of plaintiff, was killed about three miles east of Ardmore. This action is to recover damages for the killing of said animals. The record discloses that the line of railway upon which the animals were killed is owned by the Rock Island Railroad, but that the defendants, as receivers of the Frisco Railroad, operated trains over said line. The

theory of the plaintiff is that by reason of the failure, refusal, and neglect of the defendants to keep up the fence along the right of way, which they wrongfully, carelessly, and negligently permitted to be left open and down, that the live stock strayed upon the right of way and were killed. No one testifies as to the actual circumstances under which the animals were killed, but from the time fixed by some of the witnesses, at which the train of the Frisco passed over this part of the track, there is possibly evidence to warrant the jury in finding that the animals were killed by a Frisco train.

The statute covering the fencing of its line by a railroad (sections 1435 and 1438, Revised Laws of 1910) is as follows:

"1435. It shall be the duty of every person or corporation owning or operating any railroad in the state of Oklahoma to fence its road, except at public highways and station grounds, with a good and lawful fence."

"1438. Whenever any railroad corporation or the lessee, person, company or corporation operating any railroad, shall neglect to build and maintain such lawful fence, such railroad corporation, lessee, person, company or corporation operating the same, shall be liable for all animals killed by reason of the failure to construct such fence."

In the case of *K. C., F. S. & G. Railway Co. v. Ewing*, 23 Kan. 273, under a similar statute, it is held:

"Where a railway company, by the mere license or permission of another company, runs an engine over the road of the latter company, without being the assignee or lessee of such company, and a cow is killed by the engine on the road, which injury occurs not from any negligence in the running of the engine, but in consequence of the omission to inclose the road with a good and lawful fence, to prevent animals being on such road, a judgment for damages, attorney's fees and costs may be properly rendered against the company owning the road."

The court declined to decide whether or not the company operating the particular train by which the animals were killed would in any event be liable.

It is not contended in the case at bar that these defendants, or the railroad company for which they are receivers, owned the road upon which the animals were killed, nor is it contended that they operated the same or that they did more than operate trains upon this line of road, which was owned and operated by another railroad corporation.

In the case of *K. P. Ry. Co. v. Wood*, 24 Kan. 619, in which the Kansas Pacific Railway Company was sued for damages for animals killed upon its road by reason of failure to fence and in which the plaintiff recovered judgment against the railroad company for damages for stock killed by a train upon such road, operated by the receivers, the question was, whether or not the company or the receivers were liable. Justice Brewer, in rendering the opinion, says:

"Upon the other question, as the statute has made no exception on account of a receiver, the courts are not warranted in making one. This is not a case in which a party is relieved

from a statutory duty because a superior duty or force prevents compliance. It may be true, as counsel urge, that after full possession has been transferred to the receiver, the company may not enter to build the fence, and that the court appointing the receiver would punish for contempt any such interference with his possession. If the statute had been enacted after the appointment of a receiver, it may well be that this argument would be conclusive. But here the statute was in force years before the appointment of any receiver. The company failed to comply with its behests. It accepted the alternative, i. e., liability for all stock killed by trains run upon its road. This liability arises, not from any negligence in the running of the trains, any misconduct of the receiver or his employees. If it did, it might well be argued that his should be the responsibility. The default is that of the company. It did not complete its road as the statute contemplated that it should be completed. It is not the theory of the law, that the receiver succeeds to the company in all its powers and duties of construction and completion of the road. He simply preserves the property pending the litigation for its future owners. He takes the road as he finds it, and unless specially ordered otherwise by the court appointing him, he discharges his full duty, and is guilty of no omission, no misconduct, if he turn it over at the close of his trust in as good condition as he received it. So that it cannot be said that the want of a fence is his default. Whether the property of the corporation in his hands can be charged with injuries resulting from the default of the company prior to his appointment, we need not stop to inquire. By the record, the only one in default was the company, and it alone is sought to be charged with the responsibility. * * *

"A distinction may be drawn between those statutory duties which require constant action on the part of those operating the road, such as ringing the bell at every crossing, and those which, like the one in question, are of the nature of permanent improvements. If the company has complied with the former while it was running and operating the road, an omission during the possession of the receiver may not be the default of the company. But an omission of the latter, when the company had the power and opportunity to obey, is its default, and one for which it remains liable so long as its chartered relations continue to the road."

There is no particular difference between the statute under consideration by the Kansas court and the statute here. It will be observed that by our statute (section 1438), supra, the lessee, person, company, or corporation operating any railroad, who shall neglect to build and maintain a lawful fence, is made liable for all animals killed by reason of such failure. This statute does not require that the train doing the injury be owned and operated by the company owning and operating the road, but the liability fixed is general for "all animals" killed. The statute does not mention the matter of negligence in the management of the train doing the injury, nor make the liability contingent in any particular upon negligence in its operation, and, in our judgment, if the negligent operation of a train would make the company operating the same liable for the animals killed by such negligence, it would still not relieve the company owning and operating the road from its statutory liability by reason of failure to build and maintain a

fence. In the case at bar, however, there is no competent evidence whatever that there was any negligence in the operation of the train by which the animals in question were killed, and, in the absence of such evidence, the defendants in this case are not liable.

The cause is reversed and remanded.

PER CURIAM. Adopted in whole.

HASKEW v. KNIGHTS OF MODERN MACCABEES. (No. 6957.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. INSURANCE — §817(1) — FRATERNAL BENEFIT INSURANCE — PROOFS OF LOSS.

In an action on a benefit certificate of a fraternal insurance association, the plaintiff must prove a reasonable compliance with the requirements of the association as to the furnishing of proofs of death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1989, 2000; Dec. Dig. §817(1).]

2. INSURANCE — §789(1) — FRATERNAL BENEFIT INSURANCE — PROOFS OF LOSS.

A member of a fraternal insurance association, in his application for membership, agreed that no claim by his beneficiary should be valid until proofs were made and filed, establishing such claim in accordance with the laws, rules, and regulations of the association in force at the time such claim was made. Upon the death of the insured, and after proofs were received, the association requested that the proofs be made in a manner not provided for in the laws, rules, and regulations. *Held*, that the officers of the association were without power to impose further duties upon the beneficiary as to the manner of making the proofs of death; that the beneficiary could not be required to comply with such unwarranted requests; and that from the record it appears that the proofs of death reasonably complied with the laws, rules and regulations of the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1963, 1964; Dec. Dig. §789(1).]

3. INSURANCE — §789(2) — FRATERNAL BENEFIT INSURANCE — PROOFS OF DEATH — WAIVER OF OBJECTIONS.

Where proofs of death are received and retained without condition or objection, except to demand compliance with certain requests of the association, which requests it had no authority to make, the association will be held to have waived any objections thereto, which it might otherwise have urged.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1965; Dec. Dig. §789(2).]

4. INSURANCE — §806(1) — FRATERNAL BENEFIT INSURANCE — ACTIONS — CONDITIONS PRECEDENT.

The failure of a fraternal insurance association to comply with the provision of its by-laws, in regard to the disapproval of death claims, excuses the beneficiary from complying with the further and related provision, that all claims must be submitted to the proper tribunals within the order before commencing a suit in law or equity, and permits such beneficiary to maintain an action on the benefit certificate in the courts of this state, without first having sought relief in the tribunals of the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1987; Dec. Dig. §806(1).]

Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by Mollie Haskew, née Curington, against the Knights of Modern Maccabees. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

J. M. Crook, of Oklahoma City, and W. B. Stone, of Durant, for plaintiff in error. Porter Newman and Frank E. Jones, both of Durant, and S. H. Kyle, of Bisbee, Ariz., for defendant in error.

SHARP, J. This was an action to recover \$1,000 on a benefit certificate issued April 13, 1906, by defendant, Knights of Modern Maccabees, to James Henry Curington, plaintiff being the beneficiary named therein. The insured died May 22, 1906, a member in good standing of defendant order, at which time the plaintiff was a child 11 years of age. Notice of the death of the insured was sent to the association, and blank proofs of death were by it sent to plaintiff's mother, to be filled out as directed. Said proofs of death were filled out July 3, 1906, and returned to the association, which received them July 28, 1906. The association then sent notice to plaintiff's mother that she must be appointed guardian, and sent new blank proofs of death upon which the guardian should make out the required proofs. In 1907 a copy of the appointment of plaintiff's mother, as her guardian, was sent to the association, but it still objected that the claimant's affidavit was signed by the minor child, and not by the guardian. In 1909 and 1910, it seems that further attempts were made to comply with the requests of the association, and on April 7, 1913, new affidavits were sent to it by her. Being unable to effect a settlement, action to recover the amount of the benefit certificate was commenced July 23, 1913. Trial was had to the court, and judgment rendered for the defendant. Motion for a new trial having been overruled, plaintiff brings error to this court.

Plaintiff in error seeks a reversal of this case upon two grounds: (1) That the court erred in finding that sufficient proofs of death were not made out by the beneficiary; (2) that the court committed error in concluding that it was incumbent upon the beneficiary to first seek redress in the order itself before commencing an action in the courts.

With regard to the first proposition, it is complained that the court erred in finding that the proofs of death made out July 3, 1906, were not a sufficient compliance with the requirements of the association. In the application for membership it was agreed by the insured as follows:

"I further agree that no claim by myself or my beneficiary shall be a valid claim against this order until proofs shall be made and filed

establishing such claim in accordance with the laws, rules, and regulations of the association in force at the time such claim is made, and the failure to file such proof shall be in itself a good defense to any action which may be brought upon the certificate issued upon this application."

By the parties to this action it is stipulated and agreed that the only by-law of the society having to do with the making of proofs of death, introduced in evidence, is section 84 of the by-laws, reading as follows:

"Immediately upon the death of a life member in good standing proofs thereof shall be sent to the great record keeper, on the form prescribed by the executive committee, and under the seal and signed by the commander and record keeper of the tent of which he was a member, and must state his name in full, date of joining the order, date and cause of his death, amount contributed to the life benefit fund, and the name of the person or persons, if known, to whom the benefits are to be paid. Upon the approval and receipt of such proofs the same shall be laid before the proper officers and upon such approval shall be paid by warrant of the order as provided in these laws."

The other stipulations regarding the furnishing of proofs of death are as follows:

"It is hereby agreed and stipulated that Beulah Curington has duly qualified and made the bond required by law, and had letters of guardianship issued to her over the person and estate of Mollie Curington, a minor, on the 14th day of October, 1906, by the county court of Fannin county, state of Texas, and the said appointment was in all respects regular and as made and provided by law in such cases.

"Statement of death of James H. Curington: On the 28th day of May, 1906, M. L. Guthrie, record keeper, A. C. Hooker, commander, and T. H. Seely, tent physician, of the local tent of Knights Modern Maccabees, of Santa Anna, Texas, prepared and sent to the great record keeper, A. M. Slay, at Port Huron, Michigan, on the forms prescribed by the executive committee of said order, a statement showing the death of James H. Curington, the cause of death, duration of last illness, the name of the tent physician, date of initiation, that deceased was a member of said tent, the name of the beneficiary, which was in the usual form.

"[Signed] M. L. Guthrie, Record Keeper.
A. C. Hooker, Commander.

"Proof of death of James H. Curington: On the 3d day of July, 1906, statement by E. L. Howard, the physician who attended James H. Curington, in his last illness, and Sam Allen, the undertaker, who buried James H. Curington, both of Brownwood, Texas, were made out on the blanks prescribed by the executive committee, in the usual form, and sworn to by said E. L. Howard, and Sam Allen, and transmitted to the great record keeper at Port Huron, Michigan. That said statement was duly signed by A. C. Hooker, commander, and M. L. Guthrie, record keeper of the local tent, at Santa Anna, Texas, but not under oath. This proof was received by the record keeper on July 28, 1906.

"The proofs of death, 1913: That on the 7th day of April, 1913, the beneficiary, Mollie Haskew, formerly Mollie Curington, but who had married prior to this date, sent to the great record keeper at Port Huron, Michigan, upon the blanks furnished by him an affidavit of herself to establish proof of the death of James H. Curington, and her interest in the policy held by him, in said order, which said affidavit showed that said affiant was the daughter of the deceased, James H. Curington, and named in the policy, carried by him in said order as the beneficiary, and on the 13th day of January, 1913, E. L. Howard made an affidavit to the effect

that he was a practicing physician, and attended the said James H. Curington in his last sickness; that the cause of his death was gastralgia; that said death occurred on the 22d day of May, 1906, at Thrifty, Texas; that same was filled out on blanks furnished by said order and was in proper form and sworn to."

[1] An examination of these agreements will show that the by-law as to proofs of death was complied with. It is true there is in the record testimony of A. M. Slay, to the effect that the proofs were not properly made out; but none of the facts upon which he based his statement showed that the proofs were not in reasonable compliance with the application of the insured and with section 84 of the by-laws. That a reasonable compliance in such cases is all that is required, this court has previously held. *St. Paul F. & M. Ins. Co. v. Mittendorf*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651; *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 333, 129 Pac. 16. See 2 Bacon, *Benefit Societies and Life Insurance*, § 404.

[2] The beneficiary having complied with the requirements of the order, it was not incumbent upon her to furnish additional affidavits called for by it. In *Modern Order of Praetorians v. Kennedy*, 157 Pac. 926, the society defended the action on the ground that the insured, prior to his death, had allowed his certificate to lapse for failure to pay dues, and in his application for reinstatement had made false warranties, whereby the defendant was released from liability under the certificate. Under the constitution of the order it was not required that a member, who had allowed his certificate to lapse for 30 days or less, should make a written application for reinstatement; and it was held in the opinion that the association did not have the right to require him, as a condition precedent to reinstatement, to make such written application, and, therefore, that any statements which he made in the application for reinstatement were not binding upon his beneficiary as warranties or otherwise. And so, in the present case, the beneficiary not being required by the laws, rules, and regulations of the association to make out and forward the additional affidavits requested, the association was not justified in refusing consideration of the claim by reason of the failure to comply with such arbitrary requests.

[3] The testimony shows that the proofs of loss furnished by the beneficiary at different times were not returned to her, but were retained by it, and additional affidavits demanded. This is very much the state of facts which was before the court in *Pacific Mut. Life Ins. Co. v. O'Neil*, 36 Okl. 792, 130 Pac. 270. In that case, the proofs were received and retained by the insurance company without condition or objection, except to call for the names of additional witnesses who were passengers on the train at the time of the insured's death. It was held that the company by such conduct on its part waived any

objection to the proofs, though they may not have been in the form required by the policy.

[4] Under the facts of this case, was it incumbent upon the plaintiff to have first sought her relief in the tribunals of the defendant order before the institution of the present action? The court's ruling in favor of the plaintiff is clearly based upon the following condition of the by-laws:

"Sec. 60. The executive committee shall decide on all death claims referred to it, and if in its judgment any such claim is not on its face a valid one, it shall notify the beneficiary of the deceased member thereof, and give them or their attorneys an opportunity to appear before such committee within sixty days thereafter, and present such evidence as they may have to establish the justness of said claim, and the said committee shall try, hear and decide upon the justness or validity of such claim, and such decision shall be binding on such claim, unless an appeal is taken to the great camp. The notice of the appeal from the decision of the committee must be filed with the great record keeper within sixty days thereafter. The decision of the great camp in all such cases shall be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary against the order until every remedy provided by its law has been exhausted."

In fact this position of the trial court is made evident by its finding No. 10, which reads:

"That as to whether the attempted proofs of death made from the time of the death of James H. Curington, up to and including those made in the year 1918, all combined, fulfilled the laws of the order, I make no finding, but if it should be true that they, taken together, fulfilled the requirements, still I find after the proofs of death were complete, that is, the last attempted proofs sent it, the law requiring the beneficiary to pursue the remedies therein named against the order in the tribunals of the order was not complied with and that before she can maintain this suit, it is necessary that she exhaust her remedies in the tribunals of the order."

And in the conclusions of law, the court's decision specifically states the reason for reaching its conclusion:

"I conclude that at the time of the death of James H. Curington, the plaintiff herein had a valid claim for the sum of one thousand dollars against the defendant order and that upon making proper proofs of death and pursuing the remedy in the tribunals of the order, she would have been entitled to recover a thousand dollars, and if the tribunals of the order had failed to grant her relief she could have established her claim in the courts. But that because of such failure on the part of the plaintiff she cannot recover in this action and judgment will be rendered for defendant."

There is no evidence in the record, nor is it contended by defendant in error that it at any time complied with the duties placed upon it by the by-law above quoted. The executive committee made no decision as to the justness of the claim; it did not give the beneficiary an opportunity to appear before such committee within 60 days thereafter and present such evidence as she may have had to establish the justness of her claim.

Under this by-law, before the beneficiary had any right of appeal to the great camp, it was necessary that the order should see to it that its executive committee first passed on the claim as to its sufficiency on its face, and if found lacking to so notify the beneficiary. Not having fulfilled its own duties, the association will not now be allowed to point out wherein the beneficiary under the policy has failed in not first prosecuting her appeal within the order. The question presented was before the California Supreme Court in *Schon v. Sotoyome Tribe*, No. 12, I. O. R. M., 140 Cal. 254, 73 Pac. 996, and arose in very much the same manner as in the present case. It was there said:

"Before an order can hold a member to strict observance of its rules regulating procedure on appeal it must show that in all matters touching his substantial rights it has itself observed these regulations, and this the defendant did not do. Its dereliction in this regard excuses a claimant from exhausting his remedy within the rules of the order. *White v. Brownell*, 2 Daly [N. Y.] 329; *Carlin v. Drury*, 1 Vesey & Beams, 154. It is only upon such compliance with its own regulations that the defendant acquires the right to invoke the above-quoted provisions forbidding a member or other claimant from seeking the aid of the instituted courts for relief. The courts themselves are willing—nay, more than willing—that all such vexatious questions should be determined within the order itself, and they will never be found unduly swift in taking jurisdiction. But, upon the other hand, they will never refuse their aid to one whose substantial rights are suffering at the hands of a benevolent association through violence done by that association itself to its own prescribed rules."

And this rule was approved again by the California court, in *Neto v. Conselho Amor Da Sociedade*, 18 Cal. App. 234, 122 Pac. 973, where it was said in the syllabus:

"The rules requiring members of a beneficial association to exhaust their remedies within the society before appealing to the courts does not apply where it has violated its own laws and regulations, so as to arbitrarily invade the rights of members."

Other authorities holding that a beneficiary need not exhaust his or her remedies within the order, where the order violates its own laws, or does not give the beneficiary an opportunity to appeal, are *Ruterbusch v. Supreme Court I. O. F.*, 162 Mich. 213, 127 N. W. 288; *Kelly v. Ancient Order of Hibernians Ins. Fund*, 113 Minn. 355, 129 N. W. 846; *Kulberg v. K. & L. S.*, 124 Minn. 437, 145 N. W. 120; *Carpenter v. Modern Woodmen of America*, 160 Iowa, 602, 142 N. W. 411; *Colley v. Wilson*, 86 Mo. App. 396.

We conclude, therefore, that the court erred in both its findings of fact and conclusions of law, and that the judgment should be reversed and remanded, with instructions to the trial court to enter judgment for plaintiff in conformity with the prayer of her petition, and the proofs submitted. All the Justices concur.

TRACY et al. v. STATE ex rel. FANCHER,
Co. Atty. (No. 7261.)
(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. JUDGMENT \S 363—VACATING—GROUNDS.

It is not a sufficient ground upon which to vacate a judgment, that the defendant, nor his attorney of record, was not notified of the time that the case was set for trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 705; Dec. Dig. \S 363.]

2. JUDGMENT \S 384—PLEADING \S 8(2)—VACATING—SETTING UP VALID DEFENSE—CONCLUSION OF LAW.

It is a condition precedent to entitle one to have the judgment vacated that the party applying therefor must, if the defendant, set up in such motion or petition, a valid defense against the judgment rendered, and a motion or petition which seeks to vacate a judgment, averment that the defendant has a good defense as shown by his answer on file in the cause without making such answer a part of the motion or petition, being a mere conclusion of the pleader, is not sufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 727-732; Dec. Dig. \S 384; Pleading, Cent. Dig. \S 13; Dec. Dig. \S 8(2).]

3. APPEAL AND ERROR \S 257—PRESENTATION OF OBJECTIONS.

Where an exception is not taken to the action of a court in refusing to quash service of summons, this court will not review such action of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1494-1497; Dec. Dig. \S 257.]

4. APPEARANCE \S 20—FILING ANSWER.

Where a motion to quash the service of a summons is overruled and not excepted to, and afterwards the movant applies for leave to, and files an answer in the cause, the service of summons is waived, and the movant is properly in court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. \S 91-102; Dec. Dig. \S 20.]

Commissioners' Opinion, Division No. 1. Error from District Court, Hughes County; Geo. C. Crump, Judge.

Action by the State, on the relation of Tom H. Fancher, County Attorney of Hughes County, against W. E. Tracy and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. N. Lewis, of Davis, for plaintiffs in error. Tom H. Fancher, Co. Atty., and G. R. Stirman, both of Holdenville, for defendant in error.

COLLIER, C. This is an action by the defendant in error against plaintiff in error to recover upon a forfeited bond. The parties hereafter will be designated as they were in the trial court.

In the brief of plaintiff in error it is said:

"It is not intended that this cause should be reversed as to any other of the plaintiffs in error except as to Mat Wolf. Hence the only question involved in this appeal is as to the legality of the judgment rendered against said Mat Wolf, one of the defendants in the court below. Summons was issued to Mat Wolf, which was subsequently quashed, and an alias

summons was ordered to and did issue, was served, and the return of said alias summons was made by 'M. S. Rollins, Sheriff, H. L. Eubank, Deputy.'"

Attorney for Mat Wolf appeared especially and for no other purpose than that of the motion, and moved to quash the service upon the grounds that H. L. Eubank was not and never had been a deputy sheriff. Upon the hearing of said motion, conclusive evidence was offered that said Eubank was not and never had been a deputy sheriff.

The record in regard to the action of the court on the motion to quash the service is very indefinite, and it is difficult to determine from it whether the motion to quash was sustained or not. Thereafter the said Mat Wolf obtained leave to, and filed an answer. Subsequently judgment by default was entered against the plaintiffs in error, and motion was made by Mat Wolf, one of the plaintiffs in error, to vacate and set aside such judgment, which motion, omitting the caption, is as follows:

"Comes now Mat Wolf, one of the defendants in the above entitled and numbered cause, and respectively moves the court to vacate, set aside and hold for naught the judgment rendered in this cause on the 11th day of November, 1914, for the following good and sufficient reasons, to wit:

"For mistake, neglect, and omission of the clerk and irregularity in obtaining the judgment.

"Affiant states that on October 28, 1914, or by that time, he was ordered by this court to file his answer in said cause, and that on October 27, 1914, his verified answer in this cause was mailed to Davis, Okl., with postage prepaid directed to the clerk of the district court of said Hughes county, at Holdenville, Okl., and that this defendant did not receive any notice of the setting of the cause on the trial docket, or any notice of said cause being heard on said November 11, 1914, as shown by his affidavit attached hereto, and by affidavit of W. N. Lewis, his attorney of record in this cause, also attached hereto, and this defendant did not know that judgment was rendered against him in said cause until this date, December 16, 1914.

"This affiant says he has a valid defense to said suit as shown by his verified answer filed in said cause."

Said plaintiff in error did not make said verified answer filed in said cause a part of his motion.

On the hearing of the motion the uncontradicted evidence was: That said defendant and his attorney did not have any notice that said cause had been placed on the trial docket of said court for the November, 1914, term of said court, and that neither the attorney of Mat Wolf, nor Mat Wolf received any notice of said case being set for the November, 1914, term of court. The court overruled the motion to vacate the judgment, to which Mat Wolf duly excepted, and brings error to this court.

The specifications of error are as follows:

"As stated before, it is not contended that any error has been committed except as to plaintiff in error, Mat Wolf. Two errors are complained of as to him, to wit:

"(1) The court erred in overruling motion of plaintiff in error, Mat Wolf, to quash the service as to him.

"(2) The court erred in overruling motion of plaintiff in error, Mat Wolf, to vacate and set aside the judgment rendered by default against him."

[3, 4] As previously stated, it is difficult to determine, in the state of the record, what action was had by the court upon the motion to quash the service of alias summons issued to the plaintiff in error. If the court overruled the motion to quash said service of said alias summons to Mat Wolf, the record does not disclose that any exception was reserved to said action of the court. If the court sustained said motion to quash said service as to said alias summons, the record showing that thereafter said Mat Wolf appeared and filed an answer in the cause, such appearance was a waiver of summons, and there is, therefore, no merit whatever in the first assignment of error.

An order of court vacating or refusing to vacate an order of judgment rests much in the discretion of the court, and will not be disturbed on appeal unless plainly erroneous. *Wood v. Stell*, 27 Okl. 595, 112 Pac. 1004.

[1] The only ground upon which the motion to vacate the judgment is predicated is that neither Mat Wolf nor his attorney had notice of the setting of the case for trial, which, in our opinion, is not a sufficient ground upon which to vacate the judgment rendered.

In *Stout v. Calver*, 6 Mo. 254, 35 Am. Dec. 438, the motion for a new trial was based upon the theory of surprise by the cause coming on sooner than defendant expected. In said case the court says:

"If new trials be granted for such reasons as this, trial becomes a farce, and consequently all proceedings to obtain a judgment will be mere nullities."

In *Seifert et al. v. Holt*, 82 Ga. 757, 9 S. E. 843, it is held:

"Defendants, against whom a judgment is rendered on their absence, cannot have it set aside because of such absence, where they have shown no diligence in ascertaining when the case was set for trial."

In *Union Brewing Co. v. Cooper*, 15 Colo. App. 65, 60 Pac. 946, it is held:

"A court may set a cause for trial solely on its own motion, and without notice to the parties; there being no statutory provision governing such action."

See, also, *Bigsby et al. v. Eppstein*, 39 Okl. 466, 135 Pac. 934; *Savage et al. v. Dinkler*, 12 Okl. 463, 72 Pac. 366.

There is no law of this state that requires that attorneys or their clients be notified of the setting of the time for trial. It is the duty of any attorney to be diligent, and ascertain when his case is set for trial.

[2] That there is a valid defense to the action is a condition precedent to the vacating of a judgment. The statement in the petition that the answer filed in the case

discloses a valid defense, but said answer not being made a part of said motion, is a mere conclusion of the pleader. However, we have examined the answer of said Mat Wolf, and are of opinion that the answer does not disclose any valid defense.

Again it is admitted in the brief of the attorney for Mat Wolf that there is no merit in the first and second grounds set up in said motion for the vacation of said judgment. This leaves for consideration only the third ground stated in the motion for vacating said judgment. We think that the third ground is not of more merit than the first and second grounds of said motion, and that the court did not commit prejudicial error in overruling said motion to vacate the judgment.

This cause should be affirmed.

PER CURIAM. Adopted in whole.

O'NEIL ENGINEERING CO. et al. v. CITY OF LEHIGH. (No. 6454.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐657(3)—RECORD — DEFECTS IN CASE-MADE—AMENDMENT.

An appeal will not be dismissed by this court, upon motion of defendant in error for fatal defects in the case-made, when there is a motion timely filed herein by plaintiff in error to be permitted to withdraw such case-made for correction, supported by certificate of the clerk of the trial court showing that the defects existing in the case-made may be removed by amendment, when it appears from the record that such matters are amendable under section 5243, Rev. Laws 1910.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2830-2832; Dec. Dig. ⇐657(3).]

2. APPEAL AND ERROR ⇐653(3), 657(3) — AMENDMENT—IN APPELLATE COURT — IN LOWER COURT.

This court is without authority to amend a case-made, but will, upon motion, permit same to be withdrawn for the purpose of proper amendment under supervision of the judge of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2818, 2830-2832; Dec. Dig. ⇐653(3), 657(3).]

3. APPEAL AND ERROR ⇐801(3)—RECORD — CASE-MADE—TIME FOR SERVING.

An order, extending time for service of case-made, made under the provisions of section 5246, Rev. Laws 1910, which is regular on its face and which contains a recital, "And it appearing that notice of this application has been duly given, and it appearing that, on account of accident and misfortune which could not reasonably have been avoided by the above-named defendants, the said defendants have not been able to serve case-made upon the plaintiff within the time heretofore fixed by a previous order allowing time," will not be reviewed on motion to dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3162; Dec. Dig. ⇐801(3).]

Commissioners' Opinion, Division No. 5. Error from District Court, Atoka County; Robt. M. Rainey, Judge.

Action by the city of Lehigh against the O'Neil Engineering Company and the Southern Surety Company. Judgment for plaintiff and defendants bring error. Motion to dismiss appeal denied, and motion to withdraw case-made for correction granted.

J. G. Ralls, of Atoka, and Stanard, Wahl & Ennis, of Shawnee, for plaintiffs in error. George Trice, of Coalgate, for defendant in error.

CAMPBELL, C. The defendant in error has filed in this court its motion to dismiss the appeal herein, and the plaintiffs in error have filed a motion for permission to withdraw the case-made for correction. The ground upon which a dismissal is urged is that the case-made was not served within time. Under the record as it exists in this court, such contention is true for the reason that the case-made fails to affirmatively show that the orders of the trial court, extending the time for service of case-made, were entered of record in the trial court as required by law; but it is made to appear that such orders were actually entered by the certificate of the clerk of the trial court in support of the motion of plaintiffs in error for permission to withdraw case-made for correction in the particulars above pointed out.

[1, 2] If such orders were actually entered in the trial court, it should so affirmatively appear in the case-made. A showing is made that such orders were entered of record in the trial court and were of record at the time the case-made was served, and it is sought to have the case-made corrected so as to show the true condition of the record of the trial court in relation to such orders. Under the condition of the record in this cause, it would be unjust to dismiss the appeal without giving plaintiffs in error an opportunity to correct the case-made. A record like this one was before this court in the case of *Grayson v. Damme et al.*, 153 Pac. 1159 (not yet officially reported), and it was held:

"Upon timely motion to correct a case-made filed in this court, this court will not sustain a motion of the defendant in error to dismiss such appeal without giving plaintiff in error an opportunity to correct such record."

It has been many times held that this court will permit records to be corrected under section 5243, Revised Laws 1910, and this court, being without authority to make even proper corrections, will permit the withdrawal of records from this court for the purpose of permitting them to be corrected in the trial court under the supervision of the judge thereof, in proper cases. In fact, it has come to be a frequent practice as a means of preventing dismissals, and such amendments are favored on account of the due regard which the law has for the rights of litigants.

[3] Another question is raised by the mo-

tion which should receive consideration from this court at this time. It is contended by plaintiff in error that the trial court was without jurisdiction to make the order of April 10, 1914, extending the time for service of the case-made, after the expiration of the time fixed by the last previous order of extension. The order in question appears to have been made under the provisions of section 5243, Revised Laws 1910, and is regular on its face, and contains the following recitals:

"* * * And it appearing that notice of this application has been duly given, and it appearing that on account of accident and misfortune which could not reasonably have been avoided by the above-named defendants, the said defendants have not been able to serve case-made upon the plaintiff within the time heretofore fixed by a previous order allowing time. * * *"

It also contains an exception by the defendant in error, and thus clearly shows that it was present at the hearing, pursuant to the notice given, at which time the order in question was made. The authority for making such an order of extension is found in the statute, supra, and this court has passed upon the identical question here presented. This court, in *Spaulding v. Beidleman et al.*, 152 Pac. 367 (not yet officially reported), held:

"An order of extension, made under the provisions of section 5243, Rev. Laws 1910, which is regular on its face, and recites therein a finding by the court that accident or misfortune which could not reasonably have been avoided has been shown, will not be reviewed on motion to dismiss."

To the same effect is the holding of this court in the case of *Rogers, County Treasurer, v. Bass & Harbour Co.*, 150 Pac. 706 (not yet officially reported), where it was held:

"Where an order of extension was made under the provisions of said section 5243, and the order is regular on its face and then recites therein a finding by the court that accident or misfortune which could not reasonably have been avoided has been shown, such finding will not be reviewed in the absence of a cross-petition in error, assigning as error the finding of the court therein."

Under these decisions, the motion to dismiss does not properly present the question urged in the brief of defendant in error, and the motion should not be sustained upon this ground.

The motion to dismiss the appeal should be denied, and the motion of plaintiffs in error for permission to withdraw the case-made for correction should be granted; but the right is hereby reserved to the defendant in error to file another motion to dismiss the appeal after the said case-made is corrected, in the event the case-made as corrected does not meet the requirements of law.

The plaintiffs in error will be allowed to withdraw from this court the case-made filed herein for the purpose of having same corrected by the trial court, or under the su-

pervision of the judge thereof, so as to show the true condition of the record of the trial court with relation to the entry of record of the orders and final judgment and with relation to the exact date of the clerk's certificate to case-made, and to refile said case-made in this court within 35 days from the date of the filing of this opinion; and the plaintiffs in error will give 5 days' notice to the defendant in error of the time and place of the hearing in the matter of the correction of the case-made herein.

PER CURIAM. Adopted in whole.

TIGER v. READ et al. (No. 7433.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

INDIANS \Leftrightarrow 27(2)—LANDS—JURISDICTION OF COURTS.

Under the act of May 27, 1908, c. 199, 35 Stat. 312, the person and property of minor allottees of the Five Civilized Tribes of Indians, are made subject to the jurisdiction of the county courts of the state of Oklahoma, acting under their probate jurisdiction, and the district court is without power to decree a judgment of \$672 a lien against the rents and profits accruing from the allotment of a minor Creek Indian freedman.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 20; Dec. Dig. \Leftrightarrow 27(2).]

Commissioners' Opinion, Division No. 2. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by George Tiger against Harlan Read and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Geo. C. Beldleman, of Okmulgee, A. A. Hatch, of Tulsa, and J. C. Stone, of Muskogee, for plaintiff in error. Geo. T. Brown, of Tulsa, for defendants in error.

BRUNSON, C. This action was commenced on the 11th day of January, A. D. 1910, in the district court of Tulsa county, by the filing of a petition by T. J. Dawson, as next friend of George Tiger, a minor, against the defendants in error in this action. In the petition it is alleged that George Tiger is the owner of certain lands described therein, and that he is entitled to the immediate possession thereof; that the defendants, and each of them, are unlawfully keeping him out of the possession of the same.

For the purpose of this case it is not material as to what happened between the plaintiff and any of the defendants except G. E. Cassity. He filed a separate answer in which he denied the plaintiff's title and right to possession of the lands and claimed that he was the owner of said lands himself. He also denied each and every material allegation in the plaintiff's petition. The cause was tried to the court without a jury on the

18th day of December, 1911, and during the progress of the trial there was a stipulation made and entered into by and between G. E. Cassity and the next friend of said minor, in which it was agreed that said minor was the owner of the lands in question and entitled to the possession of the same, but that the minor was indebted to said G. E. Cassity in the sum of \$672; that judgment should be rendered against him and in favor of said Cassity for that amount, and that the court should enter judgment against him, decreeing said amount to be a lien upon the rents and profits arising from a portion of the lands in question. This agreement was made in the presence of the court and subject to his approval. He approved the same and entered judgment accordingly.

On the 9th day of July, A. D. 1914, said George Tiger, having arrived at full age and within one year after reaching his majority, filed a petition in said cause asking that the judgment so rendered against him be modified, and that that part of the judgment which decrees said \$672 as a lien against said lands be set aside for the reason that it is void, the court having no power to make the same a lien against the rents and profits arising from his allotted lands.

It is alleged in said petition that he is a citizen of the Creek Indian Nation, duly enrolled as a freedman upon the rolls made by the Commission to the Five Civilized Tribes opposite roll No. 532, and that according to the enrollment records of said commission, he reached his majority and became of age on the 1st day of August, 1913, and that the lands in question are the lands allotted to him by virtue of his being a Creek Indian freedman. That at the time the above judgment was rendered against him, he was a minor and under the age of 21 years. A certified copy of the enrollment records of the Commission to the Five Civilized Tribes, showing the date of his enrollment and his age at the time of enrollment, was attached to his petition and made a part thereof. To the petition to so modify the original judgment the defendant in error G. E. Cassity filed a demurrer, and on the 2d day of January, 1915, it was by the court sustained, to which ruling of the court the plaintiff in error excepted and refused to plead further, whereupon the court dismissed the petition and an appeal was prosecuted from said judgment to this court.

The question for our consideration is: Did the court err in sustaining the demurrer to the petition of the plaintiff in error to modify the judgment? The demurrer admits that the court entered the judgment against said minor for \$672, while he was a minor, and that said amount was decreed to be a lien upon the rents and profits of his allotted lands; admits that he was a minor and a Creek Indian freedman; that the land in

question is his allotment; admits the truthfulness of the census card and enrollment record attached to said petition and made a part of it—in fact it admits all the statements set out in the petition to modify the judgment.

The vital question here for our consideration is, whether or not, that part of the judgment is valid which makes the \$672 a lien upon the rents and profits arising from the allotment of a minor Creek Indian freedman. It is provided in the act of Congress of May 27, 1908, c. 199, 35 Stat. at Large, 812:

"That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma."

In this act exclusive jurisdiction is conferred upon the probate courts of the state of Oklahoma over the estates of minors, and it is specifically declared that the term minor shall include all males under the age of 21 years, and all females under the age of 18 years, and that in the management, leasing, and sale of the lands of the minor allottees of the Five Civilized Tribes the statute of Oklahoma prevails, with the single exception of the age when minority terminates, and the restriction being removed upon the alienation of this minor as to his allotted lands, the same could have been sold as the lands of other minors are sold by the proper county court of the state in the exercise of its probate jurisdiction. Prior to the act of May 27, 1908, no act of Congress had removed the restrictions upon the alienation of any part of the lands allotted to minors.

In the case of *Cochran v. Teehee*, 40 Okl. 388, 138 Pac. 563, the plaintiff was a minor Cherokee Indian according to the enrollment records, but as a matter of fact she was of age, and it was stipulated by and between the attorneys for the plaintiff and defendant that she was of age and that the rolls showed her to be a minor. She filed a suit in the district court asking for an accounting to her by her guardian; that he be required to pay over to her the royalties and profits accruing from her allotment. The sole question presented to the court was whether the county court exercising probate jurisdiction charged with the guardianship of minor members of the Five Civilized Tribes until they attained their majority as evidenced by the enrollment records in the office of the Commissioner to the Five Civilized Tribes are charged with guardianship of said allottees as to the profits or income derived from the allotted lands until the owner thereof attained the age of majority as shown by the enrollment records. The court, in discussing the jurisdiction of the probate courts over the person and property of minor allottees, said:

"That the statute in question placed the lands of these allottees who were minors under the jurisdiction of the probate courts of Oklahoma, and that such jurisdiction extended to a full superintending control over the lands and to the time when the said minors, as provided by

the said act, attained their majority, presents a common highway which both parties to this action travel together."

And again it is said in this opinion:

"Herein is recognized that it is the intention of the lawmakers, not to withdraw the protection of the department from such allottees so far as the proceeds arising from the sale of their lands were concerned. * * * The lands of these allottees, as conceded, are subject to such jurisdiction, and we can see no reason for holding that where the lands are exchanged for money, that then the protection is removed. * * * The act provided for the retention by the probate court of jurisdiction over the lands of these allottees until they became of age as shown by the rolls, and we believe that a reasonable construction is that, until such allottee becomes of age as shown by the rolls, the disposition of his allotted lands and the proceeds thereof are subject to the jurisdiction of the probate court without reference to what extraneous proof may show with reference to his actual age, and that it was the intention of Congress that this should be so."

It will be seen that this court held that the district court had no authority to require the guardian to make an accounting to his ward of the royalties and profits arising from the allotment of said ward, and it appears to us that the effect of this decision is, that the management of royalties and profits arising from the lands of minor allottees are restricted to and within the jurisdiction of the county courts of the state acting under their probate jurisdiction. It naturally follows that if the rents and profits arising from such lands are restricted to the management of the county courts of the state acting within their probate jurisdiction, that the judgment of the district court in the instant case making it a lien against the rents and profits of said minor Creek freedman is void.

In the case of *Redwine et al. v. Ansley et al.*, 32 Okl. 317, 122 Pac. 679, the court had under consideration rents and profits arising from restricted Indian lands. It is said in the syllabus:

"Rents and profits from the allotted lands of a deceased Choctaw or Chickasaw Indian, accruing after the death of allottee, after they have been collected and paid to the heirs, cannot be subjected by creditors of deceased to the payment of debts or obligations incurred by deceased prior to the time his allotments were alienable."

Also in the case of *Emmett Brewer v. J. S. Dodson, and American Surety Company*, 159 Pac. 329 (not yet officially reported), it is shown that Emmett Brewer was a minor Creek freedman; that he owned his allotment and considerable inherited lands, but all these lands including his own allotment were sold by his guardian through the probate court, and thereafter and while he was still a minor the district court conferred the rights of majority upon him. The guardian then had a final settlement and filed his final report in the county court, and upon a hearing thereof before the county court, said final report and settlement was approved by the court; the guardian was discharged and his bondsmen released from further liability; thereafter, and before said minor became of

age, he brought suit against the guardian and his bondsmen for the amount for which the land sold. A part of the syllabus is as follows:

2. "Where allotted and inherited lands of a minor Creek freedman allottee are sold and converted into money by his guardian, through the medium of the county court, there occurs a mere change in the form of such property, which is still charged with the trust, and remains subject to the jurisdiction of that court during the minority of the ward as defined by congressional enactment, and shown by the enrollment records."

3. "(a) A judgment conferring rights of majority upon a minor Creek freedman allottee, regardless of fraud in its procurement, is ineffectual and void in so far as it purports to empower him to transact business as an adult with reference to the proceeds of his allotted and inherited lands, or to personally maintain an action for the recovery thereof.

"(b) And where more than three years after the rendition of such judgment the allottee, while still a minor as defined by the act of Congress of May 27, 1908, and evidenced by the enrollment records, by next friend, commenced suit against a former guardian and his surety, to recover the proceeds of the sale of his allotted and inherited lands, held, that the statute of limitations had not been set in motion as to the allottee plaintiff in such action, and interposes no bar to the relief sought."

It appears to us that if the district court is without power to confer the rights of majority upon a minor Creek freedman allottee to transact business as an adult with reference to the proceeds of his allotted lands, that the district court is also without power to fix and decree a lien against the rents and profits arising from the lands allotted to such minor.

In *Truskett v. Closser*, 236 U. S. 223, 35 Sup. Ct. 386, 59 L. Ed. 549, it is said:

"Section 2 defines minors, male and female, and provides for the disposition of their property under, as stated, rules and regulations provided by the Secretary of the Interior and declares that the jurisdiction of the probate courts of the state shall be subject to its provisions. And section 6 declares to what courts the property of minors so defined shall be subject. Explicitly such property is made 'subject to the jurisdiction of the probate courts of the state of Oklahoma.' The qualification 'except as otherwise specifically provided by law' means, as said by the Circuit Court of Appeals, 'Federal Law, not State Law.'"

In *Re Frances' Estate*, 75 Pa. 224, it is said:

"It is well settled as a general rule of law, that the devise of the rents, issues and profits of land, is equal to a devise of the land."

In the case of *Otis v. Conway*, 114 N. Y. 13, 20 N. E. 628, it was held:

"Technically, rent is something which a tenant renders out of the profits of the land which he enjoys. Equitably, it is a charge upon the estate."

It will be noted that the act of Congress of May 27, 1908, supra, says:

"That the persons and property of minor allottees * * * shall * * * be subject to the jurisdiction of the probate courts of the state of Oklahoma."

The rents and profits arising from the minor's allotment in the instant case is "property" within the meaning of this act, and the judgment of the court establishing a lien against said rents and profits equitably is a charge upon the estate, and we believe that the district court exceeded his power when he undertook to establish a lien against the rents and profits arising from the allotted lands of this minor.

"A void judgment may be vacated at any time, on motion of a party, or any person affected thereby." Revised Laws of 1910, § 5274; *Phoenix Bridge Co. v. Street*, 9 Okl. 422, 60 Pac. 221; *Spies v. Stone*, 40 Okl. 542, 139 Pac. 951.

Having arrived at the conclusion that that part of the court's judgment decreeing the \$872 to be a lien against the allotted land of this minor Creek freedman is void, the judgment may be vacated and set aside at any time on motion of a party or any person affected thereby. The trial court, therefore, committed prejudicial error in sustaining the demurrer to the petition of the plaintiff asking that said judgment be modified.

The judgment of the trial court is reversed, and the cause remanded, with directions to him to set aside his judgment sustaining the demurrer and otherwise proceed with said cause in a manner not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

BARTEDES SEED CO. v. GUNN et al.
(No. 7745.)

(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

1. EXEMPTIONS \S 48(1)—PROPERTY EXEMPT—EARNINGS.

Under subdivision 16 of section 3342, Revised Laws of 1910, all current wages and earnings for personal or professional services earned within the last 90 days is reserved to the head of every family residing in the state, exempt from attachment or execution, and every other species of forced sale for the payment of debts.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. \S 64-69, 71, 72; Dec. Dig. \S 48(1).]

2. EXEMPTIONS \S 48(1)—PROPERTY EXEMPT—EARNINGS.

Under section 5199, Revised Laws of 1910, the earnings of a debtor, who is a resident of this state, for his personal services at any time within three months next preceding the issuing of an execution, attachment, or garnishment process, cannot be applied to the payment of his debts when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the maintenance of a family supported wholly or partly by his labor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. \S 64-69, 71, 72; Dec. Dig. \S 48(1).]

3. EXEMPTIONS \S 48(2)—PROPERTY EXEMPT—EARNINGS.

The object of these statutes is to give to the head of a family his current wages or his personal earnings in whatsoever manner acquired for his personal services earned within the time specified by the statute, and he is entitled thereto, although his wages or his earnings for his personal services may be reserved to him under a contract, whereby he is to receive so much for the job performed.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. \S 71; Dec. Dig. \S 48(2).]

Commissioners' Opinion, Division No. 3. Error from County Court, Canadian County; R. B. Forest, Judge.

Action by the Barteldes Seed Company against C. E. Gunn and others. Judgment for defendants, and plaintiff brings error. Modified and affirmed, with directions.

E. F. Maley and J. N. Roberson, both of El Reno, and McLaury & Hopps, of Oklahoma City, for plaintiff in error. D. F. Carl, of El Reno, for defendants in error.

HOOKER, C. The plaintiff in error recovered judgment against C. E. Gunn in the county court of Canadian county in April, 1915, for the sum of \$231.29. Thereafter, in order to enforce the collection of said judgment, it sought to subject thereto a debt due by the Stiles Construction Company to C. E. Gunn.

It appears from the evidence here that on February 16, 1915, the said Gunn made a contract with the Stiles Construction Company whereby he obligated himself to do all the hauling required in the erection of the post office at El Reno, for which he was to receive so much per 1,000 tons or yards as the case

might be, and in order to carry out the provisions of his contract he employed other parties to assist him in said hauling, and at the time of the service of the garnishment herein there was due by him to several parties moneys for their services in aiding him in the performance of said contract. It further appears that the construction company owed him about \$113 which the plaintiff in error attempted to subject to the satisfaction of its debt. It is asserted here by Gunn that, at the time of the service of the garnishment herein, he was a resident of this state with a family dependent upon him for support, and that the money attempted to be subjected here constitutes his earnings for his personal services within three months next preceding the service of said garnishment, and that for these reasons the fund due him by the Stiles Construction Company is not subject to the garnishment issued in this cause, while it is asserted by the plaintiff in error that all of said fund is subject to garnishment for the reason that the sum is due under a contract for the services of Gunn and others, and that Gunn is not entitled to claim the same as exempt. The record here discloses that Gunn made no profit from the labor of others, and the parties performing services were to receive from him the same pay as he himself received, and they are not parties to this appeal.

[1-3] It appears from an examination of our statute (section 3342, subd. 16) that:

"All current wages and earnings for personal or professional services earned within the last ninety days" "shall be reserved to the head of every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts."

And it further appears from section 5199 that:

"The earnings of a debtor, who is a resident of this state, for his personal services at any time within three months next preceding the issuing of an execution, attachment or garnishment process, cannot be applied to the payment of his debts when it is made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the maintenance of a family supported wholly or partly by his labor," etc.

Under these provisions of the statute Gunn asserts that this money involved here is not subject to garnishment. It cannot be contended that this money is due him for wages, inasmuch as the evidence conclusively shows that the money is due for services performed by Gunn and others in the performance of his contract with the Stiles Construction Company, and, if he is entitled to the same as exempt, it must be under the other provision of the statute for earnings for personal services, as there can be no claim for professional services involved here. Clearly the object of this statute is to give to the head of a family his current wages and his earnings in whatsoever manner acquired for his personal services earned within the time

specified within the statute. The court cannot extend it beyond the time nor beyond the purposes for which the statute intended to protect the head of the family, and if there should be any doubt whatever, as to the application of the statute to the fund in question, that doubt should be resolved in favor of the claimant. However, the courts cannot give to statutes of this character an application which the Legislature did not intend should be extended to it.

Under the evidence here Gunn performed some of the services for which this money was due by the construction company to him, and the same clearly constitutes his earnings, and, as we view the law, it is absolutely immaterial how the pay may be reserved to him, whether so much by the day, or week, or month, or so much for the job, it nevertheless constitutes his earnings for his personal services out of which he is entitled to his exemptions. However, for that part of the fund due by the Stiles Construction Company to him for services performed by others, we are of the opinion that he is not entitled to claim any exemptions therefrom, as many elements may enter into the same other than the personal services of Gunn, and the object of the statute, we think, is to exempt the earnings for personal services as contradistinguished from the income arising from a business involving other elements of gain; and it is clearly evident that the contract feature of the services performed by others involved many elements of profit aside from the mere personal earnings of Gunn.

The Supreme Court of Pennsylvania, in *Smith v. Brooke*, 49 Pa. St. 150, said:

"Dr. Smith employed [Adam] Hipple, a master carpenter, to build a house, and agreed to pay him \$1.50 the day for his own labor, and \$1.00 a day for each of his hands, and, from this per diem of the hands, Hipple was to receive assessments varying from 5 to 50 cents a day for each hand, according to the degree of supervision they would respectively require. On the trial of the cause, the per diem for Hipple's own labor was ascertained to amount to \$463.50—a fund which the court held to be exempted from attachment—execution by the Act of Assembly of June 16, 1836. * * * The assessments on the wages of the hands amounted to another fund of \$493.37, which the court held to be liable to attachment; and the two first errors assigned raise the question whether the court erred in holding this latter fund to be subject to attachment.

"Both in *Heebner v. Chave*, 5 Barr. 117, and in *Costello v. The Coal Co.*, 9 Casey, 241, the 'wages of laborers,' which the statute was designed to protect, were defined to be the earnings of the laborer, by his personal manual toil, and not the profits which the contractor derives from the labor of others. The cases illustrate the distinction between the two kinds of gains or rewards. It is the difference between the sale of your own labor, and a sale of another man's labor, at something more than you pay for it. What is received for another's labor over and above what is paid for it is called 'profit,' and such profits were held not to be within the protection of the statute.

"We think this ruling was right. The statute secures to the laborer and his family the earnings of his own hands, but this is its full extent and scope. If it were carried farther by judicial

decision, it would be hard to assign a limit to its operation. The profits of every enterprise might be called the wages of labor, with no great violence to language, and thus the collection of debts be abolished in many instances where ample means of payment existed. The Legislature meant nothing so unreasonable and extravagant. They only meant that what a man earned by his personal labor should not be intercepted by his creditors, but should go to supply the wants of himself and family, leaving whatever other moneys might be due to him to be seized for his debts."

Also, the Supreme Court of Wisconsin, in *Kuntz v. Kinney et al.*, 33 Wis. 512, said:

"The principal question arising in the case is one of considerable interest and importance to a large class of laborers, namely, whether the moneys garnished were exempt as the 'earnings' of the debtor under our statute. Section 40, c. 134, Tay. Stats., provides that the earnings of all married persons, or persons who have to provide for the entire support of a family in this state, for 60 days next preceding the issuing of any process from any court of record or justice of the peace against them, shall be exempt from levy, seizure, or sale upon such process; and the same shall not be liable to be garnished on attachment or other process. The debtor in this case was a married man, and had a family to support. The garnishees were indebted to him when served with process, in the sum of \$19.93, for six days' work recently performed by him with his team in hauling lumber and wood. It appears that the debtor's services per day were worth without a team \$1.50, while, working with his team, he could earn more than double that amount. The municipal court held that it was only the personal earnings of the debtor which were exempt, and that the balance which the team earned must be applied to the payment of debts. The circuit court reversed this judgment, holding, as we suppose, that not only the produce of the debtor's own industry was exempt, but also the earnings of his team. We fully agree with the circuit court in this construction of the statute.

"We assume, as we think we have the right to, upon the facts disclosed, that the debtor had but one team, and that the debt due him by the garnishees was for work performed by him and his team in hauling lumber and wood; in other words, that the debt was the gross earnings of the laborer, and of his team, itself exempt property. * * * And it seems to us that whatever the debtor—being a married person and having a family to support—may earn with his exempt team, wagon or dray, and tackle, may fairly be considered as constituting 'the earnings' which are exempt within the intent and meaning of section 40. * * * A construction which leads to such results we are confident is a violation of the policy and humane principles of the exemption laws, and is not to be adopted. It is a cardinal rule in the interpretation of such statutes that they are to be liberally construed in order to promote the object of their enactment. They are intended to benefit the laboring classes, which make up a large part of our society, and to enable them the better to provide for those dependent upon them for support and maintenance. Hence it was in *Brown v. Hebard*, 20 Wis. 326 [91 Am. Dec. 408], this court held that a debtor whose business it was to inspect flour for merchants in Milwaukee, and who had to employ others to aid him in his work, might claim the net receipts or gains of his employment as 'earnings,' when the labor was performed within the period fixed by the statute."

Also, the same author, in *Brown v. Hebard*, supra, said:

"Section 94 of chapter 134, R. S., provides that in proceedings supplementary to execution

the judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services at any time within 60 days next preceding the order cannot be so applied when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or in part by his labor. At the time this statute was enacted, the earnings of the debtor were not exempt from attachment, garnishee process, or seizure and sale upon execution. Subsequently the act of 1858 (chapter 148, R. S., p. 799) was passed which as amended by chapter 280, Laws of 1861, declares that the earnings of all married persons, or persons who have to provide for the entire support of a family in this state, for 60 days next preceding the issuing of any process from any court of record or justice of the peace against them, shall be exempt from levy, seizure, or sale upon such process; and the same shall not be liable to be garnished, or seized by attachment, or levied upon by execution, or sold on any final process issued from any court of this state. This last act worked a repeal or modification of section 94, so far as it is inconsistent with that section. By extending the exemption from execution to the earnings of a certain class of debtors for the period of 60 days, absolutely, it rendered the latter clause of section 94, as to the earnings to be excepted, etc., wholly inapplicable to that class of debtors. Debtors of the new class become absolutely entitled to the exemption of their earnings for the period of 60 days under the first clause of the section, by which the power of the judge is limited to the application of the property of the judgment debtor, not exempt from execution.

"A question is made as to the application of the act of 1858. I have no doubt it includes all persons who support themselves by the labor of their hands, without regard to the grade of such labor or the degree of skill and experience required in its performance. I think the act is applicable to the case of the present defendant, who is shown to be a debtor of the class provided for by it.

"The question then is as to the meaning of the word 'earnings,' as found in the act of 1858, without the qualifying words contained in section 94. It is not easy, perhaps, to determine the precise application of this word as used in the statute. I think a correct definition to be, the gains of the debtor derived from his services or labor without the aid of capital. If the debtor has no capital and no credit contributing to increase his profits, except the credit arising from the labor or service in which he is presently engaged and out of the proceeds of which his obligations on account of such labor or service are to be discharged, then I think his net receipts or gains from such labor or service may fairly be accounted 'earnings.' If, for example, the man whose business it is to dig a well, sink

a mine, erect a house, run a raft of lumber or a ferryboat, or to perform any of the numerous kinds of work in which the assistance of others is necessary, employs others, as he must do, to assist him, and who are to be paid as he himself is paid, out of the proceeds of the work, it seems to me that what remains after the others are paid must be regarded as his 'earnings.' We all know that there are many men who have a peculiar skill and adaptation to these different kinds of labor, who, from long application and experience, are qualified to assume the management and control of them and of others engaged in them, and when they do so, under the circumstances stated, why may not their gains, increased perhaps beyond the gains of others who have no skill and experience, be said to be the result of their personal services? I must say that I think they are the 'earnings'—the fruits of the proper skill, experience and industry—of the persons to whom they belong.

"These observations are applicable to and dispose of this case. The net proceeds of the defendant's services as flour inspector, after the payment of his employes, were his 'earnings,' and as such were exempt with the period fixed by the statute.

"The order of the court is affirmed."

We are therefore of the opinion that the part of the fund here which was due by the Stiles Construction Company to Gunn for the services performed by others was subject to the garnishment issued herein; but, for that part which was due to Gunn for services performed by him within 90 days next preceding the garnishment process here, that the same was not subject to garnishment.

There being no dispute in this case as to these various amounts, and it appearing from the evidence that the Stiles Construction Company was due to Gunn the sum of \$113.23, and that there was due by Gunn to R. E. Whalin \$22, to F. E. Wyman, \$21.71, and to C. W. York \$7.80, making a total of \$51.51.

It is therefore ordered that \$51.51 of this fund in the hands of the clerk of the county court of Canadian county be paid to the plaintiff in error and the balance thereof be paid to the defendant in error, C. E. Gunn, and that the costs here be equally divided between the plaintiff in error, Barteldes Seed Company, and the defendant in error, C. E. Gunn.

The judgment of the lower court is therefore modified and affirmed, with directions.

PER CURIAM. Adopted in whole.

HAYT v. UNION STATE BANK et al.
(No. 8962.)

(Supreme Court of Colorado. Oct. 2, 1916.)

En Banc. Error to District Court, Alamosa County; Jesse C. Wiley, Judge.

Proceeding between Charles D. Hayt, Jr., and the Union State Bank and others. Judgment for the Union State Bank and others, and Hayt brings error, and applies for a supersedeas. Application denied, and judgment affirmed.

Charles D. Hayt, Jr., of Denver, and Albert L. Moses, of Alamosa, for plaintiff in error. John T. Adams, of Alamosa, for defendant in error Union State Bank. W. W. Platt, of Alamosa, for defendant in error Sturtevant.

PER CURIAM. After a careful consideration of the record, the petition for supersedeas, and for reconsideration of the same, we are of the opinion that the judgment of the trial court should not be disturbed. The petition for reconsideration of the application for supersedeas is therefore denied, and the judgment of the trial court affirmed.

GABBERT, C. J., and BAILEY, J., not participating.

DILL v. SANDS et al. (No. 7758.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 351(2) — **PROCEEDINGS IN ERROR—COMMENCEMENT—STATUTE.**

Section 4659, Rev. Laws 1910, is applicable, by analogy, to the commencement of proceedings in error in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1915-1918; Dec. Dig. \S 351(2).]

2. APPEAL AND ERROR \S 430(1) — **SERVICE OF SUMMONS IN ERROR—NECESSITY.**

A petition in error will be dismissed on motion, even though it is filed in this court within the 6 months allowed under the statute, where no waiver of issuance and service of summons is had, and no general appearance made within such time, or where a summons is issued on a praecipe duly filed but is never served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2173, 3126; Dec. Dig. \S 430(1).]

Error from District Court, Okfuskee County; Tom D. McKeown, Judge.

Action by Roley Sands against Harvey Gregory Malot and others. From the judgment in favor of plaintiff, defendant, William H. Dill, brings error. Dismissed.

Huser & Huser, of Okemah, for plaintiff in error. Bossiter & Wright, of Okemah, for defendant in error Roley Sands.

SHARP, J. Defendant in error, Roley Sands, on January 31, 1916, filed his motion to dismiss this proceeding in error, for the reason, among others, that no summons in error, was served upon him, or any other defendant in error, either within 6 months

from the date of the judgment appealed from, or within 60 days from the expiration thereof. The records of this court show that the case made with petition in error, attached, together with praecipe for summons in error, were received for filing October 12, 1915, the last day of the statutory time for filing the appeal; that summons issued October 13, 1915, to defendants in error, but that no return was made on same. And it appears from the motion of defendant, Roley Sands, that no summons has been served on him, which fact is not controverted by plaintiff in error.

This court has held that section 4659, Rev. Laws 1906, with regard to the commencement of actions, by analogy is applicable to the commencement of proceedings in error in this court, and that the summons must be served within 60 days after the expiration of the time for filing an appeal. School Dist. No. 39 v. Fisher, 23 Okl. 9, 99 Pac. 646; Dr. Koch Vegetable Tea Co. v. Davis et al., 145 Pac. 337.

The record disclosing that defendant in error has not waived the service of summons in error, and it appearing that he was not served within 60 days from October 12, 1915, or at all, the motion to dismiss must be sustained. Coleman v. Eaton, 26 Okl. 858, 110 Pac. 672; Hartsell v. Edwards et al., 29 Okl. 119, 116 Pac. 942.

The action is dismissed. All the Justices concur.

FIRST STATE BANK OF VINITA et al. v. FAY et al. (No. 7609.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

INFANTS \S 77 — **ACTIONS—NEXT FRIEND.**

Where the guardian of an infant is removed for his failure to account to the county court for money due the infant, and no guardian is appointed to succeed the guardian removed, an action upon the bond, for the benefit of the infant, may be brought by a next friend.

[Ed. Note.—For other cases, see Infants, Cent. Dig. \S 192-194, 231; Dec. Dig. \S 77.]

Commissioners' Opinion, Division No. 4. Error from District Court, Adair County; John H. Pitchford, Judge.

Action by W. P. Fay, as next friend and guardian of Ella Morris, a minor, against E. L. Morris and others. Judgment for plaintiff, and defendant First State Bank of Vinita, Okl., and another bring error. Affirmed.

J. Berry King, of Tahlequah, and C. Caldwell, of Vinita, for plaintiffs in error. E. B. Arnold, of Stilwell, for defendant in error Fay.

EDWARDS, C. This action was brought originally by W. P. Fay, as next friend and guardian of Ella Morris, a minor, against E. L. Morris and the Southwestern Surety Insurance Company. Subsequently the plain-

tiff filed an amended petition, making additional parties defendant. The amended petition, in substance, alleges that E. L. Morris had been appointed guardian in the probate court of Adair county, for Ella Morris, his minor daughter, and other minor children, and executed his original guardian's bond to Ella Morris and others with the defendants Paden, White, and Allen as sureties, and that thereafter he executed an additional bond for the sale of real estate belonging to said minors with the International Bank & Trust Company of Vinita as surety, and that subsequently a supplemental additional bond was filed with the Southwestern Surety Insurance Company as surety thereon; that the guardian had made a sale of certain real estate belonging to said minors, had failed to account in full for the proceeds thereof, and in default thereof had been removed as guardian, and that the judge of the said county court had made a finding adjudging him in default in the sum of \$487.57, for which he and his surety, the Southwestern Surety Insurance Company, were found liable. After demurrers had been overruled the Southwestern Surety Insurance Company and the International Bank & Trust Company both filed answers, in which it is alleged, in substance, that the surety had no notice of the hearing at which the guardian was found to be in default, and that such hearing was irregular in form; that the guardian, E. L. Morris, was improperly discharged, no charges having been preferred against him and no citations served upon him; that no successor had been appointed in regular form. The right of the defendant in error W. P. Fay to bring the action in the manner and form in which it was brought was also denied by the said sureties, who contended that the said W. P. Fay was not the regularly appointed guardian, and, since there was a guardianship pending, was not entitled to bring the action as next friend. In the course of the trial, upon motion of defendants the court required the defendant in error Fay to elect whether he would sue as guardian or next friend, and the said defendant in error elected to sue as next friend. Judgment was rendered against E. L. Morris and Benjamin F. Paden by default, and against the Southwestern Surety Insurance Company and the First State Bank of Vinita as successors to the International Bank & Trust Company. Motion for new trial was filed and overruled, and within due time the case was appealed to this court. Counsel for plaintiffs in error expressly limit and confine their argument to the one point of law, that the action should be brought by the guardian and cannot be brought by the next friend. Sections 4683 and 4686 of the Revised Laws of 1910 are as follows:

"Sec. 4683. An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made

for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

"Sec. 4686. The action of an infant must be brought by his guardian or next friend. When the action is brought by his next friend, the court has power to dismiss it, if it is not for the benefit of the infant, or substitute the guardian of the infant, or any person as the next friend."

It will be observed that by section 4686, supra, when the action is brought by the next friend, the court has power to dismiss, if not for the benefit of the infant, and the trial court here was advised of the contention of the parties and permitted the suit to be maintained. The court finds that all the allegations of the petition have been proven and the record discloses that the defendant in error E. L. Morris, as guardian, had failed to account to the court; that he had been cited from time to time to make his report; that he had been arrested for failure to make such report, and was present at the time the order discharging him as guardian was entered. If this order of discharge was improperly made by the county court, the remedy was by appeal, and not by collateral attack upon such order in an action upon the bond. After the guardian had been discharged, we fail to see why a next friend, prior to the appointment of another guardian, might not, for the benefit of the infant, maintain this suit. It is true that the cause is not correctly styled, but under our Code (Sec. 4790, Revised Laws 1910) any error in that regard might have been corrected by amendment. In the case of *Wilson v. Me-ne-chas*, 40 Kan. 648, 20 Pac. 468, the Supreme Court of Kansas holds:

"There is no error of the court in overruling the suggestion of the defendant to correct the transcript of the justice, for the plain reason there was no evidence offered to support it. From the bill of particulars and the affidavit in replevin, it is very evident Me-ne-chas claimed that She-ka-see was the real plaintiff in the action, and, although it would have been correct to have followed the provisions of section 10, c. 81, Comp. Laws 1885, and have had Me-ne-chas appointed as guardian to the suit, or possibly to have commenced the action under the form and style of 'She-ka-see by Me-ne-chas, his next friend,' yet this irregularity is without any possible prejudice to the defendant. She-ka-see appears in the pleadings as the real plaintiff, and under the evidence is shown conclusively to be the real party in interest; but the irregularity is so unimportant that the attorneys for plaintiff did not even suggest an amendment, which would have been granted as a matter of course, if asked, without such an amendment, we think the defendant could not possibly have been misled to his prejudice. We think the court right in overruling the motion to dismiss."

In *Gulf, C. & S. F. Railroad Co. v. Styron*, Next Friend, 66 Tex. 421, 1 S. W. 161, it is held:

"Where an action is prosecuted by a parent as nominal plaintiff, for the use and benefit of an infant child, as real plaintiff, the precise

form of words used in describing their relation to each other, and to the action, is immaterial, if the record inform the court who is the real beneficiary."

We are of the opinion that there is no error in the record upon the assignment urged that would warrant reversal.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

BUELL et al. v. U-PAR-HAR-HA et al.
(No. 7231.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. CHAMPERTY AND MAINTENANCE §7(5)—GRANT OF LAND HELD ADVERSELY—SUIT BY GRANTOR.

The grantor in a deed, void as against the defendant in adverse possession, may maintain an action in his own name and without joining in the action his grantee against those holding adversely to him and his grantee to recover the land described in such void deed.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 57-64; Dec. Dig. §7(5).]

2. EJECTMENT §81—DEFAULT JUDGMENT—REQUISITES.

Judgment for plaintiff cannot legally be rendered in an action of ejectment without proof of the averments of the petition as to title in plaintiff.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 220, 221; Dec. Dig. §81.]

3. DEFAULT JUDGMENT IN EJECTMENT—PROVING PETITION.

Where no appearance or defense is made by defendant in an action in ejectment, the plaintiff cannot recover without establishing the allegations of his petition by competent evidence.

4. DEMURRER—JUDGMENT ON PLEADINGS.

Where a demurrer is interposed to the petition in ejectment which was overruled by the court and the defendant declines to plead further, judgment on the pleadings cannot be legally rendered in favor of the plaintiff.

5. PLEADING §214(8)—DEMURRER—EFFECT.

While a demurrer admits the allegations of the petition, such admission is only for the purpose of testing the demurrer, and such admission cannot be said to be in compliance with section 4928, Rev. Laws 1910, "as to establishing the allegations of the petition."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 534; Dec. Dig. §214(8).]

Commissioners' Opinion, Division No. 1. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by U-Par-har-ha and others against J. Garfield Buell and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

McDougal, Lytle & Allen and Pryor & Rockwood, all of Sapulpa, for plaintiffs in error. A. A. Hatch and Harry H. Rogers, both of Tulsa, for defendants in error.

COLLIER, C. This is an action instituted by the defendant in error against the plaintiff in error to recover the lands described in

the petition. Hereinafter the parties will be designated as they were in the trial court.

Defendant interposed a demurrer to the petition, which said petition, among other averments, averred:

"That the plaintiff, on the 2d day of January, 1913, covenanted and warranted to W. D. Allen, a quiet and peaceful possession of the lands described in the petition; that at the time of the making of said covenant, to wit, on the 2d day of January, 1913, the said plaintiffs were not in possession of said lands, nor had they, nor those under whom they claimed, been in possession thereof or received rents and profits therefrom for a space of one year next preceding the said second day of January, 1913, and at the said time the defendants were in possession of said lands."

W. D. Allen was not made a party to this action.

The court overruled the demurrer to the petition, and the defendants declined to plead further, and judgment, on the pleadings, was rendered in favor of plaintiff for the lands sued for. To reverse said judgment this appeal is prosecuted upon transcript. There are several assignments of error, but these several errors, as stated by plaintiffs' brief, may be stated concisely as follows:

"(1) That the court erred in overruling the demurrer of defendants to the petition of the plaintiffs; (2) that the court erred in rendering judgment upon the pleadings after overruling the demurrer of the defendants to plaintiff's petition."

[1] We are unable to agree with the contention of the defendant that it was necessary that the petition state facts sufficient to constitute a cause of action by said W. D. Allen against the defendants.

In *Burckhalter v. Vann*, 157 Pac. 1148, it is held:

"The grantor in a deed, void as against defendants in adverse possession, may maintain an action in his own name against those holding adversely to him and his grantees to cancel void deeds executed by said grantor to those in adverse possession."

In the body of the opinion, Commissioner Rummons says:

"It is also a well-settled rule of law that the grantor in a deed which is ineffective as against those in possession of the land conveyed thereby may maintain an action in his own name against those in possession to recover the land." *Huston v. Scott*, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721, note at page 738.

It has also been held by this court that a grantee in champertous deed may bring an action in the name of the grantor against those holding adversely to recover possession of the land. *Gannon v. Johnston*, 40 Okl. 695, 140 Pac. 430, Ann. Cas. 1915D, 522. Therefore there is no question that the plaintiffs, without joining Allen, or averring that the action was brought for the benefit of Allen, could maintain this action in their own name. We have carefully examined the petition in this cause and are of the opinion that the court did not err in overruling the demurrer thereto.

As shown by the judgment roll, judgment was rendered in this cause upon the pleadings, which excludes the idea that any evidence was offered in support of the averments of the petition in the trial of the cause.

[2] We think that the rendition of the judgment on the pleadings without evidence in support of the allegations of the petition was prejudicial error.

Section 4928 provides:

"In actions for the recovery of real property, it shall be necessary for the plaintiff to set forth in detail the facts relied upon to establish his claim, and to attach to his petition copies of all deeds or other evidence of title, as in actions upon written contracts; and he must establish the allegations of his petition, whether answer be filed or not."

It will be noted in the history of this section:

"That the section is redrafted to require plaintiff to set forth his title and establish it whether answer be filed or not."

[3, 4] We are of the opinion that under this section, that the importance of the question of title to land has caused the law-makers to declare, by said section above quoted, that notwithstanding the defendant may not even appear in an action of ejectment a judgment for the land cannot be rendered upon the pleadings. In short, to sustain an action of ejectment, proof must be made of the title of the plaintiff.

[5] The contention of plaintiff, "that the demurrer admits the allegations of the petition, and that therefore the allegations of the petition are established," is without the slightest merit. It is true that the demurrer admits the allegations of the petition, but only for the purpose of testing the demurrer—farther than this the admission does not go.

This cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

EUREKA PUB. CO. v. FIRST NAT. BANK OF STIGLER. (No. 7608.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

CORPORATIONS §388(2)—LIABILITIES — ESTOPPEL TO DENY LIABILITY.

Where the president of a corporation makes arrangements with a bank to borrow money on behalf of such corporation and at the time advises the bank that the treasurer of the corporation will execute, for the corporation, the note evidencing such loan, and pursuant thereto the note is later made in the name of the corporation by its treasurer, and the proceeds thereof are duly passed to the credit of the corporation in said bank and checked out by the corporation in due course of business for corporate purposes, and where such transaction is in consonance with the prior business transactions between said bank and said corporation, the corporation will be held liable on such note, regardless of whether the note is executed in the

manner and form required by the by-laws of such corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1557; Dec. Dig. §388(2).]

Commissioners' Opinion, Division No. 4. Error from District Court, Haskell County; W. H. Brown, Judge.

Action by the First National Bank of Stigler against the Eureka Publishing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Holley & Means and A. L. Beckett, all of Stigler, for plaintiff in error. E. O. Clark and J. W. Foster, both of Stigler, for defendant in error.

EDWARDS, C. The parties will be designated as plaintiff and defendant, according to their position in the lower court.

This action is upon a negotiable promissory note in the sum of \$1,012.50, signed, "The Eureka Pub. Co., by E. B. Wallace, Treas.," payable to said First National Bank of Stigler. The petition is in the usual form. The answer is a general denial, verified. After hearing the evidence the court instructed a verdict for the plaintiff for the full amount sued for, with interest and attorney's fees as provided in the note.

There is no controversy but that the note was executed for the benefit of the defendant corporation on authority of and pursuant to arrangements made by the president of said corporation, with said bank, nor that the proceeds of the note were passed to the credit of the defendant corporation in said bank and checked out by it in due course of business, for the benefit of the corporation.

The record discloses that there had been prior dealings between the defendant corporation and said bank, and that the treasurer had signed checks of the corporation in the same manner the note was signed, and that said checks had been paid and returned to the corporation as charges against its deposit in the bank, without objection on the part of such corporation.

The by-laws of the corporation, introduced in evidence, provide that the president and secretary shall sign all legal documents, and that the treasurer shall keep a record of the moneys taken in and paid out by the corporation and make an annual report to the board of directors.

The defendant contends that the treasurer, E. B. Wallace, had no authority to execute the note sued upon, and that the note is not the contract of the corporation, but admits the right of the bank to recover the amount of money received with lawful interest, but that judgment upon the note carrying a higher rate of interest and attorney's fees is improper.

This contention does not appeal to us. The contract is not ultra vires, and conceding, for the purpose of this opinion, that the issue is properly raised by a general denial, and

that the term, "legal document," as used in the by-laws of the corporation, contemplates and included the making of a promissory note on behalf of the corporation in the transaction of its business, we are still of the opinion that the corporation is liable upon the note here sued upon. The authority of the corporation to make the note is not questioned, the objection is to the manner in which it was exercised. It is well settled that, where the power to issue such paper is granted by law, mere irregularity in its exercise or mere noncompliance with a by-law as to the manner of execution cannot be set up as a defense. 8 Cyc. 54.

Parties dealing with a corporation are, of course, required to take notice of the authority of the corporation, but the same strictness is not required as to the manner in which the authority is exercised.

In *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453, it is held:

"If a corporation permits its treasurer to act as its fiscal agent, and holds him out to the public as having the general authority implied from his official name and character, and by its silence and acquiescence suffers him to draw drafts, and to indorse notes payable to the corporation, it is bound by his acts within the scope of such implied authority."

In *National Spraker Bank v. Geo. C. Treadwell Co.*, 80 Hun, 363, 30 N. Y. Supp. 77, the syllabus reads:

"The fact that a promissory note was made by the president of a corporation, and was not signed by its treasurer in accordance with the by-laws of the company, constitutes no defense to an action thereon if the paper was not diverted from its original purpose, went into the hands of a bona fide holder and the company received the benefit of the proceeds."

In *Allegheny City v. McClurkan & Co.*, 14 Pa. 81, the court says:

"The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, when these contracts, for a series of times, were entered into publicly, and in such a manner, as by necessary and irresistible implication to be within the knowledge of the corporators. It was the acquiescence of the corporators, and the habit and custom of business of the corporation, which induced the public to give credit to the scrip or notes, which was evidence of contract. But when to this circumstance we add that the corporators themselves received the value of these notes or contracts in the erection of improvements in the city, and enjoyed and still enjoy the value of them, the conclusion is irresistible that the corporators ought to pay them by the assessment of taxes on the corporations, if it has no other available means. The debt is due by positive engagement—it is due *ex æquo et bono*—in the forum of conscience, and the forum of law. One rule of law is often met and counterchecked by another of equal force, so that although the corporators are in general protected from unauthorized acts of their agents, yet at the same time a rule of equal force requires that they should not deceive the public, or lead them to trust and confide in unauthorized acts of

their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them. They adopt the act and are responsible to those who on the faith of such acquiescence and approbation trusted their agents."

It is true that in the latter case there is a controlling statute, but in this case the note being made to the bank at the behest of the president of the corporation at the time informing the president of the bank that the note would be executed by the treasurer of the borrowing corporation, who was a son-in-law of its president, and such transaction being in line with former dealings between the parties, and the borrower having received and used the proceeds of said note, the corporation should be held liable upon the note.

The judgment of the lower court is in all things affirmed.

PER CURIAM. Adopted in whole.

SPAULDING et al. v. THOMPSON.
(No. 7629.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 422—VERIFICATION—WAIVER—JOINING ISSUES.

In order for a litigant to avail himself of section 4759, Rev. Laws 1910, which prescribes that the allegation of indorsement upon a written instrument shall be taken as true, unless met by a verified denial, he must accept the allegation as true himself; but if he raises an issue thereon by introducing evidence to establish the truthfulness of said indorsement, it is too late then to complain if the defendant accepts the issue and attacks the indorsement and plaintiff's evidence substantiating the same with adverse evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1414–1417; Dec. Dig. \S 422.]

2. EXECUTORS AND ADMINISTRATORS \S 451(3)—ACTION AGAINST ADMINISTRATORS—INSTRUCTIONS.

An instruction that when a party presents an administrator with a claim in proper form that it was necessary for the party to request the administrator to either allow or reject the same is erroneous.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1880; Dec. Dig. \S 451(3).]

Commissioners' Opinion, Division No. 4. Error from County Court, Bryan County; J. L. Rappelee, Judge.

Action by H. W. Spaulding, F. E. Spaulding, and E. H. Spaulding, partners doing business under the firm name and style of Spaulding Manufacturing Company, against Green Thompson, administrator of the estate of Arthur F. Eastwood, deceased. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Chas. P. Abbott, of Durant, for plaintiffs in error. Utterback & MacDonald, of Durant, for defendant in error.

MATHEWS, C. This was an action against an administrator to recover upon two promissory notes. The case was tried to a jury, verdict for the defendant, and plaintiffs appeal. It appears from the evidence that one A. F. Eastwood, during his lifetime, executed two notes to the plaintiffs for the purchase of certain buggies, and, having died, Green Thompson was appointed as his administrator. The only defense interposed to the action was that the claim of plaintiffs had not been presented to the administrator within four months from the date of the first publication of notice to creditors as provided by statute. The evidence in the case relative to the exact time the proof of plaintiffs' claim was presented to the said administrator is peculiarly conflicting. It appears this confusion in the evidence arose from the fact that the administrator was also in the banking business, and that it was the custom of plaintiffs to leave notes which it held against parties in that vicinity in this bank for collection, and it seems that the two notes in controversy had been placed in this bank for collection, and it was the contention of the administrator that the notes were not presented to him for payment as administrator until after the expiration of four months from date of the first publication notice, and that if the notes were placed in the bank this was done for the purpose of trying to effect collection from another source, while plaintiffs contend that the claim in proper form, with notes attached, was presented to the administrator for payment within the four months' period.

Plaintiffs' amended petition contains two counts. In the first, it is alleged that a claim upon the first note was duly presented to the administrator, the same being verified as required by law, on the 25th day of November, 1914, and that on this date the said administrator rejected the said claim and wrote on the back the following:

"Presented and rejected, November 25, 1914. Green Thompson, Administrator of the Estate of A. F. Eastwood"

—a copy of said claim, with the above indorsement, being attached to the petition. The second cause of action was based upon the second note and contained the foregoing allegation, with the exception it was alleged that the claim upon the second note was presented on the 5th day of January, 1915, and the indorsement of rejection bore that date.

[1] Defendant's answer was not verified, and for that reason plaintiffs contend that under section 4759, Rev. Laws 1910, the allegation in plaintiffs' petition that the claims presented to the administrator bore the indorsement that they were presented and rejected on certain dates there set out should be taken as true, and that the court committed error in permitting defendant to introduce certain evidence over their objection tending to prove that the claims were not

presented to the administrator for payment until January 28, 1915. The record shows that when this case was called for trial the plaintiffs first introduced evidence tending to prove, among other things, that proof of claims had been made out and presented to the administrator and by him rejected within four months from the date of the first publication notice to creditors, which publication was had on the 18th day of September, 1914, and not until the cross-examination on this point of the witness who gave this evidence did the plaintiffs make the objection to the introduction of evidence which tended to prove that the dates on the indorsement of the proof of claims were not correct.

In the case of *Kaufman v. Bolsmier et al.*, 25 Okl. 252, 105 Pac. 326, it is said:

"It would seem, however, that when the plaintiff in error (plaintiff below) joined issue on the joint answer of the administrator and guardian by filing a reply and treated the issue of non est factum as properly raised, introducing evidence tending to show the execution of the instrument, and then offering it in evidence, that that waived any defect in the affidavit or verification. *Hoopes v. Buford & George Implement Co.*, 45 Kan. 549, 26 Pac. 34; *Warner v. Warner*, 11 Kan. 121; *Johnson v. Douglass Co.*, 8 Okl. 594, 58 Pac. 743."

The import of the above-quoted opinion is that if the plaintiffs intend to rely upon the statute that the allegation of indorsement upon written instruments shall be taken as true, unless met by a verified denial, then they must accept it as true without proof; but if they introduce evidence tending to establish the truthfulness of the indorsement, it is too late then to complain if the defendant accepts the issue and attacks the indorsement with adverse evidence. The proper procedure would be to take advantage of the situation in such cases by motion to strike. *Doughty v. Funk*, 24 Okl. 312, 103 Pac. 634; *Jones v. Citizens' State Bank*, 39 Okl. 393, 135 Pac. 378. But we see no reason why a motion for judgment upon the pleadings should not be sustained in cases where it is not necessary to introduce any evidence in order to make out a case.

[2] The only other assignment of error which we deem it necessary to notice is the giving of the following instruction:

"You are further instructed that it will be necessary for the plaintiffs herein before they could have a claim legally filed with the administrator for allowance or rejection that they have the same properly proven under the statutes and placed in the hands of the administrator with the request that he either allow or reject same, if the plaintiffs herein placed the said claims or either of them within the hands of the administrator without the request that the same be either allowed or rejected then it will be immaterial the length of time that he might leave them and it will be your duty to find for the defendant."

We are of the opinion that the giving of this instruction was reversible error. Section 6842, Rev. Laws 1910, provides that when a claim in proper form is presented to the administrator, he must indorse thereon his

allowance or rejection with the date thereof.

There is no statutory requirement that makes it necessary for the claimant to do anything except as above stated. When a claim is presented the statute tells the administrator what he must do, and it is not essential that he receive any instructions from the claimant. This instruction is especially prejudicial here, owing to the fact that the witness who testified to presenting the claims to the administrator further testified that he did not make any request of the administrator that he either allow or reject the same. The effect of this instruction under this testimony is to practically instruct the jury to find for the defendant.

Counsel for plaintiffs, in his brief, has seen fit to severely arraign the trial court, defendant's attorneys, and the administrator. The record does not disclose the slightest foundation for the same or any improper conduct whatever. The brief should have been stricken from the files. Such practice is to be censured and condemned.

We recommend that the judgment be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

BLY et al. v. POOL et al. (No. 7311.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 236(3)—AMENDMENT—REPLY—TIME FOR AMENDMENT.

It is not an abuse of discretion for the trial court to permit an amended reply, which does not change the issues, to be filed prior to the rendition of final judgment in the case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 601; Dec. Dig. \S 236(3).]

2. CONTINUANCE \S 14(1) — PLEADING \S 356(1)—AMENDMENT—CONDITIONS.

If an amended reply is permitted to be filed just prior to the time of the commencing of the trial of a cause, and it appears that the defendant is not then prepared to proceed with the trial, by reason of such amended reply being filed, the proper practice is not to move to strike such amended reply from the files, but to apply to the court to postpone the trial for such time as may be reasonable for defendant to prepare to meet such amended reply.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. \S 99; Dec. Dig. \S 14(1); Pleading, Cent. Dig. \S 1111; Dec. Dig. \S 356(1).]

3. TENDER \S 12(2) — REQUISITES — CONDITIONS—AMOUNT.

In order to successfully plead a tender of payment in an action upon a money demand, the tender must be unconditional, and must be of such an amount as to cover the demand.

[Ed. Note.—For other cases, see Tender, Cent. Dig. \S 22; Dec. Dig. \S 12(2).]

Commissioners' Opinion, Division No. 1. Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by Abram J. Pool and another against C. C. Bly and another. Judgment for

plaintiffs, and defendants bring error. Affirmed.

Holding & Herr, of Chickasha, for plaintiffs in error. Barefoot & Carmichael, of Chickasha, for defendants in error.

COLLIER, C. This is an action brought by defendant in error to recover from the plaintiffs in error upon a note in the sum of \$800, together with interest thereon from the 1st day of March, 1913, at the rate of 6 per cent. per annum and for interest thereafter at the rate of 12 per cent. per annum until paid and for foreclosure of a mortgage on the lands described in the petition.

The note and mortgage were originally executed by M. J. Armstrong to the Pittsburg Mortgage Investment Company and assigned by the said company to Abram Pool, and subsequently assigned by the executor of Abram Pool, deceased, to the defendants in error. After the execution and delivery of the said note and mortgage, the plaintiffs in error purchased the premises described in the mortgage and as a part of the consideration thereof assumed and agreed to pay the said mortgage indebtedness.

The Pittsburg Mortgage Investment Company filed its answer and cross-petition alleging its cause of action against its codefendants, plaintiffs in error, that they were indebted to it in the sum of \$80, with 12 per cent. interest thereon, that the said note was executed and delivered to it by one Armstrong, and that to secure the payment of said note said Armstrong executed to said company a second mortgage on the premises described in the petition, and that plaintiffs in error purchased said property from said Armstrong and as a part of the purchase price assumed the payment of said indebtedness.

To the petition of the defendant in error Abram J. Pool, Jr., and the cross-petition of the Pittsburg Mortgage Investment Company, the plaintiffs in error filed their answer denying any indebtedness to the Pittsburg Mortgage Investment Company and alleging a tender on the 13th day of March, 1913, to the defendant in error in the sum of \$800 in full satisfaction of the indebtedness owing to the defendant in error.

On August 22, 1914, the defendant in error filed a reply to the answer of plaintiff in error, and on the 15th day of October, 1914, the cause came on for hearing, and, this being an equitable case, the court, to aid his conscience, submitted certain questions to the jury, which are unnecessary to recite, as the same relate alone to the judgment rendered in favor of the plaintiffs in error and against the Pittsburg Mortgage & Investment Company, of which no complaint is made in this appeal.

The undisputed evidence in the case is that the plaintiff in error, acting through the State National Bank of Marlow, tendered to

the Pittsburg Mortgage & Investment Company \$830 to secure the release of all papers in the C. G. Bly loan as per letter of instruction by the Pittsburg Mortgage & Investment Company, which letter is as follows:

"First National Bank, Pittsburg, Kansas—Gentlemen: The Pittsburg Mortgage Investment Co. of your city holds a real estate mortgage on the northwest quarter of section 32, township four, north of range eight west, I. M., Grady county, Oklahoma. The mortgage was signed by M. J. Armstrong—a single man. The loan was assumed by C. G. Bly, of Marlow, Oklahoma, who wishes to pay the loan.

"Mr. Bly has had a controversy with the company as to the amount due on the loan, and Mr. Bly claims that he owes them the principal sum of eight hundred dollars and twenty-four dollars interest, and also interest on the \$824 from March 1st, inst., when the note was due, till the tenth, for which we will say is \$6.00.

"We are inclosing herewith New York Exchange for eight hundred and thirty dollars, as above set forth, and would like for you to take that amount of legal tender, to the officer of the Pittsburg Mortgage Investment Company and offer it to them in full settlement of the mortgage, securing from them a release in full of all claims they have against the land, and we ask that you have two witnesses with you who can make affidavit that you offered the money, as it may be necessary to secure from them affidavits to that effect. If they refuse to take the money please deduct the amount of your fee and return the balance to us, if they accept the money, please advise us of your charge and we will remit.

"Yours truly, O. R. McKinney, Cas."

The Pittsburg Mortgage Investment Company replied to said demand that they were not in possession of the papers at the time; that they had been assigned; that it would be impossible for them to comply with the demands of the letter and that the amount tendered was insufficient to cover the indebtedness to Mr. Bly; that said letter was presented to the Pittsburg Mortgage Investment Company.

It was further shown in the evidence that the Pittsburg Mortgage Investment Company had never objected to furnishing Mr. Bly release of the Abram J. Pool, Jr., mortgage upon the payment of the Pittsburg Mortgage Investment Company; that the Pittsburg Mortgage Investment Company would have secured a release properly from Mr. Bly had he remitted the amount of the first mortgage and accrued interest thereon; that the \$830 tendered was not tendered solely for the payment of the Abram J. Pool, Jr., loan, but was for the release of both the first and second mortgage held against the land by Abram J. Pool, Jr., and the Pittsburg Mortgage Investment Company.

On the 21st day of October, 1913, the defendant in error Abram J. Pool filed his motion for judgment upon the evidence introduced in his favor and against the defendant for the sum of \$830, with interest at the rate of 12 per cent. from the 1st day of March, 1913, for the costs of the suit and for \$80 attorney's fee.

Upon the hearing of said motion on the 29th day of October, 1914, plaintiff asked

and was granted leave of the court to file an amended reply in said cause, which leave was by the court granted, to which the plaintiffs in error duly excepted. Said amended reply, in substance, denies that a legal tender was ever made to the plaintiff, and sets out that said tender was a conditional tender, therefore void, and no tender at all.

On the 30th day of October, 1914, plaintiffs in error moved to strike from the files said amended reply for the reason that the court had no authority in law to permit said reply, and that the court abused the authority to grant such leave to file said reply, which said motion the court overruled, and plaintiffs in error duly excepted thereto.

The court sustained the motion of defendant for judgment and rendered judgment against the plaintiff in error Bly, in the sum of \$969.97, with interest thereon at the rate of 6 per cent. per annum from the 31st day of October, 1914, and costs of the suit and \$80 attorney's fee.

Timely motion was made for a new trial as to the judgment rendered against plaintiffs in error in favor of Abram J. Pool, Jr., which said motion was overruled and duly excepted to. To reverse said judgment so as to modify the same by reducing said judgment to \$830, the amount of the tender, and that the interest and attorney's fee be denied and the costs of the cause taxed to the plaintiff, this appeal is prosecuted.

The errors assigned are: (1) That the court erred in rendering judgment in excess of \$830; (2) that the court erred in permitting the plaintiff, after the trial of said cause, over and against the objection and exception of defendant, to amend his reply to conform to the purported provision in said cause; (3) the court erred in overruling defendant's motion to strike said reply; (4) the court erred in overruling defendant's motion for a new trial.

[3] The pivotal question involved in this case is, whether or not the tender pleaded in this case was a legal tender and unconditional tender so as to discharge the plaintiff in error from the payment of interest thereafter and the payment of attorney's fees and the costs incident to this cause. There is no evidence in the case that the \$830 tendered was sufficient to cover the entire indebtedness, which it was tendered to pay.

The uncontradicted evidence in this case is that the tender was a conditional one, conditioned upon the surrender of the evidence of the security for all indebtedness claimed against plaintiffs in error.

"To constitute a sufficient tender, it must be unconditioned. Where a larger sum than that tendered is in good faith claimed to be due, the tender is ineffectual as such if its acceptance involves the admission that no more is due." Sam J. Smith v. School Dist., 89 Kan. 225, 131 Pac. 557. Ann. Cas. 1914D, 139; Moore v. Norman, 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 58 Am. St. Rep. 526, and notes page

529; 38 Cyc. and cases cited in note on pages 152 and 153.

The money tendered must be tendered unconditionally, and a tender accompanied with some condition, as where a sum is offered in full discharge or as a payment in full, is invalid. 38 Cyc. 152, and authorities cited in note 55. We are of the opinion that the tender was a conditional one and invalid as a tender.

[1] The contention of the plaintiff in error that the amended reply was filed after the trial is not supported by the record. The issues between plaintiff Abram J. Pool, Jr., and the plaintiffs in error C. G. Bly and N. E. Bly were not settled until the judgment was rendered on October 30, 1914, and therefore the said amended reply was filed prior to the final trial of this cause. However, we are of the opinion that under section 4790, R. L. 1910, the court did not abuse its discretion by permitting the amended reply to be filed.

[2] We are unable to see that the amended reply in any way changes the defense or that it was necessary for plaintiff to file the amended reply, and the judgment was rendered on the 30th day of October, 1914, after permission had been granted to plaintiff to file the amended reply. If the amended reply changed the issues or it was necessary in justice to the plaintiff in error that they be given time in which to prepare to meet the issue raised by the amended reply, the proper practice would be to request the court for time to prepare to meet the issues raised by said amended reply, and the motion to strike the said amended reply from the files was without merit.

It follows that the court did not err in denying a new trial in this cause. The appeal in this case being without merit from any standpoint from which it may be viewed, this cause should be affirmed.

PER CURIAM. Adopted in whole.

FINCH v. ROSE. (No. 4603.)

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR 766—BRIEFS—FAILURE TO INCLUDE DOCUMENTS.

Affirmed on account of failure of plaintiff in error to comply with rule 25 of this court (20 Okl. xii, 95 Pac. viii).

[Ed. Note.—For other cases, see Appeal and

Error, Cent. Dig. §§ 3101, 3126; Dec. Dig. 766.]

Error from District Court, Roger Mills County; E. D. Tracey, Special Judge.

Proceeding between Finch and Rose. Appeal from justice of the peace court by Finch dismissed, and he brings error. Affirmed.

Moore & Mouser, for plaintiff in error.

D. W. Tracy, of Sayre, for defendant in error.

WILLIAMS, J. Rule 25 of this court (20 Okl. xii, 95 Pac. viii) requires that the brief of the plaintiff in error—

" * * * shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court."

In this proceeding in error the action of the trial court in dismissing an appeal from a justice of the peace court on account of a defect in the appeal bond is sought to be reviewed. The body of the appeal bond is nowhere set out in plaintiff in error's brief, and we are unable to determine whether there was error committed without examining the case-made. This court has repeatedly held that when the plaintiff in error fails to comply with this rule the proceeding will either be dismissed or the judgment of the lower court affirmed. *Ebey v. Krause*, 35 Okl. 689, 130 Pac. 1100; *Seminole Townsite Co. v. Town of Seminole et al.*, 35 Okl. 554, 130 Pac. 1098; *Scoville et al. v. Powell et al.*, 33 Okl. 446, 126 Pac. 730; *Lawless v. Pitchford*, 33 Okl. 633, 126 Pac. 782; *Williams v. Haycraft*, 33 Okl. 697, 127 Pac. 494; *Fire Ass'n of Philadelphia v. Bryant & Whistler et al.*, 33 Okl. 698, 127 Pac. 699; *Arkansas Valley Nat. Bank v. Clark*, 31 Okl. 413, 122 Pac. 135.

The defendant in error in its brief raises the question as to the deficiency in the abstract or brief of the plaintiff in error, but no move on his part has been made to correct the same.

It follows that the judgment of the trial court must be affirmed. All the Justices concur.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes 159 P.—33

SNEE v. STATE. (No. 415.)

(Supreme Court of Arizona. Oct. 17, 1916.)

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Frank M. Snee, alias Francisco Valenzuela, was convicted of grand larceny, and he appeals. Affirmed.

Timmons & Harris, of Yuma, for appellant. Wiley E. Jones, Atty. Gen., and Clement H. Coleman, Co. Atty., and T. D. Molloy, Deputy Co. Atty., both of Yuma, for the State.

FRANKLIN, J. Appellant has taken an appeal, and on June 12, 1916, caused to be filed in this court a transcript of the record of his conviction of the crime of grand larceny. No effort has been made to show any legal reason for reversing the judgment of the trial court. We have carefully examined the record presented, which clearly shows appellant's guilt of the offense charged, and that his substantial rights have been guarded in a fair and impartial trial.

The judgment is affirmed.

ROSS, C. J., and CUNNINGHAM, J., concur.

MESSENGER v. STATE. (No. 405.)

(Supreme Court of Arizona. Oct. 17, 1916.)

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Norman Messenger was convicted of murder in the second degree, and he appeals. Affirmed.

Doan & Doan, of Douglas, for appellant. Wiley E. Jones, Atty. Gen., J. F. Ross, Co. Atty., of Douglas, and Wm. B. Cleary, of Bisbee, for the State.

FRANKLIN, J. The defendant was convicted of murder in the second degree, and appeals.

The record of his conviction was filed in this court March 17, 1916, but no appearance or effort whatever made to aid the court in its determination of the appeal. We have given the record presented careful consideration, and find the judgment of conviction abundantly justified.

The appellant appearing to have had a fair and impartial trial, and discovering no error prejudicial to any of his substantial rights, the judgment of the superior court is in all things affirmed.

ROSS, C. J., and CUNNINGHAM, J., concur.

MORGAN et al. v. BOARD OF COM'RS OF LOGAN COUNTY. (No. 5649.)

(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 564(3)—PREPARATION OF CASE ON APPEAL—CASE-MADE.

An order or orders, purporting to grant an extension of time in which to serve case-

made for appeal to the Supreme Court, made after the expiration of the time or times formerly allowed, is and are nullities, and appeal based upon service of case-made thereunder will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2503, 2556; Dec. Dig. \Leftrightarrow 564(3).]

Commissioners' Opinion, Division No. 4. Error from District Court, Logan County; A. H. Huston, Judge.

Action by the Board of County Commissioners of Logan County, Okla., against Fred R. Morgan, C. L. Woods, T. F. McKennon, H. M. Adams, William Wilson, F. L. Williams, and M. Collar. Judgment for plaintiff, and defendants bring error. Dismissed.

H. M. Adams and T. F. McKennon, both of Guthrie, for plaintiffs in error. Arthur R. Swank, of Guthrie, for defendant in error.

DAVIS, C. Final judgment in the court below was rendered on April 9, 1913, in favor of the plaintiff and against the defendants, the defendants duly excepting. Motion for a new trial was duly filed by defendants on April 10, 1913, and duly heard and overruled by the court on April 21, 1913, the defendants duly excepting, the court, for good cause shown, allowing the defendants "60 days herefrom in which to make and serve a case for appeal herein to the Supreme Court of the state of Oklahoma." The next extension of time is by order of the court as follows:

"Now, on this 18th day of June, 1913, for good cause shown and it appearing to the court, it is ordered and adjudged by the court that the defendants herein be and they hereby are allowed and granted 30 days additional time to that already granted to make and serve a case for appeal herein to the Supreme Court of the state of Oklahoma."

And the next one as follows:

"In the above-entitled cause upon motion of counsel for the defendants and for good cause shown, it is ordered that the defendants be allowed 30 days in addition to the time heretofore granted to make and serve a case-made on appeal to the Supreme Court."

Thus it becomes manifest that the defendants were granted 120 days in all, as shown by the extensions, supra, in which to make and serve a case-made, and that excluding the first day and including the last the time expired on August 19, A. D. 1913, which was on a Tuesday. This being true when the defendants obtained the next order, which is as follows:

"On this 21st day of August, 1913, it is ordered by the court that the defendant have and be granted ten (10) days additional time to that heretofore given, in which to make and serve a case-made to the Supreme Court of the state of Oklahoma"

—and the next one, which is as follows:

"On this 29th day of August, 1913, it is ordered by the court that the defendant have and be granted thirty (30) days additional time to that heretofore given in which to make and serve a case-made to the Supreme Court of the state of Oklahoma"

—their time had expired and 2 days beside had fully elapsed, and hence the service of the case-made upon the plaintiff on September 25, 1913, was not within the time fixed and allowed by the trial court by any valid and subsisting order extending the time in which to make and serve such case-made, and renders this court powerless to hear, consider, and determine this cause on appeal. This rule is universal and firmly established in our law and procedure of appellate practice in this state. It needs no citation of authorities, but see the cases of *V. J. Howard et al. v. Freeman Arkansas* et al., Supreme Court No. 6648, 158 Pac. 437 (not yet officially reported), and cases cited therein; and *Childs v. Moore*, 45 Okl. 206, 157 Pac. 333, *Byrd v. Harrison*, 45 Okl. 142, 145 Pac. 318, *McLean v. McLean et al.*, 45 Okl. 763, 147 Pac. 302, and cases cited.

The orders of August 21, 1913, and August 29, 1913, *supra*, being nullities, the appeal based upon service of case-made thereunder will be dismissed. Appeal and proceedings in error herein are dismissed.

PER CURIAM. Adopted in whole.

PITTSBURG MORTGAGE INV. CO. et al.
v. SNEED. (No. 7545.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. PUBLIC LANDS §136—LANDS OF UNITED STATES—HOMESTEAD INCUMBRANCE.

A mortgage, executed by an entryman upon the lands acquired by him under the provisions of the United States statute for the homesteading of public lands, being a voluntary act, the consideration therefor being money advanced to enable the entryman to commute his land and the balance thereof being paid after the final receipt was issued to him, may be enforced by a sale of said lands for the satisfaction of the debt thus created, and this is true, even though the final certificate issued to the entryman was afterwards canceled and he was ordered to make other proof which he did and received a final certificate and a patent to said lands. It is held that the title thus acquired by him inured to the benefit of the first mortgagee, who furnished him the money with which to commute his land, and other money after the first final certificate was issued to him.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 364-366; Dec. Dig. §136.]

2. CONFLICTING DECISIONS OVERRULED.

The cases of *Stark v. Glaeser*, 19 Okl. 503, 91 Pac. 1040, and *Stark v. Fallis*, 26 Okl. 358, 109 Pac. 66, in so far as the same are in conflict with this opinion, are hereby overruled.

Commissioners' Opinion, Division No. 3. Error from District Court, Texas County; W. C. Crow, Judge.

Action by Edna B. Sneed against the Pittsburg Mortgage Investment Company and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

Nelson Case, of Oswego, Kan., for plaintiffs in error. John L. Gleason, of Guymon, for defendant in error.

HOOKER, O. Prior to May 16, 1906, Clay S. Mason made settlement as a homesteader on the land in controversy here, and continued to reside on said land from the time of his settlement until December 30, 1913. A short time prior to March 30, 1909, the Pittsburg Mortgage Investment Company agreed to loan said Mason \$500, of which sum enough should be paid to him at once to enable him to make commutation of his original settlement to a cash entry of the land settled upon and the balance of said amount was to be paid to him as soon as he had made his proof and received his receipt. This loan was to be represented by a promissory note and secured by a first mortgage upon the land, which mortgage was to be executed by Mason as soon as entry had been made. Thereupon the company paid Mason something over \$200, which sum was paid by him on March 30, 1909, to the land office at Woodward, Okl., for the entry of said land, and the said Mason did then and there receive from the proper officers thereof a certificate of purchase or final receipt, which he had at once recorded. On April 1, 1909, Mason executed to the Pittsburg Mortgage Investment Company his note and mortgage in the usual form on the real estate involved here, which mortgage was recorded in the office of the register of deeds of Texas county, and was afterwards sold to the other defendant here. Thereafter Mason sold and conveyed said real estate to one L. B. Sneed, who as a part of the consideration therefor agreed by a provision inserted in the deed of conveyance to assume and pay the aforesaid debt to the Pittsburg Mortgage Investment Company. At the time of the execution of the note and mortgage by Mason to the Pittsburg Mortgage Investment Company it was believed by Mason and the company that the entry of said Mason of said land was valid, and that he (Mason) would, in due time, receive a patent therefor, and that he had the absolute right to mortgage the land as he was doing, and neither party knew of any defect in the entry proceedings, but acted in good faith in the transactions.

In May, 1910, the Commissioner of the General Land Office directed the cancellation of Mason's certificate of entry because of the failure upon the part of Mason to strictly comply with the rules of the Land Department, but the Commissioner expressly ordered that his original entry should remain in full force, and that he should be allowed to complete settlement and proof thereunder, which he did on July 10, 1913, by making proof at the government land office and complying with all the requirements of the Land Department, which proof was

accepted as sufficient and upon which another certificate of entry was issued to him for said land, and on April 13, 1914, a patent was issued to said Mason for said land upon said entry.

On December 30, 1913, after the second certificate of entry was issued to Mason, but before the patent was issued to him, Mason conveyed the land to Edna B. Sneed, the wife of the aforesaid L. B. Sneed, "subject to any legal lien existing at this time," and the deed of the said Mason was acknowledged before L. B. Sneed, the husband of Edna B. Sneed, as a notary public. Thereafter Edna B. Sneed commenced suit in the district court of Texas county, alleging Mason's original settlement, final proof and certificate of entry, the execution of the note and mortgage thereon, the subsequent cancellation of the certificate, Mason's second proof and second certificate of entry to him and conveyance to her and a patent to Mason, and she alleged that the mortgage thus executed by Mason to the Pittsburg Mortgage Investment Company was void and constituted a cloud on her title and asked to have the same canceled.

The answer here sets forth the facts stated above and sought a lien upon the real estate to secure said mortgage, but a demurrer was sustained thereto, and from such ruling an appeal is had to this court.

It will be seen from the facts alleged that the Pittsburg Mortgage Investment Company furnished to Mason the money with which to make commutation and pay to the government the amount required by it from him before the government would issue a patent to Mason. Mason paid this money to the government, and received from it a final receipt, and after the final receipt was issued to him the Pittsburg Mortgage Investment Company furnished him \$300 more money, and accepted his note secured by a mortgage upon this real estate. Thereafter, for some reason the government canceled the final receipt, but did not cancel the original entry, but permitted Mason to file additional proof in order that he might receive his final receipt, which Mason did, and a final receipt was issued to him and subsequently a patent also.

[1] The validity of mortgages upon public lands executed by claimant under the homestead acts prior to patent or final proof has oftentimes been before the courts of this country. And it is very generally held that the sections of the homestead laws providing that the land shall not be liable for debts incurred prior to the issuance of a patent are for the benefit of the homesteader, and that the law does not prevent a voluntary subjection of the land as security for debts created prior to the patent. The prohibition simply prevents the land being taken from the homesteader for the satisfaction of past debts. This court in the early case of *Farr*

v. Deeming Investment Company, 5 Okl. 496, 49 Pac. 926, said:

"It has been held by numerous courts that after a settler has resided upon the land and cultivated the same in accordance with the law for a period of five years, and made proof of such fact and received his final certificate, he at once becomes entitled to a patent therefor, and the owner of the land, and that his right to convey and pass title thereto is absolute."

And in *Newkirk v. Marshall*, 35 Kan. 78, 10 Pac. 571, the court, by Justice Valentine, uses the following language:

"Under the United States homestead laws, and by a compliance with them, a person entering a homestead, or in case of his death, his widow, or in case of death of both, his heirs or devisees, obtain a vested right in the homestead at the expiration of five years from the entry thereof, and upon making proper proof is entitled to a patent to the land from the United States. And as soon as a person is entitled to a patent, although it may not yet have been issued, and may not be issued for [five] years, he or she may contract or be contracted with concerning the land. * * * Equity, in order to do justice, and protect the rights of the parties, and to prevent frauds, will generally consider that as having been done which ought to be done; and, in order to protect the rights of all parties, where a patent is due, but has not yet been issued, equity will consider such rights precisely the same as though patent had in fact been issued on the very first day on which it ought to have been issued."

Also, in the case of *Stark v. Duvall*, 7 Okl. 216, 54 Pac. 453, it is said:

"It is provided by section 2291 of the Revised Statutes of the United States [U. S. Comp. St. 1913, § 4532] that no certificate should be given or patent issued before the expiration of five years from the date of entry; that before final receipt an affidavit must be filed by the entryman, averring that 'no part of such land had been alienated.' * * * 'Alienation' is the voluntary and complete transfer from one person or another, and, if it be concerning the transfer of property, it involves the complete and absolute exclusion, out of him who alienates, of any remaining interest, or part of interest, in the thing transmitted. It involves the complete transfer of the property and possession of land, tenements, or other things to another. And, while other views were formerly held by some of the courts, the doctrine was announced in *Mudgett v. Railroad Co.* [8 Land Dec. Dept. Int. 243-248] by Secretary Vilas, that the 'alienation prohibited by the statute is an absolute alienation of the land, or a part thereof, whereas the mortgage given by *Mudgett* was simply a pledge for the security of a debt, to be avoided on payment of the debt,' and that 'there is no good reason why a homestead entryman, whose good faith is otherwise apparent, may not mortgage his claim, before final certificate, to procure money with which to improve his land, or for any other purpose not intended to impeach his bona fides.' This case affirmed the holding of Secretary Teller in *Larson v. Weisbecker* [1 Land Dec. Dept. Int. 409], in which it was held that the 'mortgage was a mere security for the money loaned, and the contract does not necessarily divert property from him, and was not a contract or agreement, within the meaning of the statute.' The doctrine thus laid down in the Land Department was adopted and avowed by the Supreme Court of Colorado in *Wilcox v. John* [21 Colo. 367], 40 Pac. 880 [52 Am. St. Rep. 246], in which it was held that by the later, and, as it was thought, better-considered, cases neither a mortgage nor a deed of trust is a grant or conveyance within the prohibitory clause of the statute."

And it was held in *Stewart v. Powers*, 98 Cal. 514, 33 Pac. 489, in a like case, that:

"The mortgagor is estopped from defeating by his own act the operation and enforcement of the lien appellants have attempted to create."

And in *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693, which involved a mortgage of land under the homestead law, it was held that a mortgagor was estopped from defeating by his own act the enforcement of a lien he had attempted to create, and that the mortgage was not made void or voidable under the provisions of the homestead act. The same doctrine is fully affirmed in *Spless v. Neuberg*, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211, and in *Lang v. Morey*, 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748, in which it was stated in the syllabus that:

"A person making entry under the homestead laws of the United States may execute a valid mortgage upon land so entered, prior to submitting final proof and receiving the final certificate."

It was so held in *Fuller v. Hunt*, 48 Iowa, 163. It is also provided in section 2296 of the Revised Statutes of the United States (U. S. Comp. St. 1913, § 4551), that:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

This section does not prohibit the borrowing of money at the option of the homesteader. It prohibits the land being taken from him for the satisfaction of past indebtedness. It is intended as a protection to the homesteader, and not as a limitation upon his control over the land, in disposing of or borrowing money upon it. It was said by the Supreme Court of Kansas in *Watson v. Voorhees*, 14 Kan. 329, by Judge Brewer, that:

"The limitations were on the creditor, and not upon the debtor. * * * His deed passed a good title, and he could not thereafter avoid that deed by showing that the only consideration therefor was past indebtedness, and if he could convey absolutely, so he could conditionally. He could use the land as security. He was in no wise limited or restricted in his power of disposing of the property."

And that:

"Having once appropriated it for that purpose, they may not thereafter deny such appropriation."

Also in *Blanchard v. Jamison*, 14 Neb. 247, 15 N. W. 212, it was held:

"That the homestead act does not prohibit the owner of a homestead from pledging it voluntarily to secure a pre-existing debt, and that the only effect of the statute was to protect the debtor against a compulsory payment of such demand out of the land."

And in *Klempp v. Northrop*, 137 Cal. 414, 70 Pac. 284, it was held that there was nothing in the homestead act forbidding a voluntary conveyance of the land for security prior to the issuance of the patent. And in the case of *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 825, the prohibition of the homestead act was held not to prevent the owner from creating for his own benefit a

special lien thereon prior to the receipt of a patent. And in the following cases it is expressly held that a mortgage made by a homesteader, even prior to his right to file final proof, was valid: *Fuller v. Hunt*, 48 Iowa, 163; *Lang v. Morey*, 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748; *Skinner v. Reynick*, 10 Neb. 323, 6 N. W. 369, 35 Am. Rep. 479; *Forgy v. Merryman*, 14 Neb. 513, 16 N. W. 836; *Stark v. Duvall*, supra; *Melnhold v. Walters*, 102 Wis. 389, 78 N. W. 574, 72 Am. St. Rep. 888; *Spless v. Neuberg*, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211. And in *Dickerson v. Cuthburth*, 56 Mo. App. 647, a mortgage given upon homestead lands immediately after entry was held valid. And in the *Deeming Investment Co. Case*, 5 Okl. 496, 49 Pac. 926, supra, it was said that the mortgagee might, upon default, foreclose the same, notwithstanding the fact that a contest had been instituted in the Land Department to cancel the certificate issued to the entryman. And we would call especial attention to the case of *McFall v. Murray*, 4 Kan. App. 554, 45 Pac. 1100, wherein a mortgage on homestead lands, given to procure money to pay commutation price for a cash entry, was held valid, where the mortgagor, having a homestead right to a quarter section of the land, had made settlement and improvements thereon, and had filed the final proofs and also his affidavit of right to commute the same to a cash entry, required under section 2301 of the Revised Statutes of the United States (U. S. Comp. St. 1913, § 4589). In *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726, a mortgage made before the entry was held valid as against the mortgagor, where the mortgagor afterwards acquired a patent to the land; and the mortgagor was held estopped from denying his title at the time of making the mortgage. And in *Kirkaldie v. Larrabee*, 31 Cal. 450, 89 Am. Dec. 205, it is said that one who, while in possession of public land, executes a mortgage thereon and afterwards homesteads the same—

"is estopped from denying the existence of the lien which he has attempted to create, and from defeating by his own act the enforcement of the lien against the property thus mortgaged."

Also in the case of *Stark v. Morgan*, 78 Kan. 453, 85 Pac. 567, 6 L. R. A. (N. S.) p. 934, 9 Ann. Cas. 930, it is said:

"(1) A mortgage in this state, being merely security for a debt, conveys no title, and is not an 'alienation,' within the meaning of section 2291, U. S. Rev. Stat. [U. S. Comp. St. 1913, § 4532].

"(2) A mortgage upon government land, made by a claimant holding under the homestead act, prior to final proof, for the purpose of procuring money to improve the land, or for any purpose, provided it is not intended thereby to transfer the title in evasion of the statute, is not void, nor in violation of the homestead laws.

"(3) A homestead claimant, who executed a mortgage under such circumstances, and afterwards procured the title to the land from the government, will be estopped from defeating, by his own act, the enforcement of the lien created

by the mortgage. His after-acquired title inures to the benefit of the mortgagee."

For authorities supporting the proposition that a mortgage, executed by the homesteader to secure an indebtedness contracted prior to the issuance of the patent, is valid and enforceable, even though executed prior to the issuance of the patent, or before final proofs have been made so as to entitle the homesteader to a patent, see 6 L. R. A. (N. S.) 935.

In the case of *Spieß v. Neuberg*, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211, the Supreme Court of Wisconsin said:

"Where defendant, having a right of pre-emption to certain lands, mortgages his interest to plaintiff for a valuable consideration, and subsequently commutes same, proves his occupation, pays the purchase price, and receives patent thereto, the mortgage held by plaintiff is a valid lien upon the property, and the title thus acquired by defendant inures to the benefit of the plaintiff."

See authorities cited in the opinion.

In the case at bar the Pittsburg Mortgage Investment Company loaned to Mason \$200 with which to commute his land, and the government issued to him a final receipt, which was duly recorded, and thereupon the company advanced him the additional sum of \$300, taking his note therefor, and secured the same by a mortgage upon the real estate. The company did not have any knowledge of any imperfections in the final proof of the entryman. It relied upon the record, and had every reason to believe that this record spoke the truth, and the company had no reason to believe that the government would revoke the final certificate which it had issued to Mason. So here we have a cause where the mortgagee after the final receipt had been issued accepts a mortgage upon the land (homestead) as security for money advanced to the entryman to commute the land and for money advanced after the final certificate had been issued, which certificate was evidence of the fact that the entryman was entitled to a patent to the land. The original entry was not canceled, but Mason was permitted to correct the imperfections in his final proof and receive a final certificate and a patent to this land. When he did this, it inured to the benefit of the Pittsburg Mortgage Investment Company, and gave to it a lien upon this land to secure the payment of the amount due by Mason to it.

[2] We are not unmindful of the two cases of *Stark v. Glaser*, 19 Okl. 503, 91 Pac. 1040, and *Stark v. Fallis*, 26 Okl. 358, 109 Pac. 66, but we would call especial attention to the fact in these two cases, inasmuch as it appears that the court said in these cases that the language used was insufficient to constitute a mortgage, and that the contract sued upon was in the nature of a mortgage; that nowhere in the contract was it made expressly a lien upon the land, but while an attempt

was made to bind the land for the performance of the contract, it did not, in express terms, make the contract a lien upon the land, and the language used in the contract sought to be enforced was too vague and uncertain to be considered by the court as a lien against and running with the land. To have sustained the contract in the two cases, supra, and subjected the land thereto would have subjected the homestead by a compulsory process to the satisfaction of a claim which did not constitute a voluntary lien upon the property, and which was clearly prohibited by the United States statute in question.

We believe that this opinion is supported by the best-reasoned authority in the courts of this country, and the same is in keeping with the early decisions of this court, and, in our judgment, clearly applies the rule of law to the facts in question, and, entertaining this view, we must hold that the trial court was in error in sustaining a demurrer to the answer and cross-petition of the defendants here, and this cause is therefore reversed and remanded, with directions to the trial court to overrule the demurrer to the answer and cross-petition of the defendants below, and to proceed in accordance with this opinion.

PER OURLIAM. Adopted in whole.

Ex parte WILLIAMS et al. (No. 2247.)
(Supreme Court of Nevada. Aug. 10, 1916.)

CRIMINAL LAW §238—PRELIMINARY EXAMINATION—SUFFICIENCY OF EVIDENCE.

Testimony on a preliminary hearing for larceny from the person, held, in habeas corpus proceedings, not to make reasonable or probable that the crime was committed by accused so as to constitute the sufficient cause necessary under Rev. Laws, § 6987, for holding them to answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 493; Dec. Dig. §238.]

Original proceeding in habeas corpus by Phil A. Williams and another. Writ granted, and petitioners discharged.

R. M. Hardy, of Lovelock, for petitioners.
T. E. Powell, of Winnemucca, Dist. Atty., for respondent.

MCCARRAN, J. This is an original proceeding in habeas corpus. By the petition it appears that one Phil A. Williams and one John E. Lathrop were charged before the justice of the peace of Lake township, Humboldt county, with the crime of larceny from the person under circumstances not amounting to robbery. A preliminary examination was held, and the testimony in its entirety, as given and had at that examination, is made a part of the petition here.

The sole ground upon which petitioner relies for the release of the parties restrained of their liberty is that the evidence fails to

establish reasonable or probable cause for the holding or detaining or restraining of the parties. In the recent case of *Ex parte Molina*, 157 Pac. 1012, we said:

"It is not required upon a preliminary examination, in order to warrant a magistrate in holding the accused to answer, that the evidence taken as a whole be sufficient to warrant a jury in reaching a conclusion of the guilt of the accused beyond a reasonable doubt."

In the matter at bar, however, we find nothing, even in the strongest evidence produced for the state, upon which reasonable or probable cause could be supported. The testimony of the complaining witness is perhaps the most direct; and yet at no place in his evidence do we find anything that would warrant the holding of the parties whose release is sought.

It appears that on the night on which the alleged offense was committed, the complaining witness had been drinking to a considerable extent. At the solicitation of Lathrop, he went to the saloon conducted by the petitioner Williams. It appears that there they entered into a game of matching coin, and some money was exchanged. While there, the complaining witness exchanged coats with Lathrop; and his testimony in that respect is as follows:

"Well, he said, 'Dutch, let's change coats,' and he tried to pull it off, but I let him have my coat, and at the same time he took my coat and put it on, and he was quick; he flopped this pocketbook over the bar, but I saw him. Q. And where was that pocketbook before he flopped it over the bar? A. In my coat. Q. In your right-hand pocket, the one you have previously described? A. Yes; I don't know whether the money lost out by being flopped over the bar or not, but I said to Williams, 'You come through with this pocketbook right away,' and he reached down and gave me this pocketbook back, and I put it in my pocket, and I didn't look at it, but I think I went over to Charlie Aroblo's. Q. Did you examine the pocketbook after the defendant Phil Williams handed it back to you? A. No. Q. About how long was it after the defendant Lathrop tossed it over the bar before the defendant Phil Williams handed you back the pocketbook? A. Oh, maybe I could count to five or maybe to ten. He dropped it over, and I kind of looked over, and maybe I could have counted five. Q. And you saw this pocketbook flop down on the other side of the bar, and he reached down and handed it back to you? A. Yes. Q. Could you see the pocketbook during any of the time after it was flopped over the bar until it was handed back to you? A. Yes; I looked over and saw it. Q. Where was it when you looked over and saw it? A. It was on the inside of the bar on the floor. Q. When did you look over the bar, before or after you spoke to Phil Williams and told him to hand it back to you? A. Well, I watched it right away. When the pocketbook flopped there I looked right away until he reached down and handed it over again. I never would have noticed, but I heard the flopping, and I said: 'Come on, I want this money back; I want this pocketbook.' Q. Did the defendant Phil Williams hand it to you directly after he picked it up, or was there a space of time? A. No, he kind of reached down like that (demonstrating) and came up and handed it over to me. Q. To the best of your judgment, then, you could have counted five? A. Yes, maybe five or ten; five anyhow. Q. When the defendant Lathrop asked you to change

coats, what else did he say at that time, if anything? A. He didn't say much; he said, 'Let's see how your coat fits me;' he said, 'I think you and me are the same size;' and I didn't see, after he got that coat on, how he took it out, but I saw the pocketbook flop down. Q. You didn't see him with the pocketbook in his hand prior to the time you saw it going over the bar? A. No; I saw it the minute it flopped down."

In addition to this, the complaining witness testified that the pocketbook was handed to him by Williams and never left his possession thereafter to his knowledge.

It appears that after the incident related in the testimony of the complaining witness he went to another saloon, and there, in an intoxicated condition, was assisted to a chair by the bartender of the place. He slept in the chair for several hours; on awakening, he attempted to buy a drink in the place, when for the first time he discovered that his money was gone.

Section 6987 of our Revised Laws, applying to preliminary examinations, is as follows:

"If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the depositions and statement, an order signed by him to the following effect: 'It appearing to me by the within depositions and statement (if any), that the offense therein named (or any other offense according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named ——— guilty thereof, I order that he be held to answer the same.'" Rev. Laws 1912, § 6987.

In the case of *In re Kelly*, 28 Nev. 491, 83 Pac. 228, this court has held that in order to justify a magistrate in holding one accused, the evidence need not show guilt beyond a reasonable doubt. We subscribe to this rule as it has been generally stated by this and other courts. But neither this rule nor any other of which we are aware goes so far as to say that the committing magistrate may hold one accused to answer where no cause appears; and in the case at bar we find nothing, as we read the record, that might be termed sufficient cause to make it either reasonable or probable that the crime of larceny from the person was committed by the parties so charged. Indeed, the circumstances surrounding the incident in the Williams saloon were not even sufficient to arouse the suspicion of the complaining witness at the very time at which the incident took place. There is testimony in the record to show that several hours after the incident in the Williams barroom the complaining witness exhibited the pocketbook to a disinterested party, and at that time it contained a number of bills; and at that time the complaining witness, according to the record, boasted of having \$250 therein.

Taking the testimony in its entirety as it is presented to us in the record, it is our judgment that there is no reasonable or probable cause sufficient to hold these parties accused, or to deprive them of their liberty.

It is the order of the court that the writ prayed for be granted and perpetuated, and that Phil A. Williams and John E. Lathrop, in whose behalf the petition is laid before this court, be discharged.

NORCROSS, C. J., and COLEMAN J., concur.

STATE v. WELLS et al. (No. 2209.)
(Supreme Court of Nevada. Aug. 1, 1916.)

1. CRIMINAL LAW — 224 — PRELIMINARY EXAMINATION — NECESSITY — RIGHT OF ACCUSED.

Under Laws 1913, c. 209, § 2, requiring, in all cases where defendant has not had or waived a preliminary examination, that there be filed with the information an affidavit verifying it upon affiant's personal knowledge, and section 9 thereof, as amended (Laws 1915, c. 17), providing that an information may be filed after preliminary examination, or waiver of it, but if accused has been discharged on preliminary examination, or the complaint upon which the examination has been held has not been delivered to the clerk, the district attorney may file an information, upon affidavit, of any person knowing of the offense, etc., but that such affidavit need not be filed where the defendant has waived a preliminary examination or upon such examination has been bound over, one accused of crime has a right to opportunity to either have or waive preliminary examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 466, 467; Dec. Dig. — 224.]

2. CRIMINAL LAW — 301 — PLEA — NOT GUILTY — WITHDRAWAL.

A motion to set aside a plea of not guilty for the purpose of interposing a plea in abatement is addressed to the sound judicial discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 687; Dec. Dig. — 301.]

3. CRIMINAL LAW — 279 — PLEA IN ABATEMENT — TIME AND ORDER OF PLEADING.

The objection in a plea of abatement that no preliminary hearing on the charge was had or waived, and that no leave of court was obtained for the filing of the information, should be made before plea of not guilty is entered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 643, 644; Dec. Dig. — 279.]

4. CRIMINAL LAW — 1149 — APPEAL — REVIEW — DISCRETION OF TRIAL COURT — REFUSAL TO ALLOW WITHDRAWAL OF PLEA.

The decision of the trial court on motion to withdraw a plea to the merits of an information for the purpose of interposing a plea in abatement will not be disturbed, where its discretion has been exercised without effecting a manifest injustice, and where there is no improper assumption of jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039-3043, 3058; Dec. Dig. — 1149.]

Appeal from District Court, Clark County; Charles Lee Horsey, Judge.

R. Wells and James Steele were charged with robbery. From a judgment and order denying their motion to withdraw pleas, they appeal. Affirmed.

Leo A. McNamee, of Las Vegas, for appellants. A. S. Henderson, of Las Vegas, and Geo. B. Thatcher, Atty. Gen., for the State.

McCARRAN, J. The appellants, being charged jointly with the crime of robbery in an information filed by the district attorney of Clark county, interposed a plea of "not guilty," and thereafter moved the court for permission to withdraw their plea, in order that they might make a plea in abatement.

[1] The ground upon which appellants sought to attack the information was that no preliminary hearing on the charge was had or waived, and that no leave of court was had and obtained for the filing of said information. The law of this state applicable to prosecutions and punishment of crimes, misdemeanors, and offenses, by information, is found in Session Acts 1913, p. 293. Section 2 of the act provides, among other things:

" * * * In all cases in which the defendant has not had or waived a preliminary examination there shall be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of affiant that the offense was committed."

It is the contention of the state, as the respondent in the matter at bar, that this provision of the statute contemplates that no preliminary examination need be held, and that a defendant charged by an information might be held and put to trial upon an information without opportunity for preliminary examination. Section 9 of the act of 1913 was amended by the Legislature of 1915, and, as amended, reads as follows:

"An information may be filed against any person for any offense when such person has had a preliminary examination as provided by law before a justice of the peace, or other examining officer or magistrate, and has been bound over to appear at the court having jurisdiction, or shall have waived his right to such preliminary examination. If, however, upon such preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process shall forthwith issue thereon. The affidavit mentioned herein need not be filed in cases where the defendant has waived a preliminary examination, or upon such preliminary examination has been bound over to appear at the court having jurisdiction. All informations shall set forth the crime committed according to the facts." Session Acts 1915, p. 16.

If there be any ambiguity in section 2 of the original act, it is clarified by section 9 as amended. The latter section, to our mind, contemplates one of two things: Either that a party accused of crime shall have opportunity for and avail himself of a preliminary examination; or, having opportunity for such preliminary examination, waives his right thereto. But that the opportunity must be afforded for a preliminary examination to one accused of crime appears to us to be

the intendment of the act, especially as it is set forth in the amended section 9 of the act. The provisions of section 9, as we view it, only go to make operative and effective the provisions of the latter part of section 2. The first part of section 9 provides for the filing of an information against one who, having had a preliminary examination, has been bound over to appear at the court having jurisdiction, or who, having had opportunity for a preliminary examination, has waived his privilege in that respect. Under such conditions as this, the statute says: "No affidavit need be filed with the information." But section 9 makes provision for other conditions that might arise, as, for instance, where a party accused has had a preliminary examination and has been discharged by the committing magistrate, or where, after the preliminary examination, the affidavit or complaint upon which such examination was held has not been delivered to the clerk of the proper court. In either event, an information may be filed, if it is accompanied by an affidavit of any one having personal knowledge and authorized by an order of the court having jurisdiction of the offense.

It is the contention of the state, as respondent herein, that the Legislature intended that an information may be filed both where a preliminary examination was had and also where no preliminary examination took place. In our opinion, this contention may be well taken, and yet the right to a preliminary examination is one which a party accused is by the state accorded. The statute, both in section 2 and in the amended section 9, makes waiver to a preliminary examination on the part of the party accused a condition precedent to certain things. This, to our mind, emphasizes the fact that the Legislature intended that a party accused should have the right, if he saw fit, to waive his privilege of preliminary examination, but that he must have opportunity to waive such is patent. How can it be said that a party may waive a preliminary examination if the right to such preliminary is not afforded? If the right to a preliminary examination is not contemplated by the statute, why does it make provision for waiver? The answer to these propositions is conclusive that the statute contemplated the right of one accused by information to a preliminary examination.

[2, 3] The motion to set aside the plea of not guilty for the purpose of interposing a plea in abatement was addressed to the sound judicial discretion of the trial court. An objection such as that sought to be raised by appellants herein ought to be made before plea is entered. In the case of *State v. Collyer*, 17 Nev. 275, 30 Pac. 891, Mr. Justice Hawley, speaking for this court, said:

"If a wrong has been committed, the law intends that the party injured shall have a rem-

edy; but where it provides the manner in which relief shall be given, the path pointed out should be followed. It is important, to the fair and impartial administration of justice, that the time for making such motions should be restricted. * * * By pleading to the indictment it will be considered that he consented to the irregularity, and thereby waived his right to make any objection to the method."

To the same effect are: *State v. Roderigas*, 7 Nev. 333; *State v. Larkin*, 11 Nev. 325.

[4] In the case of *State v. Collyer*, supra, the court took occasion to observe that in the exercise of sound judicial discretion, where the motion is made in good faith before the trial commences, it would be the better practice to allow the plea to be withdrawn and give the defendant an opportunity to make his motion to quash the indictment, especially if the court was of the opinion that there was any merit in the motion. We subscribe to this doctrine in its entirety. Nevertheless, the right to withdraw a plea to the merits of an information for the purpose of interposing a plea in abatement being a matter addressed to the sound judicial discretion of the court, its decision in that respect should not be disturbed, where, as in this case, such discretion has been exercised without effecting a manifest injustice and where there is not an improper assumption of jurisdiction.

The order and judgment appealed from will be affirmed.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

SKAGGS v. BRIDGMAN et al. (No. 2184.)

(Supreme Court of Nevada. Aug. 1, 1916.)

1. APPEAL AND ERROR \S 653(3)—STATEMENT—NEW STATEMENT—JURISDICTION.

The Supreme Court has no power to make a new statement on appeal, which must be settled in the lower court, or to direct that court to make one, the statement having been settled as prescribed by statute; but any relief under Practice Act, \S 142 (Rev. Laws, \S 5084), by reason of mistake, inadvertence, surprise, or excusable neglect of appellant, must be had in the lower court; a motion for new trial there made having never been determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2818; Dec. Dig. \S 653(3).]

2. APPEAL AND ERROR \S 807—DISMISSAL—RESTORATION.

An appeal dismissed for noncompliance with Supreme Court rules 2 and 3 (154 Pac. viii), will not be restored, where no purpose would be served, the record presenting for consideration only the judgment roll showing no error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3177-3188; Dec. Dig. \S 807.]

Appeal from District Court, Elko County; Edward A. Ducker, Judge.

On motion to restore appeal. Denied.

For former opinion, see 154 Pac. 77.

W. W. Griffin, of Carson City, for appellant. Carey Van Fleete, of Elko, and Charles R. Lewers, of San Francisco, Cal., for respondents.

NORCROSS, C. J. [1, 2] This court heretofore dismissed the appeal in the above-entitled cause for noncompliance with the provisions of rules 2 and 3 of this court (154 Pac. viii), subject to a motion to reinstate as prescribed in said rule 3. A motion to restore the appeal has been made. In *Lightle v. Ivancovich*, 10 Nev. 41, 43, this court said:

"As this is the first case where an interpretation has been given to these rules, we deem it proper briefly to state that we entertain the opinion that all applications to reinstate appeals must show that appellant has used reasonable diligence in procuring, or attempting to procure, the transcript on appeal, and if he fails to present the same in this court within the time prescribed by rule 2, his affidavit must present sufficient facts to constitute a legal excuse for the delay, and, in addition to the statement, 'that the appeal has been taken in good faith,' it should also show that in the opinion of appellant's counsel 'there are substantial errors in the record which ought to be corrected by this court.' *Hagar v. Mead*, 25 Cal. 600; *Dorland v. McGlynn*, 45 Cal. 18."

The appeal in this case is from the judgment alone, and it is conceded that the record certified from the court below as the record on appeal would present only the judgment roll for consideration, and that no error appears upon the face of the judgment roll.

Counsel for appellant has, however, filed with the clerk of this court what is alleged to be the transcript of the testimony in the case, together with certain exhibits, and we are asked virtually, either to make a new record on appeal ourselves, or to direct the court below to do so. This request is based upon the provisions of section 142 of the Practice Act (Rev. Laws, § 5084), authorizing the relief of a party from some proceeding taken against him "through his mistake, inadvertence, surprise, or excusable neglect." The record certified to this court was made by former counsel for appellant. It appears that appellant has been represented in the court below and in this court at various times by different attorneys and firms of attorneys. The affidavit of appellant and the affidavit of one of her former counsel set forth alleged facts justifying, according to the contention of counsel now appearing for appellant, some relief to appellant whereby her case could be heard upon its merits in this court. The case upon an appeal from the judgment alone could only be heard and determined in this court upon a statement on appeal or a bill of exceptions. Whichever method is pursued, the statement or bill must be settled in the court below. A statement was settled in the way prescribed by the statute, and we now have no power to

make a new statement or to direct the court below to make a new and different one.

It appears from the affidavits filed that a motion for a new trial was made in the court below, which motion has never been submitted to the court below, and hence has never been determined. If the plaintiff in the action is entitled to any relief by reason of mistake, inadvertence, surprise, or excusable neglect, we think the only forum to apply for such relief is in the court below.

As no purpose could be served by restoring the appeal, the motion should be, and is, denied.

McCARRAN and COLEMAN, JJ., concur.

PICETTI et al. v. D. C. WHEELER, Inc.
(No. 2211.)

(Supreme Court of Nevada. Aug. 1, 1916.)

APPEAL AND ERROR 1011(1) — REVIEW — CONFLICTING EVIDENCE.

A judgment will not be reversed for insufficiency of evidence where substantial, although conflicting, evidence supports it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. 1011(1).]

Appeal from District Court, Washoe County; Cole L. Harwood, Judge.

Suit by Luigi Picetti and others against D. C. Wheeler, Incorporated. From a judgment for defendant, plaintiffs appeal. Affirmed.

Heer & Glynn and Mack & Green, all of Reno, for appellants. Le Roy F. Pike and L. A. Gibbons, both of Reno, for respondent.

NORCROSS, C. J. This is an appeal from a judgment in favor of the defendant in an action brought by appellants, plaintiffs in the court below, for a permanent injunction restraining the defendant from interfering with certain alleged water rights of plaintiffs.

The only question urged upon appeal is that the evidence does not support the judgment. The case was tried to the court below without a jury. From the opinion of Harwood, District Judge, we quote the following:

"The evidence in this case clearly showed that whatever rights the plaintiff claimed must be based upon waters having their source below the point where the so-called Towle Ranch ditch crosses the ravine which is referred to in the pleadings and in the testimony. There is some claim that there are small springs in addition to the large one situated on the south side of the ravine, but the evidence on this point is not clear or convincing. The only clearly established source of water supply except the waste waters, to which, of course, no claim of appropriation can be made, is the large spring above referred to. This spring has a constant flow, although it varies somewhat in quantity, and the testimony establishes the fact that in the summer the flow of the spring in question is somewhat reduced, probably as low as 2½ or

3 inches. This spring is located a distance of about 600 yards above the plaintiff's land, and I am convinced, both from the testimony and from an inspection of the premises, which was had in company with the representatives of the parties and the parties themselves, that this small flow of water will not reach the plaintiff's land during the irrigating season. The evaporation and seepage will consume it. Undoubtedly, when this flow was added to the waste water which was used for irrigating above the spring, or that might be used for irrigating below the spring, there might have been a sufficient head of water flowing down the ravine to be available. But steps have been taken to save this waste water and carry it to other lands of the defendant company. The plaintiff has failed to make out a case with such clearness of proof and by such a preponderance of the evidence as would entitle him to a decree."

It is too well settled to require a citation of authorities, that a judgment will not be reversed for insufficiency of evidence where there is any substantial evidence to support it. The most that can be said in this case is that the evidence is conflicting. The court below not only heard the evidence, but it was the exclusive province of that court to determine the weight and credibility to be given to the testimony. In addition to hearing the testimony, the judge, in company with the respective parties, made a personal inspection of the premises in controversy. We think no good purpose could be served by entering upon a consideration of the evidence in detail. Suffice it to say we have examined the transcript and that it cannot be said therefrom that there is not substantial evidence to support the judgment.

Judgment affirmed.

MCCARRAN and COLEMAN, JJ., concur.

CLAPP v. SMITH et al. (No. 1853.)
(Supreme Court of New Mexico. July 17, 1916.)

(Syllabus by the Court.)

CORPORATIONS §550(10), 563(2)—LIABILITY OF STOCKHOLDERS—CORPORATE DEBTS—ACTION BY RECEIVER.

The statutory added liability of holders of corporate shares of stock, in addition to the par value thereof, is not a corporate asset, but a secondary or collateral liability flowing directly to and to be enforced by creditors, and the receiver, assignee, or trustee of an insolvent corporation cannot, in the absence of express statutory authority, recover it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2200, 2280½; Dec. Dig. § 550(10), 563(2).]

Appeal from District Court, Dona Ana County; R. L. Medier, Judge.

Action by Lafayette Clapp, as receiver of the First State Bank of Las Cruces, an insolvent corporation, against T. R. H. Smith and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The appellant, as plaintiff in the district court of Dona Ana county, brought this action as the receiver of the First State Bank

of Las Cruces, an insolvent corporation, against the defendants, as the stockholders of said bank, to enforce their added liability as declared by section 403 of the Codification of 1915. A demurrer was interposed to the complaint upon the grounds that the complaint did not state a cause of action, in that it is not shown that the several amounts alleged to be due from the stockholders are assets of said corporation, subject to administration by the plaintiff as receiver of said bank; that so far as liability exists, it is to and for the exclusive benefit of the creditors of said bank; and in the absence of express statutory authority conferring the right upon the plaintiff, as receiver, he cannot maintain his action against the defendants; that it is not alleged in the complaint that the several and respective amounts due from the defendants, as stockholders, have been determined or ascertained by any judicial proceeding. The trial court sustained the demurrer and dismissed the complaint, from which judgment this appeal is prayed.

Wade, Taylor & Wade, and W. H. H. Llewellyn, all of Las Cruces, for appellant. Young & Young, of Las Cruces, for appellees.

HANNA, J. (after stating the facts as above). The only question raised by the demurrer which we are called to pass upon is whether or not the receiver is the proper person to bring the suit. The act defining stockholders' liability appears as section 403 of the Codification of 1915, and provides that stockholders of every banking corporation shall be individually liable for all debts contracted, during the term of their being stockholders of such corporation, equally and ratably to the extent of their respective shares of stock in such corporation. This statutory provision is what is generally denominated as a statutory added liability of stockholders. It would seem to be quite clear that if this added liability of stockholders is an asset of the corporation, the receiver of such corporation, when insolvent, should be authorized to enforce the liability. If, on the contrary, the added liability of stockholders is a provision for the benefit of creditors and not to be considered an asset of the corporation, the creditors only would have the right of action and be entitled to enforce the so-called added liability. It is said by Mr. High in his work on Receivers (4th Ed.) 317a, that:

"The authorities are not wholly reconcilable as to the right of a receiver of a corporation to maintain an action in behalf of its creditors, to recover of shareholders an individual or additional liability, imposed by charter or statute upon shareholders for the protection of creditors."

An interesting discussion of the question is to be found in the case of Jacobson, As Receiver, v. John Allen et al. (C. C.) 12 Fed.

454, 20 Blatchf. 525, where it is pointed out that the receiver of an insolvent corporation makes his title through the corporation, and cannot, through his appointment, acquire that which the corporation never had. The court, in the case referred to, pointed out that the liability of the stockholders to creditors is to be regarded as a collateral statutory obligation of the shareholders for the benefit of the creditors, by which the former becomes sureties to the latter for the debts of the corporation. The liability by our statute is expressly declared to be for all debts contracted, and is obviously for the benefit of the creditor, and cannot be deemed an asset of the corporation. The corporation, therefore, not being entitled to invoke the statutory right, we cannot see by what construction the receiver could claim to be entitled to claim a right or remedy not existing in the corporation itself. While, as pointed out by Mr. High, the authorities are not uniform in passing upon the right here contended for, yet the great weight of authority is against the right.

In the case of *Tiger Shoe Mfg. Co.'s Trustee v. Shanklin*, 125 Ky. 715, 102 S. W. 295, 31 L. R. A. (N. S.) 365, a large number of cases are collected and referred to as sustaining the rule that the statutory added liability of holders of corporate shares of stock, in addition to the par value thereof, is not a corporate asset, but a secondary or collateral liability flowing directly to and to be enforced by creditors, and the receiver, assignee, or trustee of an insolvent corporation cannot, in the absence of express statutory authority, recover it. See, also, 7 R. C. L. § 373; *Cook on Corporations* (7th Ed.) § 218.

It is apparently contended by appellant that because in this state, under the provisions of section 462 of the Codification of 1915, a receiver is appointed for insolvent banks to wind up the business and affairs thereof, for the benefit of its depositors, creditors, and stockholders, therefore his right to represent the creditors is to be inferred, and as a result statutory authority exists authorizing the receiver to institute a suit such as the one under consideration for the purpose of recovering the added liability of stockholders. We do not consider that such is the case. The character of statutory authority referred to in the decisions is such as is to be found in the new banking act of 1915, wherein section 86 of chapter 67 provides that no creditor shall maintain any action to recover upon stockholders', officers', or directors' liability while a bank is in the possession of the receiver, but such stockholders', officers', and directors' liability shall be deemed an asset of said insolvent bank, and such receiver shall have the sole and exclusive right to maintain such action. In this connection it is contended by appellant that the latter provision of the

Code of 1915 is a declaration by the Legislature of the rule as it theretofore existed in this jurisdiction. It could just as well be argued that the last declaration of the Legislature in the act of 1915 evidences an intention on the part of the Legislature to correct an existing condition and afford a remedy or right not theretofore existing as it can be argued that the provision of the act is a declaration by the Legislature of the rule as it had existed, for which reason we do not find merit in this contention of appellant. The act of 1915 was passed after the complaint in this cause had been filed and therefore has no bearing upon this case save as it might be urged, as is here done, that it is declaratory of the former rule in this jurisdiction, with which we cannot agree.

For the reasons stated, we conclude that the judgment of the district court must be affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

STAFFORD et al. v. CLOUTHIER. (No. 1827.)

(Supreme Court of New Mexico. July 17, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR §982(1)—REVIEW—DISCRETION OF TRIAL COURT—VACATION OF JUDGMENT.

A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and the determination of the trial court will not be disturbed on appeal unless it is plain that there has been an abuse of such discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3877, 3878; Dec. Dig. § 982(1).]

Error to District Court, Colfax County; T. D. Leib, Judge.

Action by Josephine A. Clouthier against John Stafford and another. Motions to set aside a judgment for defendants were denied, and defendants bring error. Affirmed.

L. S. Wilson, of Raton, for plaintiffs in error. W. R. Holly, of Springer, for defendant in error.

HANNA, J. This was an action in replevin instituted in the district court of Colfax county, by Josephine A. Clouthier, against the plaintiffs in error in this court, seeking to recover certain personal property, or the market value thereof, alleged to be the property of the plaintiff and at the time of the institution of the suit in the possession of the defendants. In due course an answer was filed, denying that plaintiff was the owner or entitled to possession of the property in question, and setting up other matters material to the issue. This answer was filed

on the 15th day of November, 1912. On the following day the attorney for the plaintiff addressed a letter to Mr. J. H. Crist, attorney for the defendants, advising that on that day the case was set for trial by the court on the 29th day of the same month. It appears that Mr. Crist had written the attorney for the plaintiff that he would be required to attend the term of court in Rio Arriba county, and would be in attendance upon this court for a period of two weeks. Mr. Holly, the attorney for plaintiff, thereafter, on the 16th day of November, forwarded a stipulation, unsigned by him, to the effect that the case would be taken up in vacation without a jury, counsel for plaintiff agreeing not to press the matter for trial on the 29th if such stipulation was entered into, and requesting that the stipulation be promptly signed and returned, and that a wire be sent him, advising as to the signing of the stipulation. This was for the purpose of avoiding the necessity of having the case go over for the term, and apparently to avoid necessity of bringing in witnesses for the trial at the term in case the stipulation was entered into providing for a later trial before the court. Mr. Holly, in order to be certain that his communications should reach Mr. Crist, promptly mailed a copy of the letter and stipulation to Mr. Crist's office at Santa Fé, and another copy of the same to Tierra Amarilla, where the district court of Rio Arriba county was sitting. Not hearing from Mr. Crist before the date set for the trial of the case, Mr. Holly secured a judgment against the defendants. On the 3d day of January, 1913, Mr. Crist, on behalf of the defendants, moved to vacate the judgment, and moved for a new trial, setting up: First, that the trial was had without due notice to the defense and contrary to the terms of the stipulation between counsel; secondly, upon the ground that the judgment was improvidently rendered because of an alleged variance between the allegations of the complaint and the testimony given in support thereof. This motion was supported by several affidavits, most of them going to the merits of the defense to the action, and the affidavit of counsel, Mr. Crist, setting up that he did not receive the letter and stipulation from Mr. Holly until the 28th day of November, 1912, or three days before the date set for trial of the cause, further stating that he was unable to give a reason for the delay in the receipt of the communication in question, and that he promptly signed this stipulation, but, being busily engaged in the trial of other causes then before the court, overlooked the request of Mr. Holly that he be advised by wire as to the signing of the stipulation; that he did not learn of the judgment which had been taken until the 17th or 18th day of December, when he received a letter from Mr. Holly, advising him relative thereto, whereupon he promptly

ly sought to have the judgment set aside, and filed a motion for such purpose on the 3d day of January, as indicated. A supplementary motion to set aside the judgment was later filed, setting up two grounds tending to show a good cause of defense to the action. The motions in question were not disposed of until the 15th day of May, 1915, at which time both motions were denied.

On the hearing upon the motions referred to, affidavits and a number of letters were presented for the consideration of the court, and the matter was evidently carefully and fully inquired into by the district judge. While defendants in error have moved to dismiss the appeal in this court on a number of grounds, we prefer to consider the matter upon its merits, as we feel that we should do so under the circumstances of this case.

The plaintiffs in error have assigned numerous grounds of error, all, however, having to do with the action of the district court in denying the motion to vacate the judgment.

While the facts of this case are not quite analogous to the numerous cases to be found in the books dealing with the setting aside of default judgments or refusal to vacate such judgments, because in this case the defense had filed an answer and had been advised of the setting of the case for trial, and had through inadvertence or neglect defaulted in appearance at such trial, nevertheless it seems clear to us that the same rule should apply to this case as to ordinary defaults, and, in fact, it seems to be well settled that a motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and the determination of the trial court will not be disturbed on appeal unless it is plain that there has been an abuse of such discretion. 23 Cyc. 895. This being the rule it would seem to be only necessary to inquire whether or not the district judge has abused his discretion under the facts of this case. It does not appear that any effort was made to take undue advantage of defendants or counsel. Although no notice is required of the setting of cases during the term time, yet counsel for defendants were advised, 13 days before the trial, not only that the case had been set, but that counsel for the plaintiff did not desire to have it go over the term unless it was stipulated to waive a jury, in order that an early disposition of the case might be had as provided for by the terms of the stipulation. Had counsel for the defense accepted the terms of this agreement, and advised concerning his acceptance, within the time limited, as he could have done, no difficulty would have arisen, so that it would seem to be clear that counsel for the defense was to blame for the condition which resulted.

Counsel for plaintiffs in error have cited numerous cases, which we have examined,

nearly all of which are based upon state statutes permitting the setting aside of default judgments for excusable neglect or equivalent circumstances under the terms of the statute. We do not believe that these cases, however, change the general rule which we have set out, and which vests in the trial court a legal discretion to be measured by the facts of the case.

In view of all the conditions as we see them, we cannot say that the trial court was guilty of an abuse of discretion in denying the motions to set aside this judgment, and we therefore affirm the judgment of the district court; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

JOHNSON v. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. (No. 2913.)

(Supreme Court of Utah. July 25, 1916.)

1. PLEADING \S 350(3)—MOTION—JUDGMENT ON PLEADINGS—CONSTRUCTION OF ANSWER. Where plaintiff moves for judgment upon the pleadings, the answer must be construed most favorably to the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1075, 1077; Dec. Dig. \S 350(3).]

2. TELEGRAPHS AND TELEPHONES \S 82—OPERATION—CONTRACT FOR SERVICE—VALIDITY OF RULE.

Where defendant installed private and pay phones in plaintiff's place of business under an agreement to share with him the pay phone receipts, a rule, restricting the private phone's use to plaintiff, is reasonable, at least against its promiscuous use by others.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. \S 18; Dec. Dig. \S 82.]

Mandamus proceedings by H. W. Johnson against the Mountain States Telephone & Telegraph Company. Writ denied, and proceedings dismissed.

M. E. Wilson, J. J. Whitaker, and P. P. Jensen, all of Salt Lake City, for plaintiff. Van Cott, Allison & Riter, of Salt Lake City, for defendant.

STRAUP, C. J. We are asked by mandamus to compel the defendant to reinstate and connect an office telephone taken from the plaintiff's place of business. It is alleged that the defendant, in Salt Lake City and elsewhere, owns and operates a public telephone system, and that the plaintiff, the owner of the Metropole Bar at Salt Lake City, was for many years a patron of the defendant and had an office telephone at his place of business; that he paid all charges and tolls, and complied with all reasonable rules of the defendant, but that it, without cause or excuse, disconnected his telephone and removed it. These allegations are admitted, except plaintiff's compliance with the defendant's rules, and that the telephone was disconnected or removed without cause

or excuse. The defendant further alleged that as a part of the contract of service the plaintiff had subscribed and agreed to a rule that:

"The subscriber agrees that the instrument shall be used only for the purpose of personal communication of the subscriber and his employes or immediate household, upon the subscriber's business"

—and a rule reserving to the defendant the right to terminate the contract "for any use of the instrument contrary to the subscriber's contract," or for a violation of any of its rules and regulations. The defendant also averred that in addition to a private telephone it also, with the plaintiff's consent, installed a public pay telephone at plaintiff's place of business, in consideration of which he was to receive 25 per cent. of the gross receipts derived from local calls and 10 per cent. from long-distance calls, and that the charges of \$6.50 a month for the private telephone were based on the restricted use of that telephone as stated in the rule referred to. Then the defendant further averred that the plaintiff, in violation of his agreement and of the rule, permitted and encouraged persons other than those mentioned in the rule to use his private, instead of the public, telephone, and that upon the defendant's unheeded complaint and protest of such use, the plaintiff's private telephone, upon prior notice given to desist, was disconnected and removed. Upon these pleadings the plaintiff moved for judgment.

[1, 2] It is not disputed that the defendant had the right to make reasonable rules and regulations concerning the use and service of its telephones. The claim made on the one hand and denied on the other is that the rule restricting the use of plaintiff's private telephone "for the purpose of personal communication of the subscriber and his employes or immediate household, upon the subscriber's business," is unreasonable. The plaintiff argues that such a rule forbids a mere caller or visitor at the plaintiff's residence or office from temporarily using his telephone for the convenience or accommodation of the caller or visitor, the housemaid, or even the subscriber's wife or children, from communicating with one over the telephone not upon the subscriber's business. Let it be assumed such an interpretation of the rule might render it unreasonable. But that is not this case. The plaintiff by his motion confessed all the well-pleaded and material facts most favorable to the defendant. We thus have a case where the defendant installed a telephone in the plaintiff's place of business for his private use and, with his consent, also one for the public. It is not averred with that degree of certainty as might be just whom—whether the public generally or his customers or patrons at his place of business, or only now and then a caller or visitor—the plaintiff permitted and

encouraged to use his private telephone. The allegation in such respect is that the plaintiff violated the rule "by permitting and encouraging persons other than those mentioned" in the rule to use his private, instead of the public, telephone. That allegation the plaintiff confessed. It, in view of plaintiff's motion, must be taken most favorably and liberally to the defendant. So considering it, it in effect is alleged that, notwithstanding the defendant with the consent of the plaintiff, and, as is also alleged, upon a consideration moving to both and for the mutual benefit of both, installed at his place of business a public telephone for the use of the public, nevertheless the plaintiff permitted and encouraged the public generally, or his customers, or his patrons—whomsoever he pleased—to use his private, instead of the public, telephone. We think it was competent for the parties to contract against that, and that the rule under the pleaded circumstances forbidding it is reasonable. Certainly the plaintiff may not contract for a restricted use of the telephone and then claim the right to permit any and all persons, without restriction or hinderance whatsoever, to use it as he may designate. That, in effect, is what he claims. He acquired no such right.

Let the writ therefore be denied, and the proceedings dismissed at plaintiff's costs. Such is the order.

FRICK and McCARTY, JJ., concur.

BURT v. STRINGFELLOW et al. (No. 2872.)
(Supreme Court of Utah. July 17, 1916.)

1. APPEAL AND ERROR ¶1010(1)—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings in a law case supported by substantial evidence cannot be reversed because based upon insufficient evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ¶1010(1).]

2. BROKERS ¶31—EMPLOYMENT—VALIDITY OF CONTRACT.

A contract under which a prospective vendor gives a broker the right to sell within a certain period with the option of purchasing the land himself is valid.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 24; Dec. Dig. ¶31.]

3. BROKERS ¶50—COMPENSATION—PERFORMANCE WITHIN TIME SPECIFIED.

Where a broker interested certain parties in land which they purchased from his principals soon after his contract expired, but the principals did not prevent him from closing the deal within the contract period, *held*, the broker could not collect his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 68; Dec. Dig. ¶50.]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by John A. Burt against Arthur Stringfellow and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jones, Brown & Judd, of Salt Lake City, for appellant. Ben Johnson and J. J. Whitaker, both of Salt Lake City, for respondents.

FRICK, J. The plaintiff brought this action to recover a real estate broker's commission. The case is here on second appeal. Burt v. Stringfellow et al., 45 Utah, 207, 143 Pac. 234. In the opinion in that case we set forth in full the contracts entered into between the plaintiff and the defendants, and upon which this action is based; and we shall not repeat the terms thereof here, except in so far as it may become necessary to a complete understanding of the points decided.

At the first trial the district court dismissed the action upon the ground that, as a matter of law, plaintiff could not recover a commission under the terms of the contracts. The judgment was reversed and the cause remanded for a new trial. The case proceeded to second trial in the same court, but before another judge. After hearing the case upon the evidence produced by the parties the court found the issues in favor of the defendants and entered judgment accordingly. Plaintiff appeals.

The findings are too long to be copied into this opinion. The substance of the material portions thereof is as follows: That on the 8th day of September, 1911, the defendants entered into the two agreements mentioned in the former opinion and under the circumstances there set forth; that under the terms of said agreements the plaintiff obtained an option to purchase certain real property owned by the defendants for the sum of \$9,000 or to sell it to some other person for said sum, and that in either event plaintiff was to receive the sum of 5 per cent. on the purchase price, or \$450, as a commission, the same to be deducted by him out of the purchase price aforesaid; that the plaintiff paid the sum of \$50 for the option aforesaid and the same was to continue in full force and effect until the 15th day of November, 1911; that the plaintiff made efforts to sell said property and to that end he induced H. A. and Almer O. Sproul, two brothers, to visit and inspect said property; that plaintiff offered to sell said property to said Sproul brothers for the sum of \$11,000, and that he at no time offered to sell the same to them, or to any other person or persons, for a less sum; that said Sproul brothers at no time informed plaintiff that they were ready, able, and willing to purchase the property at the price aforesaid, although they informed him that they thought they could "handle" the property and would "make him a proposition * * * if they decided to take it"; that they at no time made plaintiff an offer to purchase the property, although they frequently saw him before the 15th day of November, 1911.

The court further found:

"That thereafter on or about the 18th day of November, 1911, while the said option and contract of agency was still in force, certain of the defendants signed to one John Jones a commission of agency to sell the said property for the sum of \$9,000 upon a commission of 5 per cent. of the purchase price, which it was understood and agreed was not to become effective until all the parties to said agreement had signed; and the said agreement did not become effective until the 18th day of November, 1911, the date upon which Arthur Stringfellow, one of the defendants named herein, signed the same. And on the said 13th day of November, 1911, there was paid to the said John Jones by the said H. A. Sproul and A. O. Sproul the sum of \$50 to apply upon the purchase price of said property, which sum, however, was to be returned by the said Jones to the said Sproul in case he was unable to get all the parties interested in said property to sign the agreement to said Jones. That thereafter on the — day of February, 1912, the said defendants made, executed, and delivered to said Sproul and Sproul a deed of conveyance for said property and delivered the said water stock to them for the consideration of \$9,000.

"That the plaintiff was the procuring cause of making the said sale of said real estate and water stock to said Sproul and Sproul, but under the terms of his contract with the defendants he is not entitled to the sum of \$450 for his commission for said sale, or any sum whatsoever, nor is he entitled to the sum of \$50 or any sum paid by him to the defendants as a consideration for the execution of the two agreements above referred to. That the said plaintiff did not up to or including the 15th day of November, 1911, or at any time afterward procure and produce to the defendants, or any of them, a purchaser or purchasers who were able, ready, and willing to purchase the said property for the sum of \$9,000.

"That neither of the defendants above named nor H. A. Sproul and A. O. Sproul, nor J. W. Stringfellow, or any of them, ever secretly, knowingly, willfully, or fraudulently connived or conspired together for any purpose whatever. And the said parties or any of them never made or entered into any agreement to sell or dispose of the real property and water stock above described to the said Sproul and Sproul without the knowledge or consent of plaintiff or for the purpose or with the intention of cheating or defrauding the plaintiff out of his commission, or the \$50 paid by the plaintiff as a consideration of the execution of the two said written agreements, or for any purpose whatever.

"And the defendants or either of them did not unlawfully interfere with the plaintiff in making the sale to the said Sproul and Sproul within the time, terms, and provisions stated in said contract. And the said defendants, or either of them, did not sell or deliver the said property to the said Sproul and Sproul prior to the 15th day of November, 1911, and did not deprive or prevent plaintiff from making a sale to the said H. A. Sproul and A. O. Sproul within the time, terms, and provisions of said contract.

"From the foregoing findings of fact the court now makes and files its conclusions of law: That the said plaintiff is not entitled to any judgment against the defendants or any of them and that the defendants are entitled to be hence dismissed with their costs."

Counsel for plaintiff assails the findings in his assignments of error. He contends that the evidence is insufficient to justify a number of the findings.

[1] This is a law case, and, therefore, if there is any substantial evidence, either direct or inferential, in support of every material finding, we may not interfere. We

have read the evidence, and, after doing so, are firmly convinced that there is not only some substantial evidence in support of every material finding, but, in our judgment, the findings are sustained by the preponderance of the evidence. Indeed, the evidence adduced by the plaintiff, in view of the cross-examination, is alone sufficient to sustain the principal findings made by the court.

[2] Counsel, however, insists that the court erred in its conclusions of law and in entering judgment for the defendants. Counsel for the defendants, however, vigorously contends that both the conclusions of law and judgment are sound for the reason that under no circumstances can the plaintiff legally recover judgment under the terms of the contract entered into between him and the defendants. He insists that in view that the plaintiff had an option to purchase defendants' real estate, therefore, his relation to them was that of purchaser and as agent or broker at the same time; that his duty as agent or broker was incompatible with his interests as a purchaser in this, that as agent or broker it was his duty to sell the real estate at the earliest possible moment for the price fixed by the defendants while with an option to purchase his interest would be to obtain the highest possible amount in excess of the \$9,000, and he would thus delay a sale until he could obtain the highest possible price for the property so that he might make a large profit for himself while in doing so he would in no way benefit the defendants as the owners of the property since the amount they would receive was fixed by the contract. It is therefore contended that the plaintiff was attempting to serve two masters, of which he was one, at the same time, which is abhorrent to the law.

Counsel relies on the doctrine laid down by the Supreme Court of Wisconsin in *Stewart v. Mather*, 32 Wis. 344, where, in the third headnote, it is said:

"It is a well-settled general rule that a person cannot at the same time be agent of the vendor to make sale, and purchaser of the property, and that in assuming the character of purchaser he abandons that of agent to effect the sale."

Counsel also cites 4 A. & E. Ency. L. (2d Ed.) 966, where the same doctrine is stated.

No doubt the general rule is as stated in the foregoing authorities, but the rule does not apply in all of its strictness under all circumstances. This is made clear by the authorities cited and relied on by counsel. For example, in the Wisconsin case it is held that the rule, as it is stated, applies, "unless it was the understanding between him (the broker) and the vendor at the time of the sale that he should be entitled to it," the commission. In 4 A. & E. Ency. L. (2d Ed.) supra, the doctrine is stated thus:

"A broker employed to sell goods for his principal cannot buy them for himself; nor can a

broker employed to buy, buy his own goods, unless the principal, with full knowledge of the facts, assents to the transaction. This rule is inflexible, and it is immaterial that the broker acts in good faith and works no injury to his principal, or even that the transaction is more advantageous to the principal than if had with a stranger.

"The reason of the rule is that, if the broker were permitted to buy from or sell to himself, there would be combined in him the incompatible relations of purchaser and seller, and an interest adverse to that of his principal would be created such as would ordinarily lead to a violation of his duty as agent." *Italics ours.*

We think the rule is also well settled that the vendor may agree with the broker that the latter have an option to purchase the property himself and at the same time also have the right to sell it to others, and that in case he purchases or sells he shall be entitled to a commission. There is no public policy that is violated by such an agreement and the vendor, being fully cognizant of all the facts, cannot complain. Under such an agreement, however, where a time limit is imposed upon the broker by the contract, he must either purchase or sell within the time specified. He certainly cannot claim the right to purchase under the option after the time has elapsed, nor can he claim the right to a commission unless he finds a purchaser ready, able, and willing to purchase the property at the price and upon the terms and conditions agreed upon between the broker and the vendor, unless the vendor in some way has prevented the broker from making the sale within the time limit. We shall, however, not pause here to again state the law applicable to broker and vendor. It must suffice for us now to refer to the recent decisions of this court upon the subject. See *Little v. Herzinger*, 34 Utah, 337, 97 Pac. 639; *Little v. Gorman*, 39 Utah, 63, 114 Pac. 321; *Neighbor v. Realty Ass'n*, 40 Utah, 610, 124 Pac. 523, Ann. Cas. 1914D, 1200; *Butterfield v. Con. Fuel Co.*, 42 Utah, 499, 132 Pac. 559; *Burt v. Stringfellow*, supra; *Young v. Whitaker*, 150 Pac. 972. There is nothing in any of those cases, nor is there anything in the authorities cited by counsel, which prevents the vendor and broker from agreeing upon the conditions under which the latter shall be entitled to commissions; and where such agreement is otherwise free from legal objections and is carried out in good faith by the broker we can see no objection to the enforcement of such an agreement. We are of the opinion, therefore, that the contention of defendants' counsel cannot prevail.

[3] We proceed to consider whether the court erred in its conclusions of law as contended by counsel. He relies upon the court's finding "that the plaintiff was the procuring cause of making the said sale . . . to said Sproul and Sproul," etc., and he vigorously contends that in view of that finding but one result is permissible, namely, a judgment for the plaintiff. As we said at the

outset the findings are very long and go into great detail. Indeed, they contain evidentiary as well as ultimate facts. If the findings just referred to, however, are to be held as controlling, then the conclusions of law and judgment would seem not to be in harmony therewith. In view of all the other findings, however, and especially in view of the undisputed evidence, we cannot see how the finding now under consideration can be considered as controlling or even as being of great importance in this case. As we have seen, the plaintiff, under his contract with the defendants, was given an option to purchase as well as an agency to sell the property. There was, however, a time limit agreed upon within which he was required either to sell or to purchase in order to be entitled to a commission. In view of the uncontradicted evidence and of the finding based thereon that the plaintiff did not procure a purchaser within the time limit we cannot see how, under the law, he is entitled to a commission. He was promised a commission upon the express condition that he should either purchase the property himself or sell it to another for the price named by the defendants within the time specified in his contract. Plaintiff himself testified that he did not do that. He, however, claims that he is entitled to the commission not because he has complied with the aforesaid conditions, but upon the ground that the defendants in some way prevented him from selling the property to the Sprouls, who thereafter purchased it from the defendants. The court, however, found against plaintiff's contention, and, as already intimated, we are bound by the finding in that respect. Counsel, however, vigorously insists that notwithstanding the findings, plaintiff, under the authorities, is entitled to recover the commission for the reason that the property was in fact sold to the Sprouls, who were the parties to whom he had shown it and to whom he attempted to sell it within the time limit of his contract. Counsel cites a number of authorities which, he contends, sustain his contention. There are only two cases which require comment, namely, the case of *Wells v. Andreas*, 135 Wis. 319, 115 N. W. 792, and *Gregory v. Bonney*, 135 Cal. 589, 67 Pac. 1038. In both of those cases the vendor and the broker entered into an agreement whereby it was agreed that if the broker sold the property within a certain time he was to receive the commission agreed upon and it was further stipulated that in the event the vendor should, after the time limit, sell the property to a person to whom the broker had shown the property and whom he had solicited to purchase it, that, notwithstanding the time had expired within which the broker should make a sale, he, nevertheless, should be entitled to the commission agreed upon. In both cases it was found that the property had been sold to a person who came within the terms of the

contract and both the Supreme Court of Wisconsin and the Supreme Court of California held the broker entitled to the commission. While the Supreme Court of California said that it considered the contract a "hard bargain" as against the vendor, yet the court found no legal reason why the contract should not be enforced. It is obvious that those cases can have no bearing upon the case at bar. Indeed, if they have any bearing at all, they make against the plaintiff's contention and not for it, since they enforce the terms of the contract. If contracts are to be enforced against the vendor they necessarily must be enforced against the broker, unless some good reason is shown why such should not be the case. All the other cases cited by plaintiff can be given no effect under the facts and circumstances of this case. Under the terms of plaintiff's contract in order to be entitled to a commission he was required to buy or sell the property within the time limit agreed upon. While it is true that the defendants had no right to interfere with a sale or to collude or connive with a prospective purchaser to prevent a sale within the time limit and thereafter sell the property themselves and thus escape the payment of a commission to plaintiff, yet they were not precluded by law, or otherwise, from seeking a purchaser for their property, and if they did so in good faith they could sell the same at any time after the time had expired within which plaintiff was required to purchase or sell the property, and this would be so even though they sold the same to one to whom the plaintiff had attempted to sell if the defendants in no way interfered with plaintiff or the prospective purchaser and the sale by the broker fell through without their fault. This is precisely what happened in the case at bar. While plaintiff contends that some of the defendants, not all, interfered with him in effecting a sale, the court found to the contrary. In view of the further finding that the plaintiff at no time offered to sell the property to the Sprouls for \$9,000, and that he at no time within the time limit produced a purchaser who was ready, able, and willing to purchase the property for the sum of \$9,000, the conclusion of law and judgment that the plaintiff was not entitled to the commission seems to us clearly right and therefore should prevail. While it may be true, merely from the standpoint of ethics, that the acts of two of the defendants were not justified, yet we cannot see how, under the facts and circumstances, they exceeded their legal rights, nor can we understand why all of the defendants should suffer because the two may not have followed the strict ethical rules.

The judgment is therefore affirmed, with costs to the defendants.

STRAUP, C. J., and McCARTY, J., concur.

SHUGREN v. SALT LAKE CITY.
(No. 2863.)

(Supreme Court of Utah, July 17, 1916.)

1. MUNICIPAL CORPORATIONS — § 821(5, 6) — DEFECTS IN STREETS AND SIDEWALK — NEGLIGENCE — QUESTION FOR JURY.

Ordinarily whether maintenance of a particular defect in a street or sidewalk constitutes negligence of the city is a question for the jury.¹

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1748; Dec. Dig. § 821(5, 6).]

2. MUNICIPAL CORPORATIONS — § 821(6) — DEFECTIVE SIDEWALK — QUESTION FOR JURY.

It cannot be said as matter of law that a city was not negligent in maintaining in the residence portion of a city a sidewalk with one of the cement blocks raised from 2 to 2½ inches, on the edge of which a pedestrian was tripped.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1748; Dec. Dig. § 821(6).]

3. MUNICIPAL CORPORATIONS — § 768(2) — INJURY TO TRAVEL — LIABILITY.

If improvements of streets or sidewalk are in the condition made in following plans adopted by the city, it is ordinarily not liable for injury therefrom to a traveler.²

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1622, 1624; Dec. Dig. § 768(2).]

4. MUNICIPAL CORPORATIONS — § 818(9) — DEFECTIVE SIDEWALKS — EVIDENCE.

Evidence that other persons had previously stumbled, though they had not fallen, over the projection in a sidewalk, on which plaintiff had tripped, causing her to fall, is competent both as notice to the city, and as characterizing the defect.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1735; Dec. Dig. § 818(9).]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Hannah Shugren against Salt Lake City. Judgment for plaintiff, and defendant appeals. Affirmed.

H. J. Dininny, W. H. Folland, and Moses Davis, all of Salt Lake City, for appellant. E. A. Walton, of Salt Lake City, for respondent.

FRICK, J. The plaintiff recovered judgment against the defendant for damages for personal injuries sustained in falling upon a sidewalk which, plaintiff alleged, was defective, as will hereinafter appear.

The evidence on behalf of plaintiff relative to the defective condition of the sidewalk, and her fall and injuries, in substance, is as follows: The plaintiff, a woman of middle age, on the evening of January 21, 1914, at about 7 o'clock, while on her way home from the business portion of Salt Lake City, stumbled or tripped against a projection in

¹ Jones v. Ogden City, 32 Utah, 221, 89 Pac. 1006; Bills v. Salt Lake City, 37 Utah, 507, 109 Pac. 745; Robinson v. Salt Lake City, 40 Utah, 497, 121 Pac. 968; Sweet v. Salt Lake City, 43 Utah, 306, 134 Pac. 1167.

² Ward v. Salt Lake City, 151 Pac. 905.

a sidewalk and fell, sustaining somewhat severe, but not dangerous, injuries. The place where plaintiff fell is in the residence part of the city between Second and Third East streets and on Eighth South street. The sidewalk on which she fell is a concrete or cement walk about 5 feet in width and had been laid seven or eight years before the accident. When the walk was laid it was divided into square blocks or sections by cutting a groove with a trowel or some sharp instrument through the still plastic or wet cement, so that when the walk was completed for use it had the appearance of a series of large flagstones, one closely joined to the other. One of the cement blocks or squares for some reason, perhaps by the roots of a growing tree which stood a few feet from the defect, was lifted up out of its place at one end so that the end in question projected above the other block adjoining it to the extent of 2½ inches on one side of the walk and about 2 inches on the other. The walk, according to the testimony, had been in that condition for several years, and the projection was perhaps getting a little higher. At the time plaintiff passed over the projection it was dark, but the electric lights on the street were lighted so that she could see the walk. She said she did not know whether she had passed over that portion of the walk before, but if she had, she did not know of the projection or defect. She was passing toward the face of the projecting block, and, in attempting to pass over it, the toe of her shoe hit against the projection, and she was tripped and fell prone on the sidewalk, where she was found lying in a semi-conscious condition by another woman, who helped her to her feet, after which she walked to her home, which was a few blocks away. There was evidence by another witness for the plaintiff that the projection was between 2 and 3 inches high, but the witness merely gave his judgment. The plaintiff and two other witnesses had, however, measured the height of the projection at different times, and they agreed on the height as above stated. The defendant's witnesses testified that they had made careful measurements with suitable instruments, and found the projection at its highest point to be 2½ inches and at the lowest point 1½ inches. The plaintiff also produced two witnesses who testified, over defendant's objections, that they had seen other persons, in passing along the walk, stumble or trip over the projection before plaintiff fell, but that they had never seen any one fall down. The evidence respecting the extent of the injuries suffered by the plaintiff is not material here.

[1, 2] Defendant's counsel at the close of the evidence, moved the court to direct the jury to return a verdict for the defendant for the reason that under the undisputed evidence the defendant, as matter of law, was not guilty of negligence in maintaining the walk in the condition described by the wit-

nesses, and, further, that from the evidence it was made to appear that plaintiff did not exercise ordinary care for her own safety at the time, and that her want of ordinary care was the proximate cause of her injury. The court denied the motion and submitted the case to the jury upon the whole evidence. The jury returned a verdict in favor of the plaintiff for the sum of \$750, and the defendant appeals.

The defendant assigns the ruling of the court in denying its motion for a directed verdict as error.

Counsel for defendant have referred us to a large number of cases in which, they contend, the courts have held that projections or defects in sidewalks like the one in question are not such defects as will make the municipality liable for injuries to a person who tripped and fell over them. We shall, as briefly as possible, give the gist of the decisions which are cited by counsel in support of their contention.

In *Belts v. City of Yonkers*, 148 N. Y. 67, 42 N. E. 401, it was held "a depression 2½ inches deep, 7 inches wide, and 2 feet 6 inches in length * * * in the center of a flag sidewalk, 8 feet wide" did not constitute negligence on the part of the city. (One justice dissenting.)

In *Hamilton v. City of Buffalo*, 173 N. Y. 72, 65 N. E. 944, the court held that where "a traveler was injured by reason of a rounded depression in a flagged sidewalk about 4 inches deep, 34 inches long, and 12 inches wide, caused by heavily laden trucks wearing away the corners of the flagstones where they came together," did not constitute negligence on the part of the city. (Two justices dissenting.)

To the same effect is *Gastel v. City of New York*, 194 N. Y. 15, 86 N. E. 833, 128 Am. St. Rep. 540, 16 Ann. Cas. 635.

In *Terry v. Village of Perry*, 199 N. Y. 70, 92 N. E. 91, 35 L. R. A. (N. S.) 666, 20 Ann. Cas. 796, the court held:

"A municipal corporation is not liable for injury to a pedestrian, caused by his falling on a sidewalk because of a depression due to the settling of one edge of a concrete square in the walk 1½ inches below the level of the adjoining square, although one or two persons had tripped on the unevenness before."

The other edge of the square was even with the adjoining block or square.

In *Weisse v. City of Detroit*, 105 Mich. 482, 63 N. W. 423, the court held: "A crosswalk containing a loose plank, the end of which is raised about 2 inches above the level of the walk, is 'reasonably safe' within the requirements of the Michigan statute. (One justice dissenting.)

In *Jackson v. Lansing*, 121 Mich. 279, 80 N. W. 8, the court held "an irregular depression worn in a sidewalk about 1½ to 2 feet in area, all sides of which, except on the south, where there was an abrupt depth of about 1½ inches, sloped to a center from 1½ to 3 inches in depth" did not show that

the walk was not in a reasonably safe condition.

In *Butler v. Village of Oxford*, 186 N. Y. 444, 79 N. E. 712, the court held that where it was shown that "at the junction of a stone and dirt sidewalk in an incorporated village, the surface of the former walk was higher than that of the latter by about 2½ inches in the center and by about 5 inches at the edge," the evidence was insufficient to show negligence on the part of the village.

In *Yotter v. City of Detroit*, 107 Mich. 4, 64 N. W. 743, the court, in effect, held that to lay 2-inch planks on a board sidewalk to permit teams to cross over it so that the planks projected 2 inches above the surface of the walk did not make the walk unsafe.

In *Kawlecka v. City of Superior*, 136 Wis. 618, 118 N. W. 192, 21 L. R. A. (N. S.) 1020, the court held that where "the city rebuilt a portion of a sidewalk by nailing planks to the upper side of the walk, and permitting other parts of the walk to remain unchanged, so that there was an abrupt difference in level of 2 inches at the ends of the plank nailed on the walk, over which plaintiff tripped and fell, and was injured, * * * the defect was too slight to justify a recovery" under the Wisconsin statute.

In *Davidson v. City of New York*, 133 App. Div. 352, 117 N. Y. Supp. 185, the court held that where "a flagstone in a sidewalk 6 feet wide, which projected at the highest point 2½ inches above the other stones, and gradually decreased in height until it was level with the other stones at the outside of the walk," did not constitute such a defect as would render the city liable to one who fell over the defect, and was injured.

In *Northrup v. City of Pontiac*, 159 Mich. 250, 123 N. W. 1107, the court held:

"A grating projecting only 2 inches or less above a sidewalk is, as matter of law, not an obstruction which will render the sidewalk not reasonably safe for public travel."

In *City of Chicago v. Norton*, 116 Ill. App. 570, it was held that:

"The mere fact that one of two adjoining flagstones in a sidewalk is 2½ to 3 inches lower than the other is not sufficient to charge a municipality with the result of injuries received by a person who fell while stepping from the higher to the lower."

In addition to the foregoing defendant's counsel have also cited *Lalor v. New York City*, 208 N. Y. 431, 102 N. E. 558; *City of Richmond v. Schonberger*, 111 Va. 168, 68 S. E. 284, 29 L. R. A. (N. S.) 180; *City of Richmond v. Courtney*, 32 Grat. (Va.) 792; *Kleiner v. City of Madison*, 104 Wis. 339, 80 N. W. 453; *City of Dayton v. Glaser*, 76 Ohio St. 471, 81 N. E. 991, 12 L. R. A. (N. S.) 916; *Goodwyn v. City of Shreveport*, 134 La. 820, 64 South. 762; *Morgan v. City of Lewiston*, 91 Me. 566, 40 Atl. 545; *City of Lexington v. Cooper*, 148 Ky. 17, 145 S. W. 1127, 43 L. R. A. (N. S.) 1158; *McCoy v. City of Utica*, 143 App. Div. 634, 128 N. Y. Supp. 60; *Vanderborg v. City of New York*, 158

App. Div. 297, 143 N. Y. Supp. 26; *Schall v. City of New York*, 88 App. Div. 64, 84 N. Y. Supp. 737.

While in all of the foregoing cases there are some features which, in some respects, resemble the case at bar, yet there are other features which readily distinguish those cases from the one before us, and therefore those decisions can have no controlling influence here. The foregoing quotations are practically all taken from the headnotes, which, while they correctly reflect the gist of the decisions, yet in a number of the cases there are special features which, in some respects, would distinguish even those cases from the case at bar. We cannot go into detail respecting those features, nor is it necessary to do so, since the reader will readily discover the controlling features of each case. In a number of the cases it is, however, squarely held that a defect like the one described by the evidence in the case at bar is not such a defect as will make the municipality liable for injuries caused by tripping and falling over it.

Upon the other hand, plaintiff's counsel have referred us to some cases where the courts have arrived at different conclusions under a similar state of facts. In *Marvin v. City of Bedford*, 158 Mass. 464, 33 N. E. 605 the defect was less than in the case at bar, yet the Supreme Judicial Court of Massachusetts held that the question of negligence was for the jury. The same court in *Lamb v. City of Worcester*, 177 Mass. 82, 59 N. E. 474, held:

"Whether projecting hinges, nearly 2 inches tall, on bulkhead doors, in an otherwise smooth sidewalk, constitute defects in a sidewalk which the city, in the exercise of reasonable care, should have remedied, is a question for the jury."

In *Wile v. Los Angeles Ice Co.*, 2 Cal. App. 190, 83 Pac. 271, the Court of Appeals of California held "the maintenance of a spike 2 inches high in a sidewalk is, * * * a nuisance," and a judgment in favor of the plaintiff, who tripped and fell over the spike, was affirmed. In *Glantz v. City of South Bend*, 106 Ind. 305, 6 N. E. 632, the Supreme Court of Indiana held:

"An obstruction or inequality in a sidewalk, from 2 to 2½ inches in height, is such as may render the city liable for an injury caused thereby to one using due care in traveling upon such walk." (One justice dissenting.)

The defect in the foregoing case was very much like the one in the case at bar. In *Bieber v. City of St. Paul*, 87 Minn. 35, 91 N. W. 20, it is held that:

"A depression of an inch and a quarter in a hexagonal cement block in a city sidewalk, in view of the extent and peculiar incidents of its necessary use at the place of an accident, might constitute such a defect as to render the municipality liable for damages for failure to remedy the same." (One justice dissenting.)

It would seem from the foregoing, if the cases are considered from the mere point of numbers, that the weight of authority is with the defendant. It will be observed,

however, that the courts differ with regard to when the defect in a sidewalk may or may not, as matter of law, be declared harmless. As we have pointed out, even the justices of the same court do not agree upon that question. That fact, in and of itself, is a very strong argument in favor of submitting such questions to the jury and permitting them to pass upon the question of whether the maintenance of a particular defect under all the circumstances was such as would constitute negligence on the part of the municipality. This court is firmly committed to the doctrine that ordinarily the question of whether the maintenance of a particular defect in a street or sidewalk constitutes negligence on the part of the municipality is a question of fact for the jury. *Jones v. Ogden City*, 32 Utah, 221, 89 Pac. 1006; *Bills v. Salt Lake City*, 37 Utah, 507, 109 Pac. 745; *Robinson v. Salt Lake City*, 40 Utah, 497, 121 Pac. 968; *Sweet v. Salt Lake City*, 43 Utah, 306, 134 Pac. 1167.

While there is much force to the contention that to hold a municipality liable for a defect in a sidewalk in the outlying residence districts, such as the one in question here, where the municipality must of necessity maintain hundreds of miles of walks, is enforcing a rather strict rule of liability against the municipality, yet, in our judgment, such a rule in the long run is fairer and more logical than is the one adopted by some of the courts, whereby it is attempted to determine as matter of law that a defect of 2, or one of 2½, inches, or even more, does not constitute such a defect as will make the municipality liable for injuries sustained by persons falling over it. In all such cases courts are compelled to adopt and enforce an arbitrary rule applicable to all cases, while if the question is treated as one of fact, a jury of fair, practical men may determine each case upon its own peculiar features or facts and circumstances. True, a jury may return a verdict against a municipality upon what may be considered slight grounds; but that is a matter that, under our jurisprudence, cannot well be avoided. And yet, if the verdict of a jury is manifestly wrong upon the facts or the law, it may be corrected by the trial courts, and upon all questions of law may be corrected on appeal to this court. If, however, courts arbitrarily determine that the maintenance of particular defects in sidewalks or streets do not constitute negligence, then there is absolutely no way of correcting an erroneous conclusion on the part of the courts. It goes without saying that upon questions of negligence judges are no better qualified to speak than are ordinary laymen who act as jurors. It seems to us that in case it is made to appear that reasonable men might arrive at different conclusions with regard to whether the maintenance of a particular defect in a sidewalk or street constituted negligence on the part of the municipality,

the question should be submitted to the jury. That method is certainly quite as safe, and much more logical than to have the courts as matter of law declare that the maintenance of a projection 2½ inches in height is not an actionable defect, while one of 3 inches or more is. Of course there may be defects so slight and unimportant, or by reason of their location may be so unimportant, that a court might well say as matter of law that the maintenance thereof did not constitute negligence on the part of the municipality. Under such circumstances, however, reasonable men may not differ. However unsatisfactory the foregoing test may be, yet it is the only practical, and, all things considered, the fairest test that courts have been able to evolve. A careful reading of the foregoing cases we have cited in this opinion demonstrates the truth of the foregoing statement.

[3] We feel constrained to add that it must be obvious to all that not every raise or projection in a street or sidewalk can be held objectionable. Steps leading from the surface of the street to the surface of the sidewalk at the curbs, although such steps rise abruptly, may nevertheless not be deemed obstructions for which the municipality may be held liable in case a pedestrian should fall over them if they are kept in reasonably safe condition and repair. Then again, the municipality has a right to adopt plans in making improvements in its streets or in constructing sidewalks, as we have pointed out in *Ward v. Salt Lake City*, 151 Pac. 906, and in making such improvements it would not be liable except for the reasons pointed out in that case. The case at bar, however, differs widely from all such cases. Here an abrupt projection is allowed to remain where no one would be apt to look for it or expect it, and instead of being a raise from a lower to a higher level, as a step would be, the projection is a mere obstruction in an otherwise level and smooth walk.

It follows, therefore, that the court committed no error in refusing to direct the jury to return a verdict for the defendant.

[4] Counsel for defendant also insist that the court erred in permitting plaintiff's witness to testify that they saw other persons in passing over the projection trip before the plaintiff was tripped and fell. In that connection counsel contend that if the evidence had shown that others had tripped and fallen, then the evidence would have been competent, since it would then have constituted notice to the defendant that the defect was such as might cause injury; but, they contend, merely to show that others in passing over the projection stumbled or tripped has no significance for the reason that it is a daily occurrence for pedestrians to stumble or trip over very slight defects. We think the evidence was proper. Counsel's argument merely relates to the weight and not to the competency of the evidence.

We think the evidence proper both as notice to the defendant and also as characterizing the defect. If counsel's theory should prevail, then whether a certain incident was proper evidence or not would depend, not upon the character of the defect, but rather upon the ability of the one who tripped over such defect to maintain his equilibrium. If he could control himself and remain upon his feet, the evidence of the fact that he tripped would be improper, but if he was unable to control himself and fell, then the fact of his fall would be proper evidence. The distinction seems unreasonable. At all events it does not commend itself to our judgment.

For the reasons stated, the judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

WHERRITT v. DENNIS et al. (No. 2827.)

(Supreme Court of Utah. July 17, 1918.)

1. MORTGAGES ⇐456—FORECLOSURE BY ACTION—PLEADING—REPLY—NECESSITY.

In a mortgage foreclosure suit, no reply is necessary to an answer claiming a homestead right, where plaintiff contends the acts pleaded do not state a defense, for Comp. Laws 1907, § 2980, requires a reply only to a counterclaim, or where plaintiff confesses and avoids.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1334-1336; Dec. Dig. ⇐456; Pleading, Cent. Dig. § 339.]

2. REFORMATION OF INSTRUMENTS ⇐45(8)—SUFFICIENCY OF EVIDENCE—MORTGAGE.

Reformation of a mortgage will be granted only upon clear proof of a mutual mistake.¹

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 167, 168, 179; Dec. Dig. ⇐45(8).]

3. VENDOR AND PURCHASER ⇐252—REMEDIES OF VENDOR—LIEN—RETAINING TITLE.

A vendor who retains title has a purchase-money lien upon the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 636; Dec. Dig. ⇐252.]

4. MORTGAGES ⇐126—CONSTRUCTION—PROPERTY MORTGAGED.

A mortgage given by one partner to secure a note purchasing the other partner's undivided half interest in their property, and which covered an undivided half interest in the partnership property, held to cover the mortgagor's rather than the mortgagee's interest, where the mortgagee retained title to his share until the note should be paid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 248, 261-265; Dec. Dig. ⇐126.]

5. MORTGAGES ⇐579—REVIEW—DETERMINATION OF CAUSE—AFFIRMANCE.

A mortgage foreclosure decree cannot be affirmed where the findings and conclusions must be corrected to show that plaintiff had a mortgage on half the property, and a vendor's lien on the remainder.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1656; Dec. Dig. ⇐579.]

6. HOMESTEAD ⇐117—INCUMBRANCES—JOINER OF HUSBAND AND WIFE.

A husband, with his wife's consent, may incur their homestead under the local statute.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 191-202; Dec. Dig. ⇐117.]

7. DOWER ⇐26—NATURE—PRIORITIES—PURCHASE—MONEY CLAIM.

Under Comp. Laws 1907, § 2826, the wife's dower right in her husband's property is subject to a purchase-money claim.²

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 67, 68, 71; Dec. Dig. ⇐26.]

8. APPEAL AND ERROR ⇐1176(4)—REVERSAL DIRECTING JUDGMENT BELOW.

Upon reversing an equity case, the Supreme Court may direct the findings, conclusions, and decree to be entered below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4591; Dec. Dig. ⇐1176(4).]

Appeal from District Court, Wasatch County; A. B. Morgan, Judge.

Mortgage foreclosure suit by W. R. Wherritt against W. R. Dennis and Lysle Dennis. Decree for plaintiff, and defendants appeal. Reversed and remanded, with directions.

E. A. Walton, of Salt Lake City, and W. S. Willes, of Heber, for appellee. Charles J. Wahlquist, of Heber, for appellants.

FRICK, J. On and prior to the 16th day of December, 1912, the plaintiff and the defendant W. R. Dennis were partners engaged in raising live stock in Wasatch county, Utah, and were doing business under the firm name of Wherritt & Dennis. In addition to the live stock and other personal property owned by the firm it also owned a ranch consisting of something over 500 acres, which was used by the firm in connection with its business aforesaid and which is specifically described in the complaint. On the date aforesaid the partners entered into an agreement in writing whereby it was agreed that the partnership should be dissolved, and the defendant Dennis agreed to and did purchase Mr. Wherritt's interest in the partnership property including the ranch aforesaid. As a part of the transaction the plaintiff agreed to assume and pay the firm's debts to the extent of \$2,501.85, and the defendant Dennis assumed and agreed to pay any other indebtedness of the firm, if there should be any in excess of \$2,501.85. The plaintiff also was awarded all of the firm's money on deposit in the bank amounting to \$466.96. Defendant W. R. Dennis was to have and was given possession of all the other partnership assets, including the real estate aforesaid, for which he agreed to pay the plaintiff the sum of \$7,750, which sum was to be evidenced by a promissory note for that amount, and the payment thereof secured by a mortgage upon the ranch aforesaid. The terms respecting the proposed dissolution

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ Weight v. Bailey, 45 Utah, 584, 147 Pac. 899.

² Lumber Co. v. Vance, 23 Utah, 74, 88 Pac. 396, 125 Am. St. Rep. 822.

of said partnership and disposition of its assets and payment of its indebtedness were set forth in said agreement. It was, among other things, provided:

"That for and in consideration of the sum of \$7,750, as evidenced by one certain promissory note of even date herewith and the further agreements, conditions, and stipulations hereinafter named and mentioned, the party of the first part hereby sells and so soon as the aforesaid sum of money is paid in full according to the conditions of said note and a mortgage to be given to secure the payment of said note and all stipulations and conditions herein set forth, said note, mortgage and this agreement to be read, construed, and taken together, have been fully kept, performed, and complied with, to convey unto the said party of the second party by quitclaim deed all right, title, and interest now owned or that may hereafter be acquired, in, of, and to that certain real property situated in Center precinct, Wasatch county, state of Utah, familiarly known as the Thomas and Richardson ranch consisting of approximately 500 acres of ground (more or less) all of which is now inclosed in one piece and now owned by the said parties hereto as copartners doing business as Wherritt & Dennis.

"This agreement, together with other agreements are made for the purpose of closing up the said partnership heretofore and now existing known and doing business as said Wherritt & Dennis and for the purpose of making a division of the property and claims now existing against said copartnership equitably between the respective parties thereto; therefore, to that end the following named conditions and agreements are hereby stipulated, to wit:

"That said party of the second part agrees to pay said note on or before the 16th day of December, A. D. 1917, with interest at 8 per cent. per annum from date until paid, interest payable annually, and if default shall be made in the payment of either the principal or any interest thereon then the party of the first part may, at his option, at any time thereafter, proceed to enforce the payment of the whole amount then due by declaring the same then and there due and payable, by foreclosure and sale of the mortgaged premises according to the tenor of said note and mortgage.

"The party of the second part to have immediate possession of the aforesaid lands and premises together with all improvements thereon and appurtenances thereto belonging, of every kind and nature, including all water right heretofore used upon the same; to have all rents, profits, and issues of every kind and nature arising therefrom so long as this agreement is in force and effect. The party of the second part to pay all taxes and assessments levied against or becoming in any manner a lien thereon or against the same, both upon the lands and improvements, and also the water stock or rights belonging thereto, and no expense or charges of any kind connected therewith shall be chargeable to the said party of the first part hereto, and if said party of the first part shall at any time be compelled to pay any such charges or assessments in order to protect any interest he may have in said lands, premises, or water rights, or if the said party of the second part shall default in the payment of any interest due on said note, the party of the first part may at any time thereafter declare this agreement null and void, and may also declare the whole of said note then owing, both principal and interest, immediately due and payable and may at once proceed to collect the same, and all moneys then or thereafter paid either under this agreement or on account of this note shall then and there be forfeited to the party of the first part as rents, profits, and interests on account of sale, and as liquidated damages.

"That immediately upon the execution of this

agreement, said note and mortgage and the assignment of the aforesaid account in the said Bank of Heber City as herein provided, steps shall be taken to dissolve the aforesaid partnership of Wherritt & Dennis according to law, and neither party to said partnership shall thereafter hold himself out to the public, either directly or indirectly, as a member of such partnership nor shall he thereafter, in any manner, obligate the members thereof, or the partnership as such."

The note and mortgage referred to in the foregoing agreement were duly executed by W. R. Dennis and the defendant Lysle Dennis, his wife, but the mortgage covered only "an undivided one-half interest" of the real estate owned by the partnership, which was specifically described, however, in the mortgage. The note for \$7,750 was made payable in five years from date. It provided for the payment of 8 per cent. interest, payable semi-annually. It was also provided therein that in case default in the payment of interest should be made the holder might declare the whole sum due and payable forthwith and might proceed to collect the same. The note also contained a stipulation for the payment of an attorney's fee equal to 10 per cent. of the amount due thereon. The mortgage practically contained the same conditions and also contained a further provision that the mortgagor should pay all taxes and assessments against the mortgaged property, etc.

The plaintiff retained the title to his undivided interest in the ranch, and the defendant W. R. Dennis having made default in the payment of interest and taxes, the plaintiff brought this action to collect the whole amount due on said note and to foreclose the mortgage aforesaid.

All of the foregoing facts are alleged in plaintiff's complaint and are supplemented with other facts, to the effect that it was intended by the parties to include the whole of the real estate described in said mortgage instead of only one undivided one-half interest therein, and that said one undivided one-half interest was inserted in said mortgage "by mutual mistake of the parties and of the scrivener" in drawing the same, and that it was intended by the parties that the plaintiff's note was to be secured by a mortgage upon the whole interest of said real estate. The plaintiff therefore asked that the said mortgage be reformed so as to cover the whole interest, and that it be foreclosed as reformed.

W. R. Dennis filed an answer to the complaint in which, after admitting the execution and delivery of the note and mortgage, he set up various defenses, among others, that the mortgage was intended to cover only the one undivided one-half interest of the ranch, namely, that portion which he purchased from the plaintiff, and that his own one-half interest was intended to remain unincumbered. He also averred in his answer that it was agreed that the plaintiff and his

wife should execute a warranty deed for plaintiff's interest in said real estate, which deed "should be placed in escrow with defendant's note for the purchase price thereof until said purchase price and interest should all be paid." He also claims a homestead right in what he terms his one-half interest.

The plaintiff filed a reply to W. R. Dennis' answer in which the facts constituting the alleged affirmative defenses were, in effect, denied. The defendant Lysle Dennis, as the wife of W. R. Dennis, also filed an answer in which she claimed a dower interest in the undivided one-half interest of her husband, and also sets up the homestead claim the same as her husband. No reply was filed to her answer.

In view that counsel for defendants vigorously insists that in failing to reply to the wife's answer the plaintiff thereby admitted the averments contained therein, and for that reason she was entitled to judgment as prayed for, we shall dispose of that matter before proceeding to consider the questions arising between the partners.

[1] Counsel is in error in his contention. Our statute requiring a reply (Laws Utah 1903, p. 182, carried forward in Comp. Laws 1907, as section 2980) is taken from the Code of Iowa. See Code of Iowa, Ann. St. 1897, § 3576. That section had been repeatedly construed by the Supreme Court of Iowa before it was adopted in this state. *McQuade v. Collins*, 93 Iowa, 22, 61 N. W. 213, decided in 1894, and cases there cited. It is there held that although affirmative matter is set up in an answer amounting to a defense, "yet no reply was necessary under our system of pleading unless the plaintiff claimed to have a defense thereto by reason of some fact in avoidance of the matter so alleged. * * * The law interposed for plaintiff a general denial of the affirmative matters in the answer and plaintiff was not required to file a reply unless he wished to confess and avoid" the facts set up in the answer. Under our statute, therefore, while a reply is always necessary to a counterclaim, yet it is not necessary to affirmative defenses, unless the plaintiff desires to confess and avoid the facts set up in the answer. If he merely desires to meet the facts by negative evidence, the law, as stated by the Iowa Supreme Court, denies the facts for him and he may offer any evidence in reply which would be admissible under a general denial. As a matter of course, a plaintiff may always insist that the facts pleaded in an answer do not amount to a defense or do not entitle the defendant to what he claims without filing a reply. That is all the plaintiff claims as against the wife in this case. We shall refer to Mrs. Dennis' claims again hereinafter.

[2] Proceeding now to a consideration of the respective claims of the partners we remark that the principal matter that divides

them is: What rights has the plaintiff in or to the real estate which was owned by the partnership prior to its dissolution and to what extent is he entitled to relief in this action? The court found that by mutual mistake of the partners and the scrivener who prepared the mortgage only one undivided one-half interest in the real estate was inserted therein, while it was intended to mortgage the whole interest to secure the payment of the \$7,750 note which was given to evidence the purchase price of plaintiff's interest in the partnership property. The court accordingly reformed the mortgage so as to make it cover the whole of the real estate owned by the partnership and then ordered the same foreclosed as reformed. We have set forth all of the terms of the written agreement entered into by the parties upon that point, and we must confess that to us the terms of that agreement in that regard seem somewhat uncertain and ambiguous. We have carefully considered the evidence produced by the parties; however, and from it we have become convinced that the evidence, as contended by W. R. Dennis, is insufficient to sustain the finding that there was a mutual mistake in drawing up the mortgage. We, in a recent case (*Weight v. Bailey*, 45 Utah, 584, 147 Pac. 899), have had occasion to pass upon what is sufficient evidence to authorize a court of equity to reform the terms of a written instrument. The prevailing rule followed by the courts is stated in the headnote to that case in the following words:

"Reformation of an instrument will not be granted upon a probability or a mere preponderance of evidence; there being a presumption that the instrument correctly evidences the agreement of the parties."

Other cases and authorities in support of the text are cited in the course of the opinion. We are clearly of the opinion that the district court erred in decreeing a reformation of the mortgage for the reasons just stated.

[3-5] That error, however, does not dispose of this appeal, nor does it put the plaintiff out of court. The evidence is clearly to the effect that the plaintiff was to retain the title to his interest in the partnership real estate until the note was paid. This, in effect, is admitted by W. R. Dennis. He, however, claims that the plaintiff was to execute a deed for his interest in the partnership real estate, but admits in his answer that he was not to obtain possession of it until he had fully paid the purchase price of plaintiff's interest. Moreover, the great preponderance of the evidence is to the effect that plaintiff was to retain the title to his interest until the purchase price was paid. Neither is there any doubt that the plaintiff did in fact retain the title. He, therefore, as a matter of law, had a lien for the purchase price upon the interest he sold to Dennis. Dennis' counsel contends, how-

ever, that it was the interest sold by the plaintiff that was included in the mortgage and nothing else. In that connection it is insisted that although the legal title remained in the plaintiff, yet Dennis obtained the equitable title which was sufficient to sustain the mortgage. To our minds the contention that the interest sold by the plaintiff to Dennis was the only interest intended to be mortgaged is not only against the great weight of the evidence, but it is against reason, logic, and common sense as well. Why should the plaintiff seek a mortgage on property to which he retained title? Upon the other hand, why should Dennis mortgage real estate the title to which was confessedly in the mortgagee? Common knowledge as well as the experience of all men is to the contrary. Mortgages are generally given on that which the mortgagor owns and not on that which is owned by the mortgagee. We are forced to the conclusion that it was the intention of all concerned in the transaction to make the mortgage cover the undivided one-half interest of Mr. Dennis, and that the plaintiff should retain the title to the interest he sold to Dennis until the purchase price was paid. The plaintiff thus had a lien upon the one undivided interest by contract—that is, by virtue of the mortgage—and also had a vendor's lien upon the other undivided one-half interest by virtue of law. This is precisely what counsel for plaintiff contend for, and in view of that situation they somewhat forcibly insist that although the court by its decree had reformed the mortgage and foreclosed it as reformed, yet no reformation was necessary, and hence the decree in that regard becomes immaterial. The judgment, it is contended, should therefore prevail. The difficulty in pursuing such a course is that the findings, the conclusions of law, as well as the decree, are all based upon the theory that the mortgage should be and was reformed so that it covered the entire property. The mortgage was ordered foreclosed and the whole property was ordered to be sold as though it had been actually included in the mortgage. While the allegations of the complaint, and the prayer thereof, and the evidence in support of the allegations in equity, are clearly sufficient to justify findings, conclusions of law, and a decree ordering a foreclosure of the mortgage against Dennis' undivided one-half interest in the partnership real estate, and are also sufficient to authorize a court of equity to establish and enforce a vendor's lien in favor of the plaintiff upon the undivided one-half interest sold by him to Dennis, and to order such lien foreclosed and the whole premises sold under the mortgage and the lien, yet the present findings, conclusions of law, and decree are wholly insufficient in substance to justify such a foreclosure and sale. In other words, when the findings and conclusions of law authorizing

a reformation of the mortgage are set aside, as they must be, then the findings, conclusions of law, and decree are insufficient to authorize the sale of the whole real estate owned by the partnership, one-half interest of which is covered by the mortgage and the other one-half by the vendor's lien. The findings and conclusions of law as they now stand are therefore wholly insufficient to support a decree ordering the whole premises sold.

[6] This brings us to the defense of Mr. Dennis, namely, that he is entitled to carve a homestead out of his undivided one-half interest. This claim is predicated upon the theory that the mortgage in question did not cover the interest he owned in the partnership real estate. In view that we have been forced to find against his claim in that regard there is nothing to the contention that he has a homestead right as against plaintiff's claim. Although it were conceded that Dennis could carve a homestead out of partnership realty, a question we do not pass on now, yet he, with the consent of his wife, under our statute, could incumber even an existing homestead. To what extent the Legislature may authorize the homestead to be sold upon execution is determined by this court in *Lumber Co. v. Vance*, 32 Utah, 74, 88 Pac. 896, 125 Am. St. Rep. 828. There is nothing in that case which prevented Dennis and his wife from mortgaging even the declared homestead to secure the payment of the note in question.

[7] Nor can the claim of Mrs. Dennis that she has a dower or other inchoate right in the partnership property be sustained. Even if it were conceded that the wife has an inchoate right in partnership real estate, a question we refrain from passing on, yet, under our statute, she would have no such right as against a claim for purchase money. Her right is expressly excluded as against such a claim. Comp. Laws 1907, § 2826. True, her counsel insists that she did not consent to the mortgage on her husband's half interest, yet the evidence is clearly to the contrary. There is not sufficient evidence to justify a finding of fraud, even though the district court had not found against it, which it did. It follows that neither the claim of Mr. Dennis nor that of his wife can be sustained.

While there are a number of other questions discussed by Dennis' counsel, yet they all relate to and are controlled by the principal question we have discussed. It is unnecessary, therefore, to devote further time to the other assignments.

[8] In view that this is an equity case we can direct what orders should be made in order to fully dispose of the case. The judgment is therefore reversed, and, in so far as the findings of fact and conclusions of law are in conflict with our views herein, they are vacated and set aside, and the district

court of Wasatch county is directed to make findings and conclusions of law to conform to the views herein expressed and to enter a decree ordering the mortgage upon the undivided one-half interest owned by Mr. Dennis in the real estate described in the complaint, and which is included in said mortgage, foreclosed, and further to declare that the plaintiff has a vendor's lien upon the undivided one-half interest by him sold to said Dennis and to direct that all of said real estate be sold and the proceeds of sale be applied to the payment of plaintiff's claim, attorney's fee, and costs of sale, and that the remainder, if any, be turned over to Mr. Dennis.

It is further ordered that each party pay one-half of the costs on this appeal, including all of the costs in preparing the case for this court.

STRAUP, C. J., and MORSE, District Judge, concur.

BEROW et al. v. SHIELDS et ux. (No. 2866.)
(Supreme Court of Utah. July 10, 1916.)

1. HUSBAND AND WIFE \S 19(14)—LIABILITY OF HUSBAND—FAMILY EXPENSES.

Under Comp. Laws 1907, \S 1206, providing that both husband and wife shall be liable for indebtedness for family expenses incurred by either, the question whether the indebtedness was for necessities is immaterial if it was for legitimate and proper family expenses.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 134; Dec. Dig. \S 19(14).]

2. APPEAL AND ERROR \S 1071(5)—HARMLESS ERROR—ERRONEOUS FINDING.

In an action against a husband for goods purchased by his wife, the finding that the goods furnished were not necessities, though immaterial, held not prejudicial where the conclusions of law in favor of defendant were supported by other sufficient findings of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4238; Dec. Dig. \S 1071(5).]

3. HUSBAND AND WIFE \S 19(1)—LIABILITY OF ONE FOR INDEBTEDNESS OF OTHER—FAMILY EXPENSES.

To make either spouse liable for goods furnished the other, the relation of husband and wife must exist, and the indebtedness must be for legitimate and proper family expenses.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 121; Dec. Dig. \S 19(1).]

4. HUSBAND AND WIFE \S 19(3)—LIABILITY OF HUSBAND—DEBTS OF WIFE—SEPARATION.

Under Comp. Laws 1907, \S 1206, providing that husband shall be liable for debts contracted by the wife "for expenses of the family," where a husband permanently separated from his wife because of her excessive use of intoxicants, he was not liable for goods furnished her during such separation; no "family" existing.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 123; Dec. Dig. \S 19(3).]

5. ESTOPPEL \S 107—PLEADING.

In an action under Comp. Laws 1907, \S 1206, for goods furnished defendant's wife, plaintiff cannot recover on the ground that though the family relation had ceased to exist

at the time of the sale, the defendant was estopped by his conduct to deny liability, where such estoppel was not pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 297; Dec. Dig. \S 107.]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Louis Berow and another against F. A. Shields and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

Chris Mathison, of Salt Lake City, for appellants. E. A. Walton and T. D. Walton, both of Salt Lake City, for respondents.

FRICK, J. The plaintiffs, in their complaint, after alleging that they were copartners doing business, etc., alleged as follows:

"That on or about the 24th day of September, 1912, at Salt Lake City, Utah, the defendants became indebted to the plaintiffs in the sum of \$115.90 on account of goods, wares and merchandise sold and delivered by the plaintiffs to the defendants, at their request and for which they agreed to pay. That they have not paid the same nor any part thereof, by reason whereof there is now due and justly owing from the defendants the sum of \$115.90, together with interest at the legal rate from the 24th day of September, 1912. That payment has been requested.

"Wherefore plaintiffs pray judgment against the defendants for the sum of \$115.90, together with interest at the legal rate from the 24th day of September, 1912, and for all costs of suit."

The action is based on Comp. Laws 1907, \S 1206, to which we shall refer hereafter.

The defendant F. A. Shields alone appeared and filed an answer to the complaint, in which, after denying liability, he set up as an affirmative defense that when the indebtedness was contracted by Mrs. Shields his former wife and codefendant, they were not living together as husband and wife; that at said time he had commenced an action, which was then pending in the district court of Salt Lake county, wherein he prayed for a divorce from his wife and that he was "shortly thereafter" granted a divorce by said court; that said plaintiff had knowledge of the pendency of said action and that the defendant and his wife did not live together as a family, or, by the exercise of ordinary diligence, should have known that such was the fact when they extended credit to his former wife and codefendant.

After a trial to the court findings of fact were made and filed as follows:

"That on September 24, 1912, the plaintiffs sold upon credit to the defendant Mrs. F. A. Shields a lady's suit at the agreed price of \$32, and in like manner did sell to said Mrs. F. A. Shields thereafter at the dates and for the prices mentioned the following goods: October 16, 1912, waist, \$7; October 16, 1912, hose, \$1.35; November 29, 1912, fur coat, \$64.50; November 29, 1912, hat, \$5.25; November 29, 1912, feather, \$11.50; December 5, 1912, comb, \$3.25; December 5, 1912, vest, \$0.20; December 5, 1912, hose, \$0.35; April 24, 1913, coat, \$22.50.

"That no payments have been made on said account except that said Mrs. F. A. Shields, between the 24th day of September, 1912, and

February 5, 1918, paid to the said plaintiffs on said account sums aggregating \$32.

"That said goods were sold to said Mrs. F. A. Shields upon her own credit and not upon the credit of the defendant F. A. Shields, and the same were charged on the books of the plaintiffs to said Mrs. F. A. Shields, and the same were none of them necessities.

"The said defendant F. A. Shields did not know of any such sales until long after the same were made; and from and after the 8th day of September, 1912, the defendant F. A. Shields and the defendant Mrs. F. A. Shields were living separate and apart from each other, and at the time of said separation the said Mrs. F. A. Shields had been and was well provided for by the defendant F. A. Shields.

"The said separation was because of the fault of the defendant Mrs. F. A. Shields.

"The defendant F. A. Shields brought in this court a suit for divorce on the 18th day of September, 1912, against the said defendant Mrs. F. A. Shields, whose proper name is and was Daisy I. Shields, and to the defendant F. A. Shields, in said divorce suit, was granted a divorce on the 10th day of October, 1912.

"The plaintiffs, during the year 1910, had sold to the defendants upon account three items of goods aggregating \$47, which account had been paid, balanced and closed March 1, 1911, and thereafter had no dealings with the defendant F. A. Shields.

"Reasonable inquiry on the part of plaintiffs at the time of said sales to the defendant Mrs. F. A. Shields would have disclosed to said plaintiffs the said separation and divorce proceedings.

"The plaintiffs did not sell any of the said goods, ware or merchandise, on account of which this suit is brought, to the defendant F. A. Shields; neither did he receive the same nor any benefit thereof."

Upon these findings the court entered conclusions of law that the defendant F. A. Shields was not liable, and thereafter entered judgment dismissing the complaint as against him. Plaintiffs appeal.

[1.2] While a number of errors are assigned, yet counsel, in his brief, in respect to that, says:

"All of the assignments of error relate to the question whether the articles furnished to Mrs. Shields were family expenses for which the respondent F. A. Shields is liable and we shall argue the assignments as one."

Counsel, however, insists that the court's finding that the articles purchased by Mrs. Shields were not "necessaries," under the statute, is wholly immaterial and that the authorities are to that effect. We think the contention is well founded for the reason that all that is required by the statute is that the things purchased are legitimate or proper family expenses. All the authorities, as we read them, so hold. The finding, although immaterial, nevertheless, did not prejudice the plaintiffs if the other findings are sufficient and the conclusions of law are right. Upon the other questions involved counsel for plaintiffs has cited a large number of cases. The principal question discussed, however, by counsel for both parties is whether the defendants, at the time the articles were purchased, lived together and thus constituted a family. Section 1206, *supra*, which must control upon that question, provides:

"The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

[3] We think that in order to make either spouse liable the relation of husband and wife must exist, and the expenses for which either, or both, are liable must be what are termed family expenses. Identical or similar statutes are in force in a number of states. Section 1206, *supra*, is apparently copied from Iowa. See McClain's Ann. Code Iowa 1888, § 3405. The same statute is in force in Illinois, Colorado, Washington, Oregon, and, perhaps, a number of other states. The courts of those states have had frequent occasion to pass upon the effect of the statute. So far as we are advised, however, all of those states hold that in order to hold either spouse liable under the statute the family relation must exist, and the things for which recovery is sought, in an action based on the statute, must be for family expenses just as the statute provides.

In *Davis v. Ritchey*, 55 Iowa, 719, 8 N. W. 669, the Supreme Court of Iowa held that a wife could not be held liable under the statute for money borrowed by her husband, although he borrowed it for the purpose of paying family expenses and used it for that purpose. That seems a somewhat strict construction.

In *Featherstone v. Chapin*, 98 Ill. App. 223, the court held that the statute "is not to be construed so as to make the wife liable for services rendered in caring for a drunken husband with whom she is not living at the time."

In *Gilman v. Matthews*, 20 Colo. App. 170, 77 Pac. 366, it is said:

"In an action against a wife for wearing apparel purchased and worn by the husband, it is not sufficient to show that they are husband and wife, but it must also be shown that they are living together, so as to constitute a family."

The judgment was accordingly reversed upon the sole ground that plaintiff had failed to establish those facts.

In *Schlesinger v. Keifer*, 30 Ill. App. 257, the court said:

"In this case it appeared that the appellees had ceased to live together for some months before the purchase, though the appellants had no notice of such separation. Neither had the husband any notice that the wife was buying the goods."

The court accordingly concluded as follows:

"The superior court rightly decided that the appellees were not liable under the statute for family expenses where there was no family."

In *Vose v. Myott*, 141 Iowa, 506, 120 N. W. 58, 21 L. R. A. (N. S.) 277, it is again held by the Supreme Court of Iowa that:

The "statute does not impose upon the wife the expense of her husband's board while absent from their home in contemplation of separation." (*Italics ours.*)

[4] By what we have said, or from the quotations we have just made, we do not

mean to hold that the statute would not apply in a case where the husband and wife were merely temporarily living apart and where the family relation had not in fact been severed. That the statute may still apply in such a case is well illustrated by the Supreme Court of Washington in the case of *Russell v. Graumann*, 40 Wash. 667, 82 Pac. 998, 5 Ann. Cas. 830. In the case at bar, however, the facts are very clear that the family relation had been intentionally and permanently severed at the time the goods in question were purchased by the former wife of the defendant F. A. Shields. Indeed, all the items except the first one were purchased after the husband had obtained a divorce from the wife for her fault. It appeared that the husband had cause to leave his wife upon the ground of her excessive use of intoxicants, and that she frequently became intoxicated. If, therefore, as was held by the Iowa court, a wife cannot be compelled, under the statute, to provide for her drunken husband, it is not easy to perceive how a husband can be required to provide for a drinking wife with whom he has ceased to live. But, by referring to the first item, even that was purchased after the defendants had permanently ceased to live together as husband and wife in the family relation. Be that as it may, however, the evidence shows that that item was fully paid by Mrs. Shields long before this action was commenced.

Plaintiff's counsel has also cited, and apparently strongly relies on, the decision in *Arnold v. Kell*, 81 Ill. App. 237. A mere cursory reading of that case, however, will disclose that the decision is in full accord with all those we have referred to above. In the latter case the goods were purchased before the husband left the wife and were all delivered on the very day he in fact did leave. Moreover, it is not absolutely clear that at the time the husband did leave the wife they intended to permanently sever the family relation.

Counsel for plaintiff has severely criticized the decision in *Schlesinger v. Kelfer*, supra, from which we have taken the liberty to quote. It is not necessary to review counsel's criticism of that case since if his criticisms were given effect it would have to apply to practically all the cases we have quoted from and to others to which we have not deemed it necessary to refer.

Counsel, however, strenuously insists that the statute is remedial, that it was intended for the protection of the merchant and trader as well as for that of the husband and wife, and that it should therefore receive a liberal construction and application. No doubt the statute is remedial. It is also clear that its purpose is to protect those mentioned by counsel. The statute, however, limits the right of recovery for "the expenses of the family." It must therefore be given a fair, sane, and reasonable construction so as not

to frustrate its real purpose upon the one hand and to carry it beyond what it was intended thereby to accomplish upon the other. When the statute refers to the expenses of the family it necessarily presupposes or assumes the existence of a family, and, further, that those who usually comprise a family are in fact sustaining that relation. While it is not practical—nor is it necessary—to determine in advance under what circumstances the family relation might still be deemed to exist, and while in that regard the facts and circumstances of each case must, to a large extent, be considered in determining the relation, yet it is quite clear under all the authorities that such a relation did not exist in this case when the articles in question were sold to Mrs. Shields.

[5] Counsel, however, further contends that although it were true that the family relation had in fact been severed and had ceased to exist at the time the goods in question were purchased by Mrs. Shields, yet, in view that the defendant F. A. Shields had permitted his wife to purchase goods on credit from the plaintiffs while the family relation subsisted and had paid for them, and that he had not notified plaintiffs of the change of relation between him and his former wife, therefore he should be estopped from availing himself of the defense that the family relation had ceased to exist. Counsel for defendant F. A. Shields, however, insist that plaintiffs, in view of the meager allegations of their complaint, cannot avail themselves of the claim that the defendant Shields is estopped, even though the facts justified such a claim. We have set forth all the material allegations of the complaint and it must be conceded that there is nothing pleaded which, in the remotest degree, could be held to savor of anything akin to an estoppel. Plaintiffs, however, contend that it is not always necessary to plead an estoppel in order to make it availing to a party claiming such to exist. While that is true as a general statement, yet where, as in this case, an action is based upon a liability created by statute, and the plaintiffs, while basing their action upon the statute, nevertheless seek to recover upon the ground that the defendant by his conduct has estopped himself from successfully interposing what would otherwise constitute a defense under the terms of the statute, we think, under all the authorities on pleading, the plaintiff must, in order to avail himself of such an estoppel, plead it. Under such circumstances the estoppel becomes what is termed "an element of the cause of action," and when such is the case the estoppel should be pleaded. The general rule in respect to when estoppels in pais must be pleaded and when they may be availed of without pleading them is tersely, and, as we think, correctly stated in 16 Cyc. 806-809. Under the rule there stated the plaintiffs in this case, in order to avail themselves of the alleged estoppel, should have pleaded it.

They certainly had the opportunity to do so and the alleged estoppel clearly constituted an element of their cause of action if they sought to make it availing. Not having pleaded the estoppel the trial court was not required to consider that phase of the case. For the foregoing reasons the question of whether there was or was not an estoppel, or to what extent such an estoppel is available under the statute in question, is not properly before us for review, and we express no opinion upon those questions.

The judgment is affirmed, with costs to the defendant F. A. Shields.

STRAUP, C. J., and McCARTY, J., concur.

KETCHUM COAL CO. v. CHRISTENSEN,
District Judge, et al. (No. 2942.)

(Supreme Court of Utah. July 1, 1916.)

1. MANDAMUS \S 164(3) — PLEADING — ANSWER.

A defendant in a mandamus proceeding may file an answer and raise issues of fact, and, when he does so, the Supreme Court may refer such issues to the district court for a hearing and findings thereon; but when the question presented to the Supreme Court turns upon the facts admitted by a demurrer in the district court and the only question is whether upon such facts the judgment of the district court should not have been in favor of the application, the defendant may not for the first time deny the truth of the facts in the Supreme Court.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 348, 349; Dec. Dig. \S 164(3).]

2. JURY \S 19(3)—RIGHT TO JURY TRIAL—MANDAMUS.

Upon questions of fact raised in a mandamus proceeding, either party is entitled to a jury trial under the statute.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 106; Dec. Dig. \S 19(3).]

3. EMINENT DOMAIN \S 249 — ENFORCEMENT OF JUDGMENT—FORM OF PROCEEDING—RELIEF—CONTEMPT.

An application to the district court, though in form an application to punish defendant for contempt of court, the sole purpose of which was the enforcement of the order or judgment of such court entered in a condemnation proceeding, giving plaintiff possession of a strip of ground for a mine tramway was not a proceeding for the sole purpose of enforcing respect for the court's order or judgment, but to require the court to protect a right based upon the judgment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 646; Dec. Dig. \S 249.]

4. MANDAMUS \S 55—ENFORCEMENT OF JUDGMENT.

Where a judgment can be enforced merely by issuing a writ of execution, a mandate will issue to require the execution to issue.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 109-112; Dec. Dig. \S 55.]

5. MANDAMUS \S 28 — RELIEF — MATTERS OF DISCRETION.

The Supreme Court may not by means of a writ of mandate control or direct the discretion of an inferior court.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 64; Dec. Dig. \S 28.]

6. MANDAMUS \S 26 — RELIEF — PROCEEDING WITH CAUSE.

In a case which has not proceeded to judgment, an inferior court may merely be compelled to act or go forward in case it refuses or fails to do so.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 62; Dec. Dig. \S 26.]

7. MANDAMUS \S 54—RELIEF—ENFORCEMENT OF JUDGMENT.

Where a coal company instituted a condemnation proceeding in a district court and obtained an order or judgment giving it possession of the surface of a strip of ground owned by defendant companies for use for the construction of a tunnel and tramway, and, after it had partly constructed the tramway, applied to the district court for an order against defendant companies and their employees to show cause why they should not be adjudged guilty of contempt in interfering with the construction of the tramway and be required to obey the condemnation judgment, and the court sustained the demurrer, the Supreme Court, on original application for mandamus, might issue its mandate requiring that the condemnation judgment be enforced, since the enforcement of the judgment was a duty of the district court, and not a matter of its discretion.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 108; Dec. Dig. \S 54.]

8. MANDAMUS \S 3(1), 4(1)—REMEDY BY APPEAL OR WRIT OF ERROR.

A writ of mandamus may not be issued as a substitute for a writ of error or the right of appeal, and the court may not have recourse to the writ merely because there is no other remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 9, 11, 17-19; Dec. Dig. \S 3(1), 4(1).]

Mandamus by the Ketchum Coal Company against A. H. Christensen, Judge of the District Court of Carbon County, and others. Permanent writ of mandamus ordered to issue.

Boyd, De Vine & Eccles, of Ogden, E. A. Walton and T. D. Walton, both of Salt Lake City, and C. S. Price, of Price, for plaintiff. M. P. Braffet, Van Cott, Allison & Riter, and Dickson, Ellis, Ellis & Schuider, all of Salt Lake City, for defendants.

FRICK, J. The plaintiff, a corporation, filed its application in due form in this court praying for an alternative writ of mandate against the defendants named in the title. The facts upon which the application aforesaid is based, and which facts were stated in an application to the district court of Carbon county, Utah, as hereinafter made to appear, in substance are as follows:

The plaintiff is a corporation and is the owner of a partially developed coal mine and is endeavoring to mine coal and to place the same on the market for general use. The Pleasant Valley Coal Company and the Utah Fuel Company are likewise corporations owning coal mines adjacent to the plaintiff's mine which mines are developed and said companies are engaged in mining and selling coal for general use. The defendants Cowie

and Thompson are employes of said companies, and in the matters hereinafter stated acted under the direction of and for said companies, and the defendant Hon. A. H. Christensen is the judge of the district court of Carbon county, Utah. In the year 1913 the plaintiff, in a condemnation proceeding duly instituted under our statute against the defendant coal companies, obtained an order or judgment giving it possession and occupancy of the surface of a strip of ground owned by said companies 60 feet in width by about 1,300 feet in length. The purposes for which possession of said strip of ground was obtained and ordered by the court, and the character of said possession, are stated in the order or judgment aforesaid as follows:

"Said occupancy is for the use of said strip of land for the driving and construction of a tunnel or tunnels for the laying of the necessary tracks and for the construction and operation of a tramway or tramways and for the purposes and uses as in said complaint set forth as indicated on map attached to said complaint marked Exhibits A and C. The plaintiff is given the exclusive possession of the entire strip above described with this exception: At the point of intersection of plaintiff's proposed tramway with the Willow Creek tramway of the Pleasant Valley Coal Company, the plaintiff is only given the right to construct its tramway beneath the Willow Creek tramway at such point of intersection and in such a way as not to endanger the Willow Creek tramway or impair its strength or stability and the safe operation of cars thereover. Should any controversy arise between the parties as to the safe and proper manner of constructing the plaintiff's tramway beneath the Willow Creek tramway, the matter shall be referred to the court or judge at chambers at any place within the district on three days' notice to the opposite party. When the plaintiff is ready to construct its tramway beneath the Willow Creek tramway it shall so notify the Pleasant Valley Coal Company which is hereby given the right to have a representative present when construction work is going on to see that the Willow Creek tramway is properly protected."

Pursuant to that order, the plaintiff took immediate possession of the strip of ground and constructed a temporary tramway thereon and shipped some coal. In January, 1916, the plaintiff made preparation to construct a permanent tramway, or, what is termed in said application, "a permanent tramline" for the purpose of reaching the Denver & Rio Grande Railroad Company's tracks with said line so that plaintiff could transport the coal mined in its coal mine over said strip of ground by means of said tramline to such railroad tracks, to be there loaded upon the cars of said railroad company for transportation. The plaintiff, in the application to the district court aforesaid, sets forth specific acts of interference by the defendant coal companies through their employes aforesaid, and that by such acts of interference said defendants are actually preventing the plaintiff from transferring the necessary lumber and material to be used in the construction of said tramway from the railroad tracks of said Denver & Rio Grande

Railroad Company to said strip of ground, which lumber and material are intended to be used in the construction of said permanent tramway or tramline for the purposes aforesaid. The plaintiff, in the application to said district court, also alleged other acts of interference as follows:

"That, notwithstanding the opposition of the defendants, the plaintiff has, to a considerable extent, developed its coal mine and shipped some coal, and is now able to produce without delay large quantities of coal for which it has orders to the amount of thousands of tons, and the plaintiff's work and mining operations are, and have been, suspended since the last day of April, 1916, wholly by reason of their improper and unlawful maintenance by the said Pleasant Valley Coal Company and Utah Fuel Company of several electric and power lines and wires over, upon, and across the said 60-foot strip of land at an elevation substantially the same distance from the surface of the ground as the tracks of plaintiff's proposed tramline; that said wires and electric lines to the number of about five (5) were placed across said premises long after the order of occupancy referred to in the original affidavit was granted, and a new pole line was erected by said defendants to carry said wires long after said order of occupancy was made and without the consent of the plaintiff; said lines and wires were so placed and constructed and maintained as to interfere with and prevent the construction and completion of plaintiff's said tramline, and said tramline and trestle therefor was, on or about the 1st day of April, 1916, completed and constructed up to the close vicinity—within five (5) feet—of said wires, and plaintiff cannot proceed further with the construction of its said tramline, by reason whereof plaintiff's work is at a standstill, and said condition has existed since the 1st day of April, 1916, to the great loss and damage of the plaintiff. * * * Affiant further states that it is readily practicable to either put the said wires in conduits or to elevate the same so as not to interfere with the plaintiff's said work or the defendants' use of the same; that the same can be elevated at an expense of \$50 or less."

Upon the foregoing facts the plaintiff asked the district court aforesaid to issue an order directed to said defendant coal companies and to said Cowie and Thompson, their employes as aforesaid, to show cause why they should not be adjudged guilty of contempt and that they be required to "obey and respect said order" (the order giving plaintiff possession of said strip of ground). An order, as prayed for, was duly issued by said court and served on said coal companies and said employes. They appeared by their counsel and entered a general demurrer to the application. Upon a hearing, on the 25th day of April, 1916, said demurrer was sustained by said court. The plaintiff then presented its application to this court in which all the foregoing facts, with others, are set forth and in which application it prays "that a writ of mandate issue to the end that said judgment (the order or judgment giving plaintiff possession of said strip of ground) be enforced."

This court issued an alternative writ of mandate directed to all the defendants to which they interposed a motion to quash upon substantially the following grounds.

(1) That the facts stated in the application for the writ do not entitle the plaintiff to the relief prayed for "or to any relief"; (2) that this court is "without jurisdiction to control or in any way direct the lower court in the exercise of its jurisdiction and discretion to judicially determine the matters and things referred to in said affidavit"; and (3) that it affirmatively appears from said application that the district court "exercised its jurisdiction and judicially determined the questions presented to it * * * on the hearing of the contempt proceedings referred to in said affidavit." With the motion to quash defendants have also filed an answer in which, while admitting all the allegations of inducement stated in the application to this court, they nevertheless deny some of the allegations which were contained in the affidavit filed in the district court of Carbon county and to which they had demurred, and which demurrer was sustained as before stated. The denials, therefore, merely attempt to raise an issue upon the facts stated in the application to the district court and not to the facts which confer jurisdiction upon this court in a proceeding of this character.

[1, 2] While in a mandamus proceeding a defendant may file an answer and raise issues of fact, yet, when he does so, this court may refer the issues of fact to the district court for a hearing and findings thereon. Upon questions of fact either party is entitled to a jury trial in such a proceeding under our statute. When, however, as in this case, the question presented to this court must turn upon the facts that were admitted by the demurrer in the district court, and the sole question is whether, upon the conceded facts, the judgment of the district court should not have been in favor of the application, then the defendant may not, for the first time, deny the truth of the facts in this court which were admitted in the district court and upon which that court entered judgment. For the purposes of this proceeding, the defendants must stand or fall upon the demurrer filed in the district court. If they desired to raise an issue of fact they should have filed an answer in the district court and not stood on their demurrer as they did. In view of the conclusions reached, however, we desire to state here that after this case gets back to the district court the defendants may, by leave of that court, file an answer and may raise such issues of fact as they may be advised, but they may not do that here and by that means prevent this court from passing judgment upon the questions presented by the application in the court below which questions were based upon facts admitted by the demurrer. If any other rule were adopted this court could always be prevented from directing the enforcement of the judgment of inferior courts. We shall therefore limit our discussion to

the motion to quash the application, the legal effect of which is the same as though a general demurrer had been interposed.

[3] The motion to quash is based upon three grounds, which we have hereinbefore set forth. In our judgment there is no merit to the first ground stated in the motion to quash, and we shall therefore devote no time to that ground. The real questions arise upon the second and third grounds of the motion. Those two grounds may, however, be considered together. The first question to be determined, however, is, What was sought to be accomplished by making the application to the district court? While it is true that in form the application was one to punish for contempt of court, yet, in its essence, the sole purpose of the application was the enforcement of the order or judgment entered in the condemnation proceeding giving plaintiff possession of the strip of ground hereinbefore referred to for the purposes before stated. It was therefore not a proceeding instituted for the sole purpose of vindicating the dignity of and enforcing respect for the court's order or judgment, but was for the purpose of enforcing a right based upon the order or judgment aforesaid. When, therefore, we look beyond the mere form of the proceeding, that is, the application to punish the defendants as for a contempt, it becomes quite apparent that the application both in fact and in law was for the sole purpose of enforcing the judgment or order of the district court in the condemnation proceeding. In other words, the real purpose of the application was to require the court to protect and enforce plaintiff's rights under the order or judgment. The Supreme Court of California, in a similar proceeding entitled *Merced Min. Co. v. Fremont*, 7 Cal. 130, states the proposition thus:

"It is true that the proceeding is in form a case of contempt, while it is in substance a private right."

This is precisely the situation here. It is manifest, therefore, that the real purpose of plaintiff's application in the district court was to require that court to enforce its order or judgment which was being violated and disregarded by the defendants, and, that court having, upon the conceded facts, refused to do so, the application to this court is to require the district court to enforce its judgment.

[4-7] It has become elementary that mandamus is the proper remedy to require inferior courts to enforce their judgments. If a judgment can be enforced by merely issuing a writ of execution, a writ of mandate will issue to require the execution to issue. All judgments can, however, not thus easily be enforced. Whatever may be the proper method of enforcement, however, the court in which the judgment was entered and where it remains in force and effect;

may, by mandamus, be coerced to pursue that method for the enforcement of its judgment. The proposition, therefore, that was so earnestly argued by defendants' counsel at the hearing upon the motion to quash, namely, that this is a case where the district court in passing upon the demurrer had exercised its discretion and jurisdiction and that mandamus will not lie in any case where an inferior court has acted and exercised its discretion, does not apply. True, a demurrer was interposed to the application and the district court acted upon it and entered an order or judgment sustaining the demurrer. Now, if such had occurred in any pending case where the questions respecting the ultimate rights of the parties before the court were still in litigation, that is, still undetermined, then the contention of defendants' counsel would be sound. This court may not, by means of a writ of mandate, control or direct the discretion of an inferior court, however humble that tribunal may be. In any case, therefore, which has not proceeded to judgment, the inferior court may merely be compelled to act or go forward in case it refuses or fails to do so, but its judicial acts or discretion may not be controlled to any extent by a superior court by a writ of mandate. If, however, in any matter in litigation or dispute of which the inferior court has jurisdiction, it has regularly proceeded to judgment and has judicially determined and declared the rights of the parties to the proceeding, then the court may not exercise its discretion with regard to whether it will or will not enforce a judgment thus regularly entered. When the judgment is once entered, and under the law is an enforceable judgment, the party in whose favor it is rendered has a clear right to have the same enforced, and if any one attempts to interfere with that right it is also the clear legal duty of the court, in case a proper application is made, to enforce the judgment. It may be said, however, that in such a case an application of some kind must be made to the court, and that that court must exercise some discretion regarding the sufficiency of the application. That no doubt is true. It is, however, true only to a limited extent and that court may not arbitrarily or capriciously, or for any reason except a sufficient legal reason, refuse to act when the fact is conceded that the enforcement or the enjoyment of the fruits of the judgment, as the case may be, is denied. To permit such a course would be tantamount to permitting a court to enter a judgment but thereafter deny its enforcement. When, therefore, as in this case, it is admitted by the demurrer that a judgment was duly and regularly entered; that the same is in full force and effect; that the respondents had interfered and are persisting in interfering with the plaintiff in its right to enjoy the fruits of the judgment, then the court may not say that it will not

enforce the judgment. Under such circumstances the law gives plaintiff the right to have the judgment enforced and imposes the duty upon the court to enforce it, and no discretion is vested in the court whether it will enforce it or not.

The following authorities discuss and apply the principles we have discussed thus far: *Merced Min. Co. v. Fremont*, supra; *Raleigh v. District Court*, 24 Mont. 306, 61 Pac. 991, 81 Am. St. Rep. 431; *Montgomery v. Judge*, 100 Mich. 436, 59 N. W. 148; *Crocker v. Conrey*, Judge, 140 Cal. 213, 73 Pac. 1006; 2 *Spelling*, Ex. Rem., § 1418; *State v. Kansas City Court of Appeals*, 97 Mo. 331, 10 S. W. 855, 3 L. R. A. 482; *People v. District Court*, 46 Colo. 386, 104 Pac. 484, 24 L. R. A. (N. S.) 886, 133 Am. St. Rep. 84. The last case referred to is a case precisely like the case at bar. In that case the district court of Jefferson county, Colo., in a condemnation proceeding, like the district court in this case, had entered a judgment condemning a certain strip of ground and had given the condemner the right of possession. When that right was disputed, however, and the condemner had made application to have his rights enforced, the court, the same as here, refused to enforce the judgment. Application was therefore made to the Supreme Court of Colorado for a writ of mandate to require the lower court to enforce the judgment of condemnation. In the course of the opinion the Supreme Court of Colorado, in referring to the duty of the lower court to enforce the judgment, says:

"Instead of issuing a proper writ (a writ of mandate) for the prompt and efficient enforcement of its clear and unequivocal decree, without jurisdiction or authority, as it seems, it attempts by its order, upon the relator's application for such writ, to modify the force and effect of that solemn and binding judgment, in which all parties acquiesced. The duty of the court to grant an order for the writ prayed was and is clear, and the right of the relator to have it equally plain. Its issuance involves the exercise of no judicial discretion; it was and is an order to which the relators were and are entitled as a matter of right. It is a mockery of justice to give one a judgment and then deny him the means of its enforcement. Every court has the inherent power and authority, and upon it rests the duty of enforcing its own judgments and decrees by proper orders and directions to ministerial officers to that end. Were it otherwise, judgments and decrees of courts would be empty and meaningless things, just as this judgment and decree in condemnation is, if incapable of enforcement. The relators have no other plain, speedy, or adequate remedy, and the court below has no discretion whatever, except to issue the writ prayed for by the relator, and to which prayer that court turns an unheeding ear."

The foregoing case is also cited in *State ex rel. Shaw v. Thompson*, 21 N. D. 428, 131 N. W. 231.

We have taken the liberty to quote thus liberally from the opinion in that case for the reason that it completely fits the case at bar. The same doctrine, although in a somewhat different case, is stated by Mr.

Chief Justice Sherwood in the case of State v. Kansas City Court of Appeals, *supra*. The Chief Justice, in concluding the opinion, says:

"Taking the admitted facts of this cause into consideration, the duty of the respondents (the court) was prescribed by law. * * * This duty admitted of no discretion, at least not of such an exercise of that discretion as would place it beyond the 'superintending control' of this court."

Broadly speaking, superior courts never control nor attempt to direct inferior courts or tribunals before judgment while acting merely judicially or in matters of discretion. After judgment, however, when the inferior court or tribunal has exhausted its discretionary powers, the superior court will compel the enforcement of judgments, regardless of the nature or character of the proceeding. Before an action has proceeded to judgment there ordinarily are ample statutory remedies provided for the correction of errors of judgment and for an abuse of discretion. No such remedies are, however, necessary after judgment, since, when that point is reached, judicial discretion ends and it then becomes the duty of the courts to enforce their judgments, and if they refuse or neglect to do so mandamus will lie to compel them to discharge the duty, which is one imposed by law. Any other course would compel men, in vindicating their legal rights, to have recourse to the primitive methods of applying brute force. Courts are instituted to prevent recourse to such methods. But if courts can successfully refuse to do their duty they merely invite men to have recourse to such methods.

[8] Counsel for defendants have cited and rely upon State v. Wright, 4 Nev. 119, 251, *Ex parte Newman*, 14 Wall. 152, 20 L. Ed. 577, and other similar cases in which it is held that a writ of mandate may not be issued as a substitute for the writ of error or the right of appeal, and that the court may not have recourse to the writ merely because there is no other remedy. There is no doubt of the soundness of the propositions decided in those cases and we do not have the slightest inclination either to avoid or to depart from the wholesome doctrine there announced. The doctrine, however, has no application here. In requiring the district court of Carbon county to act upon the conceded facts and to proceed to enforce its judgment, we are merely enforcing an old and well-established remedy. There is neither a usurpation of power nor a substitution of remedies in what we are directing to be done. Upon the facts stated in the application to the district court, all of which are repeated in the application to this court, and which were admitted by the demurrer filed in the district court, it is the duty of this court to direct the district court of Carbon county to enforce its judgment giving plaintiff possession and occupancy of the strip of ground

described in the judgment. By that judgment plaintiff is given possession of the strip of ground for the purposes of constructing a tramline and other things connected therewith. For such purposes our statute expressly authorizes the exercise of the right of eminent domain. Any interference with the plaintiff in its possession for the purposes aforesaid constitutes an interference with the judgment and cannot be tolerated. If the defendants may hamper or prevent the plaintiff from having and enjoying possession of the strip of ground for the purposes stated in the judgment, then they may prevent it from using it at all and they may thus defeat the wholesome purposes of our statute. Moreover, the plaintiff is not only entitled to the unmolested possession of said strip of ground, but it may not be interfered with in taking material to and placing it on to said strip for the construction of the tramline and other improvements.

It is therefore ordered that a permanent writ of mandate issue directing the district court of Carbon county to reinstate the contempt proceedings and to overrule the demurrer and to give the defendants a reasonable time, not exceeding 10 days, to file an answer to the application. In case they file an answer in which any issue of fact is raised, the court is directed to hear and determine the ultimate facts under the provisions of our statute and to enter judgment accordingly. If, upon the other hand, the defendants present no issue of facts as aforesaid, or if upon a hearing it be found that the defendants are interfering with the plaintiff in its possession and occupancy of such strip of ground or in making the improvements thereon contemplated by the order or judgment entered in the condemnation proceeding, or any of them, then said court is directed to forthwith proceed to enforce the order or judgment giving plaintiff possession of said strip of ground and to restrain the defendants, and all persons acting through or under them, from interfering with the plaintiff in that possession and in making the improvements aforesaid, and to impose such penalties and costs upon the defendants, or on some of them, as to the court may seem proper. Applicant to recover costs in this court.

STRAUP, C. J., and McCARTY, J., concur.

STATE v. BROWN. (No. 2875.)

(Supreme Court of Utah. July 13, 1916.)

1. CRIMINAL LAW §1172(2) — TRIAL — INSTRUCTION — CONTRADICTION STATEMENTS — REFUSAL TO INSTRUCT.

Refusal to instruct that a conflict between complaining witness' voluntary admissions and her testimony might be considered in determining her credibility is prejudicial error, where the complaining witness had denied accused's guilt

previous to the trial and her story is uncorroborated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155; Dec. Dig. ¶1172(2).]

2. CRIMINAL LAW ¶1172(2)—TRIAL—INSTRUCTION—CONTRADICTORY STATEMENTS—REFUSAL TO INSTRUCT.

Refusal to instruct that if any witness had made statements material to issues conflicting with his testimony, such testimony might be disregarded except as corroborated by other credible evidence, is prejudicial error where the complaining witness had denied accused's guilt previous to the trial and her story was not corroborated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155; Dec. Dig. ¶1172(2).]

3. CRIMINAL LAW ¶823(12)—INSTRUCTIONS—CURE BY OTHER INSTRUCTION—CREDIBILITY OF WITNESSES.

Refusal to give the above instructions is not cured by instructing that if any witness willfully testified falsely his whole testimony might be disregarded, for the inconsistencies may be considered irrespective of whether the witness willfully testified falsely.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158; Dec. Dig. ¶823(12).]

4. CRIMINAL LAW ¶815(9)—SUFFICIENCY OF INSTRUCTION—PRESUMPTION OF INNOCENCE.

An instruction that the evidence must remove all reasonable doubt of defendant's guilt is improper because implying that defendant is attended only by a reasonable doubt of his guilt, whereas he is presumed innocent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. ¶815(9).]

5. CRIMINAL LAW ¶823(9)—SUFFICIENCY OF INSTRUCTION—CURE BY OTHER INSTRUCTION—REASONABLE DOUBT.

The above instruction does not constitute reversible error where other portions of the charge correctly state the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158; Dec. Dig. ¶823(9).]

Frick, J., dissenting in part.

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Frank R. Brown was convicted of having carnal knowledge of a female between 13 and 18 years of age, and appeals. Reversed.

J. E. Darmer and S. P. Armstrong, both of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for the State.

FRICK, J. The defendant was convicted of the crime of having had carnal knowledge of a female under the age of 18 years and over the age of 13 years, which, under our statute, is a felony. He appeals from the judgment.

The first error assigned relates to statements made by the prosecutrix while testifying as a witness for the state. Though it were assumed that the statements were objectionable, yet, no objection or exception having been interposed or taken to the statements, the assignment is not reviewable by us.

At the trial the prosecutrix, a girl of about 14 years of age, but apparently a well-developed female for that age, testified, among other things, that on the 25th day of January, 1915, she lived in defendant's family, consisting of his wife and a daughter of about the age of the prosecutrix, near Garfield, Salt Lake county; that the defendant kept boarders who roomed and slept in small houses, or so-called shacks, which were located on the same lot and near defendant's dwelling where he and his family lived; that on the day aforesaid a little after 4 o'clock in the afternoon, after the prosecutrix had returned from school, she went to one of the shacks, the one most distant from the dwelling house, in which there were two rooms in which the boarders roomed and slept in two beds; that she went there to make up the beds and was alone in the shack when the defendant came in and that he then and there had sexual intercourse with her; that she was in the room from 20 minutes to half an hour and the defendant a somewhat shorter time. She also testified, without objection, that the defendant had had sexual intercourse with her on several occasions in the same shack prior to the date aforesaid. She, however, could not state the precise dates on which the prior acts occurred, but fixed them as nearly as she could remember. On cross-examination defendant's counsel insisted that the witness, at the preliminary examination, had fixed at least some of the prior dates with certainty and that she at the trial was changing the dates fixed as aforesaid. The witness admitted that she, on the preliminary hearing, might have given a particular date, but insisted that if she did she did not thereby mean that she could with certainty fix the date or dates on which the prior acts of sexual intercourse took place, and that she gave those dates as nearly as she could remember them. We have carefully read all of the evidence which is preserved in the bill of exceptions, and we feel bound to state that the discrepancies in the testimony of the prosecutrix with respect to times and dates are less than usual in such cases, and that she seemed quite fair in her statements and gave both the state and the defendant her best recollection with regard to the matters she testified to, and especially with regard to the different dates upon which the alleged prior acts of intercourse took place. The act upon which the complaint was predicated she always gave as having occurred on the 25th of January, 1915, and there is no contention to the contrary.

In view of the foregoing statements counsel for the defendant, at the trial, contended, and now insists, that the prosecutrix had made contradictory statements respecting material facts in issue and for that reason

they requested the court to charge the jury as follows:

"No. 6. I charge you that a witness may be impeached by proof of contradictory statements; and, if you believe that any witness has been successfully impeached, why, then it would be your duty to disregard the evidence of such witness; but it is for you to say whether or not you will believe the witness sought to be impeached or the witness brought to impeach him, the credibility of all witnesses being for you and your consideration. If you believe that any witness has been successfully impeached in reference to contradictory statements upon some material issue in the case—and it must be some material issue in the case—then you would not be authorized to believe him, unless you find that he has been corroborated. He may be corroborated, or he may be sustained by proof of good character, or by other facts and circumstances in the case."

The court refused to give the request and the refusal is assigned as error.

The Attorney General insists, however: (1) That the statements of the prosecutrix are not of that character which would authorize the giving of the foregoing request; and (2) even though it were conceded that the statements were of that character, yet the request was improper, and hence the court committed no error in refusing it.

When all of the testimony of the prosecutrix is considered, as it must be, it must be conceded that there is little, if anything, upon which to base the contention that the statements are contradictory in the sense that that term is usually applied. Assuming, however, that the contention is well founded, the question still remains whether the court erred in refusing to give the request. The request seems to have been taken from the case of *Powell v. State*, 101 Ga. 19, 29 S. E. 300, 65 Am. St. Rep. 277. It was there held that the trial court committed no error in charging the jury in the language of the request. The Supreme Court of Georgia, however, arrived at such conclusion after a somewhat lengthy review of the Georgia decisions and after a somewhat exhaustive analysis of the instruction. The court accordingly held that while it would be error to instruct the jury that they must not consider the testimony of a witness who, it is shown, has made conflicting statements upon material issues, and that the jury must be left at liberty to give his testimony such weight as in their judgment, upon the whole evidence, it is entitled to, or to disregard it in whole or in part, as in their judgment would be just and right, yet, that the charge in question, when properly construed, was merely to that effect. While a trained lawyer might be able to arrive at such a conclusion after carefully reading the instruction in the light of his experience as a lawyer, and in view of his knowledge of the law, yet it seems to us that the obvious and ordinary meaning of the language as it would likely be applied by laymen is not what the court found it to be. It is true that it is said in the charge that it is for the jury "to

say whether or not you will believe the witness sought to be impeached or the witness brought to impeach him, the credibility of all witnesses being for you and your consideration," yet it is also said, "If you believe that any witness has been successfully impeached, why, then it would be your duty to disregard the evidence of such witness." The instruction then concludes with the statement that if the jury "believe that any witness has been successfully impeached in reference to contradictory statements, * * * then you would not be authorized to believe him, unless you find that he has been corroborated." The jury is thus clearly told that in case a witness is impeached it is their duty to disregard his evidence, and, further, if they so find they would not be authorized to believe him unless corroborated. As we view it, the average layman or juror would construe and apply the language of the instruction thus:

"While I am at liberty to believe either one of the witnesses, if, however, I do believe the witness who testified to the making of the contradictory statements, then it is my duty to disregard the testimony of the witness who made them unless such witness is corroborated by other credible evidence."

We can see no escape from such a conclusion. The cases are quite numerous in which it is held that to charge a jury that it is their duty to disregard the testimony of a witness who, it is shown, has made contradictory statements, or who has been otherwise impeached, upon material issues, or to tell them that they cannot consider any of his testimony unless corroborated, constitutes error. In 2 *Thompson on Trials* (2d Ed.) § 2426, the subject is thoroughly discussed and the author there lays down the doctrine we have just stated. To the same effect are *Green v. Cochran*, 43 Iowa, 545-553; *Harper v. State*, 101 Ind. 109; *Addison v. State*, 48 Ala. 478; *Higgins v. Wren*, 79 Minn. 462, 82 N. W. 859. Moreover, upon both reason and principle such must be the law. It is elementary that the credibility of the witnesses and the weight to be given to their testimony is the exclusive province of the jury. This applies to all the witnesses and not only to those against whose statements no objection is made. It would be almost revolutionary to hold as a matter of law that because some witness comes into court and testifies that another witness has made statements in conflict with his present testimony therefore all that the latter witness testified to should be disregarded by the jury. To so hold would be in direct conflict with the doctrine that the credibility of the witnesses and the weight to be given to their testimony and statements is the exclusive province of the jury. The most that courts can do, or ought to do, in that regard is to give the jury some plain directions to guide them in arriving at a just result. That is best accomplished by admonishing them that if they find that any

witness has, upon any material issue, made statements, either in court proceedings or otherwise, which are in conflict with his present testimony, or if they believe that any witness has willfully testified falsely upon any material issue, that in either event they are at liberty to disregard any part or the whole of his testimony except in so far as the witness may be corroborated by other credible evidence.

In connection with the subject now under consideration it may not be improper to observe that it is not every discrepancy in time or dates that is necessarily a contradiction or constitutes a conflicting statement. Much must be left to the good judgment of the jury in that regard. As is well stated by the author in 1 Bishop's New Crim. Proc. § 1064:

"Honest witnesses oftener mistake dates, the time of day, and the identity of people seen, than the average of other things to which they testify."

The truth of the foregoing statement is amply vindicated in this case by the following incident: A young woman, a witness for the defendant, who, from a perusal of her testimony, seemed quite intelligent and fair in her statements, but very positive and firm, testified in chief that a certain event occurred on Monday the 28th day of a certain month, and on cross-examination she gave some special reasons why she knew the event occurred on a Monday and on the 28th day of the month. She was utterly surprised and confused, however, when the prosecuting attorney produced a calendar from which it conclusively was made to appear that the event could not have occurred upon both a Monday and on the 28th day of the month, since the 28th day of the month fell upon a Friday. The witness frankly conceded her error, but still insisted that the event occurred on the 28th day of the month. After a careful reading of the record it is not easy to say to what extent this little incident may have affected the result in this case. It clearly illustrates, however, that it would be most unfair and unjust to hold as a matter of law that all such discrepancies in the statements of witnesses would destroy or seriously affect their testimony; and, further, that with regard to such matters they all should be left to the jury under proper precautionary instructions.

In this case the testimony of the prosecutrix and that of the defendant relating to the sexual intercourse were in direct conflict. She, in emphatic terms, stated that he had sexual intercourse with her on the 25th day of January, 1915, and he as emphatically, stated that he, neither on that day nor at any other time, had had sexual intercourse with her. It follows, as a matter of course, therefore, that either the defendant or the prosecutrix testified falsely. They could not be mistaken with regard to the fact of sexual intercourse. In view of that the court in-

structed the jury that if they "shall believe any witness has willfully testified falsely as to any material fact in the case you are at liberty to disregard the whole testimony of such witness" unless corroborated. In addition to that the court explicitly and fully instructed the jury that it was their exclusive province to determine what witnesses they would believe or what weight they would give to their testimony, stating the rule in that regard for their guidance. We think that in view of all the facts and circumstances in this case the charge was sufficient, and was as favorable to the defendant as he was entitled to have it. It follows, therefore, that the things which it was proper to include in the precautionary instruction, such as the defendant's counsel requested, were substantially covered in the court's general charge to the jury. In view of the conflict between the prosecutrix and the defendant it was a question exclusively for the jury. Her testimony is sufficient if believed. *State v. Bayes*, 155 Pac. 335.

The defendant, however, offered two other requests which covered practically the same ground as request No. 6 in different language, and it is urged that the court erred in refusing those two requests. What we have already said practically covers those two requests. We remark, however, that while it would not have been improper to give defendant's request No. 7, yet, as before stated, it was substantially covered by the court in its general charge, and for that reason no error was committed in refusing it.

The last one of the requests, numbered 8, was properly refused both because it was substantially covered in the court's charge, and because, like request No. 6, it contained some improper matter.

Error is also assigned upon the following instruction given by the court:

"Circumstances of suspicion, if they amount to no more than that, or a preponderance merely of evidence against a defendant, is not sufficient to warrant a conviction. The weight of the evidence must be such as to remove from the minds of the jury all reasonable doubt of the defendant's guilt in order to warrant a conviction."

The second or last sentence of the instruction, it is insisted, constituted prejudicial error for the reason, as counsel express it, that:

"The court thereby tells the jury that all reasonable doubt of the defendant's guilt must be removed from their minds by the weight of the evidence before they can convict him. This instruction is so clearly wrong as not to require further comment. Weight of evidence means preponderance of evidence; that is, if the doubt is removed by the preponderance of the evidence, the jury may convict."

That is all counsel offer upon the subject. We do not think that counsel's construction is the natural and ordinary effect of the language used by the court. Moreover, the court had, in the preceding instructions, already three times told the jury in explicit terms that they could not find the defendant

guilty unless they found his guilt established beyond a reasonable doubt. Again, the court, in subsequent instructions, repeated that precaution at least three times. The jury were thus fully informed that it was not merely a preponderance of the evidence upon which they could base a finding of guilty, but they must be satisfied beyond a reasonable doubt of the defendant's guilt before they could convict him. That fact was made so plain and so prominent by the frequent repetitions in the charge that we cannot see how the jury could have been misled by what the court said in the sentence criticized by counsel. It is elementary that instructions can neither be upheld nor condemned by what may be said in one sentence. In the instruction itself, however, the jury were again told that "all reasonable doubt" must be removed from their minds before they could convict the defendant, and that a mere preponderance of the evidence "is not sufficient to warrant a conviction." That such doubt must be removed, as the court seems to say, by "the weight of the evidence" could, in view of the whole charge, not have had the effect contended for by counsel; nor could it have misled the jury.

It is also insisted that the court erred in refusing to grant a new trial upon the ground of alleged newly discovered evidence. The state insists, however, that the affidavit in support of the motion for a new trial is insufficient in that it fails to disclose the facts constituting defendant's diligence or to disclose what actions he took to procure the alleged newly discovered evidence to be used at the trial. The authorities are to the effect that merely to state that the party making the application exercised due diligence, or words to that effect, merely states a conclusion and renders the affidavit fatally defective. *Spelling New Tr.*, etc., § 218; *Thompson on Trials* (2d Ed.) § 2762; *Bradley v. Norris*, 67 Minn. 48, 69 N. W. 624, and cases there cited. The affidavit in this case is merely in the form of a conclusion. Assuming, however, for the purposes of this decision, that the affidavit is sufficient, yet we are of the opinion that the court committed no error for the reason that a part of the alleged newly discovered evidence is what is termed impeaching evidence and the remainder is merely cumulative. It could subserve no good purpose to set forth the alleged newly discovered evidence. It must suffice to say that the defendant produced the affidavits of five persons of lawful age who testified that the general reputation of the prosecutrix for truth and veracity is bad, and that they would not believe her under oath. Another witness, a woman, made affidavit that if a new trial were granted she would testify that she was present at the home of the defendant on the afternoon of January 25, 1915, and there saw the prosecutrix and the defendant. She also details in her affidavit such facts as would make it improb-

able or unlikely, but not impossible, that the sexual intercourse testified to by the prosecutrix between her and the defendant took place. Substantially the same facts detailed by this witness were, however, testified to by the defendant, by his wife, by their daughter, and by another lady visitor, all of whom were at the defendant's home on the afternoon of January 25, 1915, and at the time it is alleged the charged intercourse took place. The testimony of the witness was therefore merely cumulative. That is, a mere repetition of what the other four witnesses had testified to, while that of the five persons was clearly impeaching and nothing more. The authorities are very numerous, and practically unanimous, that it is only in exceptional cases, of which the instant case is not one, that new trials will be granted for alleged newly discovered evidence which is merely impeaching or cumulative, or both. This court is firmly committed to that doctrine, as appears from the following cases: *Klopfenstein v. Hays*, 20 Utah, 48, 57 Pac. 712; *State v. Mollitz*, 40 Utah, 447, 122 Pac. 86; *State v. Montgomery*, 37 Utah, 515, 109 Pac. 815; *State v. Moore*, 41 Utah, 247, 126 Pac. 322, Ann. Cas. 1915C, 976. To the same effect are *Harper v. State*, 101 Ind. 100; *Rains v. Ballow*, 54 Ind. 79; *Dodds v. Vannoy*, 61 Ind. 89; *Arwood v. State*, 59 Ga. 391; *McDonald v. Corryell*, 134 Ind. 493, 34 N. E. 7. In the Georgia case there was but one witness for the state, and it was that witness that the newly discovered evidence sought to impeach. Notwithstanding that the court held that a new trial should not be granted. In this case there are, however, some facts in the record which would make the impeaching evidence less effective than in that case. The foregoing cases make it clear that if all that defendant's counsel contend for in their motion for a new trial be conceded, yet, under the overwhelming weight of authority, we are not authorized to grant a new trial. It is, however, clearly made to appear from the testimony of both the defendant and his wife, and possibly other witnesses, which was received without objection, that the prosecutrix was a dutiful, reliable, and obedient girl, and that they knew nothing derogatory to her character and had heard nothing against her until after the present charge was preferred.

In conclusion the writer feels constrained to say that after a careful reading of the whole evidence and proceedings, and judging alone from the face of the record, if he had been a juror he would have found the defendant not guilty. The jury were, however, in a much better position to judge of the real merits of the case than is he. Again, I desire to concede that, judging alone from the face of the record, including the proceedings in support of the motion for a new trial, if I had been the trial judge I should have felt inclined to grant the mo-

tion for a new trial. Here again the trial judge was in a much better situation to judge than I am, and in view that there is no substantial legal error shown which, in my judgment, affected any of the substantial rights of the defendant we, as an appellate court, have no authority to interfere with the verdict of the jury or the judgment of the court based thereon.

Since writing the foregoing my Associates, in separate opinions, have given their reasons for arriving at a conclusion different from mine. After again carefully considering the whole record I am still unable to yield my former judgment. After all, whether the trial court committed reversible error or not in refusing to charge as requested, in my judgment, depends wholly upon how one regards the weight or probative force of the evidence. I say this because in this case there is positive and direct evidence in support of as well as against the finding of the jury. The contradictory statements of the prosecutrix were fully explained by her and all the circumstances why and how she made them were before the jury and they were fully advised with respect thereto. The prosecutrix either told the truth at the trial or she did not. Whether she did or did not had to be determined from all that occurred at the trial. The question, therefore, was one peculiarly for the jury. It is impossible in an opinion to reflect all that occurs at a trial which might influence the judgment of the triers of fact upon questions of fact. The circumstances may be such that one witness is, and ought to be, believed, notwithstanding he has made contradictory statements which are satisfactorily explained to the jury, as against another witness who has made no conflicting statements. No doubt, under ordinary circumstances, the credibility of a witness is affected in case he has made contradictory or conflicting statements. This, however, is a matter of such general knowledge that even school boys who have attained the age of 10 years are fully aware of it and constantly apply it in their daily conduct and intercourse with their playmates and associates. Let one of them make contradictory statements concerning a fact and his statements will at once be discounted by his playmates. This, too, without any instruction or admonition from any one. Yet when those same school boys have become business men and their knowledge and experience have increased, then it is solemnly assumed that they no longer are capable of weighing the testimony of a witness who has made conflicting statements without an instruction from a court. I freely concede that such instructions have many times been given and have as often been approved by the courts, and that judgments have even been reversed because they were refused; but to do so under all the circumstances in the case, in my judgment, constitutes an unwarranted in-

terference with the verdict of the jury for the reason that in effect it is but another way of saying that the jury, upon the evidence, should have found contrary to what they did find. I desire to add, however, that while such precautionary instructions can do no harm, they, in my judgment, have not the slightest effect upon the average juror. When, however, as here, there is direct and positive evidence in support of the jury's finding and the parties have been given every latitude and opportunity to lay before the jury all the facts and circumstances concerning the alleged offense, and having also fully explained to the jury the relationship of the witnesses and their statements and conduct preceding the trial, I cannot see how either the giving or withholding of such an instruction could influence the jury or affect their verdict. I am of the opinion, therefore, that the judgment should prevail. In view, however, that my associates are of a different opinion the judgment is reversed and the cause is remanded to the district court of Salt Lake county, with directions to grant a new trial.

MCCARTY, J. The only evidence against the defendant was the uncorroborated testimony of the prosecutrix. Her father, who was a witness for the state, testified that, before she went to live at the home of the defendant, he had "neglected the child"; that she had "been practically on the street, running free and doing as she pleased"; that he "was advised to get her a place to stay"; and that he "knew she was going wrong." The prosecutrix testified:

That she, on several occasions, had sexual intercourse with defendant prior to the commission of the act for which he was tried and convicted; that on one occasion, in July, 1914, the act occurred between 2 and 3 o'clock in the afternoon; that "I was cleaning up the room. Think Miss Wall was working there at the time. Mr. Brown was sitting by the dining room table when I went out. Think Miss Wall was in the kitchen. I think Mrs. Brown was sitting in the dining room with Mr. Brown. We were sitting at the table, talking, after lunch. I took the broom and went out about 2 o'clock I guess. * * * The screened porch of the kitchen looks right into these doors. You can see plainly from the kitchen right into the shack. * * * From where Mrs. Brown, Miss Wall, and Mr. Brown were to the * * * shack you could hear each other talk, pretty near. The windows were up in July, and doors open. Mr. Brown came in and he pushed me over on the bed and we began fooling and scuffling around in there and the act took place. I think he was there 5 or 10 minutes. I went right on cleaning and he helped me straighten up the bed. He went into the house and I went into the other shack."

She testified:

That on another occasion "the act occurred just after noon. * * * Georgia (defendant's daughter) was in the kitchen, and Mrs. Brown, doing the dishes. * * * I just came from my lunch. He came out with me to fix down the carpet. He fooled around about 45 minutes. Mrs. Brown came in while he was helping me put down the rug, but went right back to the house. * * * The windows from the dining

room and kitchen are within 15' or 20 feet of the shack. The windows were open, but we closed the door. * * * We could hear them all the time doing the dishes. If we were talking in an ordinary tone of voice I expect they could hear us."

Regarding the circumstances under which the prosecutrix claims the act for which the defendant stands convicted was committed she testified in part as follows:

"I got home from school on January 25th about 10 minutes of 4; went in the kitchen and got something to eat. Mrs. De Hart, Mr. and Mrs. Brown were in the kitchen. Mr. and Mrs. Brown were getting supper for the boarders. The other lady was a dressmaker. I took the broom and went out to clean up the rooms ('shacks'). * * * I was there sweeping and Mr. Brown came and asked me if he 'could have a piece.' I told him, 'Well, I don't know.' I said I was afraid Mrs. Brown would come; so then, as we were in there, why, we had sexual intercourse, and when that was over, why Mr. Brown went to the house and I went to my work. * * * I think this was on the birthday of Georgia Brown. * * * There was a birthday cake for Georgia at the baker's. * * * I remember distinctly that I went up with Georgia to the baker's and got this birthday cake. It was somewhere about 5 o'clock. * * * Georgia and I went out coasting on the hill. That was while supper was on. I was out coasting about 20 minutes. I wasn't well; menstrual period came on the day before. Mrs. Brown fixed me up that afternoon."

Earl Peterson, a roomer or lodger of the Browns, and who occupied the shack in which it is claimed the offense was committed, was a witness for the defendant and testified in part as follows:

"On January 25, 1915, Mr. Brown and I moved one of the stoves out and put a new one in my room. That was all we did except clean it up, when we left. * * * Mr. Brown fixed up the room—made the bed. I went to work on that day at 3:30. Started for work between 2:30 and 3 o'clock."

The defendant and three other witnesses, two of whom were his wife and daughter, testified to facts tending to show, and, if true, do show, that notwithstanding defendant was at home on that day (January 25, 1915) assisting his wife with the work in the kitchen, preparing the meals for boarders, he had no opportunity to commit the criminal act for which he was tried and convicted. The testimony of the prosecutrix regarding other acts of sexual intercourse between her and defendant is contradicted in every essential particular by the evidence of defendant and his witnesses.

The prosecutrix further testified as follows:

"When I was brought to the city by the juvenile (court) authorities I did not tell them about Brown's acts. When Mrs. James said she knew about it, then I told her. She asked me first the first day I was up here. I told her no at first, then she went to Garfield and found out; then I told her yes, that it was so. I did not deny it about all the other six at that time—just denied it about Mr. Brown. They brought me to court Tuesday and it was the next Monday before I admitted that anything had taken place between me and Brown."

Her father was called as a witness by the state and testified, and she admitted:

That she at first told him that the defendant was innocent. "I asked her if there was anything about it (referring to her alleged illicit relations with defendant) and she said, 'No, sir.' Afterwards * * * she told me there was, because they brought Frank (defendant) in to jail."

Defendant requested the court to charge the jury as follows:

"The court instructs the jury that if they believe from the evidence that any witness in this case, at a time prior to this trial, had made voluntary admission in regard to the facts thereof, and that such admission is in conflict with the evidence given by such witness at the trial of this cause, such conflict may be considered by the jury for the purpose of determining the credibility of the testimony of such witness, and the weight to be given to the evidence of such witness."

The court not only refused to instruct the jury as requested, but, as I read the record, failed to charge the jury at all on the point covered by the request. This is assigned as error.

I am of the opinion that the requested instruction should have been given. The only incriminating evidence against the defendant was that given by the prosecutrix, and her evidence in that regard was not corroborated in any particular. This is conceded by the state. The Attorney General, in his printed brief, says:

"It is true that the verdict of the jury stands on the uncorroborated testimony of the prosecuting witness."

The statements of Sir Matthew Hale in regard to the crime of rape, which have generally, if not universally, been approved by the courts and text-writers, are appropos to this class of cases, namely, that "it must be remembered that it is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent," and that we should "be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are overhastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses." 33 Cyc. 1485. And if the judgment in this case is to remain undisturbed it may be said with equal, if not greater, force of the crime of carnally knowing a female under the age of 18 years in this state, that "it is an accusation easily to be made" and in all cases where the female is a willing witness easily to be proved and impossible to be defended by the party accused, however innocent he may be. In such cases all that is required is for the prosecutrix to testify that the accused had an opportunity to and did commit the crime. And when, as in the case at bar, the defendant testifies in his own behalf and denies that he defiled the prosecutrix or otherwise ill-treated her and produces witnesses whose testimony, if true,

shows conclusively that he is innocent, the jury may assume, as they must have done in this case, that the parties had the opportunity to commit the offense and the inclination to do so, and that the defendant gave way to his evil propensities, hence the testimony of the prosecutrix must be true. It seems that an opportunity for the defendant to commit the crime was alone sufficient to convince the juvenile court officers, referred to by the prosecutrix in her testimony, of his guilt. When the prosecutrix was first taken into custody she implicated—accused—six other men or boys of having had sexual relations with her, but stated that the defendant had not defiled or otherwise mistreated her. While she was being held in custody the juvenile court officer mentioned went to Garfield to investigate the charges and on her return stated to the prosecutrix that "she knew about it"—referring to the alleged criminal relations between defendant and the prosecutrix. Then, for the first time, the prosecutrix stated that she had been defiled by the defendant. We have a right to assume that if the juvenile court officer had been informed of any fact tending to establish defendant's guilt other than the mere opportunity for him to commit the crime she would have advised the district attorney and her informant would have been subpoenaed and called by the state to testify in the case. I do not think the evidence shows that the defendant had an opportunity to commit the particular criminal act for which he was tried and convicted. The circumstances under which the alleged crime was committed, as related by the prosecutrix, the character of her illness at the time, the lack of privacy because of the unobstructed view of the shack and its close proximity to the kitchen in which were defendant's wife and daughter, a dressmaker and another lady, to say nothing of the conflicting statements made by the prosecutrix respecting her alleged relations with the defendant, make her story, as I view the case, improbable, unreasonable, and unbelievable. For the purpose of determining whether defendant's request No. 7 for instruction should have been given, I shall assume, for the sake of argument, that the evidence shows that the defendant had an opportunity to commit the particular criminal act for which he was tried. I am unable to conceive or imagine how it would be possible in this kind of a case, where the reputation of the prosecutrix for truth and veracity is not directly assailed and impeached, for the party accused to make a stronger or better showing in his own behalf than was done by the defendant in the case at bar. As I have stated, the defendant denied he had had illicit relations with the prosecutrix. His wife and daughter and a lady who was visiting with the Browns on that day (January 25, 1915) testified that they were in the house with the defendant at the time it is claimed

the act took place, and that he was engaged with his wife preparing supper for the boarders. And their evidence is to the effect that he was not in the shack after Peterson left to go to his work at 2:30 o'clock, and that he was not alone with the prosecutrix at all that afternoon. Moreover, while there is no direct evidence on the point, yet the only reasonable inference deducible from the evidence as a whole is, that defendant is a kind father and a devoted husband. The prosecutrix testified that defendant and his wife "seemed to take an interest" in her and that they fitted her out with clothes. Mrs. Brown, in giving her testimony, spoke kindly of the girl, and, among other things, said:

"When I asked her to do something she would do it. * * * I never had reason to suspect her or doubt her, and never had any difficulty with her; never had any unkind words."

I refer to these matters because they tend to illustrate the character and kind of people the Browns are. But it seems that these traits of character are of no avail to a defendant in this kind of a case. Mrs. Brown further testified:

That the prosecutrix associated with and occupied the same bed with her daughter, Georgia Brown, who is about the same age as the prosecutrix. "I generally knew where she and the little girl were. I knew what she was doing when she was about my place mostly all the time. If she went to a shack I would know it. I can see every shack. On the afternoon of the 25th the beds had been made up about 2:30. When Mr. Peterson went to work the beds were all made." That about 4 o'clock that afternoon she told the girls they might go coasting and that the prosecutrix said she wasn't well. "I said, 'Well, wrap up good and it won't hurt you.' I knew that she was in her menstrual period. For three days I helped fix her up."

I have copied somewhat copiously from the evidence because it was necessary to refer to the facts in detail in order to get a clear understanding of the different phases or angles of the case. Viewing the evidence in the light most favorable to the theory advanced by the state, we have a case (1) in which the prosecutrix, according to her own testimony, promiscuously indulged in sexual intercourse with no compunctions or qualms of conscience whatever, and with as much indifference as a person ordinarily steps to a soda fountain and drinks a glass of soda water or partakes of a dish of ice cream; (2) the crime was committed, if committed at all, when the prosecutrix was menstruating, thereby making the act both loathsome and unnatural; (3) when the prosecutrix was taken into custody by the juvenile court officers and questioned by them she accused six men or boys of having carnally known her, but stated that the defendant had not thus, or otherwise, mistreated her; (4) when she had been in custody a week one of the juvenile court officers went to Garfield, the place where it is claimed the delinquencies of the prosecutrix occurred, to investigate her conduct. The juvenile court officer, on her return from Garfield, informed

the prosecutrix that she "had found out at Garfield that it—(her immoral relations with the defendant)—was so," and that she "knew about it." Then the prosecutrix, for the first time, implicated the defendant. Under these circumstances the defendant was entitled to have the court instruct the jury that they might, in determining the weight that should be given the testimony of the prosecutrix, take into consideration the conflicting and contradictory statements regarding her alleged illicit relations with the defendant. 2 Thomp. on Trials (2d Ed.) § 2426; Henderson v. State, 1 Tex. App. 432; Hall v. State, 122 Ala. 85, 26 South. 236; Rose v. Otis, 18 Colo. 59, 31 Pac. 493. And especially so in view that the juvenile court officer pursued a course to induce the prosecutrix to implicate the defendant that was manifestly unfair to him and which, under the peculiar facts and circumstances of the case, amounted to undue influence. In a case of this kind where, as here, the prosecutrix shows by her own testimony that she has no conception whatever of the enormity of the crime of which the defendant was convicted and who is aware that she may be committed to the industrial school, generally spoken of as the "reform" school, her fear of being committed to that institution may create a strong incentive to implicate parties, regardless of their guilt or innocence, with her delinquencies, provided she gets the impression that by so doing she will gain favor with those who have her in charge and be treated leniently by them. After having made one confession, like Topsy in Uncle Tom's Cabin, she is apt to keep on confessing by adding additional names to her list of offenders so long as she thinks it is to her advantage to do so. Therefore, in cases of this kind, the fullest latitude should be given the defendant to avail himself of every right recognized by the law in the presentation of his defense and his theory of the case to the jury. This court, in a similar case (State v. Hilberg, 22 Utah, 39, 61 Pac. 218), took occasion to invite attention to the great disadvantage in which a defendant in this class of cases is placed and the ease with which he may be convicted, however innocent he may be, and, in the course of the opinion, makes the following pertinent observations:

"We do not overlook the danger attending prosecutions under this act. The rules of law governing trials under this statute are more stringent and less flexible than those applicable in other criminal cases. An accusation under this statute is easily made. The offense, if committed, is generally in secret. The general character of the prosecutrix cannot be attacked. Specific acts of unchastity on her part cannot be shown. Her testimony as in many other cases where she may be an accomplice does not require corroboration in order to obtain full credit, and the woman who participates in the act is not criminally liable therefor. Under such circumstances the charge when made is hard to disprove and difficult to defend against no matter how innocent the accused may be. While

the protection of the honor and chastity of young women is of paramount importance to the state, and every effort should be made to fully care for and protect it, yet in such prosecutions full latitude should be given the accused to discover the truth by cross-examination and otherwise, so as to enable him to defend against any unjust accusation."

Since the submission of the foregoing observations to my Associates, Mr. Justice FRICK has written an addendum to his opinion, wherein he says:

"The contradictory statements of the prosecutrix were fully explained by her and all the circumstances why and how she made them. * * * The circumstances may be such that one witness is, and ought to be, believed, notwithstanding he has made contradictory statements which are *satisfactorily explained* to the jury, as against another witness who has made no conflicting statements. No doubt, under ordinary circumstances, the credibility of a witness is affected in case he has made contradictory or conflicting statements. This, however, is a matter of such general knowledge that even school boys who have attained the age of ten years are fully aware of it and constantly apply it." (Italics mine.)

Mr. Justice FRICK has not, either in his original or in his supplemental opinion, pointed out wherein the prosecutrix "satisfactorily" or "fully explained why and how" she came to make the contradictory statements. Any person, be he lawyer or layman, who will take the time to read the record will readily observe that the prosecutrix made no explanation whatever regarding the contradictory statements she made to her father of her alleged unlawful relations with the defendant. Nor did she "fully," "satisfactorily," or otherwise explain why she, for 8 days after she was taken into custody, failed to implicate the defendant and persistently, during that time, denied having had illicit relations with him. In view of what I regard to be the unsupported and unwarranted deductions made by Mr. Justice FRICK from the testimony of the prosecutrix on this point, I shall again refer to her evidence, wherein she said:

"She (the juvenile court officer) asked me first, the first day I was up here. I told them no at first. * * * I did not deny it about all the other six at that time. I just denied it about Mr. Brown. * * * They brought me to court Tuesday and it was the next Monday (eight days) before I admitted that anything had taken place between me and Mr. Brown. * * * Mrs. James said she had found out at Garfield that it was so; * * * said she knew about it. Then I told her it was so."

Mr. Justice FRICK, in his main or first opinion, says:

"When all of the testimony of the prosecutrix is considered, as it must be, it must be conceded that there is little, if anything, upon which to base the contention that the statements are contradictory in the sense that that term is usually applied."

Conceding, for the sake of argument, that "school boys who have attained the age of 10 years," and occasionally a jurist, may be found who are unable to discern anything in the conflicting, inconsistent and irreconcilable statements of the prosecutrix that is

contradictory "in the sense that that term is usually applied," it nevertheless would be difficult for a person gifted with a versatile and vivid imagination to conceive of statements more contradictory and more at variance than those of the prosecutrix wherein she first absolutely and unqualifiedly denied and later asserted that she had illicit intercourse with the defendant. Mr. Justice FRICK, in the concluding paragraph of his main or first opinion says:

"That after a careful reading of the whole evidence and proceedings, and judging alone from the face of the record, if he (the writer) had been a juror he would have found the defendant not guilty."

And again:

"Judging alone from the face of the record, including the proceedings in support of the motion for a new trial, if I had been the trial judge I should have felt inclined to grant the motion for a new trial."

These observations by Mr. Justice FRICK, I think, clearly indicate that he is of the opinion that the defendant was not properly convicted, because the only ground upon which he would have been authorized, under his oath if he had been a juror, to find the defendant not guilty is, that the evidence is insufficient to justify his conviction. And if he had been the trial judge he would have been justified in granting a new trial only on one or more of the following grounds: (a) That the evidence is insufficient to support a verdict of guilty; (b) that some error prejudicial to the rights of the defendant was committed during the trial of the cause; or (c) that the showing made by the defendant of newly discovered evidence on motion for a new trial entitled him to have the verdict set aside and a new trial granted. It seems that the reason advanced by Mr. Justice FRICK for not concurring in the reversal, if I correctly understand his position, is that the trial judge saw and heard the witnesses testify and was therefore more capable of determining their credibility and the weight that should be given their testimony than are we. This rule has no application where a motion, as in the case at bar, is heard on affidavits of newly discovered evidence. In such case the trial court is in no better position to consider and weigh the affidavits than is the appellate court.

It is suggested in the brief filed by the Attorney General that "it is not probable that had the evidence proffered by Louise D. Hart been given at the trial the result would have been different," and hence the new trial was properly denied. She is the dressmaker herein referred to who was at the home of the defendant at the time it is claimed the crime in question was committed. The facts set forth in her affidavit, if true, show conclusively that the defendant is innocent, and are in accord with the testimony of the defendant and his wife and daughter and that given by Agnes Williams, who, as hereinbefore stated, was visiting with defendant and

his family at the time it is alleged the offense was committed. I agree with the Attorney General that if the evidence of Louise D. Hart had been produced at the trial the result would have been the same. Notwithstanding the conditions and circumstances described by the prosecutrix under which she testified the criminal act was committed, when there was no opportunity for her to have sexual intercourse with the defendant except in the hearing, and in the full or partial view of the defendant's wife and other parties who were present at the time; and notwithstanding that her testimony that she then had sexual intercourse with the defendant was, because of her illness, highly improbable and almost unbelievable, yet the jury having accepted as true her self-impeached testimony it would be unreasonable to expect that the testimony of any number of reputable witnesses showing the defendant to be innocent of the particular crime in question would have produced a different result. In my opinion this is one of the strongest arguments that can be produced that the trial court abused its discretion by refusing to grant a new trial. Should the judgment in the case at bar be approved, then, I submit, the law governing this class of cases is a menace to the good name and liberty of every man, however honest and virtuous he may be, who has a family and takes into his household and treats as a member thereof a homeless and motherless girl who is in any degree inclined to be wayward. A few convictions on evidence such as the record here discloses would have a tendency to, if they did not absolutely, close every respectable home in the state of Utah against these unfortunate girls, because, under the rule thus declared, if a man who has taken a motherless and somewhat wayward girl into his home should incur the displeasure of his ward or arouse the unfounded suspicion of some overzealous juvenile court officer he is in danger of being accused of a heinous crime and convicted thereof on the unsupported and uncorroborated evidence of a self-impeached, discredited and irresponsible wayward girl, regardless of how improbable and unbelievable her testimony may be. And that, too, notwithstanding he may be fortunate enough to show by evidence of credible witnesses, as in the case at bar, that he had no opportunity to commit, and did not commit, the criminal act of which he is accused.

In conclusion I remark that to permit the judgment in this case to stand would be a reflection upon and an impeachment of our judicial system. For the reasons stated I concur in the reasoning of the Chief Justice and in the conclusions reached by him on the questions of law discussed, and also join with him in reversing the judgment and directing that a new trial be granted.

STRAUP, C. J. [1, 2] I think the judgment should be reversed, not for insufficiency of evidence, but for errors in refusing requests to charge. There is no doubt that a witness may be discredited or impeached, or his credibility and the weight of his testimony affected, by material inconsistencies between his testimony and statements formerly made by him, and when such are shown the court, on proper requests, should give instructions with reference to the law or principles applicable thereto, especially in a criminal case when the conviction is dependent upon the testimony alone of the prosecuting witness whose testimony is at variance with statements formerly made by him. 2 Thomp. on Trials, § 2420; Blashfield Inst. § 249; Harris v. State, 96 Ala. 24, 11 South. 255; O. & M. Ry. Co. v. Craucher, 132 Ind. 275, 81 N. E. 941; Smith v. State, 142 Ind. 288, 41 N. E. 595; Herstine v. Lehigh Valley R. R. Co., 151 Pa. 244, 25 Atl. 104. Here the state, for a conviction, depended solely upon the testimony of the prosecuting witness. To support the issue on its behalf it offered no other evidence. There are undoubted inconsistencies between her testimony and statements formerly made by her, not as to mere dates, or other immaterial matters, but as to material facts, the charged criminal act itself. She testified most directly that the defendant, on the 25th of January, 1915, and on prior occasions, carnally knew her. But she also testified that when she thereafter was taken into custody by the juvenile court officers she told them, and told her father, that the defendant had not carnally known her and that he was innocent; and while in custody for a week or more maintained his innocence until the defendant himself was arrested and taken into custody, when she finally declared his guilt. Since she herself admitted making the statements out of court inconsistent with her testimony, there was no occasion to call others to show the making of them. The state, however, as to this, in rebuttal, called her father, who, in response to questions asked him by the district attorney testified that:

"I don't say that I believe they (the juvenile court officers) had prompted the girl to testify against him (the defendant) falsely, but that they had instructed her what to say. When I first went after her she told me that this man was innocent. Q. Then you told her that you knew something about it, didn't you? A. No; I never said a word about that. I asked her if there was anything about it, and she said, 'No, sir.' Afterwards, when she was going to have a hearing, she told me there was because they brought Frank (defendant) into jail. The conversation came up and Brown wondered whether she would be allowed to tell the truth. That was a month or six weeks ago."

There thus is no question but that the girl, as to the criminal act itself, made statements out of court wholly inconsistent with her testimony in court. She herself admitted it, her father testified to it, and no one de-

nied it. In view of that, and that the state, for a conviction, depended solely upon her testimony, the defendant was entitled to something more than mere stock instructions, but to a direct charge respecting such inconsistencies and the effect, not that should, but that might, be given them. Though it be conceded that his request No. 6, set forth in the opinion by Mr. Justice FRICK, is too broad, and because invading the province of the jury is improper, still I think his request No. 7, set forth in Mr. Justice McCARTY'S opinion, ought to have been given. It in effect is, that if any witness had made voluntary admissions or statements out of court in conflict with his testimony in court, such conflict was a proper matter for the jury's consideration in determining the credibility of the witness and the weight to be given his testimony. The request pointedly and properly directed the jury's attention to the purpose and effect for which such conflict or inconsistencies could be considered as affecting the credibility of the witness and the weight of his testimony. When there is evidence, as here there is, even undisputed, rendering such a request applicable, I see no good reason for refusing it. Rose v. Otis, 18 Colo. 59, 31 Pac. 493. Whatever argument may be advanced that to give the defendant's request No. 6 would be to invade the province of the jury—that if a witness be successfully impeached it was the "duty" of the jury to "disregard" his evidence, that they "would not be authorized to believe him" unless corroborated—is not in any particular applicable to request No. 7, nor to No. 8, which the court also refused, and which is:

"If any witness in the case has at another time and place made statements, material to the issues in this case, at variance with his testimony while on the witness stand and before you, then you are at liberty to disregard the whole of such witness' testimony except in so far as he is corroborated by other credible evidence."

That request is supported by Blotcky v. Caplan & Nathan, 91 Iowa, 352, 59 N. W. 204.

[3] It, however, is urged that all this was covered by the stock and printed instructions given in every civil and criminal trial in this state since statehood, that the jury are the sole judges of the facts, the credibility of the witnesses, the weight of their testimony, and that:

"If you shall believe any witness has willfully testified falsely as to any material fact in the case you are at liberty to disregard the whole of the testimony of such witness except as he may have been corroborated by credible witnesses or credible evidence in the case."

Thus the defendant's request, that inconsistencies between statements of a witness out of court and his testimony in court should be considered as bearing on the credibility of the witness and the weight of his testimony, or, as the jury might determine, the whole of the testimony of such witness

could be rejected unless corroborated, was refused and a charge given that the jury could only so consider and regard such inconsistencies in the event they found that the witness had "willfully testified falsely." But the rule is, and as stated in 40 Cyc. 2762, and supported by cases there cited, that:

"The fact that a witness has made statements inconsistent with or contradictory to his testimony is proper to be considered as bearing upon his credibility, even though the jury do not believe that the testimony thus contradicted was intentionally false. But proof of such statements is only evidence tending to impeach the witness, leaving it for the jury to determine under proper instructions whether the impeachment has been successful, and to what extent the credibility of the witness is affected and does not require that his testimony be rejected. So the jury may believe the witness notwithstanding his contradictory statements, even though his testimony is not corroborated. On the other hand a witness' contradictory statements may justify the jury in not believing him, although they should not disregard or refuse to consider his testimony unless they consider it willfully false, even though it is not corroborated."

Hence, though the girl may not have "willfully testified falsely," still the inconsistencies between her statements out of court and her testimony in court could, nevertheless, properly be considered as affecting her credibility and the weight to be given her testimony. But, as seen, that element as so requested was not embraced in the charge, and hence the substance of the requests in such particular was not given.

The requests were not objectionable because invading the province of the jury. The seventh did not, because of the stated or assumed inconsistencies, require or bind the jury to reject the testimony of the witness; nor did even No. 8, for that merely stated that the jury were "at liberty to disregard" the testimony, which implied, not a requirement or behest so to do, but a freedom and choice to accept or reject it as they saw fit.

Now, as to prejudice. That, as to such a question as this, is dependent upon the particular facts of the case. Here, as already observed, the inconsistencies relate to the testimony of the state's only witness. She was a mere child, but 14 years of age, an age when many children are of a most impressionable nature, quite susceptible to yielding influences, and more or less moved by impulses. While testimony of some children of that age is entitled to the same weight and credit, and is as reliable as that of an adult, yet of others is more or less doubtful and unreliable, not because they are willfully untruthful or knowingly testify falsely, but because of their impulses, indiscretion, and of the environments and influences surrounding them. Hence, as to such a witness, inconsistencies of statements out of court with her testimony in court, though they may not be regarded to the extent as carried by some courts (*Johnston v. Sochurak*, 104 Ill. App. 350)—that the one state-

ment wholly negatives or neutralizes the other so that the testimony unless corroborated is entitled to no weight—still, when considered and weighed by the jury in the particular case, the inconsistencies may, nevertheless, be regarded by the jury of such controlling importance as to accomplish just such result. On the other hand, had the jury been properly guided they might have found that the girl's statements out of court were prompted by motives to shield the defendant, but that she, seeing him under arrest and believing that the state had evidence of guilt independently of her testimony, finally admitted his guilt, and thus that her statements so made out of court did not materially impair her testimony in court. Of course, all this was for the jury. But they needed guidance. Without it a juror may well enough understand that such inconsistent statements are to be considered and some effect to be given them, but unless guided may regard them as evidence of the fact declared, and so regarding them may for that purpose think them of but little or no weight, or give them undue weight, instead of regarding them as the juror should, as affecting and as striking at the credibility of the witness and the weight to be given his testimony. And then the jury, in view of the pointed inconsistencies of the prosecutrix and as applicable thereto, were misdirected because in effect told the inconsistencies could be considered on credibility only in the event the witness had "willfully testified falsely."

[4, 5] Complaint also is made of this charge:

"Circumstances of suspicion, if they amount to no more than that or a preponderance merely of evidence against a defendant, is not sufficient to warrant a conviction. The weight of the evidence must be such as to remove from the minds of the jury all reasonable doubt of the defendant's guilt in order to warrant a conviction."

The proposition is not happily put. It is based on wrongly assumed premises that the jury, at the first instance, have a reasonable doubt as to the defendant's guilt, which, to warrant a conviction, must be removed by the weight of the evidence. This is not equivalent to the proposition that the jury, at the first instance, are required to presume the defendant innocent and that before they are warranted in convicting him they, upon the evidence adduced, must be convinced of his guilt, not upon mere circumstances raising but a suspicion, nor even by a preponderance or greater weight of the evidence, but must be so convinced beyond a reasonable doubt. It is not the proposition of reasonable doubt but the legal presumption of innocence which, at the threshold, attaches to the defendant and attends him throughout the trial until overthrown by proof of his guilt beyond a reasonable doubt; and thus, to warrant a conviction, it is not the proposition of reasonable doubt but the legal presumption of innocence which must be over-

thrown or removed by evidence. The charge does not convey that meaning. In other portions of the charge, however, such meaning is clearly enough expressed. While, for the reasons stated, I disapprove the charge, yet, when it is considered as it should be, in connection with other portions of the charge bearing on the same subjects—presumptions of innocence, burden of proof, and reasonable doubt—I do not believe it to be of such harmful effect as to require a reversal of the judgment on that ground alone.

But for this, in connection with, and more especially because of, the errors heretofore referred to, I think the judgment should be reversed and a new trial granted. Such is the order.

FINLEY v. MARION COUNTY (two cases).

(Supreme Court of Oregon. Aug. 1, 1916.)

1. INFANTS \S 12½, New, vol. 17 Key-No. Series—MOTHER'S PENSION—PRESENCE OF MOTHER AT HOME.

Under Laws 1913, p. 75, providing in section 1, for a mother's pension for the support of herself and of her child or children, and section 5, providing it is the intent of the act to keep the children to which it is applicable together under the control of their mother, and that the mother shall make a home for the children, a mother did not forfeit her right to a pension by working away from the family residence some hours of the day, if such labor was necessary to contribute to their subsistence.

2. INFANTS \S 12½, New, vol. 17 Key-No. Series—MOTHER'S PENSION—DATE OF ACCRUAL OF RIGHT TO PENSION.

Under such act, an applicant's right to pension accrued from the date of her application in proper form.

3. INFANTS \S 12½, New, vol. 17 Key-No. Series—MOTHER'S PENSION—POWER OF COUNTY COURT SITTING AS JUVENILE COURT.

Under the terms of such act, the county court sitting as a juvenile court, can grant no other relief than that provided for in the act.

4. INFANTS \S 12½, New, vol. 17 Key-No. Series—MOTHER'S PENSION—REPEAL.

The passage of the amendatory mother's pension act of 1915 (Laws 1915, p. 97) did not repeal any provisions of the mother's pension act of 1913 (Laws 1913, p. 75) so as to affect an amount then due and accrued under the act of 1913, although no action on application therefor was taken until after enactment of 1915 act.

5. INFANTS \S 12½, New, vol. 17 Key-No. Series—MOTHER'S PENSION ACT—REPEAL—VESTED RIGHTS.

No person disqualified by the 1915 amendatory mother's pension act (Laws 1915, p. 97) is entitled to have her pension continued after that law went into effect.

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Application by Mary Luella Finley for mother's pension under Laws 1913, p. 75, opposed by County of Marion and State of Oregon. From a judgment for applicant, both parties appeal. Modified.

These are cross-appeals from the decision of the circuit court of Marion county in the

matter of an application of Mary Luella Finley for a pension under the mother's pension act, chapter 42, Session Laws 1913. In July, 1913, the petitioner filed her application in due form, setting forth the fact that her husband was wholly incapable of supporting her or her son, then about eight years of age. The petition was in regular form, and stated all the facts required by statute. Being of the opinion that the petitioner was not entitled to the relief sought, by reason of the fact that she was at work which kept her away from home much of the time during the day, and for other causes not necessary to mention here, the county court took no action on the petition until July 30, 1915, when it entered an order denying the same. At various times, however, the county court extended financial assistance under the provisions of the pauper statutes. The petitioner appealed from the decision of the county court denying her application and, upon the hearing of the appeal in the circuit court, the latter found that she was entitled to a mother's pension as prayed for in her petition, but held that she was guilty of laches in not compelling the juvenile court to act upon it at an earlier date, and allowed her compensation only from July 30, 1915.

Walter L. Tooze, Jr., and G. O. Holman, both of Dallas, for appellant. Geo. G. Bingham, of Salem (Ernest R. Ringo, Dist. Atty., of Salem, on the brief), for respondent.

PER CURIAM. [1] We are of the opinion that under the act of 1913 a mother was not required to be with her family all the time if she kept them together in the home, and that she did not forfeit her right to a pension by working away from the family residence at some hours of the day if such labor were necessary to contribute to their subsistence.

[2] To the first question propounded in respondent's brief we, therefore, answer that under the act of 1913 the petitioner was entitled to a pension of \$10 a month from the date of her application.

[3] The second question asked is—"whether, under the terms of the act of 1913 the county court sitting as a juvenile court can grant relief other than the relief provided for in the act."

To this we answer, "No."

[4, 5] The third question proposed in the brief of the attorney for the county is this:

"The applications having been filed during the month of June, 1913, and no action being taken to cause a record to be made until the month of August, 1915, and after the amendatory act went into effect, had the juvenile court authority to grant relief excepting under the conditions specified in section 3 of the amendatory act of 1915?"

To this we reply that in our opinion it was not the intent of the act of 1915 to repeal any provisions of the act of 1913 so as to affect amounts then due which should have

been allowed in the regular course of proceedings under the act of 1913, and that as to sums accrued before the act of 1915 went into effect they should be allowed in full. Subject to this exception no person who is disqualified under the law of 1915 is entitled to receive a pension, and pensions to persons falling in this class should be discontinued after the date that the act of 1915 went into effect. *United States v. Teller*, 107 U. S. 64, 2 Sup. Ct. 39, 27 L. Ed. 352; *Eddy v. Morgan*, 216 Ill. 449, 75 N. E. 174.

The judgment of the circuit court will be modified to conform to this opinion.

In re WOLFE

WOLFE v. MARION COUNTY.

(Supreme Court of Oregon. Aug. 1, 1916.)

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Application by Eva Maud Wolfe for widow's pension, opposed by County of Marion of State of Oregon. From a judgment, applicant appeals. Modified.

Walter L. Tooez, Jr., and G. O. Holman, both of Dallas, for appellant. Geo. G. Bingham, of Salem (Ernest R. Ringo, Dist. Atty., of Salem, on the brief), for respondent.

PER CURIAM. This case is similar in all respects to the case of *Finley v. Marion County*, 159 Pac. 557, and will take the same course.

Ex parte LEVEL.

(Supreme Court of Oregon. Aug. 1, 1916, and Aug. 2, 1916.)

1. EXECUTION \S 423—EXECUTION AGAINST PERSON.

Where the pleadings in an action for the recovery of money disclose no fraudulent actions on the part of defendant, his imprisonment under an execution against his person is unlawful.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 1214-1221, 1223; Dec. Dig. \S 423.]

2. REFERENCE \S 85—AUTHORITY OF REFEREE—FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Under L. O. L. \S 838, a referee in an equitable proceeding has no authority to make findings of fact or conclusions of law.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. \S 131; Dec. Dig. \S 85.]

3. EXECUTION \S 425—IMPRISONMENT UNDER EXECUTION AGAINST PERSON—WHEN AUTHORIZED.

The imprisonment of petitioner, by virtue of an execution under a decree finding that he fraudulently and unlawfully retained money belonging to another, rendered on unauthorized findings of fact and conclusions of law by the referee, no other evidence being received and the decree not being based on any issue found in the pleadings, is unlawful, and petitioner is entitled to release in habeas corpus proceedings.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 1224-1228; Dec. Dig. \S 425.]

In Banc. Habeas corpus on the petition of James M. Level. Petition granted, and petitioner discharged from custody.

W. P. Lord, of Portland, for petitioner. Walter H. Evans, Dist. Atty., Arthur A. Murphy, Dep. Dist. Atty., James N. Davis, and W. W. Dugan, Jr., all of Portland, for respondent Sheriff.

On Rule to Show Cause.

PER CURIAM. In response to an order made by Mr. Justice Bean, requiring the sheriff of Multnomah county to show cause why a writ of habeas corpus should not issue for the purpose of inquiring into and determining the legality of the detention by said sheriff of the petitioner, James M. Level, the parties concerned have been heard by this court, and without discussion of the merits we are of the opinion that a prima facie case has been made by the petitioner sufficient to authorize the issuance of the writ. It will therefore be issued according to the prayer of the petition.

On the Merits.

On December 19, 1912, John M. Level began an action against the petitioner and his wife for the recovery of moneys, and thereafter the defendants therein filed their answer and, at the same time, a cross-bill in equity to which John M. Level filed an answer, wherein, after certain admissions and denials, he pleads affirmatively as follows:

"For the further and separate answer to the cross-bill the defendant alleges that the money as set out in the complaint and the cross-bill was delivered to the plaintiff herein James M. Level, and that thereafter the said James M. Level and Lucy Level, his wife, and plaintiffs in said cross-bill, agreed in the state of Washington, where the James M. Level had his residence at that time, and under the laws of Washington said property delivered to him is community property, that if the defendant would let him use some of the money on hand, they would repay it all to him, whereupon the plaintiff of the cross-bill James M. Level did expend for improvements on the property of Lucy Level, and for her benefit, a large portion of said money, all of which she agreed to repay to John M. Level, the exact amount of which the defendant does not know, but asks that the same be ascertained; that during the month of May, 1911, the plaintiffs James M. Level and Lucy Level agreed to convey to this defendant the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, section 24, T. 5 N., R. 3 E., of W. M., situated in Clarke county, Wash., for the sum of \$600, which money was out of the money which had been paid to James M. Level, and this defendant further alleges that he went into possession of said property and put improvements thereon under the understanding and belief that the plaintiffs herein had good title thereto, or would acquire the same, but defendant, on or about the 1st day of March, 1912, discovered that the title to said property remained in the name of the man who had lost his life in Portland by fire, by accident, and that the said James M. Level and Lucy Level had no title to said property, and do not have the title to said property at this time.

"The defendant further alleges that James M. Level used a portion of the money turned over to him by this defendant for improvements on a homestead in the vicinity of the land above described, and that all of the money received

by this defendant from said James M. Level was the sum of \$551.50, leaving a balance due to John M. Level of \$2,219.60.

"Wherefore the defendant prays for an accounting with the said plaintiffs, and for proof that the said James M. Level and Lucy Level have a title to the property described herein. to wit: N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 24, T. 5 N., R. 3 E., of W. M., situated in Clarke county, Wash.; and that with such proof there be delivered to this defendant a conveyance thereof if the court finds such proof of title to be sufficient; and that all the moneys received by the said plaintiffs shall be decreed to be community property, and for such other and further relief as may seem meet and proper under the principle of justice and equity."

A reply being filed, the trial court referred the cause to a referee to take the testimony—

"and decide the whole issue and report upon the questions involved to the court within 15 days from this date."

Thereafter the court made and entered its decree, from which the following quotation is the part pertinent to the matter here presented:

"* * * The cause was submitted to the referee for consideration and decision, and after due deliberation thereon, the referee, duly and regularly empowered and appointed, files his findings of fact and conclusions of law, wherein it appears to the court that the defendant James M. Level received from John M. Level, the plaintiff, a sum total of \$3,269.17, in trust for the benefit of John M. Level, and that the said defendant James M. Level expended for the use and benefit of the said John M. Level the sum of \$2,225.68, leaving a balance of the said trust funds still in the hands of James M. Level amounting to \$1,043.49; and, no objections having been filed to said report, nor motion to set aside, wherefore, by reason of the law and the findings as aforesaid, it is hereby ordered, adjudged, and decreed that the said John M. Level have and recover from the defendant James M. Level the sum of \$1,043.49, together with costs and disbursements in this suit incurred taxed at ——— dollars; and it is further decreed that the said judgment be for money fraudulently and unlawfully retained by said James M. Level, and that execution be forthwith issued therein."

Thereafter an execution was issued against the person of the petitioner, and he, being imprisoned thereunder, presents his petition to this court for a writ of habeas corpus.

BENSON, J. (after stating the facts as above). [1] There are two grounds upon which it must be conceded that the imprisonment of the petitioner is wrongful: (1) A careful reading of the answer to the cross-bill discloses no fraudulent actions upon the part of the plaintiff, and therefore, the cause is not one in which the severe remedy of an execution against the person may be invoked; (2) it will be observed that the decree is based exclusively upon the findings and decisions of the referee.

[2, 3] The statute in this state has taken away from a referee the authority to make findings of fact and conclusions of law in an equitable proceeding. Section 838, L. O. L.;

Anthony v. Hillsboro Gold Mining Co., 58 Or. 258, 113 Pac. 442, 114 Pac. 95. It is true that under the authority last cited the court might adopt the findings and conclusions so made as its own, nevertheless its decree must be based upon the evidence and not upon unauthorized findings. The recital in the decree that "the said judgment be for money fraudulently and unlawfully retained by James M. Level" is not based upon any issue found in the pleadings. From these conclusions it follows that the decree is void and the imprisonment of petitioner unlawful. An order will be entered, discharging him from custody.

MOORE, C. J., and BEAN and McBRIDE, JJ., concur.

BENSON, J. Writ allowed, and petitioner discharged.

MEADOW VALLEY LAND & INVESTMENT CO. v. MANERUD.

(Supreme Court of Oregon. Aug. 1, 1916.)

1. SET-OFF AND COUNTERCLAIM \Leftrightarrow 29(1) — PLEADING—SUFFICIENCY.

In an action on a promissory note, an answer alleging that defendant leased a horse to plaintiff, which was injured and died through plaintiff's want of care, held to state a counterclaim on contract, not on tort, under L. O. L. § 74.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 49; Dec. Dig. \Leftrightarrow 29(1).]

2. APPEAL AND ERROR \Leftrightarrow 1170(3)—REVIEW—HARMLESS ERROR.

In an action on promissory notes, the failure of defendant to properly plead a counterclaim for the value of a horse leased to plaintiff and which died through want of proper care, held not to require reversal under Const. art. 7, § 3, of judgment allowing such counterclaim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4075, 4098, 4101, 4542; Dec. Dig. \Leftrightarrow 1170(3).]

3. PLEADING \Leftrightarrow 142—SET-OFF AND COUNTERCLAIM—SUFFICIENCY.

In an action on a promissory note, a counterclaim alleging that notes were procured by false representations, but not alleging that plaintiff's officer who made the false representations was then acting within the scope of his authority, held not to state a defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300; Dec. Dig. \Leftrightarrow 142.]

4. BILLS AND NOTES \Leftrightarrow 534 — ACTIONS — AMOUNT OF RECOVERY—ATTORNEY'S FEES.

In an action on promissory notes, where, by the allowance of defendant's counterclaim, plaintiff had judgment for only \$48.77, the allowance of \$100 as attorney's fees held unreasonable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. \Leftrightarrow 534.]

Appeal from Circuit Court, Lane County; G. E. Skipworth, Judge.

Action by the Meadow Valley Land & Investment Company, a corporation, against

Mrs. Olivia Manerud. Judgment for plaintiff, and plaintiff and defendant appeal. Modified and affirmed.

This is an action to recover the amount of a promissory note given by the defendant to the plaintiff March 20, 1911, for \$1,000, payable in one day, with interest at 8 per cent. per annum, and providing for the recovery of a reasonable sum as attorney's fees in case action were instituted on the note. The complaint avers that the plaintiff is a corporation; that the defendant executed to it the promissory note; that no part thereof has been paid; and that \$100 is a reasonable sum to be allowed as attorney's fees. The answer denies some of the allegations of the complaint, and for further defenses sets forth ten counterclaims, the first eight of which were allowed and are not controverted herein. The ninth defense, which was also sanctioned, substantially avers that the defendant leased to the plaintiff a horse which it stipulated properly to care for and return to her in good condition; that while the plaintiff was using the animal it was kicked by another horse; that instead of caring for the injured horse as it had agreed, the plaintiff continued to work the horse until December 13, 1913, when it died; and that the animal was worth \$300, no part of which has been paid.

The tenth counterclaim alleges in effect that the promissory note mentioned was given for 20 shares of the plaintiff's capital stock then held by I. P. Hower, who owed the corporation therefor a remainder of \$1,000; that before procuring this stock the defendant informed G. D. Linn, an officer of the plaintiff, of her contemplated purchases and inquired of him as to the kind and value of assets of the corporation, whereupon that agent detailed to her the character and worth of the plaintiff's property which representations were false, setting forth the particulars; that she believed these statements and relying thereon negotiated for the purchase of the shares of stock, which principal fund of the corporation was of no value and in consequence thereof she had paid out on account of the stock so purchased \$1,961.10, setting forth the items thereof.

The reply put in issue the allegations of new matter in the answer. At the trial the defendant's counsel obtained an order to amend the answer so as to aver that the plaintiff had violated its contract to return the horse, the reasonable value of which was \$300, and that the corporation had appropriated the animal to its own use.

The court granted a nonsuit as to counterclaim numbered ten. In referring to the attorney's fee as alleged in the complaint, the court told the jury that having heard the testimony on that subject, they should allow

whatever sum therefor they considered reasonable. The defendant's counsel thereupon inquired:

"Suppose the jury should find these counterclaims equal to the note exclusive of attorney's fees, should there be anything then? I claim there should not be anything brought in for attorney's fees."

The court replied:

"I don't know whether you are entitled to that. I don't believe you are."

An exception to this ruling was taken. The jury by special verdict found that the value of the horse was \$300; that after crediting this sum and the amount of the first eight counterclaims there remained due on the note \$48.77; and that \$100 was a reasonable attorney's fee. Judgment was rendered thereon against the defendant for \$148.77, from which she appeals, asserting an error was committed in excluding her tenth counterclaim. The plaintiff also appeals from that part of the judgment which awarded any sum for the horse.

H. B. Slaterry, of Eugene, for appellant. L. M. Travis and J. M. Williams, both of Eugene (Williams & Bean, of Eugene, on the brief), for cross-appellant.

PER CURIAM. [1, 2] It is maintained by plaintiff's counsel that the part of the answer, alleging the injury to and the death of the defendant's horse, is an attempt to interpose a defense sounding in tort to an action founded upon a contract, and for that reason the facts thus set forth do not constitute a counterclaim within the meaning of that term as defined by statute. L. O. L. § 74. The lease of the horse arose out of a contract, and though the facts stated in the answer relating thereto are not well averred, this part of the defense fairly constitutes a counterclaim; and, invoking section 3 of article 7 of the Constitution relating to such matters, the judgment in this particular should be approved.

[3, 4] It is insisted by defendant's counsel that an error was committed in granting a judgment of nonsuit as to the tenth counterclaim. It is not averred in that part of the answer that the plaintiff's officer who made the alleged false representations was then acting within the scope of his authority or for the plaintiff. The facts thus set forth do not constitute a defense to the action, and no error was committed in the respect mentioned. The court, however, should have instructed the jury as requested by the defendant as to the attorney's fee. To allow the sum of \$100 for collecting \$48.77 as the remainder due on a promissory note is certainly unreasonable, and, this being so, the judgment is modified to allow only \$25 as an attorney fee, and in all other respects affirmed.

FIRST NAT. BANK OF ALBANY v. PACIFIC TELEPHONE & TELEGRAPH CO.
et al.

(Supreme Court of Oregon. Aug. 1, 1916.)

TELEGRAPHS AND TELEPHONES §28—**COMPILING CONNECTION BETWEEN COMPANIES**
—**INJUNCTIVE RELIEF.**

Where a bank installed in its building a private intercommunicating telephone system, with its own instruments, with which the H. telephone company connected, the bank could not, in suit against the P. telephone company, have injunctive relief to compel the latter to connect its system to the bank's thus effecting a connection of the two telephone systems, competitors, the H. company not being a party to the suit, until the Public Service Commission fully considered all questions involved; injunction being an extraordinary remedy, which will not be granted unless the Public Utilities Act (Laws 1911, p. 483) will work harmoniously as a result.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 16, 17; Dec. Dig. §28.]

Department 1. Appeal from Circuit Court, Linn County; Wm. Galloway, Judge.

Suit by the First National Bank of Albany against the Pacific Telephone & Telegraph Company, a corporation, and another. From a decree dismissing the complaint, plaintiff appeals. Decree affirmed.

This suit was instituted for the purpose of permanently enjoining the defendants from disconnecting or in any manner interfering with or changing the present telephone connection between the lines of the defendant telephone company and the telephone system owned and operated by the plaintiff in its banking institution existing in the city of Albany, Or. The circuit court rendered a decree dismissing the plaintiff's complaint, from which plaintiff appeals, assigning a number of errors.

Plaintiff is the owner of a five-story reinforced concrete building, the first floor of which is occupied by the plaintiff as a banking institution, the remainder of the building being used for office purposes. During the construction of the building in 1912-1913, the plaintiff caused to be installed therein telephone conduits, and upon the completion thereof installed a complete telephone system connecting all the various offices in the bank and the offices of the First Savings Bank, another institution of the plaintiff situated in another building about one block distant, and also installed public stations therein for the use of its patrons. The telephone system can be operated from any station by means of an automatic keyboard whereby direct connection is effected with the main switchboard. Upon the completion of the building the Home Telephone Company, a public service corporation and the owner of a competitive telephone system in the city of Albany, connected its trunk line with the main switchboard of the telephone

system of plaintiff. About the same time the defendant company installed a telephone station in the bank building and afterwards the defendant company's trunk line was, at the instance of plaintiff and without the consent of the defendant company, connected with one of the cables of plaintiff's telephone system, and thereby connection was made with the main switchboard of plaintiff's intercommunicating telephone system. All the incoming and outgoing telephone communications over both the Home and Pacific Companies' lines were conducted by means of the instruments used by the plaintiff in its system as well as all intercommunications between various offices in the two banking institutions. Plaintiff occupied the building September 1, 1913. During that month the Pacific Company objected to the connection which had been made with the plaintiff's intercommunicating system and the Home Telephone system and informed the plaintiff that it would disconnect its service, whereupon plaintiff instituted this suit and obtained a temporary injunction restraining the defendant from so doing. The Pacific Company answered and affirmatively alleged that it undertakes to furnish telephone service by means of equipment owned, installed and maintained by it without connection with the system of other telephone companies or with privately owned equipment. Temporary arrangements were made at the suggestion of the chairman of the Public Service Commission for service of the Pacific Telephone in the plaintiff's bank which was understood to be without prejudice to defendants' case.

G. G. Schmitt, of Portland (Schmitt & Schmitt, of Portland, on the brief), for appellant. Omar C. Spencer, of Portland (Carrey & Kerr, of Portland, on the brief), for respondents.

BEAN, J. (after stating the facts as above). It not being shown by the record that the Pacific Company voluntarily connected its system with plaintiff's intercommunicating system or the Home Telephone system the suit in effect is to compel the desired connection. The Pacific Company asserts that it holds itself out to provide all the instrumentalities and facilities necessary and essential to the furnishing of telephone service. It is not engaged in furnishing service which consists of connecting privately owned equipment with its own instrumentalities and lines.

At the threshold of this case we are met by the contention of counsel for the Pacific Company that the circuit court has no original jurisdiction over the regulation of public utilities such as the Pacific Telephone system; that the power of regulation is conferred upon the Public Service Commission by virtue of the Session Laws of 1911, p. 483, known as the Public Utilities Act, which

was passed by the Legislative Assembly and afterwards ratified upon a referendum to the people.

Section 6 of this act provides as follows:

"The Railroad Commission of Oregon (now Public Service Commission) is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction."

Section 54 of the act provides for a review of any order or procedure before the Public Service Commission by a suit in the circuit court of the county in which the hearing was held against the commission as defendant to vacate and set aside any such order or specified portion thereof on the ground that the order or portion thereof is unlawful. That right or recourse to the courts should be exercised within 90 days after the rendition of such order or determination. It is urged on behalf of the defendant company that this act provides a complete, adequate plan for the determination of all matters connected with the regulation of public utilities; that the bank by this proceeding is endeavoring to make of the circuit court a body of equal original jurisdiction with the Public Service Commission, in such matters which has no sanction in law. We are referred to the case of *Ford v. O. E. Ry. Co.*, 60 Or. 278, 117 Pac. 809, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914A, 280, where the plaintiff sought specific performance from the railway company, of a contract to stop local trains at a road crossing on the land of plaintiff. In the determination of the case we discussed the Railroad Commission Act and held that the regulation of the stopping of trains is a duty imposed in the first instance upon the railroad commission of the state under the provisions of chapter 53, Laws 1907, p. 67, known as the Railroad Commission Act, section 6875 et seq., L. O. L.; that under the present régime if a court of equity should take cognizance in the first instance, regardless of the general plan of the railroad commission, it would doubtless tend to a confusion of results to the detriment of the public interests. Under the law the orders of the commission may be rescinded or amended from time to time according to change of conditions or requirements of necessity.

The Public Utilities Act further amplifies the general plan of regulation by the Public Service Commission in Oregon subjecting more utilities to regulation so that even greater confusion in the matter of control would follow if the various circuit courts of the state were held to have original jurisdiction with the Public Service Commission in the regulation of public utilities. The power of the Public Service Commission to regulate was discussed in *Portland Ry. L. & P. Co. v. City of Portland* (D. C.) 210 Fed. 667, in which case the city attempted to regulate the rates of the utility. United States District Judge Bean held that under the Public

Utilities Act the authority to regulate was conferred in the first instance exclusively upon the Public Service Commission, saying:

"There cannot be two public bodies existing at the same time with original jurisdiction to prescribe and fix the only lawful rates to be charged by a public utility. * * * The purpose (of the Public Utilities Act) was to provide a uniform system throughout the entire state for the control and regulation of public utilities and fixing the rates to be charged by them, and to create a tribunal for that purpose."

In *Pacific Telephone & Telegraph Co. v. Wright-Dickinson Hotel Co.* (D. C.) 214 Fed. 666, District Judge Wolverton, in speaking of the Public Utilities Act, said:

"This act has for its purpose the regulation of the public utilities of the state, and the conferring of power and jurisdiction upon the railroad commission of the state (now the Public Service Commission) to supervise and regulate such utilities. * * * By section 6 'the Railroad Commission of Oregon (the Public Service Commission) is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction'—a power and jurisdiction very broad and very comprehensive."

It is further urged on behalf of the Pacific Company that if it be assumed that the circuit court has original concurrent jurisdiction with the Public Service Commission in regulating public utilities in Oregon that there is no authority to compel a telephone company to connect with the private equipment of a subscriber. The particular facts relating to this phase of the case should be borne in mind. The bank has installed what is called a private intercommunicating system. This is composed of wires running through the bank, upon which are located various telephone stations. At each of these stations the bank has installed its own instruments, and a person may communicate from one of these stations with a person at any other station on the system by taking down an instrument and giving the proper signal. This private system is owned, controlled, and maintained by the bank. It is insisted on behalf of the Pacific Company that this intercommunicating system was installed with the bank at a time when it knew that the Pacific Company furnished its own intercommunicating system to which it willingly connected, but that the Pacific Company did not connect with any private system or instrument over which it had no control. The bank installed its private system and a connection was made between this and the lines of the Home Company in Albany. Thereafter the bank, without any authority from the Pacific Company and without any knowledge on its part, connected a trunk line of the Pacific Company which had been installed running to a booth in the bank for temporary service with the private intercommunicating system of the bank. This suit was instituted to legalize such connection or practically to enforce a connection by the Pacific Company with the private intercommunicating

system of the plaintiff and the system of the Home Telephone Company.

Section 7 of the Public Utilities Act provides as follows:

"Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any heat, light, water or power produced, transmitted, delivered or furnished or * * * for any transportation of persons or property by street railroad, or for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful."

By section 64 of the act it is made unlawful—

"for any public utility to demand, charge, collect or receive from any person, firm or corporation less compensation for any service rendered or to be rendered by said public utility in consideration of the furnishing by said person, firm or corporation of any part of the facilities incident thereto: Provided, nothing herein shall be construed as prohibiting any public utility from renting any facilities incident to * * * the conveyance of telephone messages and paying a reasonable rental therefor, or as requiring any public utility to furnish any part of such appliances which are situated in and upon the premises of any consumer or user, except telephone station equipment upon the subscriber's premises, and unless otherwise ordered by the commission meters and appliances for measurements of any product or service."

It is provided in section 8 of the act that:

"Every public utility, and every person, association or corporation having conduits, subways, street railway tracks, poles or other equipment on, over or under any street or highway shall for a reasonable compensation permit the use of the same by any public utility whenever public convenience or necessity require such use and such use will not result in irreparable injury to the owner or other users of such equipment nor in any substantial detriment to the service to be rendered by such owners or other users. * * *"

The question of the connection of plaintiff's intercommunicating system with the Pacific Company's system was passed on by the Public Service Commission December 5, 1913. The commission said:

"From the foregoing the commission finds that the defendant is under no obligation to connect its telephone system with that of any private utility and that the plaintiff, the First National Bank of Albany, does not come within the purview of section 8, chapter 279, of the General Laws of Oregon for the year 1911." First Nat. Bank, Albany, v. Pac. Telephone & Telegraph Co., 25 C. L. p. 880.

It will be seen, therefore, that while the question of the connection of the system of defendants with the private telephone system of plaintiff has been considered by the Public Service Commission, the question of the installation of a system in the plaintiff's bank to be used jointly in connection with the Pacific Company's and the Home Telephone Company's systems and to be under the joint control of those companies or the control of some quasi public corporation and to be regulated by the Public Service Commission does not appear to have been submitted to it.

An injunction is an extraordinary remedy,

and in order for the plaintiff to avail itself of this remedy the circumstances of the case should be such that the harmonious working of the law involved would result. Until the Public Service Commission has fully considered all the questions involved in this case, a court of equity should not under all the circumstances interfere and grant injunctive relief.

It was plainly stated by counsel for plaintiff upon the argument that any fair arrangement whereby plaintiff can have the service of both the Pacific Telephone system and the Home Telephone system without two sets of telephone instruments is much desired, and would be satisfactory to plaintiff. Plaintiff asserts that it is willing for the Pacific Company to install the intercommunicating system in its bank building, or take, use, and control plaintiff's system if that company will permit the Home Telephone system to be also connected therewith. Such an adjustment would be making a connection of the two systems, and a kind of joint traffic arrangement between the two telephone companies and necessitate the consideration of the interest of plaintiff and the two telephone companies and of the public, and is a proper question for the consideration of the Public Service Commission. Public utilities wherein complex matters, agreements, or arrangements are involved should not be attempted to be regulated by injunction. The rule sanctioned in Pond, Pub. Util. § 554, reads thus:

"The courts are agreed that in the absence of a contract between competing or connecting companies for the physical connection of their telephone plants or of a constitutional or statutory requirement that such plants be connected for the purpose of exchanging service, such companies cannot be required to make a physical connection of their plants by the use of a common switchboard or trunk line between their exchanges, although the few decisions on this point suggest that the power resides in the state to make and enforce such a requirement in the form of a regulation of the service."

See, also, Wyman Pub. Service Corp. § 551.

The Public Utilities Act is designed to promote efficiency in service by public utilities, and in order to obtain such result there must be uniformity in the control and regulation of such utilities. To accomplish this the statute, which is the expression of the will of the people in the exercise of their sovereign power, confers exclusive jurisdiction to supervise and regulate upon the Public Service Commission in the first instance.

The Home Telephone Company is materially interested in any arrangement that may be made for a connection of its system with that of another telephone company and can be cited to appear before the Public Service Commission in an appropriate proceeding. It is not a party to this suit.

The jurisdiction of the Public Service Commission both under the old law the Public Utilities Act has been upheld by state and federal courts in the cases above mentioned.

P. Ry. L. & P. Co. v. R. R. Com., 56 Or. 468, 105 Pac. 709, 109 Pac. 273; Id., 229 U. S. 397, 33 Sup. Ct. 820, 57 L. Ed. 1248. That tribunal has exercised the authority conferred by this law in the matter of Pac. Telephone & Telegraph Co. v. Wright-Dickinson Hotel Co., supra, wherein physical connection between the Pacific and Home Companies' systems in the Oregon Hotel was found to be feasible and ordered to be made and adjusted matter of compensation for the joint service required.

At the present stage of the controversy we do not deem that the interposition of a court of equity to grant injunctive relief would be warranted. It follows that the decree of the lower court should be affirmed and it is so ordered.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

MATHEWS v. CHAMBERS POWER CO.

(Supreme Court of Oregon. July 18, 1916.)

1. INJUNCTION \S 52—REAL PROPERTY—CUTTING AND REMOVAL OF TIMBER.

The cutting and removal of brush and timber on a swale leading from a millrace across plaintiff's premises to a river, to the use of which swale defendant had no right, and which would permit the river to further encroach upon plaintiff's premises, was a willful trespass upon his land which a court of equity would enjoin.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 105; Dec. Dig. \S 52.]

2. INJUNCTION \S 191—RELIEF—PERMANENT INJUNCTION.

Where it appeared that a few trees remained in the swale which should be protected because the roots tended to prevent the river from washing away its banks, an injunction was properly made perpetual, so as to prevent a repetition of the trespass.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 410; Dec. Dig. \S 191.]

3. APPEAL AND ERROR \S 878(1)—FAILURE TO TAKE CROSS-APPEAL—EFFECT.

Where plaintiff did not take a cross-appeal from the part of the decree sanctioning the building and maintenance of the defendant's spillway on his land, it will be assumed that he was satisfied with such final determination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 3573, 3574; Dec. Dig. \S 878(1).]

Department 1. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Suit by A. C. Mathews against the Chambers Power Company to enjoin an alleged trespass upon real property. From a decree granting plaintiff the relief prayed for, defendant appeals. Affirmed.

Helmus W. Thompson and C. A. Hardy, both of Eugene, for appellant. R. S. Hamilton, of Eugene (Foster & Hamilton, of Eugene, on the brief), for respondent.

MOORE, C. J. The facts are that, pursuant to the act of Congress approved Septem-

ber 27, 1850, Hillyard Shaw secured a donation land claim of 320 acres in section 32, township 17 south, of range 3 west in Lane county, Or. Extending from a place near the southeast corner of this land to the northwest corner thereof was a slough through which some of the waters of the Willamette river flowed during the freshets in that stream. This depression through that land was deepened in places where necessary so that water, at all stages in the river, flowed in such artificial channel to the northwest corner of the claim, where it was employed in generating power which was used in operating a sawmill and a gristmill. Shaw on March 1, 1856, and thereafter, executed to the defendant's predecessors in interest deeds conveying 23 acres of his land claim described generally as beginning at the northwest corner thereof; thence east along the northern boundary 11 chains; thence south 21 chains; thence west 11 chains to the western boundary; and thence north along such boundary 21 chains to the place of beginning. After describing this strip of land, most of these deeds so executed by Shaw contain clauses which read:

"Together with the water power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon and all other mills or machinery that may at any time or times be placed upon the above described premises of whatever kind or nature; also the right to dig the present raceway as deep and wide as may be necessary and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair."

The greater part of these 23 acres of land and of the water rights appurtenant thereto are now owned by the defendant, which leases water power generated on the premises to be used in operating machinery in factories and mills erected thereon.

The plaintiff is the equitable owner by subsequent conveyances of a tract of the donation land claim, a part of his southerly boundary extending to and along the middle of a slough forming a portion of the millrace, which waterway at this place is much wider than in other parts. From such slough a swale leads northerly, and water when high flows therein to the Willamette river. In order properly to direct the current in the millrace, a dam about 200 feet in length has been built by the defendant across the swale. A cement spillway about 16 feet wide has also been put in the dam, which means of escape permits the surplus water at flood stages and when the mills are shut down to flow to the river. That stream since it was first known by white persons has changed its current southwesterly about a mile, infringing upon the Shaw claim. The swale referred to which is a part of the plaintiff's land is covered with brush and timber the growth, and presence of which tend to pre-

vent the river from making further inroads upon his premises.

Contending that Shaw's grant to its predecessors in interest of such water power and right of way entitled the defendant to take from the swale any and all obstructions so that logs, trees, roots, and limbs flowing thereon and over the spillway might not lodge and thereby back up the water causing damage, its managing agent caused such brush and timber growing in the swale to be cut and removed without the plaintiff's consent, whereupon this suit was instituted and terminated as hereinbefore mentioned.

[1] Another appeal from a decree rendered in a suit instituted against this defendant to enjoin it from widening the millrace through premises below the plaintiff's land is also before us. It was stipulated by the parties hereto that the evidence received in that suit should, as far as applicable, be considered herein. Whatever conclusion may be reached in that case is deemed unimportant in this suit; for from a careful examination of all the testimony adverted to it is believed that Shaw's prior grant of the water power and of the millrace to the defendant's predecessors in interest was not then intended by the parties to such deeds to include any right to the use of the swale leading from such race across the plaintiff's premises to the Willamette river. This being so, the cutting and removal of the brush and timber was a willful trespass upon his land authorizing a court of equity to enjoin the invasion of his right, since the severing of such shrubs and trees may permit the river further to encroach upon the plaintiff's premises to the destruction of his estate therein. *Smith v. Gardner*, 12 Or. 221, 6 Pac. 771, 53 Am. Rep. 342; *Allen v. Dunlap*, 24 Or. 229, 38 Pac. 675; *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38, 39 Pac. 899; *Union Power Co. v. Lichty*, 42 Or. 563, 71 Pac. 1044; *Moore v. Halliday*, 43 Or. 243, 72 Pac. 801; *Roots v. Boring Junction Lum. Co.*, 50 Or. 298, 92 Pac. 811, 94 Pac. 182; *Chapman v. Dean*, 58 Or. 475, 115 Pac. 154.

[2] It is maintained by defendant's counsel that, the trespass complained of having been committed, the court erred in making the injunction perpetual. It is argued that no occasion to repeat the injury alleged can arise until the brush and trees grow in the swale, which reproduction will require about 20 years. The testimony shows that a few trees remain in the swale, which timber should be protected because the roots imbedded in the soil tend to prevent the river from washing away the banks of the plaintiff's land. If the defendant had cut and removed from the swale all the trees and brush, and no others could be grown therein, it is possible the rule adopted in *Ewing v. Rourke*, 14 Or. 514, 13 Pac. 483, might apply. In that case the refusal to enjoin a trespass

upon real property was put upon the ground that the wrong complained of had spent its force, and the injured party should resort to an action at law to recover the damages sustained. The defendant's agents and servants may again be tempted to cut and remove the remaining brush and timber as occasion for their destruction may seem to demand, and in order to prevent a repetition of the trespass the injunction was properly made perpetual.

[3] The plaintiff did not take a cross-appeal from that part of the decree which sanctioned the building and maintenance of the spillway on his land, and for that reason it will be taken for granted that he is satisfied with such final determination. *Thornton v. Krimbel*, 28 Or. 271, 42 Pac. 995; *Goldsmith v. Elwert*, 31 Or. 539, 50 Pac. 867; *Board of Regents v. Hutchinson*, 46 Or. 57, 78 Pac. 1028; *McCoy v. Crossfield*, 54 Or. 591, 104 Pac. 423; *Bank of Commerce v. Bertrum*, 55 Or. 349, 104 Pac. 963, 106 Pac. 444.

It follows that the decree should be affirmed; and it is so ordered.

BENSON, BURNETT, and McBRIDE, JJ., concur.

YOUNG v. PROUTY LUMBER & BOX CO.

(Supreme Court of Oregon. Aug. 1, 1916.)

NEGLIGENCE — § 67 — CONTRIBUTORY NEGLIGENCE — DUTY TO OBSERVE AND AVOID DANGER.

An invitee at a sawmill was negligent, where he saw that a plank was about to be thrown down to a platform on which he was standing, and then looked away without taking further precautions, and was injured thereby.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 90, 91; Dec. Dig. § 67.]

Department 1. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by James Young against the Prouty Lumber & Box Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Plaintiff is a teamster, who, at the time of the accident which was the basis of this action, was employed in hauling lumber for the city of Seaside from defendant's sawmill. A plank 3 inches thick, 12 inches wide, and 32 feet long, being dropped from the conveyor to a receiving platform about 6 feet below, struck plaintiff, breaking his leg. A trial being had, a verdict and judgment for plaintiff resulted, from which defendant appeals.

G. C. Fulton, of Astoria (Victor J. Miller, of Seaside, on the brief), for appellant. E. V. Littlefield, of Portland (Littlefield & McGuire, of Portland, and Norblad & Hesse, of Astoria, on the brief), for respondent.

BENSON, J. The important question to be considered is defendant's motion for a di-

rected verdict, which was denied by the trial court. This ruling is assigned as error. In order that the situation may be clearly understood, it should be stated that the sawmill extends east and west; the logs entering at the east side and emerging as a manufactured product at the west end. Outside of the inclosed portion of the mill upon the west a platform, which is a continuation of the mill floor, extends for about 72 feet, bearing two parallel sets of rollers or conveyors, 30 inches high, for the distribution of lumber. Upon the south side of this platform, and attached to it, is a receiving platform $3\frac{1}{2}$ feet lower, to which lumber is dropped from the south conveyor for loading upon wagons. For the purpose of loading his wagon, the plaintiff had driven alongside this receiving platform, and, having placed upon it two or three planks, was waiting for others to be sawed.

We next consider the plaintiff's own testimony as to how the accident occurred. It is as follows:

"Q. To your knowledge—well, what were you waiting for on the platform? A. I told you half a dozen times I was waiting for that pile of lumber for me to load. Q. You were waiting for the mill to cut? A. Cut that, my plank. Q. These planks? A. Cut that plank that belongs out there on the bridge. Q. Well, did you know where it would come when it was cut? A. I supposed it came down on the platform; yes. Q. You knew, then, as soon as they struck a log, found a log that was of the right kind, of the right length, this plank would be cut and rolled out on this rollway, didn't you? A. Yes, sir. Q. And you knew, after it got out on the rollway, it would be thrown down on this platform? A. Sure. Q. And you were waiting there for that? A. Yes, sir. Q. That is what you were standing there for? A. That is what I was standing there for. Q. So you could see it coming quickly? A. (No response.) Q. I say, you were waiting so you could see it come and get ready? A. Yes, sir. Q. Well, you saw this plank coming, didn't you? A. Yes, sir. Q. Sure—and you knew they were going to throw it down on the platform; you knew that is where that timber was going to be thrown, right down on the platform where you were standing? A. It would not go any place else. Q. No—well, did you see them throw it onto the platform? A. I see them catch hold of it; yes. Q. To throw it? A. Yes. Q. Did you look where they were going to throw it? A. Look? Q. Yes. A. I was watching them. Q. Did you see it come down towards you? A. I don't know; I thought I was plumb out of the way. Q. You thought you were clear out of the way? A. Yes. Q. They were right up above you, not over 7 feet from you? A. Gee whiz, I was away out from where they were throwing the lumber. Q. I understood you to say you were about 7 feet from where they were. A. I was at the end of the platform—where I was standing. Q. You were about 7 feet from the plank, and you saw them throw the plank? A. (No response.) Q. You saw the plank coming? A. No; I would not say I saw the plank coming. Q. But you saw them throw the plank? A. I seen the plank up there. Q. I say, you said you saw them throw the plank, didn't you?

"Mr. McGuire: No, sir; he did not.

"A. No, sir; I did not. Q. You knew they were going to throw it? A. Yes. Q. You saw them stop the plank, didn't you? A. Yes, sir. Q. Sure—and you saw Mr.—I can't think of

his name—Kutcher take hold of the plank to throw it? A. No; Mr. Kutcher never had hold of that plank. Q. Who did? A. Grant and that tall fellow there. Q. Oh, yes; what's his name, Kutcher, this—that is the man? A. The man in the center there (indicating). Q. Yes; you saw that man take hold? A. And Mr. Grant. Q. Yes; Mr. Grant; and you saw Mr. Kutcher? A. Yes. Q. Take hold of the plank to throw it down, didn't you? A. Well, I didn't take no notice. Q. You tell the jury that you were standing down on this platform, waiting for this plank to be thrown on the platform—you saw it rolled out on the rollers, saw Mr. Grant take hold of it, to throw it down, and knew it was coming down, yet you didn't look to see where you were when they were throwing it—that can't be true, Mr. Young? A. I must have misunderstood you. Q. I want to be perfectly fair with you—you knew it was coming down? A. Yes. Q. You saw it come out? A. Yes. Q. And you saw Mr. Grant take hold of one end, didn't you, to throw it off? A. I saw him pack it over on the rollers next to him. Q. Yes; did the plank extend beyond the end of the rollers any? A. I would not say about that. Q. No; but you knew they were going to throw it down towards you? A. I knew they were going to throw it down. Q. Still you didn't look? A. No. Q. You didn't look? A. I thought I was out of the way, plumb out of the way. Q. You thought surely you were out of the way? A. Yes, sir. Q. So you didn't take the precaution to take the second look? A. No, sir. Q. Now, that is the truth? A. That is the truth, sir. Q. The whole truth, the square truth? A. As far as I know; I thought I was safe. Q. You thought you were in a safe place? A. I thought I was in a safe place. Q. So you didn't look at all? A. No."

This testimony is the clearest and strongest produced for plaintiff, and is not in any way aided or strengthened by any of defendant's witnesses. From his own testimony it seems to us perfectly clear that he knew all the conditions which existed at the time of the accident. No notice or warning of any sort could have been given by the men handling the plank which could have enlightened him in any degree as to the impending danger, for he knew all that they knew. It is true that he was an invitee, and therefore the defendant was under obligation to use reasonable or ordinary care to keep the premises in a safe and suitable condition, so that he should not be unnecessarily or unreasonably exposed to danger. At the same time it must not be forgotten that the plaintiff is also under obligation to exercise ordinary care in the protection of his person from obvious dangers. If the servants of defendant were negligent in wrongly judging that plaintiff was in a safe place, it must follow that plaintiff was equally negligent in the same particular. His negligence and theirs were concurrent and simultaneous, and consequently the court committed error in denying the request for a directed verdict.

The judgment is reversed, and the cause remanded, with directions to enter a judgment for the defendant.

MOORE, C. J., and BURNETT and McBRIDE, JJ., concur.

D'ARCY v. SANFORD et al.

(Supreme Court of Oregon. Aug. 1, 1916.)

1. APPEAL AND ERROR §327(2)—NECESSARY PARTIES—HOW DETERMINED.

Whether one is a necessary party to an appeal depends not on whether he is adverse to the appealing party, but whether he will be injuriously affected by modification or reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814, 1831, 1834; Dec. Dig. §327(2).]

2. APPEAL AND ERROR §414 — NECESSARY PARTIES—NOTICE—"ADVERSE PARTY."

Where the maker of a note secured judgment against the assignee and the maker's former partner, decreeing the note paid and canceled for fraud of such partner in securing it and failing to pay it as agreed, the partner was a necessary and "adverse party," and notice of appeal, to him, was required under L. O. L. § 550, as amended by Laws 1913, p. 617, as to notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. §414.

For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

In Banc. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by S. A. Sanford against W. J. D'Arcy, in which D'Arcy filed a complaint in equity in the nature of a cross-bill against plaintiff and others. Decree for cross-complainant, from which Sanford appeals. Appeal dismissed.

T. R. Sheridan was the president and manager of the First National Bank of Roseburg until S. A. Sanford was appointed trustee to wind up the affairs of the bank. On March 28, 1904, W. J. D'Arcy signed a promissory note for \$3,673.50, payable to the First National Bank of Roseburg. After his appointment as trustee S. A. Sanford commenced an action on June 30, 1911, against D'Arcy to recover on the note, and the latter then filed a complaint in equity in the nature of a cross-bill, and which for convenience will be called a cross-bill, making S. A. Sanford, T. R. Sheridan, and R. S. Sheridan defendants.

In 1900 D'Arcy and the two Sheridans formed a partnership to deal in lands. T. R. Sheridan obtained moneys for the partnership from time to time from the First National Bank of Roseburg on the note of plaintiff and R. S. Sheridan. The moneys furnished by the bank were used by T. R. Sheridan in the purchase, in his own name, of lieu land certificates, which had been originally issued by the state land board of Oregon. The national government, however, refused to approve the selections made by the state of Oregon, and consequently the lieu land certificates held by T. R. Sheridan were canceled and all the moneys received by the state when these certificates were originally issued were returned to T. R. Sheridan to

whom the state paid \$4,711.99 in 1904, for the certificates held by him.

W. J. D'Arcy filed the cross-bill for the purpose of preventing Sanford from proceeding with the prosecution of the action at law. The plaintiff in this suit alleges in the cross-bill that when the partnership was formed it was agreed that T. R. Sheridan would supply the money while W. J. D'Arcy and R. S. Sheridan would perform all the services necessary to conduct the business; that when D'Arcy signed the note T. R. Sheridan promised to sign it and also to procure the signature of R. S. Sheridan; that the money returned by the state to T. R. Sheridan belonged to the partnership and was appropriated by Sheridan to his own use; that at all times until June 30, 1911, D'Arcy believed that the other partners had signed the note and that T. R. Sheridan had paid the note out of the funds received from the state; that all the business with the bank was conducted through T. R. Sheridan, the president and manager, and that, therefore, the bank had full knowledge of all the dealings among the members of the partnership. The court found that:

"At and prior to the time the said defendant T. R. Sheridan received said last-mentioned sum of money from the state of Oregon it was understood and agreed among the members of the said copartnership that he, the said T. R. Sheridan, should apply the same in payment of the said note for \$3,673.50 mentioned in the pleadings herein."

And the trial court further found that the bank had full knowledge of all the dealings—

"among the members of the said copartnership for and on account of the fact that at all the times aforesaid the said defendant T. R. Sheridan was the president and manager of the said First National Bank of Roseburg."

The decree enjoined the further prosecution of the action at law and adjudged:

"That the note mentioned in the complaint in said action at law was fully paid and satisfied long prior to the commencement of the said action at law."

Sanford alone appealed. D'Arcy is the only party to the suit upon whom notice of appeal was served, and he now moves to dismiss the appeal.

John Bayne, of Salem, for appellant. John A. Carson and P. H. D'Arcy, both of Salem, for respondent.

HARRIS, J. (after stating the facts as above). It appears from an affidavit filed on behalf of the appellant that notice of appeal was not served "on any party other than the plaintiff for the reason that defendant R. S. Sheridan had, in effect, never appeared, and the answer of the defendant T. R. Sheridan shows that he was not adverse to the defendant S. A. Sanford." The appellant claims that R. S. Sheridan did not in fact appear in the suit, and that although

the records originally made in the circuit court recite his appearance, nevertheless that tribunal had the power at any time to correct the recitals so that they would speak the truth and say that R. S. Sheridan did not appear. It will not be necessary, however, to determine whether the nisi prius court could make the correction after an appeal.

[1, 2] T. R. Sheridan appeared in the suit by filing a demurrer and then an answer. The decree appealed from prevents the successor of the bank from recovering on the note. The pleadings admit a partnership between D'Arcy and the two Sheridans. If the decree should be reversed by this court, and it should be ruled here that Sanford could recover from D'Arcy and compel him to pay the note, then it is clear that the latter would have a claim against T. R. Sheridan. The test is not whether T. R. Sheridan is adverse to Sanford, but it is whether a reversal or modification of the decree would injuriously affect T. R. Sheridan. *Smith v. Burns*, 71 Or. 133, 134, 135 Pac. 200, 142 Pac. 352, L. R. A. 1915A, 1130, Ann. Cas. 1916A, 666; *The Victorian*, 24 Or. 121, 127, 32 Pac. 1040, 41 Am. St. Rep. 838. A reversal or modification of the decree would injuriously affect the interest of T. R. Sheridan, and service of notice of appeal upon him was essential to confer jurisdiction upon this court, even though he is a codefendant with the appellant. *Lane v. Wentworth*, 69 Or. 242, 245, 133 Pac. 348, 138 Pac. 468. Appellate jurisdiction depends upon service of notice upon all adverse parties, and therefore the appeal must be dismissed because notice was not given to T. R. Sheridan, who is an adverse party within the meaning of section 550, L. O. L., amended by chapter 319, Laws 1913.

The motion to dismiss the appeal is allowed.

EAKIN, J., took no part in the consideration of this case.

PATTERSON et al. v. CHAMBERS' POWER CO. et al.

(Supreme Court of Oregon. Aug. 1, 1916.)

1. VENDOR AND PURCHASER — 231(3) — CONVEYANCES — GRANT OF EASEMENT — NOTICE — RECORD.

Purchasers of land take title with constructive notice of the grant of an easement theretofore executed and recorded.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 487, 515; Dec. Dig. —231(3).]

2. EASEMENTS — 12(1) — GRANT FOR FUTURE ENJOYMENT.

There is no rule of law prohibiting the grant of an easement to take effect or to be enjoyed in the future.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 85–88; Dec. Dig. —12(1).]

3. WATERS AND WATER COURSES — 156(1) — CONVEYANCES — GRANT OF EASEMENT — VALIDITY OF GRANT OF FUTURE EASEMENT.

The deed of land, "together with the water power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon, and other mills or machinery that may, at any time or times, be placed upon the above-described premises of whatever kind or nature; also the right to dig the present raceway as wide and deep as may be necessary, and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair"—conveys a sufficiently present and future easement or right sufficiently definite to be valid in view of the circumstances surrounding the grant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174, 175; Dec. Dig. —156(1).]

4. WATERS AND WATER COURSES — 156(2) — CONVEYANCES — GRANT OF EASEMENT — DUTY OF GRANTEE.

Nothing in such grant calls for action upon part of the grantee until the exigency contemplated in the deed shall arise.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 176, 179; Dec. Dig. —156(2).]

5. CONTRACTS — 108(1) — VALIDITY — PUBLIC POLICY.

It is contrary to the general policy of the law to restrict the power of citizens to make any kind of contract which they may see fit to enter into, so long as the proposed contract does not affect the morals or well-being of society to such an extent as to be against public policy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 498; Dec. Dig. —108(1).]

6. CONTRACTS — 9(1) — VALIDITY — INDEFINITENESS — SURROUNDING CIRCUMSTANCES.

A contract will not be held void for indefiniteness when, by considering it as a whole and taking into consideration the surrounding circumstances the true intent of the parties can be ascertained.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10–15, 17, 19, 20; Dec. Dig. —9(1).]

7. WATERS AND WATER COURSES — 156(8) — CONVEYANCES — GRANT OF EASEMENT.

If from the terms of a grant of a raceway right of way there is manifested a clear intention that the grantee shall enlarge the space originally occupied by him in accord with the demands of the future, such enlargement will be upheld.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 174, 179; Dec. Dig. —156(8).]

8. WATERS AND WATER COURSES — 156(8) — CONVEYANCES — GRANT OF EASEMENT.

Under an indefinite grant of an easement or right of way for raceway, with nothing to indicate that it may be changed or enlarged in the future, the first location and user fixes the limit of the grant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 174, 179; Dec. Dig. —156(8).]

9. EASEMENTS — 42 — CONVEYANCE — RIGHTS OF SERVIENT OWNER.

The conveyance of an easement over land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 97; Dec. Dig. —42.]

10. WATERS AND WATER COURSES \S 156(9)—**CONVEYANCE—FUTURE EASEMENT—ADVERSE POSSESSION.**

Adverse possession of grantor or his successors does not run against the right to enlarge a raceway as required by future necessities, at least until the right to enlarge has accrued, since until that time the grantee cannot object to use of land not needed by him, and is under no duty to warn the fee owners not to use such land because of his future and contingent rights.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 183; Dec. Dig. \S 156(9).]

11. ESTOPPEL \S 71—**GROUND—DISCLAIMER.**

In order to work an estoppel, a disclaimer must be so publicly made as to mislead another into believing that the person making it intended to abandon a right, and thereby induce that other to act to his injury in respect thereto.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. \S 173-182; Dec. Dig. \S 71.]

12. ESTOPPEL \S 71—**ACQUIESCENCE — EASEMENT.**

That predecessors of the owner of an easement for raceway, with right of future enlargement, had, in maintaining it, asked permission of adjoining owners to bank upon their property mud and silt that had accumulated in the ditch, and had desisted when objection was made, is not evidence of acquiescence by such predecessors in a claim by adjoining owners adverse to future necessary enlargement of the raceway, where in the conveyance of the original easement there was no right given to maintain the raceway by banking up such deposit on the side.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. \S 173-182; Dec. Dig. \S 71.]

13. WATERS AND WATER COURSES \S 156(8)—**EASEMENT — GRANTS — CONSTRUCTION — "DEEPEN."**

The grant of a raceway, with right to dig it as wide and deep as may be necessary to supply future defined needs, does not include or confer the right to maintain the ditch at its then depth by dumping upon adjoining property filth and silt which fortuitously accumulates on its bottom.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 174, 179; Dec. Dig. \S 156(8).]

14. EASEMENTS \S 1 — **WATERS AND WATER COURSES** \S 154(1) — **NATURE OF "EASEMENT."**

A pure "easement" is one where the land of one person, which land is denominated the "servient tenement," is subjected to some use or burden for the benefit of the lands of another person, whose lands are termed the "dominant tenement"; but there are many water rights and rights of way for ditches which do not strictly come within this definition and yet are called "easements."

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. \S 1, 2, 5-7; Dec. Dig. \S 1; *Waters and Water Courses*, Cent. Dig. \S 167-171, 173; Dec. Dig. \S 154(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Easement*.]

15. WATERS AND WATER COURSES \S 154(1)—**"EASEMENTS"—RACEWAY.**

Rights of way for pipe line or raceway are, in a sense easements, although there is no dominant tenement.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 167-171, 173; Dec. Dig. \S 154(1).]

16. WATERS AND WATER COURSES \S 156(5, 9)—**CONVEYANCE—EASEMENTS—TERMINATION.**

Where an easement for raceway is conveyed as appurtenant to tract, a deed of part of the tract by the grantee passes such proportion of the easement as the tract sold bears to the entire tract, unless the easement is reserved in the deed, and the easement is not extinguished.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 179, 180, 183; Dec. Dig. \S 156(5, 9).]

17. WATERS AND WATER COURSES \S 156(9)—**CONVEYANCE—EASEMENTS—TERMINATION.**

Even if appurtenant to an entire tract, a water right in the nature of an easement may be reserved in a grant of any parcel of such tract, without extinguishing the easement.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 183; Dec. Dig. \S 156(9).]

18. WATERS AND WATER COURSES \S 156(9)—**CONVEYANCE—EASEMENTS—TERMINATION.**

The grantees of land subject to a recorded easement for raceway, with right of enlargement for future needs of a certain tract, cannot claim the easement is extinguished because the grantee of the raceway easement has sold part of the tract and reserved the water power or easement, as long as the water taken is necessarily used on that tract.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 183; Dec. Dig. \S 156(9).]

19. WATERS AND WATER COURSES \S 156(8)—**GRANT OF EASEMENT—RACEWAY—MANNER OF USE.**

The owner of a raceway right of way for power purposes had no right to use the ditch for the purpose of floating logs, timber, or cordwood, without protecting its sides from the consequent erosion.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 174, 179; Dec. Dig. \S 156(8).]

20. WATERS AND WATER COURSES \S 156(8)—**GRANT OF EASEMENT—RACEWAY—MANNER OF USE.**

Courts will not interfere with a change of use of a raceway for power purposes to use for floating logs and timber unless it imposes an additional burden upon the servient tenement.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 174, 179; Dec. Dig. \S 156(8).]

Department 1. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Suit by Ida Patterson and others against Chambers' Power Company and another. From a decree for plaintiffs, defendants appeal. Modified.

This is a suit brought by 20 residents of the city of Eugene against the Chambers Power Company and Frank L. Chambers, to enjoin them from widening the millrace in the city of Eugene, and thereby cutting away and destroying the plaintiffs' property. The property involved constitutes an attractive residential portion of Eugene, and is of considerable value. It is situated along the banks of the millrace, which is owned by the defendants and used to conduct water from the Willamette river through the city of Eugene to certain mills situated on 23 acres of land known as the "mill property." The defendants claim and assert the right

to widen the millrace indefinitely as their needs may require, but for their present purposes are proposing to take from plaintiffs only a 20-foot strip of land on either side of the millrace, which can be done without actually tearing down or destroying any of plaintiffs' buildings, but which, nevertheless, will seriously impair the beauty and value of the property. The millrace was constructed in about 1852. Since that date, and for more than 48 years, the plaintiffs' property, or at least the greater portion of it, has been used for residence purposes. The plaintiffs and their predecessors in interest have improved their said lands to the very edge of the water flowing through the race thereon, making lawns and gardens and planting and growing shade trees, and otherwise improving the land bordering on the ditch, all with the knowledge of defendants and their predecessors in interest, and without any active claim or assertion on the part of the defendants that they had the right to widen said millrace and cut away the banks thereof. The defendants base their claim to widen the ditch upon certain mesne conveyances from Hilyard Shaw, the original owner of the ditch and of all the land in controversy. The facts may be briefly stated as follows: In 1852 Shaw, being the owner of the land through which the ditch passes, constructed the ditch in controversy for the purpose of supplying water power to certain mills situated near the northwest corner of the land owned by him. On March 1, 1856, he conveyed to defendants' predecessors in interest 23 acres of land, described generally as beginning at the northwest corner of his donation land claim, thence east along the northern boundary 11 chains, thence south 21 chains, thence west 11 chains to the western boundary, thence north along said boundary 21 chains to the place of beginning. There was situated upon this tract at the time of the conveyance a sawmill and gristmill owned by Shaw and operated by water power obtained from the ditch in question here. Shaw's deeds contained clauses which read:

"Together with the water power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon, and all other mills or machinery that may at any time or times be placed upon the above-described premises of whatever kind or nature; also the right to dig the present raceway as wide and deep as may be necessary, and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair."

The greater part of these 23 acres of land and the water right above conveyed are now owned by defendants, who lease water power conveyed by the ditch to the premises to be used in operating machinery in various factories and mills erected thereon. The defendants from time to time have floated cordwood and other timber along the ditch, and

claim the right to do so. The ditch at its present capacity being insufficient to convey the volume of water necessary for the factories now on the 23 acres above described and for other contemplated industries, the defendants proposed and claimed the right to widen the ditch about 20 feet on each side in order to secure the necessary power. Upon the trial there were findings and decree enjoining defendants from widening the ditch, cutting shrubbery or trees along the banks, or floating cordwood or timber upon it, and substantially prohibiting them from in any way extending it laterally, confining it simply to the right to maintain it at its present capacity. From this decree, defendants appeal.

Thompson & Hardy, of Eugene, for appellants. John M. Pipes, of Portland, and E. O. Potter, of Eugene (L. Bilyeu, of Eugene, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1-6] The whole case here turns upon the construction of the deed from Shaw. It is plain and direct in its terms, and was executed and recorded before any of the plaintiffs purchased their property, and they therefore took title with constructive notice of any burden which it created upon their holdings. We are aware of no rule of law, and there is none, prohibiting the grant of an easement to take effect or to be enjoyed in the future, and that is this case. We have first a grant of the water power upon the premises conveyed which necessarily made the raceway which carried the water across the grantor's premises to the 23-acre tract a present easement in the land conveyed. Then we have the right to dig the raceway as deep and wide as may be necessary to run the mills now on the tract sold, and all other mills or machinery that may, at any time, be placed thereon, which creates a right or easement in the land of the grantor to be taken advantage of and enjoyed whenever the necessity of the case requires. In this there is nothing indefinite, nothing that calls for action upon the part of the grantee until the exigency contemplated in the deed shall arise. It is contrary to the general policy of the law to restrict the power of citizens to make any kind of contract which they may see fit to enter into so long as the proposed contract does not affect the morals or well-being of society to such an extent as to be against public policy; and it is also a well-recognized principle of legal construction that a contract will not be held void for indefiniteness when by considering it as a whole and taking into consideration the surrounding circumstances the true intent of the parties can be ascertained. Chitty on Contracts, (17th Ed.) 97, 98.

[7-13] Let us now consider the circumstances under which the grant under consid-

eration was made. The conveyance was executed on March 1, 1866, at a time when the now flourishing city of Eugene was a very small country village, which did not arise to the dignity of a corporation until seven years later. The land over which the race-way extended had not been platted, and was all owned by the grantor, who had a sawmill and gristmill upon the 23-acre tract now owned by defendants. Presumably there was water enough, and more than enough, to operate the machinery then employed, and it is evident from all the circumstances, as well as from the terms of the deeds, that the parties had in mind at the time the construction of additional factories and mills upon the tract conveyed, and also contemplated the necessity for additional water power to operate them when they should be so constructed. Hence it was natural that the purchaser should require from the grantor such a conveyance as would effectuate this intention. Plainly it was vital to the grantee in view of the contemplated development of the tract as a factory site that these facilities should be secured, and it was clearly to the advantage of the grantor that until the occasion for widening the ditch arose, he should have the use of all the land lying adjacent to it which the present necessities of the grantee did not require. There was no method by which the exact future requirements of the grantee could be estimated or even approximated. As population increased and commerce extended the natural result would probably be to increase the demand for factory and mill sites, which would result in an increased demand for water power. The demand for manufactured products was then local, for the reason that navigation of the river was only seasonal and difficult, and a transcontinental railroad was a dream and a hope only realized many years after. In this condition of uncertainty as to the developments of the future the parties made the contract in question. The grantee wished to secure all that might be necessary for the possible future development of his power site. The grantor did not wish to grant more than such development might require, and not until it might be so required. Therefore they provided in the deed that the lateral extent of the easement should be measured by the growth of manufacturing industries upon the tract. That this was indefinite as to the extent laterally is in a sense true, but it is no more true than it is in contingent contracts and grants which are made every day and universally recognized by the courts. The principles here enunciated are not new, and have been applied in this state in a case where the grant of an easement was much less specific than in the case at bar. In *Salem Capital Flour Mills Co. v. Stayton Water-Ditch Co.* (C. C.) 33 Fed. 146, 148, decided by Judge Deady, the grant was:

"The right of a canalway through all and any lands then owned or occupied by [the grantors] in Marion county necessary to be passed through in conveying the water of the Santiam into the channel of Mill creek," and also the right "to enter upon the same for the purpose of cutting a canal sufficiently large to admit the flow of any amount of water required by said company for their purposes at Salem."

A ditch was constructed in 1857, but in 1873 the Santiam river was so deflected from its course as to leave the intake of the ditch quite a distance from the new channel of the river, and the plaintiff prolonged its ditch for a considerable distance up the river to a point where it was practical to establish a new intake. The grantees of the original owner of the land interfered with the operation of this extension of the ditch, contending, as here, that the easement became fixed when the original ditch was dug. Upon this point Judge Deady observes:

"The power and privilege was not exhausted by the construction of the ditch to a certain point on the river in 1857. For the purpose of maintaining a canal or ditch on, over, and through the Porter donation, so as to receive and take water from the Santiam thereon, in such quantity as the company or its successors in interest might or may need or require at Salem, it continued and still continues in full force. * * * At the date of the grant of the easement Porter and wife were seized of an estate of inheritance in the land, and there is nothing in the terms of their deed or the nature or purpose of the easement which at all indicates an intention to grant the easement for a less time than the duration of their own estate in the premises, but the contrary. Hence the right to maintain a ditch on and through the Porter donation was to conduct water from the Santiam to the channel of Mill creek, for the purposes of the woolen company at Salem, is perpetual; and if, in the course of time or events, it becomes necessary, to accomplish such purposes, to widen, deepen, or lengthen said ditch, the then owner of the easement may do so."

In *Everett Water Co. v. Powers*, 37 Wash. 143, 79 Pac. 617, there was a conveyance to defendants' grantor of a right of way for a water pipe line over the grantor's land, and the right to divert the flow of water with a habendum to the grantee and his heirs and assigns forever. There was no time limit for the execution of the purposes of the grant. It was contended that the deed was void for uncertainty for that reason, and the court thus disposes of this contention:

"It is claimed that the instrument is void for uncertainty, in that no time certain is fixed for the execution of the purpose of the grant. It was, however, competent for Woods to make such a conveyance without any time limitations. He could convey an interest in the realty as absolutely as he could convey the whole of it. The right of way and the right to divert the water were a part of the realty itself. By the terms of the deed these were conveyed to the grantee, his heirs and assigns forever, subject to certain specified reservations pertaining to the domestic use of the water by the grantor. The absence of specific time limitations must be construed to mean that no such were intended."

It was also claimed that the right of way was abandoned by nonuser. Concerning this the court says:

"Appellants contend that the right of way was abandoned. Soon after the deed was made, and

in the same year, the grantee selected a strip for right of way, and began the construction of a pipe line system. An outstanding lease, older than the right of way and water right, was held by one Crook. The deed was therefore subject to the lease, and the lease continued until 1898. An application by the lessee to enjoin the continuance of construction work, and the diversion of the water, was sustained by this court. *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28. Nothing further could be done until after the lease expired in 1898. Meantime there was not an abandonment. The evidence shows that there was no such intention. Some of the constructed work was left in place, and material remained upon the ground. Occasional examination was made of a constructed dam, and debris was removed to prevent injury thereto. But it is insisted, further, that the failure to proceed promptly after the lease expired, together with the delay until 1902, amounted to abandonment. This court held, in *McCue v. Water Co.*, supra, that where no time is fixed for the occupation and use of a granted right of way, no mere non-user, for any length of time short of the period of the statute of limitations, will defeat the right of grantee to occupy and use it for the purposes of the grant. If the statute of limitations comprehends the running of time against a mere nonuser, under a grant of this kind, it in any event did not begin to run until such time as the grantee might have peaceably occupied, which was after the lease expired in 1898. Active user was again attempted about August 1, 1902, and this suit was brought within the same month. A period of six years only having expired, it follows that the limitation period fixed by our statutes for actions pertaining to the possession of lands had not expired."

What is said in the foregoing excerpt in regard to the statute of limitations can manifestly have no application to the case at bar, since no necessity for widening the ditch, and consequently no right to exercise the right to do so, arose until a short time before the commencement of this suit. By the terms of the deed defendants were authorized to widen the ditch so as to furnish water to propel such machinery as might be placed upon the tract conveyed in the future; and to widen it at once and before there was any probability that an increased flow of water would be required would have been going beyond the terms of the grant. While the defendants would probably not be required to enlarge their ditch piecemeal, there certainly must be some present probability that, either at the time of the enlargement or within a reasonable time in the future, the increase of manufacturing establishments on the tract conveyed would fairly justify such enlargement.

The case of *Collins v. Driscoll*, 34 Conn. 43, is an instructive case. In that case land was conveyed which had on it a drainage ditch leading from it over the grantor's land; the ditch then being 6 feet deep, 6 feet wide at the top, and 2 feet wide at the bottom, the sides sloping so as to prevent the banks from caving in. The conveyance was of the land "with the privilege of deepening the ditch leading from the premises, to drain the same over the grantor's land as deep as the grantees may desire." To deepen it required either curbing or widening it at the top, which latter was the usual mode of

ditching swamp lands. The grantees later desired to deepen the ditch, and in order to do this without curbing, they widened it at the top, cutting away such portions of plaintiff's adjoining soil as were necessary for that purpose, and thereupon plaintiff brought an action of trespass. Plaintiff's counsel argued among other matters:

"The words giving 'the privilege of deepening the ditch' to an unlimited depth cannot be strained to confer the right to widen to a proportionate or unlimited width. The construction of words should be according to the literal sense. 1 Swift, Dig. 223, 229. It is only where the language is equivocal or doubtful that the situation of the parties or the surrounding circumstances may be shown. *Strong v. Benedict*, 5 Conn. 210; *Brown v. Slater*, 18 Conn. 195, 41 Am. Dec. 136. The circumstances confirm the literal construction. Simply deepening the ditch would not injure the plaintiff's meadow; widening would. Again, no man would convey an unlimited right to deepen and widen also, for this would be more than equivalent to conveying all his land. The language conferring the privilege of deepening the ditch is equivalent to an express provision that it shall not be otherwise disturbed."

But the court held that when the grantor gave the privilege of deepening the ditch, the parties must have had in mind the method that the grantor had used in its original construction, i. e., by sloping the sides so as to prevent caving, instead of the unusual method of curbing, and that, therefore, the grantees took by implication the right to enter upon and cut away plaintiff's land for that purpose. This case is in many particulars similar to the case at bar, except in so far as the court goes beyond the necessities of the case at bar in holding the right to cut away plaintiff's land was conferred by implication, while here such right is expressly conferred. There, as here, the extent of such lateral easement was not directly expressed, there, as in the case at bar, the actual extent of the right was limited only by the future necessities of the grantee, and there, as here, there was no limitation as to the time within which the right should be exercised. Other cases more or less remotely bearing upon this phase of the case are: *Adams v. Warner*, 23 Vt. 395; *Stevenson v. Wiggin*, 56 N. H. 308; *Jordan v. Mayo*, 41 Me. 552; *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. R. 800; *Quigley v. Baker*, 169 Mass. 303, 47 N. E. 1007; and see generally notes to *Winslow v. Vallejo*, 5 L. R. A. (N. S.) 851; *Spear v. Cook*, 8 Or. 380; *Wheeler v. Wilder*, 61 N. H. 2; *Standard Oil Co. v. Buchi*, 72 N. J. Eq. 492, 66 Atl. 427. The effect of all these cases is that if from the terms of the grant there is manifested a clear intention that the grantee shall enlarge the space originally occupied by him in accordance with the demands of the future, such enlargement will be upheld.

The able and ingenious counsel for plaintiffs have suggested no good reason why upon principle such an easement may not be created, and the authorities cited by them fail to

support their contention. In the first case cited (*Barrett v. Hosmer*, 1 Root [Conn.] 271) there was a grant to the defendant of the privilege of erecting a gristmill and dam. The grantee built the mill and dam about the year 1687, and the dam was maintained at a certain height until about 1790, when the then owners raised it 10 inches, thereby overflowing plaintiff's meadow. It was held that the easement became fixed and definite when the dam was built and long maintained at the original height. It will be noticed here that there was nothing in the grant providing for a future enlargement of the easement, as there was in the deed through which defendants claim, and it has always been the law that where there is an indefinite grant of an easement of this character, with nothing to indicate that it may be changed or enlarged in the future, the first location and user fixes the limits of the grant. The next case (*Chapman v. Newmarket*, 74 N. H. 424, 68 Atl. 868, 15 L. R. A. [N. S.] 292) was a case where there was a grant of a right of way to flow water across the grantor's lands, the quantity of water not being specified. It was held that such a grant conveyed an unlimited reasonable right to flow water, but that the grantee could not flow water where there was no necessity for it. The gist of the holding in that case was that the defendant could not flow water for which he had no use when such flow injured an adjoining proprietor. The right to flow water in a reasonable manner to the extent of the grantee's necessities was conceded. The next case cited, and the only one which comes anywhere near supporting plaintiffs' contention, is *Wood v. Saunders*, L. R. 10 Ch. 582. The case is poorly reported and the opinion ambiguous. Saunders and Bruce leased a mansion and the grounds about it to Wood for the term of two years, with the option to purchase at the end of that period. The lessee was to have the privilege of the free passage of water and soil to the existing cesspools on other lands of the grantor in and through all sewers then constructed, or to be constructed, through such lands for the term of two years. The mansion on the premises, called the "Priory House," could not be enlarged during the period of the lease without the consent of the lessor, and in its then condition it could accommodate about 25 persons. Before the expiration of his lease Wood exercised his option, and purchased the premises taking a deed which gave him—

"the free running of water and soil in and to the existing cesspools and in and through all the drains, sewers, and water courses, constructed or thereafter to be constructed, through the adjoining property of L. B. Knight Bruce."

The only cesspool then existing on the adjoining property of Bruce was an open ditch or moat about 150 yards from the Priory House, and the only drains or sewers were those conveying the water and sewage from the Priory House to the moat, and only a

part of this drainage was carried there. When Wood got his title, he enlarged the Priory House from a building suitable for 25 inmates to one that would accommodate 150 persons and converted it into a lunatic asylum, in consequence of which the volume of sewage was greatly increased, creating an intolerable nuisance. Saunders being in possession of the Bruce lands stopped up the drains, and Wood brought suit to enjoin him. It was held that the deed should be construed as giving no greater easement than that existing under the lease, and that the right of drainage should be referred to the conditions existing at that date when the Priory House accommodated only 25 persons. The conclusion of the vice chancellor seems to have been that the grantee was free to construct as many new drains as he wished, but that the aggregate flowage through them could not be increased beyond what it was at the time the deed was made.

In the case at bar the deed expressly permits a future increase in the flow of water, and expressly provides that the ditch may be widened to accommodate it. There is no room here for speculation as to what Hilyard Shaw intended to grant by his deeds. If it is in the power of a man by deed to grant an easement which may be enlarged according to the future requirements of the grantee, and to make such future requirements the measure of the extent of his right, then the grantor has used apt words to accomplish that very thing. It is a question of his power to so contract, not of construction as to the meaning of the conveyance. We have given more than usual consideration to the last case cited, for the reason that at first glance it apparently sustains the contention of plaintiffs, although a critical analysis of it shows that the conditions in that case were so different from the one at bar that it can have no application.

Other cases are cited by counsel, but, when examined, they all turn either upon a construction of the terms of the grant, or upon that well-known principle that where an indefinite easement is granted, such as a right of way across the grantor's land, without specifying the particular location, or the right to flow water through a ditch without specifying the quantity the act of the grantee in using a particular portion of the land as a way in the first instance, or the act of the grantee in the second instance in habitually and for a long period flowing a certain quantity of water, is a practical construction of the intent and extent of the grant; but in none of the grants involved in the cases cited does there appear a provision for a future enlargement of the right of the grantee such as appears in the case at bar.

The possession by the plaintiffs of the parcels of land adjoining the ditch has not been adverse to defendants. The conveyance of an easement over land does not pass the title or interfere with the right of the owner

of the soil to occupy it for any purpose not inconsistent with the easement. Washburn on Easements (3d Ed.) 3, 9; Goddard on Easements, 4. It follows, therefore, that the plaintiffs, who are successors of Shaw, had a perfect right to occupy and improve their land adjoining the ditch, so long as such occupation or improvement did not interfere with the operations of defendants. Defendants were never in a position to bring ejectment or trespass against them until they were in a position to show that the use of the adjoining land was necessary, and that the growth of manufacturing business upon the 23-acre tract had made it essential for them to widen the ditch in order to procure additional power. If the plaintiffs, with the conveyance of Shaw to defendants' predecessors staring them in the face, saw fit to make valuable improvements upon the adjoining lands under the mistaken idea that the necessity for defendants' occupying it would never arise, or that the rights given by Shaw's conveyances would not or could not be successfully asserted, they will have to take the consequences of that mistake. They had a legal right to take that risk, and an absolute legal right to improve the banks of the ditch subject to the incumbrance created by Shaw's conveyance to defendants' predecessors.

The case of *Arthur Irrigation Co. v. Strayer*, 50 Colo. 371, 115 Pac. 724, is cited and quoted from at length as holding a view contrary to that above expressed, but a close examination of it shows that the plaintiff in error in that case had simply an oral permission to construct a ditch across certain lands, without any stipulation as to its width; that in 1873 they constructed a ditch 10 feet wide on the bottom, and maintained it at that width until 1906, when they proposed to widen it to the extent of 40 feet, 20 feet on each side. Strayer and other grantees of the original owners of the land adjoining, which subsequent to the construction of the ditch had been laid out in lots and blocks, brought a suit to enjoin the proposed widening of the ditch. It was held that:

"Where one buys lands, through which, at the time, there exists an irrigating ditch in operation, the right of the owner of such ditch to maintain and use the same as before is in no wise affected. The right so acquired is an easement in the lands through which the ditch runs, but the legal title of the lands upon which the servitude rests is in the owner of the servient estate. While the right so acquired extends to the bed of the ditch and sufficient ground on either side thereof to properly operate the same, it does not vest authority in the owner of the ditch to place a greater servitude or burden upon the lands than existed at the time the ditch was constructed, or was reasonably necessary to properly operate it. The extent of the right necessarily depends, in each case, upon various circumstances and conditions."

The court says further:

"The defendant held no right of way by deed. Its right was an easement depending solely upon continued use. It not only failed to use the particular land in question, but acquiesced in its

use and improvement by the very ones in whom the fee was vested."

The case is not different from a hundred others that might be cited, holding that where the right of way is granted in general terms, it becomes fixed by location and user. In the case cited there was no grant and no provision for future widening of the ditch; here there are both. Neither is there anything shown here that ought to work an estoppel. The defendants were under no legal obligation to warn the owners of the fee not to do that which they had a perfect legal right to do. Had defendants been the owners in fee of the lands adjoining the ditch with the present right of possession, and under such circumstances permitted the plaintiffs to make improvements upon the property under a mistaken idea as to their title, perhaps it would have been their legal, and certainly their moral, duty to have spoken, but they were not the owners of the fee, and had no present right of possession, except, perhaps, to pass along the ditch for the purpose of improving or protecting it, and it was no more their duty to warn the owners of the fee against making improvements upon their potential right of way than it is the duty of a purchaser of a mortgage to warn the mortgagor against making improvements upon the incumbered property that may be sold to satisfy the exigency of the mortgage. The grant made by Shaw created an incumbrance on the property adjoining the original ditch, and the recording of the deed was notice of that incumbrance, and parties making improvements along the route of the ditch and near enough to be affected by any probable widening of it that the grantees might make, made them at their peril. There is no evidence of acquiescence in the improvements by defendants further than that they did not actually object to them, and that they did not declare orally the claim which their deeds were asserting all the time.

It is claimed that Walter Edris, a former owner of an interest in the ditch, disclaimed the right to widen the ditch, and that this disclaimer is binding upon the defendants. His testimony, however, does not indicate any disclaimer, but a mere failure to assert a right which his statements show it was unnecessary to assert, as he testifies that the ditch then furnished all the water that was necessary. A disclaimer, to be of value, must have been so publicly made as to have misled another person into the belief that the person making it intended to abandon an existing right, and thereby induced him to act to his own injury in respect to the subject-matter. Such a state of facts does not appear in the testimony here. Neither is the fact that Edris and other grantees asked permission of adjoining owners to bank upon their property the mud and silt that had accumulated in the bottom of the ditch, and had desisted when objection was made, any

evidence of acquiescence by them in an adverse claim by adjoining owners as against the easement now claimed by defendants. To "deepen and widen the ditch" means to make it deeper and wider than it then was, and does not, either by its terms or by reasonable implication, mean that in order to maintain it at its then depth defendants were at liberty to dump upon adjoining property filth and silt which had fortuitously accumulated on the bottom, thereby rendering it shallower. They had no such right.

[14-18] It is claimed that the easement granted is appurtenant to the 23 acres of land conveyed, and that a conveyance of a portion of the land reserving the water power extinguishes the easement so far as these defendants are concerned; the argument being that these defendants are not themselves engaged in operating machinery on the tract, but are selling power to other persons who are operating such machinery and who are not demanding any increased power. The authorities cited do not sustain this position. A pure easement is one where the land of one person, which land is denominated the "servient tenement," is subjected to some use or burden for the benefit of the lands of another person, whose lands are termed the "dominant tenement"; but there are many water rights and rights of way for ditches which do not strictly come within this definition and yet are called easements. For instance, one may purchase the right of way for a pipe line to convey water for the purpose of selling it to such of the inhabitants of a particular town as may choose to buy, and yet, strictly speaking, there is no dominant tenement and the way is appurtenant to nothing. The same is true of a ditch constructed for the conveyance and sale of water to persons along the line who may desire to purchase, or for general sale to persons who desire it for power purposes. Rights of way for these purposes are in a sense easements, but there is no dominant tenement.

The deed in question conveys: (1) A specific parcel of land; (2) a right to the grantee to the ditch and water flowing therein for the purpose of operating the machinery then upon the land and such other machinery as should be placed there; (3) the right to enter upon the grantor's land and appropriate so much of it as may be necessary to operate any machinery placed upon the granted premises in the future. In the very nature of things the water right was the principal thing conveyed. The 23-acre tract described in the deed would be worthless if there were not water to operate the machinery, and the future development of the tract as a factory district would be impossible without the right to convey across the land of the grantor such additional water as would make such factories practicable. Conceding for the purposes of the argument

that the terms of the deed made the water appurtenant to the tract conveyed, it does not follow that a segregation of the tract by sale of part of it destroyed the water right. Unless reserved in the conveyance, it would pass by the deed in such a proportion as the acreage of the tract sold bore to the whole 23 acres. *Ruhnke v. Aubert*, 58 Or. 6, 118 Pac. 38.

But even if an appurtenance to the 23 acres, the water right may be reserved in a grant to any parcel of the land. *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 839. Defendants' relation to the water right and way in question is fixed by the deed, which, in effect, grants to them all the power then produced through the agency of the ditch, and as much more in the future as can be used in factories erected on the 23-acre tract. They would have no right to cover the tract with factories to its full capacity, and then build other factories upon adjoining land and increase the capacity of the ditch in order to supply these additional mills, because this would be putting a burden upon the servient estate beyond that which was contemplated in the grant; but so long as they confine their operations to factories situated upon the 23 acres, it is a matter of no moment to these plaintiffs, who take subject to Shaw's conveyance to defendants' grantors, how the water is apportioned among occupants of the dominant tract. Neither is it of importance as to who owns the tract. The defendants own power as well as land, and it is inconceivable that it was the intention of the grantees of Shaw to cover the 23 acres with their own mills. The tract was principally valuable as a place where factories could be built and the water power thereby find a market. The transmission or leasing of water power to factories and mills is a common thing in the manufacturing portions of this country, and the prospective chance of doing so with profit in this instance was probably one of the incentives for the original purchase of this tract and water right from Shaw.

There are, no doubt, cases where the right or easement is so intimately connected with the land that a reservation of it destroys it entirely. Such a case is *Cadwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300. *Cadwalader* purchased from *Bailey* and another certain lands situated adjacent to *Bailey Beach*, a bathing resort. In the deed was a covenant by the grantors that they would not construct any buildings upon certain parts of said beach between the lands granted to plaintiff and the water; the evident object of this covenant, as the court found, being to preserve the view of the grantee from obstruction. *Cadwalader* sold the granted premises to another, but in the deed reserved to himself all the rights arising from the covenant of his grantors not to build in front of the land. His grantors

did build, and he brought a bill in equity to compel them to remove the building. The court held that as the purpose of the covenant was to prevent an obstruction of Cadwalader's view from the premises sold to him, and as he had sold the premises, and therefore had no view to obstruct, he had no cause of suit, and his reservation destroyed the easement created by the covenant. But here defendants have a profit in the lands they have conveyed or leased by furnishing water power for the factories thereon. As they or their predecessors could have bought the water right without buying the land in the first instance, so they can sell the land without selling the water power now, or they can sell the water right and retain the land; the only restriction being that whatever water power is used must be used in factories erected on this tract, and that no more may be taken than is necessary for these purposes.

[19, 20] The defendants have no right to use the ditch for the purpose of floating logs, timber, or cordwood, without protecting its sides from the erosion that is necessarily caused by such use of it. Courts will not interfere with a change of use of an easement of this character unless it imposes an additional burden in some way upon the servient tenement, but it is clear that unless the banks of the ditch are protected, either by booming, riprapping with stone, or bulkheading with timber, such use will add to the burden, and it should be prohibited until this is done.

The defendants will be permitted to widen

their ditch so as to bring it up to 50 feet in width, and will be enjoined from further widening it, and from throwing mud and silt from the bottom upon adjacent property. Neither party will recover costs here or in the court below.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

CITY OF EUGENE v. CHAMBERS' POWER CO. et al.

(Supreme Court of Oregon. Aug. 1, 1916.)

Department No. 1. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Suit by City of Eugene against the Chambers' Power Company and another. From a decree for complainant, respondents appeal. Modified.

Thompson & Hardy, of Eugene, for appellants. Jay L. Lewis, of Corvallis (Skipworth & Lewis, of Eugene, on the brief), for respondent.

McBRIDE, J. This is a suit brought by the city of Eugene to prevent the defendants from widening their ditch passing through the city where it crosses certain streets therein, and to enjoin them from floating logs, timber, and cordwood along said ditch to the injury of the banks where it crosses the streets. Every question involved in this case is fully considered in the case of *Ida Patterson et al. v. Chambers' Power Co. et al.*, 159 Pac. 568, this day decided, and this case will take the same course, and a decree will be entered herein to the same effect as in that case. Neither party will recover costs in either case.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

FISCHER et al. v. CAREY et al. (S. F. 6958.)
(Supreme Court of California. July 27, 1916.
Rehearing Denied Aug. 25, 1916.)

1. SHIPPING — 20 — RELATION OF OWNERS — PARTNERSHIP.

Part owners of a ship as such are not partners, but tenants in common, any partnership arising only by special contract; and no such relation exists where minority owners objecting in admiralty to the use made by the majority owners compel the giving of a bond for safe return on each voyage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 52, 312; Dec. Dig. — 20.]

2. ADMIRALTY — 1 — JURISDICTION — EFFECT OF STATE STATUTE.

Any jurisdiction as to ships attempted to be given to state courts by Civ. Code, § 964, or any state statute, cannot diminish the admiralty jurisdiction of federal courts.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1-17; Dec. Dig. — 1.]

3. ADMIRALTY — 7 — JURISDICTION — INCIDENTAL ACCOUNTING.

Jurisdiction of an action for accounting, as such, is in state courts, and not in admiralty; but admiralty will take an accounting which is a necessary incident to the main relief asked, that being within its jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 99-120; Dec. Dig. — 7.]

4. ADMIRALTY — 7 — JURISDICTION — SALE OF SHIP.

Admiralty has exclusive jurisdiction to appoint a receiver for and decree sale of a ship, because of differences between the owners as to management, though it may not decree a sale because of the paramount principle in admiralty of right of control in the majority.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 99-120; Dec. Dig. — 7.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Harry F. Fischer and others against F. W. Carey and others. From an order appointing a receiver of a ship, certain defendants appeal. Reversed.

Wm. M. Madden, of San Francisco, for appellants. H. W. Hutton, of San Francisco, for respondents.

HENSHAW, J. Plaintiffs, minority owners of the schooner *Hugh Hogan*, began this action in equity in the superior court of the state. The defendants are the owners of a majority interest in the schooner. The difference between the owners arises out of that situation so frequently presented to an admiralty court where the minority owners are dissatisfied with the employment by the majority owners of the vessel. It is charged that the vessel is being operated at an undue expense, is taken into shallow harbors which she cannot enter or leave with her full load, and is subjected to the danger of becoming a total loss if allowed to continue on these voyages. It is further charged that she is being operated in the interest of the defendant Oregon & California Lumber Cor-

poration and the Hurd Lumber & Navigation Company, and employed in the carrying of lumber cargoes from coast points to San Francisco. The plaintiffs prayed for an accounting, for the appointment of a receiver, and for an order decreeing the sale of the vessel and a division of the proceeds ratably amongst the part owners. The court appointed a receiver to take possession of the schooner and "to operate said vessel if it appears in the judgment of said receiver such operation can be done at a profit, and to preserve the said vessel, her earnings and appurtenances until the further order of the court." From this order certain of the defendants have appealed.

[1] The appellants urge that plaintiffs' action is cognizable in admiralty in the district court of the United States alone, and that the state court is wholly without jurisdiction to proceed in the matter.

The respondents, in support of the jurisdiction of the state court, announce the unquestioned principle that the adjustment of partnership matters and accounts is in equity alone and not in the admiralty court. They next declare that these parties plaintiff and defendant are partners. But this is not the fact. No partnership is averred in the pleading. The relationship of partners does not arise between part owners of ships merely by virtue of their ownership. It arises only by special contract. As part owners they are tenants in common in the ship and not partners. *Freeman, Cotenancy*, § 379; *The New Orleans*, 106 U. S. 13, 1 Sup. Ct. 90, 27 L. Ed. 96. In *Hendy v. March*, 75 Cal. 569, 17 Pac. 702, relied upon by respondents as establishing a partnership in this case, this court said:

"Here is a distinct agreement to share in the profits and loss arising from the use of the vessel, and such an agreement constitutes a partnership. * * * It is not necessary to say that the partnership extended to the ship itself as contradistinguished from its use. 'Part owners of a ship do not, by simply using it in a joint enterprise, become partners to the ship.' Civ. Code, § 2396."

And in this case it is made to appear by the pleadings that so far from being partners the plaintiffs, objecting in a court of admiralty to the use which the majority owners were making of the ship, compelled them to give a bond for the safe return of the ship upon each voyage thereof. By virtue of these proceedings and of this bond the plaintiffs relieved themselves from liability for loss upon the voyage and at the same time deprived themselves of the right to share in the ship's profit—a situation absolutely repugnant to any conception of a partnership. *Coyne v. Caples* (D. C.) 8 Fed. 638; *Freeman, Cotenancy* (2d Ed.) § 390.

[2-4] The question presented, therefore, is whether minority owners, under the indicated circumstances, may resort to the state courts for the appointment of a receiver who

takes the control of a ship away from the majority owners for the purpose of operating and selling it. Respondents base their right to maintain this action upon a section of our Code and upon certain state adjudications. Section 964 of our Civil Code declares that:

"If a ship belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any court of competent jurisdiction."

Conceding that this language is comprehensive enough to embrace within it the action here brought, neither this nor any other state statute can have the effect of diminishing the admiralty jurisdiction of the federal courts. *Aurora Shipping Co. v. Boyce*, 191 Fed. 960, 112 C. C. A. 372; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; *Steamboat Orleans v. Phoebus*, 11 Pet. 175, 9 L. Ed. 877. Our Code section, therefore, will of necessity be held to apply to such cases as do not encroach upon admiralty jurisdiction. Have the admiralty courts any jurisdiction at all over this controversy? If they have, is their jurisdiction exclusive, or concurrent merely with that of the state? One phase may be spoken of only to be eliminated. An action for an accounting, as such, is of course equitable, and jurisdiction over it is in the state courts. Admiralty has and takes no jurisdiction over such actions. The utmost limit to which it goes is that where a sale of the ship has been had under decree it will take an accounting as a necessary incident for the purpose of making a just distribution of the proceeds of the sale. But manifestly the accounting in this case is incidental to the principal relief sought. That relief is the taking over by a state court in equity, acting through its receiver, of the rem and a sale of that rem at the instance of the minority owners, who, disagreeing with the majority owners over the latter's management of the ship, plead a loss of the earning capacity of the ship, a depreciation of the value of their shares, and ask a sale of the vessel in consequence.

It is from this latter aspect that this case should be and will be treated. It is now well settled that the jurisdictional power of the district courts over "all cases of admiralty and maritime jurisdiction" (Const. U. S. art. 3, § 2) is not limited to admiralty jurisdiction as it existed in England where it was in bitter conflict with the common law, but that reference may be had to all Codes of maritime law, to all the decisions of the Mediterranean consular courts, and to the customs and practices of all civilized maritime countries. *De Lovio v. Bolt et al.*, 2 Gall. 398, Fed. Cas. No. 3776. Touching the reservation to suitors of "a common-law remedy where the common law is competent to give it" as provided in the federal Judiciary Act, Benedict says:

"The Judiciary Act, which established the United States courts and defined their jurisdiction, confirmed the existing right of the com-

mon-law courts, by providing that the federal District Courts shall have exclusive jurisdiction of 'all cases of admiralty and maritime jurisdiction saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.' The common-law remedy here mentioned is the right of a plaintiff to proceed in personam against a defendant, which remedy the common law is competent to give. Therefore, when a direct suit against a shipowner is brought, e. g., to recover seamen's wages, or damages for collision, and jurisdiction of the person of the defendant can be secured, such a suit may be brought either in admiralty or at common law, the two courts having in this respect concurrent jurisdiction. But the right to proceed in rem is distinctly an admiralty remedy, and hence exclusively within the control of the United States courts; no state can confer jurisdiction upon its courts to proceed in rem. Nor could Congress give such power to a state, since it would be contrary to the federal grant in the Constitution. So liens given by the laws of a state for matters which are subjects of admiralty jurisdiction are enforceable against the thing only in the federal courts, though the debt on which the lien is founded may be sued on in personam in the state court. This right to proceed in rem, according to the methods of the maritime law, is the 'exclusive' jurisdiction of all civil causes of admiralty and maritime jurisdiction conferred upon the district courts by section 563 of the Revised Statutes, subdivision 8 [U. S. Comp. St. 1913, § 991(3)]."

The foregoing sufficiently for our purposes outlines the principle which we conceive must govern this determination. To say when and under what circumstances a vessel shall be sold, is certainly a part of the civil law of litation, which law forms to so great an extent the foundation of admiralty jurisdiction that it is so declared in the laws of Oleron, to which courts of admiralty make so frequent reference. Thus, the third provision of those laws is, "Touching the engaging (sale or hypothecating) of ships or goods in case of necessity." And Benedict, in his learned work, after discussing the principles governing admiralty jurisdiction in the matter of disputes between part owners, declares:

"Cases of litation or sale for the purpose of partition are also within the power of the American Admiralty, as they are of the European Maritime Court." Benedict, *Admiralty*, § 187.

Hughes, however (*Hughes, Admiralty*, § 158), declares:

"Although admiralty does not have jurisdiction to decree a sale of a vessel for mere purpose of partition, where the interests in the vessel are unequal, for in that case the majority can rule, yet if the interests are equal and the equal interests disagree * * * admiralty has jurisdiction to decree a sale of the vessel."

Also it is said that in certain instances, not necessary here to specify, admiralty may order a sale of the vessel at the instance of the majority owners. In the phraseology of the last quotation is found the difficulty attending this consideration. Is it true that admiralty does not have jurisdiction to decree a sale at the instance of the minority owners, or is it that, having jurisdiction, it will not, by reason of the dominance of the principle that the majority owners have the right to the use and control of the vessel, de-

decree a sale at the instance of the minority owners? As this question is answered so must go the decision of this case. For if it be true that admiralty has not this jurisdiction in the true sense and meaning of the word, then manifestly the state court is not trespassing upon any of the reserved federal admiralty and maritime powers. But if, upon the other hand, the true holding is, as above indicated, that admiralty has the jurisdiction and power, but for reasons sufficient unto itself will not exercise that power in favor of minority owners, then the matter still remains one exclusively of federal cognizance, and the effort of the plaintiffs in this case is to accomplish in the state courts the doing of that which admiralty, with jurisdiction over the matter, would refuse to do. The manifest effect of this, then, would be an encroachment upon and a usurpation of the legitimate powers of the district courts in admiralty.

The respondents take the view first outlined, and they support it, as has been said, with decisions from state courts and with language found in some of the federal decisions. Thus the learned Justice Story, in *Orleans v. Phoebus*, 11 Pet. 175, 9 L. Ed. 677, is relied on. He speaks in the following language:

"The jurisdiction of courts of admiralty in cases of part owners having unequal interests and shares, is not, and never has been, applied to direct a sale upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages. * * * The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship."

So, also, in the *Ocean Belle Case*, Fed. Cas. No. 10402, 6 Ben. 253. In an action in the federal district court it is declared:

"The court has no power to order a sale of this vessel, on the facts stated in the libel to pay the debts and distribute the residue of the proceeds, on the demand of the owners of five-sixteenths of her, and against the will of the owners of the rest. * * * Such power of sale has never been established in this country."

And so in the well-considered case of *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12,670, where the dispute was between two equal owners, the exercise of the powers in admiralty was reviewed, and it is declared that:

"If the majority owners refuse to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority or to the public detriment; and since in such a case the minority can neither employ her themselves nor force the majority to do so, the vessel may be valued and sold."

And, finally, in *Tunno v. Betsina*, Fed. Cas. No. 14236, 24 Fed. Cas. 316, after a lengthy and learned discussion of the rights of majority owners to employ the vessel against the wish of the minority owners, and the circumstances and conditions under which admiralty will decree a sale, and in declaring finally that it will not decree a

sale at the instance of minority owners dissatisfied merely with the use, the learned circuit judge uses this language:

"If not within the jurisdiction of the admiralty, a court of equity will be found adequate to the occasion, proper for the exercise of its authority. I consider that the power to sell, as exercised by Judge Washington, in the case of *The Seneca*, supra, was carried as far as the best authorities in the maritime law will warrant. Nor is it easy to comprehend for what useful purpose the power could be exercised in any other cases than such as I have referred to, in which a disagreement between part owners cannot be determined by the operation of principles applicable to associated ownership, or such as are specially provided for an ownership in vessels. Of what use would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a court would be asked to decree a sale? It would soon be that the only mode for preventing a dissolution would be for the majority to render unquestioning accord to the wishes of the minority; no matter how small that minority, or unreasonable its exactions. In this case, the libellant is not the owner of a half of the vessel. He represents a minority in value. And the examination now made satisfies me that he is not entitled to a decree for a sale on the ground of disagreement with the other part owners as to the best mode of employing the vessel owned by them in common."

The interpretation put by certain of the state courts upon these cases, which interpretation is of course relied upon by respondents here, is that the admiralty court is without jurisdiction. In other words, that it has no power to decree a sale at the instance of the disaffected minority owners. Yet in every one of these federal cases it is to be noted that the court entertains jurisdiction of the subject-matter of the action, and, regardless of the language employed, the judgments in each case were judgments upon the merits, denying the particular remedy sought. And it must at once strike one as strange, if the courts of admiralty did not possess jurisdiction to do the thing which was sought, that they would not promptly have sent the cases out of court upon that specific ground. The fact that in every instance the district court did retain the cases did hear them, and did decide on the merits, against the positions of the minority owners, is most persuasive to the effect that by their language those judges did not mean to say that their courts had no jurisdiction, but that having jurisdiction they would not exercise it to grant the remedy or relief prayed for.

Certain of the state courts, as has been said, have taken the contrary view, and it is proper now to consider those decisions. *Andrews v. Betts*, 8 Hun (N. Y.) 322, was an action very similar to the one at bar. The vessel was owned in unequal proportions by different persons. They could not agree upon a sale, or upon the employment of it. One of these minority owners brought his action in equity to procure the appointment of a receiver, a sale of the vessel, and a division of the proceeds of the sale in proportion to

the respective ownerships. The Supreme Court of New York entertained the action first, upon the ground that admiralty had no jurisdiction to act in such a case at the instance of a minority owner, and Boardman, J., delivering the opinion of the court, said:

"I can see no reason why admiralty courts ought not to possess and exercise jurisdiction to order a sale in case of disagreement between owners, irrespective of their shares. Such a power, exercised in the discretion of the court, could scarcely fail to subserve the interests of the well disposed owners, and defeat the malice or stupidity of the evil disposed owners."

For a second ground the court took the view that even though admiralty had jurisdiction, there was still concurrent jurisdiction in the state court, owing to the saving clause of the Judiciary Act (section 563, subd. 8, U. S. Revenue Laws), which saves "to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Benedict in the passage from his learned work on Admiralty above quoted, with the support of numerous federal decisions, points out that this reservation is, as it expresses, a saving of a right to a common-law remedy which of course is essentially a distinct relief from an equitable remedy, and in especial the saving clause had reference to the common-law remedies in actions in personam as distinct from admiralty procedure, where, in so many instances, the vessel itself is personified and libel brought against the vessel, without regard to its ownership, and therein he further points out that no state can confer jurisdiction upon its courts to proceed in rem, nor to enforce in the state courts any liens which come within admiralty jurisdiction. Of course, the New York action, no more than this sought to exercise a common-law remedy. To the contrary, the common law afforded no relief to tenants in common in disputes and disagreements such as here presented. This is most lucidly pointed out by Mr. Freeman (Cotenancy [2d Ed.] § 889 et seq.), where, after discussing the refusal of the common law to aid tenants in common in their efforts to recover possession or to partition chattels, he declares, speaking now of the distinction between chattels in ordinary and ships:

"They (shipowners) may disagree either in reference to what employment is most advantageous, or in reference to the advisability of seeking any employment whatever. In either case, the law has provided remedies calculated to preserve the rights and promote the interests of all the owners, and also to minister to the general interests and promote the general welfare of the public. These remedies are not, however, to be found in the courts of the common law, nor in the tribunals charged with the administration of the principles of equity jurisprudence. Parsons on Partnership, 558; Castelli v. Cook, 7 Hare, 89. They must be sought in the courts of admiralty."

Hence, if this view be correct, a court of equity, though competent, is not empowered to give relief when such a disagreement amongst the owners shall arise. These equitable remedies are not those which are saved

to suitors by virtue of the federal Judiciary Act. Indeed, it is well understood why this is so, since the controversy was wholly between the judges of the common-law courts and of the admiralty courts, and took the form of a very active effort upon the part of the latter to destroy entirely by the writ of prohibition the jurisdiction of the admiralty courts. Nor, as the learned expound, was this done out of any jealous regard for the rights of the people, nor for the superiority of the common-law system over admiralty jurisprudence, which latter was based upon the more liberal doctrines of the civil law. But it did have its origin and it owed its existence to a very much more unworthy motive, which was the desire of the common-law judges to increase the emoluments of their offices by fees, fines, and forfeitures, which were withheld from them under the admiralty jurisdiction. Therefore we must conclude, so far as the New York case is concerned, that if sound at all it is sound as being based upon the proposition that the district courts in admiralty are without jurisdiction of such a controversy. The next case is Swain v. Knapp, 32 Minn. 429, 21 N. W. 414, where the owner of one-third of a steamboat sued in the state court for an accounting, being apprehensive of loss from the nature of the majority owners' use of the boat, and in his accounting sought a receiver and a sale of the vessel. There the court fairly faced and fairly decided the question whether or not the remedy sought was one of the reserved common-law remedies saying:

"The defendant is unquestionably right in his position that this saving is of a common-law remedy, and not merely of a remedy in a common-law court (The Moses Taylor, 4 Wall. 411 [18 L. Ed. 397]; Spear, Fed. Jud. 81), and that the remedies sought in this action are not common-law remedies."

But it reasoned to its satisfaction that since "the remedies sought in this action are not afforded in admiralty, then the subject-matter of the action is not within admiralty jurisdiction." The third of these cases is Reynolds v. Nielson, 116 Wis. 483, 93 N. W. 455, 98 Am. St. Rep. 1000. That case rests for its authority upon Andrews v. Betts, which has here been considered, and upon the text of Knapp on Partition, p. 491. That author, conceding that "proceedings for partition of personal property are unknown at common law," proceeds to say that it is doubtful whether admiralty courts can exercise jurisdiction to decree a sale in a case where a vessel is owned in unequal proportions by several persons, but "if the admiralty courts have such jurisdiction in cases where there are unequal interests, it is not an exclusive jurisdiction to that court, but concurrent with that of the common-law courts. The court of equity has jurisdiction over an action, brought to secure a partition of personal property between tenants in common thereof. It matters not whether such property is a vessel to be used, upon the high sea, or other

personal property, so long as there is a cotenancy, and a failure to agree upon the part of the cotenants, a court of equity has jurisdiction over the partition, of the property, or a sale thereof and a division of the proceeds." This learned author bases his text upon the cases of *Andrew v. Betts*, supra, and *Smith et al. v. Smith*, 4 Rand. (Va.) 95, the latter being simply a case of partition in equity between tenants in common owning negro slaves; and *Tripp v. Riley*, 15 Barb. (N. Y.) 333, where partition in equity was decreed in the case of grain owned by tenants in common, and *Fobes v. Shattuck*, 22 Barb. (N. Y.) 568, which was a case of identical nature touching the partition of grain. But of course upon such a question the weight to be given to the text is no more than is justified by the decisions cited in its support, and it is manifest that these decisions (excepting the first) have not the slightest bearing upon the particular question here before us. For the reasons pointed out the state decisions are far from being satisfactory, much less determinative. Nor, so far as investigation goes, are those cases elsewhere given any force as authority. Indeed, we may find in the early volumes of our own reports a declaration equally unsatisfactory and unsound, to the effect that:

"The judicial power of the courts of the United States in admiralty and maritime cases is not exclusive, and the states have the power to confer that jurisdiction to its fullest extent upon their own courts." *Taylor v. Steamer Columbia*, 5 Cal. 268.

The *Alcalde* (D. C.) 132 Fed. 577, is the only other federal case which respondents call to their aid upon this proposition. In that case differences had arisen between the owners, and an action was brought in the state court and a receiver was appointed. Another phase of the litigation was brought in the district court in admiralty—a libel in rem for money advanced. Incidentally there arose a consideration of the action of the state court and upon this the learned federal judge declared:

"Whether the receiver had legal authority to take the vessel out of the captain's custody is a serious question, which I will avoid by assuming that Captain White [still] continued to be master."

With this review we may return again to the main consideration. The jealousy of the English common-law courts and their attacks upon the jurisdiction of the admiralty courts have been referred to. That jealousy took the form of denying to admiralty the power to decree any sale. Thus in *Ouston v. Hebdon* (1745), 1 Wills, 101, Chief Justice Lee of the Court of Kings Bench, declared:

"Indeed, the admiralty has no jurisdiction to compel a sale, and if they should do that, you might have a prohibition after sentence; or we may grant a prohibition against selling, or compelling the party to sell or to buy the shares of others."

Here was an express denial by the common-law courts of this admiralty jurisdiction, accompanied by a threat of the use of pro-

hibition, even in a case where it did not appear that admiralty proposed to order a sale. But, as has been said, the jurisdiction of the American courts in admiralty is not limited to the jurisdiction of the English admiralty courts, and even in England complete jurisdiction over the matter of sale has been conferred upon the admiralty court by St. 3 and 4 Victoria, c. 65, § 4, and by the Admiralty Court Act of 1861, the jurisdiction of the Court of Admiralty being transferred to the High Court of Justice.

I take it to be unquestioned that our greatest authority upon American admiralty and maritime law is Justice Joseph Story, whose learned opinions when on the supreme bench of the United States did so much to elucidate, clarify, and settle the disputes. Upon this question he thus speaks, and his words are worthy of quotation in extenso:

"Malynes evidently supposes that the general maritime law authorizes a sale to be made by the proper court of admiralty in all cases, where, by reason of the disagreement of the part owners, the ship cannot be employed, whether there be an equality in the dissenting interests, or not. Molloy adopts the same opinion; and it has apparently the support of others of the old English maritime writers, as a generally recognized practical rule. The *Consolato del Mare* seems to uphold the doctrine that, at least after the first voyage of a ship, which is owned by the master and other persons, the part owners may compel a sale of the ship, in case of a disagreement between them. The law of Scotland gives a right, as it should seem, in all cases to the dissenting partners, to offer their shares for sale to the other owners at a particular price; and, if this offer is not accepted, then to require a judicial sale to be made of the ship, and the proceeds to be divided among them.

"It has also been generally supposed that, according to the common law of England, in no case whatsoever of a disagreement of the part owners, as to the employment of the ship upon any particular voyage, does there exist any jurisdiction in the Court of Admiralty (and, if that court has it not, no other court has), to order a sale thereof, whether the ship be owned in equal, or in unequal, shares. It is true that the terms of the commissions, granted to the judges of that court, include jurisdiction of all matters which concern owners and proprietors of ships as such. But this jurisdiction of the courts of admiralty has been exercised for the last two centuries in England, if one may say so, in vinculis, in consequence of the severe penalties imposed upon the judges by statute, if they should happen unintentionally to exceed their true jurisdiction, and the open hostility and prohibitory interference of the courts of common law. The commissions have thus become practically much narrowed in the import of their terms by the construction of these latter courts. It was positively, although incidentally, asserted by Lord Chief Justice Lee, in a case in the King's Bench, in the Reign of George the Second, that the court of admiralty has no authority to compel a sale in any case of disagreement whatever between part owners. If this doctrine be in reality established in the common law of England, it is a reproach both to its equity and its justice, for it leaves the part owners of ships without any remedy whatsoever, in cases where irreparable injuries may arise from an inequality of division in interests and opinions, without any fault or wrong on either side. Upon what ground it has been asserted it is difficult to perceive. It certainly has no support in the positive maritime law of other countries, or in the ancient principles of maritime

jurisprudence. All these point the other way. The admiralty courts of England have never of themselves adopted any such limited doctrine, but have always contended for the exercise of the full jurisdiction as rightful, although they have been practically compelled to surrender it under the imposing authority of the court of common law. * * * The right to order a sale of property, subjected to its jurisdiction, is clearly a matter within the competency of a court of admiralty, and, indeed, is familiar in practice, in order to prevent irreparable mischiefs or impending losses. Analogy, therefore, is clearly in its favor; and unless some limitation or exception can be asserted to exist, either in the origin, or Constitution, or practice of the court itself, it will not be a very satisfactory mode of disposing of the question, for a court of common law to assert upon its own mere dictum, without any reasoning in support of it, that the court of admiralty has a right, in cases of disputes between part owners of ships, to take a stipulation, but not to order a sale. Such language would seem more like an edict than a judgment, and promulgate an arbitrary distinction, rather than a rational interpretation of the jurisdiction of another court." Story on Partnership, p. 611 et seq.

This concludes a review of the subject-matter, necessarily hasty and imperfect, but from it it would seem that but one conclusion can be drawn, and that is that, unhampered by the restriction which the common-law courts placed upon English admiralty jurisdiction, the jurisdiction of the courts of the United States in admiralty is full and complete touching the matter of sale under the circumstances here indicated, that is to say, where dissentient owners are at strife over the use to be made of the ship, for it must, from the nature of admiralty jurisdiction, be a fundamental part of that jurisdiction to exercise control over the rem—the ship itself. Admiralty draws and may draw as well upon equitable principles as upon state statutes for the administration of its jurisdiction. But it does so as those principles and statutes appeal to it, and not by force of any compulsion other than the authority vested in Congress to make laws upon the subject-matter. Admiralty, then, has jurisdiction to decree a sale of a vessel under all circumstances like those here presented. If admiralty refuses to decree the sale it is not because of a lack of power so to do, but because the sale under the indicated circumstances would be contrary to another paramount principle of admiralty jurisdiction—the right of control in the majority. We have endeavored to be careful to limit this discussion to the facts of the case, and of course everything that has been said has been said in reference to those facts exclusively. No question here arises over the jurisdiction of equity, for example, to enforce a contract for sale or to decree an accounting as such. But we hold that the power of a state court does not go to the length here exercised, of appointing a receiver and decreeing a sale because of the differences over the management of the vessel which have sprung up between the legal

owners of that vessel. The state court is entitled to retain jurisdiction of the action in so far as it addresses itself to the equitable consideration of settling accounts. But further than that it may not go. If, however, we are mistaken in our conclusion, we are happy in the thought that now at length either suitor may have this question determined with finality by the federal courts, where its determination properly belongs.

The order appointing a receiver is therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

CANTY et ux. v. PIERCE & ANDERSON
et al. (S. F. 6959.)

(Supreme Court of California. July 27, 1916.)

1. CONTINUANCE \S 51(4)—SECOND CONTINUANCE—DISCRETION TO REFUSE.

Where suit to establish that title to land of a defendant was in trust for plaintiffs, set for trial October 9th, was continued by consent until November 1st, although defendant desired speedy trial, claiming the suit interfered with disposition of the land, and counsel were advised by defendant's counsel that no further continuance would be consented to, it was not abuse of discretion to refuse continuance on November 1st because of absence of plaintiff, where affidavits of plaintiff and his attorney showed that he was notified the day before in time to have taken a train that would have brought him to place of trial that day, but chose to go to his ranch with machinists to oversee their fixing broken machinery.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. \S 147; Dec. Dig. \S 51(4).]

2. TRIAL \S 6(3)—NOTICE OF TRIAL—EFFECT OF CONTINUANCE.

Where defendant, consenting to a continuance to a certain day, clearly states that plaintiff must then be ready for trial, there is no necessity of giving formal notice under Code Civ. Proc. \S 594, providing that either party may bring an issue of fact to trial upon five days' notice.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 18; Dec. Dig. \S 6(3).]

3. CONTINUANCE \S 19—GROUNDS—UNAVOIDABLE ABSENCE OF PLAINTIFF.

Even an unavoidable absence of plaintiff does not necessarily compel a court to grant a continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. \S 41, 43-48; Dec. Dig. \S 19.]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Daniel J. Canty and another against Pierce & Anderson and another. From judgment for defendants plaintiffs appeal. Affirmed.

E. A. Williams and C. E. Beaumont, both of Fresno, for appellants. Everts & Ewing and R. Retallick, all of Fresno, for respondents.

HENSHAW, J. [1] Plaintiffs brought their action to have it decreed that the defendant Hayden Jones held title to certain real property in trust for them, and to com-

pel Jones either to convey the property to them, or to pay them the value of it, fixed in the sum of \$1,068. The court proceeded with the trial of the action over the objection of the plaintiffs' attorneys, which objection was accompanied by their motion for a continuance, and gave judgment for the defendants. Plaintiffs' appeal urges only the abuse of the court's discretion in denying their motion for a continuance. The following matters appear from the affidavit: The cause had been set for trial on the 9th day of October, 1913. The original attorneys of plaintiffs had withdrawn from the case, and E. A. Williams and O. E. Beaumont had been substituted in their place. Because of their unfamiliarity with the case they sought a continuance of it. The defendant Jones was desirous of having the case speedily tried and determined for the reason that it interfered with the disposition of the land, which he contended he owned unburdened with any trust or valid claim of plaintiffs. By consent the trial of the cause was continued until November 1st. Plaintiff Daniel Canty was in town and at the offices of his attorneys on and after the 9th day of October, upon which date the case was thus continued for trial until the 1st day of November. Negotiations for a compromise were under way between the attorneys, but came to nothing. Plaintiffs' attorneys were told by defendants' attorneys that their client would consent to no further continuances, and that if the negotiations proved abortive, they must be ready for trial upon the date set. They replied that they were as desirous of going to trial as the defendants could possibly be. Upon November 1st defendants appeared at the time and place set for trial. Plaintiffs were represented by their attorneys, who sought further continuance upon the ground that they had not been able to secure the presence of plaintiff Daniel Canty. The affidavit of C. E. Beaumont, one of the attorneys for plaintiffs, offered upon support of the motion for a continuance, is to the following effect: He was employed in the case a few days prior to October 9th; that—

"at the request of affiant and said E. A. Williams (his associate) the date for the trial of said cause was continued until November 1st; that he did not advise his clients of the continuance because negotiations for settlement were pending; that when he found no settlement could be made, he saw his client, Daniel Canty, on the streets of Fresno and told him he desired him to come to his office so that preparation could be made for the trial, but that he did not, at that time, state to his client the date for which the trial had been set. His client stated that he would come to his office. Thereafter he was called to the city of Los Angeles and was absent for four days, returning to his office on October 22d. He was informed that Canty had been in his office during his absence. Thereafter he tried to get into communication with Canty by calling up his telephone number, but obtained no answer. On the 27th of October he wrote a letter addressed to Canty, telling him that the action was set for trial on November 1st. Finally, on the 31st of October,

he succeeded in getting into communication with Canty at Burrell, Cal. He told Canty that his case was set for trial at 10 o'clock the following morning, and Canty replied that his automobile had broken down, and that it would be impossible for him to get to Fresno the following day."

Canty's affidavit is to the effect that he received this notification at the time he was passing through Burrell with machinists going to his ranch 40 miles west of Fresno to fix broken machinery, and that it was necessary for him to be with them, as he alone could indicate to the machinists the work to be done. There was, however, a train passing through Burrell about 5 o'clock in the afternoon going to Fresno, which train would have taken plaintiff to the office of his attorney very early in the evening of the same day. He could have caught that train, but did not have time to go to his ranch with the machinists and return and catch it. Therefore he went to his ranch. He says, also, that it was necessary for him to have in attendance as a witness Mr. Barnhill, who lived in Los Angeles, and by whom he expected to prove that Jones "had admitted all of the facts upon which said action is based." Touching the Barnhill matter, the opposing affidavit of J. G. Retallick, an attorney at law, is to the effect that plaintiff had told him that Barnhill was an attorney, and that he hoped to secure his services as his own attorney, but that Barnhill could not take the employment during the present year, and therefore he did not expect him to be present at the trial, and that in this conversation there was no suggestion even that Barnhill's presence was desired as a witness.

[2, 3] Under these facts but slight consideration of the law is necessary. Mr. Beaumont's affidavit shows that he knew long in advance that the case was in fact set for trial on November 1st. With this knowledge there was no necessity for giving any formal notice such as is contemplated by section 594, Code of Civil Procedure. See *Sheldon v. Landwehr*, 159 Cal. 778, 116 Pac. 44. Plaintiffs' attorneys were in no respect taken by surprise. They were fully advised of the desire of the defendants to proceed with the trial upon the day set and of the fact that no further continuance would be consented to. If they had not themselves made sufficient preparation for the trial, under these circumstances and with this time allowance, it was their own neglect. So also was it their own neglect if their client did not receive timely notice. He certainly did receive notice so that he could have been in Fresno, not only upon the morning of the trial, but upon the day preceding, but for personal reasons declined to avail himself of the opportunity. This was not an unavoidable absence on his part, and it is the rule that even an unavoidable absence does not necessarily compel a court to grant a continuance. *Lynch v. Superior Court*, 150 Cal. 123, 88 Pac. 708.

There is nothing in this case to show that the discretion of the court in refusing the continuance was abused.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

BURR v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 6949.)

(Supreme Court of California. July 27, 1916.)

1. APPEAL AND ERROR ⇨1090(7)—REVERSAL—SECOND APPEAL.

Where the evidence on second trial after appeal is identical with that on the first trial, and in view of the presumption in favor of the law of the case the appellate court, having on the first appeal held the evidence sufficient, will not reverse for insufficiency of evidence on the second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4876; Dec. Dig. ⇨1090(7).]

2. STREET RAILROADS ⇨114(6)—OPERATION—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence held to show that the automobile in which plaintiff was injured was stalled on a crossing through its negligent construction by defendant street railroad and in full view of motorman of approaching car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 245; Dec. Dig. ⇨114(6).]

3. STREET RAILROADS ⇨86(1) — CONSTRUCTION AND MAINTENANCE—CARE REQUIRED—NOTICE.

A street railway is charged with notice of defective condition of a temporary crosswalk over its tracks, which condition it has itself created.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 183; Dec. Dig. ⇨86(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Percy L. Burr against the United Railroads of San Francisco. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott, of San Francisco (Wm. M. Cannon and Kingsley Cannon, both of San Francisco, of counsel), for appellant. William P. Hubbard, of San Francisco, for respondent.

HENSHAW, J. This is a second appeal. The first will be found reported in 163 Cal. 603, 126 Pac. 873. The first appeal was taken from the judgment following the trial court's order of nonsuit. The nonsuit was granted upon the ground that the evidence was insufficient to establish any negligence or culpability on the part of the defendant. This court, succinctly stating the substance of the evidence, held that it was sufficient to demand that the case be presented to the jury for its determination. Upon the second trial, a jury being waived, the judgment of the court was in favor of the plaintiff, and defendant appeals.

[1] Its principal contention upon appeal is that the evidence upon the second trial was in substantial respects different from the evidence presented upon the first trial, and that the evidence now before this court completely exonerates the defendant from the charge of negligence, and establishes that negligence, if negligence there were, was wholly that of the plaintiff. We are constrained to disagree with the view which the appellant takes of the evidence. It need not be repeated, but a careful reading of it discloses that it is in all respects as strong, and in some respects stronger, in favor of respondent than was the evidence received upon the first trial.

Appellant would have this court adopt the procedure of the Supreme Court of New York in the case of *Gurrie v. N. Y. & N. S. Traction Co.*, 151 App. Div. 57, 135 N. Y. Supp. 833, and reverse the case for the insufficiency of the evidence to establish the neglect of the defendant. True, it is, as appellant declares, that the facts in the New York case are very similar to those in the case at bar. But they are by no means identical in the first place, and in the second place, to do this would mean to overthrow the ruling upon the first appeal as to the sufficiency of the evidence, and this, even if the rule of the law of the case did not stand in the way, we are not disposed to do.

[2,3] Both plaintiff and defendant unite in upholding that the following statement of the governing principle, taken from *Fujise v. Los Angeles Ry. Co.*, 12 Cal. App. 207, 107 Pac. 317, is correct:

"It is incumbent upon the plaintiff to show that the circumstances were such that the motorman had an opportunity to become conscious of the facts giving rise to the duty, and a reasonable opportunity to perform it, before the railway can be held liable on the ground of negligence."

Accepting this, and indeed declaring it to be a succinct and accurate statement of the governing principle, there was enough in the facts established and in the reasonable inferences which the court was entitled to draw from those facts, to show, first, that the automobile was stalled because of the negligent condition in which the crossing was left by the defendant; that in endeavoring to cross, because of this defective condition, plaintiff's automobile was caught between the rails. His car was under control, but he was unable, because of the condition of the track, to extricate it from between the rails. The defendant's car approached down hill upon a slight curve and was visible at a distance of 500 feet. The headlight of plaintiff's automobile was facing the on-coming electric car. The electric car was blowing its whistle furiously. The only signal which the plaintiff could make was the "stop" signal given by raising and lowering his arms. This he repeatedly did. The motorman of the electric

car apparently became aware of the position of the automobile, for he blew his whistle the more furiously. Nevertheless he continued on his course with such speed that he failed to stop his car in time to avoid striking the stalled automobile, which was still between the tracks. And finally it is to be noted that he struck it at or very near the temporary crosswalk, with the existence of which and with the knowledge of the condition of which, since that condition was of its own creation, defendant and its motorman were charged.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

CRANE v. STATE SAVINGS & COMMERCIAL BANK. (S. F. 6951.)

(Supreme Court of California. July 25, 1916.
Rehearing Denied Aug. 24, 1916.)

1. BANKS AND BANKING §54(7)—INSOLVENCY—CLAIMS OF TRUSTEES.

Where an interloper became trustee of an insolvent bank whose affairs were taken over by the state bank commissioner and by various manipulations secured control of the concern and prosecuted various actions to remove it from the control of the bank commissioner, he could not have compensation for his alleged services in such actions; his purpose evidently being to loot the corporation and defraud its creditors and stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 107; Dec. Dig. §54(7).]

2. COSTS §260(1)—DAMAGES FOR FRIVOLOUS APPEAL—WHEN ALLOWABLE.

Where a long course of vexatious litigation in various cases reveals that the prosecutor thereof is attempting to take advantage of unsuspecting persons by undue prolongation of cases, damages for frivolous appeal will be awarded the opposing party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983, 986, 996; Dec. Dig. §260(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by Arthur Crane against the State Savings & Commercial Bank. From an order refusing to fix compensation of plaintiff as trustee for defendant, plaintiff appeals. Affirmed, and judgment for damages for frivolous appeal awarded.

Arthur Crane, of San Francisco, in pro per. State Savings & Commercial Bank, in pro per. A. A. De Ligne, of Sacramento, for William R. Williams, State Superintendent of Banks.

HENSHAW, J. This is an appeal from the order of the court refusing to fix the compensation of appellant, appointed "director and trustee of the State Savings & Commercial Bank, the defendant corporation, and with authority to pay the state license tax now due."

To an understanding of the controversy the following facts are pertinent and indeed

necessary: The State Savings & Commercial Bank, a California banking corporation, had become so financially involved that, under the authority of the California Banking Act as it then existed, upon July 17, 1909, Alden Anderson, superintendent of banks, took possession of the property of the bank. That banking law gave the banking corporation or other person interested 10 days' time within which to contest the possession of the superintendent of banks, and this contest was never instituted. But upon the 5th day of November, 1909, this appellant instituted an action in his own name against this bank, whose assets and affairs then were and ever since have remained in the possession and under the control of the superintendent of banks and his successor, the bank commissioner, and against certain other defendants called stockholders. In this complaint he asserts that on January 18, 1909, he became a stockholder of the corporation by the purchase of 2 shares of its stock. He alleges that he is the only stockholder, and that none of the defendants are stockholders; thus owning all of the stock of the corporation he is in equity the sole owner of the corporation. He alleges that the directors and trustees of the corporation were so actively engaged in dissipating and wasting the assets of the corporation that if the superintendent of banks "had not taken possession of said estate from the said usurping directors and trustees of the said defendant corporation it would all have been wasted and dissipated." He next asserts that the total value of the remaining assets of the defendant corporation is the sum of \$68,510.64, and that the total liabilities of the corporation amount to the sum of \$184,384.59, and that there is thus left sufficient "to pay all creditors in the neighborhood of 50 per cent. of their respective claims." He alleges that there are no directors or trustees of the corporation; that the corporation has failed to pay its license tax and is insolvent and has ceased to do business as a corporation, and prayed judgment "that the plaintiff is the sole beneficial stockholder of the said corporation; that plaintiff be appointed the sole trustee of the defendant corporation," and for general relief. Upon this complaint he secured ex parte an order of the superior court appointing him, as above indicated, "director and trustee of the State Savings & Commercial Bank, the defendant corporation, with authority to pay the state license tax now due, pending the trial or other conclusion of the above-entitled cause, or further order of this court." Thereupon, as appears from the report of this trustee, he, by virtue and authority of this order, accepted the "resignations and abandonments" of all other directors and trustees saving himself. He then transferred to Frank L. Tainter one share of stock, and to John H. Dixon another share of stock, and

then appointed Frank L. Tainter and John H. Dixon to be with him the directors of the bank, further appointing Frank L. Tainter secretary of the corporation. Thereafter, at a "special meeting of the board of directors," appellant presented two transfers, one from M. D. Rainbow to himself for 10 shares of the stock of the corporation, and another from Eliza J. Lyman to himself for 5 shares, and he caused these old certificates to be canceled and new certificates to be issued to him as the owner of 15 shares. It is of course not explained how there could be 15 or 16 valid outstanding shares in contemplation of the complaint in which plaintiff asserted under oath that he was the sole stockholder and owned but 2 shares. However, he then proceeded to levy an assessment of \$10 per share, immediately paying this assessment upon 16 shares, while "director Frank L. Tainter paid to himself as secretary the sum of \$10, and director John H. Dixon paid the sum of \$10 to the secretary as his assessment. Total received \$180." It was then resolved to "take \$110 out of the funds in the secretary's hands to pay the state license tax." Later, upon the strength of this assessment, a delinquent list was published, the stock offered for sale, and "no bids being obtainable, each of the said certificates and amounts was bid in for the corporation by Arthur Crane, trustee and president." The affairs of the corporation being in this condition, the defendant bank of which appellant was thus trustee and president, and Frank L. Tainter trustee and secretary, filed its answer to Crane's action, which answer was verified by Tainter. It denied certain of the allegations of Crane's complaint. Thus it denied that if Anderson "had not taken possession of the assets on the 17th day of July all or any of them would have been wasted." It denied that there was only left of the estate sufficient to pay the creditors 50 cents on the dollar, and averred that the assets were \$130,000 and the liabilities only \$104,000, denied that the corporation is insolvent, and denied that it had failed to pay its license tax or had ceased to do business as a corporation. The answer then proceeded to set up the assessment of which we have spoken, and once more averred that:

"The only outstanding shares of stock in the defendant corporation are 18, on which the said assessment was paid, and which stand in the names, to wit, of Arthur Crane, 17 shares; of Frank L. Tainter, 1 share."

Thereafter, on June 3, 1911, Crane filed a stipulation in the action, declaring that "every allegation contained in the answer of the defendant, the State Savings & Commercial Bank, is true," and stipulating "that judgment may be rendered in accordance therewith." On June 5th, two days thereafter, the trial court made so-called findings of fact that all the allegations contained in the answer were true; that the corporation has "duly and regularly levied an assessment of

\$10 per share on its capital stock, and that the only valid outstanding shares of stock are 18," of which Crane owns 17 and Tainter one. The judgment declares that each party shall pay his and its own costs; and:

"(2) Pending further order of the court, said plaintiff, Arthur Crane, shall continue to act as trustee under the direction of the court, and under the supervision of the said stockholders. (3) The remuneration of the said trustee may hereafter be fixed by the court on notice and hearing duly given."

On January 24, 1914, this appellant moved the court to fix his fees "for his services as such trustee, including services as attorney, to and including December 1, 1913." The State Savings & Commercial Bank, by Tainter, its secretary, promptly stipulated that Crane's motion should be granted and his remuneration fixed at \$2,000, which was the amount Crane himself sought. In the matter of services he made affidavit that he had instituted three actions, one in the circuit court of the United States, and two in the superior court of the state, for the purpose of testing the constitutionality of the seizure of the assets of the State Savings & Commercial Bank. He further stated that:

"Notwithstanding he used due diligence and extreme care in all said legal work, his action in the circuit court was dismissed and the two actions in the superior court of the state of California were decided adversely to him."

He instituted an appeal to the Supreme Court of the state of California and briefed and argued the cause there, and again losing his case secured a writ of error to the Supreme Court of the United States. At the time of the hearing of this motion the Supreme Court of the United States had not acted upon the writ of error, though it has since done so, and again the decision is adverse to this appellant. *State Sav. Bank, etc., v. Anderson*, 165 Cal. 437, 132 Pac. 755, L. R. A. 1915E, 675; *State Sav. Bank, etc., v. Anderson*, 238 U. S. 611, 35 Sup. Ct. 792, 59 L. Ed. 1488. Upon the hearing of the motion the court denied it, "without prejudice to its being renewed if and when the appeal to the Supreme Court of the United States, referred to in the affidavit on file, is won by appellant therein." This last is the order from which the present appeal is taken.

[1] What then is the case presented? It is an audacious, indeed a brazen, effort by an interloper into the affairs of an insolvent corporation to loot that corporation of some of the moneys due to its creditors. And what is the position of this appellant? Accepting at their face value every statement which he makes, and waiving the obvious inconsistency and falsity of some of them, as where in the one place he asserts that there are but 2 valid outstanding shares of the stock of the corporation and that he owns them both, and in the other that there are 18 shares, of which he owns 17, or that the corporation is wholly insolvent and can pay but 50 cents on the dollar to its creditors, while elsewhere;

and manifestly for the purpose of despoiling it, he alleges that it has \$25,000 of assets above all its liabilities, waiving, we repeat, these and like considerations, passing by the fact, which must certainly be true, that the orders and judgment which the court made were unwittingly and improvidently made, being presented ex parte, and treating this appellant, as he asserts himself to be, the owner of this corporation, what, then, looking through form to substance, is the case presented? The corporation is unquestionably in insolvency and in process of liquidation. Without regard to the inutilty of the services which he rendered to this corporation in the useless litigation which he prosecuted, the fact remains that under his own statement it was litigation prosecuted for his own benefit, and in its last analysis it is but the case of an insolvent whose assets are in the hands of a commissioner in bankruptcy prosecuting, outside of the bankruptcy court, valueless litigation seeking to take those assets away from the control of the bankruptcy court and asking remuneration for his abortive efforts from the assets in the control of the bankruptcy court. There was no occasion, therefore, for the trial court to have made a conditional order touching the receiver's compensation. It would have been a perfectly appropriate order, under the circumstances, for the court to have declared that whatever compensation this trustee believed himself entitled to he could pay to himself out of his own personal assets, but could take no dollar of it from the assets of the insolvent bank.

[2] In conclusion, this court has noted that this appellant has prosecuted numerous appeals to it, either in his own name, or in the name of one Alice Aalwyn, or in the name of the Aalwyn's Law Institute. For the most part these appeals have been of the most frivolous and foundationless character. A certain indulgence will be shown by every court to honest ignorance. But the time has passed when this court can consider that these appeals are prosecuted through an ignorance that is honest. We cannot control the pernicious activities of this appellant in the trial courts. We can, however, measurably control them in the matter of appeals to this court which he takes for harassment, vexation, and delay. The time has come when it is the manifest duty of this court to do this thing.

The order appealed from is therefore affirmed, and there is imposed upon the plaintiff, Arthur Crane, a judgment of \$250 damages for a frivolous appeal, which judgment is forthwith collectible by execution at the instance of A. A. De Ligne, for and on behalf of the respondent herein, and, when collected, will be added to the assets of the insolvent

bank in the hands of the superintendent of banks for the benefit of the creditors thereof.

We concur: LORIGAN, J.; MELVIN, J.

COBE v. CRANE et al. (BECKER, Intervener). (S. F. 6964.)

(Supreme Court of California. July 25, 1916.
Rehearing Denied Aug. 24, 1916.)

1. JUDGMENT \S 624—BAR OF CAUSES OF ACTION—PLEA IN ABATEMENT—DEMURRER.

Where a second action was not between the same parties as a first, and the parties did not occupy the same relative positions as plaintiff and defendant, demurrer to the plea in abatement grounded on judgment in the first action was properly sustained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1139; Dec. Dig. \S 624.]

2. PLEADING \S 259—PLEA IN ABATEMENT—AMENDMENT.

Where a second action was not between the same parties as a first, and they did not occupy the same relative positions as plaintiff and defendant, the court properly refused to permit a defendant to amend another defendant's so-called plea in abatement grounded on the first action, under his statement that he was "able to amend the said plea in abatement and state facts sufficient to constitute a plea in abatement to said action."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 783-792; Dec. Dig. \S 259.]

3. QUIETING TITLE \S 12(1)—POSSESSION.

The owner of land does not have to be in possession to enable him to maintain his action to quiet title.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. \S 8; Dec. Dig. \S 12(1).]

4. DEPOSITIONS \S 8—RIGHT TO COMMISSION—CONTINUANCE.

Under Code Civ. Proc. \S 595, providing that defendants are not entitled to postponement of trial for taking testimony of a party, except on a showing of the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, in suit to quiet title, defendant in his pleadings having asserted that plaintiff was a mythical person, and making no showing of merit by his affidavit or any claim that plaintiff's testimony was necessary and material to defendants, the court properly refused to order a commission to take plaintiff's testimony, application for which was made, noticed and heard the day after that set for trial.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. \S 8, 10; Dec. Dig. \S 8.]

5. JURY \S 14(9)—JURY TRIAL—QUIETING TITLE.

In suit to quiet title by a plaintiff in possession, the judgment making no mention of possession, defendants were not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 75; Dec. Dig. \S 14(9).]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Ira M. Cobé against Arthur Crane and others, wherein defendant Crane filed a cross-complaint against the Market Street Bank and others, and Adam Becker sought to intervene. From a judgment for

plaintiff and orders denying leave to file the complaint in intervention, etc., defendants and the intervener appeal. Judgment and orders affirmed, with damages imposed upon defendant Arthur Crane.

Arthur Crane, C. M. Jennings, and Paul T. Oliver, all of San Francisco, for appellants. P. L. Benjamin, of Oakland, for respondent.

HENSHAW, J. Plaintiff sued Arthur Crane, Alice Aalwyn, and Aalwyn's Law Institute, to quiet title to certain described land. He charged the commencement by defendant Crane, in his own name and in the name of Alice Aalwyn, of actions without merit, designed to harass and vex him, to cloud the title to his land and interfere with the sale of it. He charged the Aalwyn's Law Institute to be a mere instrumentality of the defendant Arthur Crane for the accomplishment of this same end, and sought a decree quieting his title against these defendants and enjoining them from further prosecution of any action asserting or claiming any right, title, or interest in or to the land. Defendant Crane filed a pleading which he called a plea in abatement, answer, and cross-complaint. In the plea in abatement Alice Aalwyn declares that she had previously brought a suit against the above-named plaintiff, asserting ownership in fee in herself in the land, and seeking to quiet her title against this plaintiff; that all of the issues raised in the present action "could have been litigated and were litigated in said cause," and prior to the commencement of this action "judgment was ordered in said former action disposing of all of the issues as to the title of the property sought to be litigated in this action as between this defendant and said plaintiff." The pleader here is careful to refrain from stating in whose favor the judgment passed in that action. In fact the judgment passed in favor of the defendants, one of whom was the plaintiff in this action, after general demurrer sustained. The action of the trial court and its judgment have been upheld by this court. *Alice Aalwyn, Plaintiff and Appellant, v. Ira M. Cobe et al., Defendants and Respondents*, 168 Cal. 165, 142 Pac. 79. By her own statement to the foregoing effect, that all issues between herself and plaintiff had been litigated, she has eliminated herself from this case.

Adam Becker sought leave to intervene, his attorney in his proposed complaint in intervention being this defendant Arthur Crane, and his complaint in intervention, so far as can be determined from the records, naming as defendants the Market Street Bank, the Market Street Securities Company, Charles W. Smith, Frank B. Sylvester, S. W. Swabey, A. F. Martel, Lyon & Hoag, and 50 others sued as John Does. The plaintiff in the proposed complaint in intervention asserted that he was the owner and entitled to the

possession "of an undivided aliquot part of the property," and then proceeded to set up somewhat incomprehensible averments of fraud and conspiracy, which so far as they are understandable appear to be precisely those which Alice Aalwyn attempted in vain to plead, as appears from the case last cited. Leave to file this complaint in intervention was denied, and properly so. *Alpers v. Bliss*, 145 Cal. 570, 79 Pac. 171; *Clark v. Kelly*, 163 Cal. 209, 124 Pac. 846.

[1, 2] Defendant's answer seems to treat this cross-complaint as an existing pleading in the cause, for the second answer is entitled "Separate Answer and Defense and for Cross-Complaint against Said Plaintiff and against Said Defendants to Cross-Complaint." So far as the answer is concerned it consists of denials of the material averments of the complaint, not however denying the prosecution of all the litigation pleaded nor the adverse decisions rendered upon this litigation, but pleading merely that it was not prosecuted in bad faith nor for the purpose of harassment. There is in this no paragraph alleging any affirmative matter, far less setting up any cross-complaint. The third defense is also pleaded as an "answer and defense for cross-complaint." This pleading again treats all of the defendants impleaded in Becker's cross-complaint in intervention as parties defendant to the existing action, which of course they were not. Aside from this, the material averments are that:

"Said defendant Arthur Crane is the owner and holder of five bonds of \$100 and one bond of \$50 of the issue of bonds hereinafter referred to. That said bonds are a valid lien and charge upon the real property described in the complaint."

Nothing follows to show the nature of the bonds nor how nor when nor where they came to exist, or, if existent, became a lien upon the property. In this condition of the pleadings the court properly sustained the demurrer to Alice Aalwyn's plea in abatement. It did not constitute such a plea. This action was not only not between the same parties, but the parties did not occupy the same relative positions as plaintiff and defendant. *Ayres v. Bensley*, 32 Cal. 630; *Walsworth v. Johnson*, 41 Cal. 63; *Helfrich v. Romer*, 16 Cal. App. 436, 118 Pac. 458. And these uncontroverted facts likewise justified the court's refusal to permit the defendant Arthur Crane to amend the so-called plea in abatement under his statement that he was "able to amend the said plea in abatement and state facts sufficient to constitute a plea in abatement to said action," since, for the reasons given, manifestly he could not do this thing.

[3] Plaintiff's complaint was in the ordinary and usual form to quiet title, to which was added the allegations of the excessive and unwarranted litigation brought and prosecuted by Arthur Crane for purposes of har-

assment. We are told by appellants that "it is fatally deficient in that it does not state any possession or right of possession." The owner of land does not have to be in possession to enable him to maintain his action to quiet title. *People v. Center*, 66 Cal. 555, 5 Pac. 263, 6 Pac. 481; *Brusie v. Gates*, 80 Cal. 463, 22 Pac. 284; *Casey v. Leggett*, 125 Cal. 672, 58 Pac. 264; *Reiner v. Schroeder*, 146 Cal. 416, 80 Pac. 517. Of the cases which appellants cite, one (*Ferris v. Irving*, 28 Cal. 645) was an action brought under the old Practice Act, which especially provided that the action to quiet title could be brought only by a party in possession. Such of course is not the present law. The other (*Cutler v. Fitzgibbons*, 148 Cal. 562, 83 Pac. 1075) contains nothing that bears on the question.

[4] The court refused to order a commission to take the testimony of plaintiff. To have granted the order would have worked an unreasonable delay in the case. Defendants were served with summons on September 4, 1912, and the action was set for trial on February 20, 1913. Upon the affidavit of Crane the application was made, noticed for, and heard on the following day. Besides the fact that defendant Crane had repeatedly in his pleadings asserted that Cobe was a mythical person, besides the absence of any showing of diligence, there was an absence in Crane's affidavit of any showing of merit or of any statement or claim that the testimony of Cobe was necessary or material to the defendants in the trial of the case. This roving commission for the taking of the deposition of a plaintiff, whose whereabouts the defendants did not even seek to show, would have necessitated a continuance of the case, and that postponement the defendants were not entitled to, excepting after a showing of "the materiality of the evidence expected to be obtained, and that due diligence had been used to procure it." Code Civ. Proc. § 595.

Defendants Crane and the Aalwyn's Law Institute objected to proceeding with the trial upon the ground that it was not at issue as to the defendant in the cross-complaint of A. F. Martel. There was no cross-complaint and Martel was not a party to the action.

[5] Appellants further complain that they were denied a trial by jury. Plaintiff's complaint was not that of a plaintiff out of possession seeking to recover possession. His

action was one simply to quiet title. The evidence showed that plaintiff was in possession. The judgment makes no mention of possession. Of course defendants were not entitled to a jury trial under these circumstances. *Angus v. Craven*, 132 Cal. 601, 64 Pac. 1091. Appellants, however, assert that if such be the rule of decision in *Angus v. Craven*, it is in effect overruled by the later case of *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140, approving the decision of *Gillespie v. Gouly*, 120 Cal. 516, 52 Pac. 816. *Haggin v. Kelly* declared that the action there under consideration was one at law—in form ejectment; that the essential allegations necessary to such an action are the estate of plaintiff, possession by defendants at the commencement of the action and their wrongful withholding, and, says the opinion:

"Even if regarded as an action under section 738 of the Code of Civil Procedure, still plaintiffs were entitled to a jury. *Gillespie v. Gouly*, 120 Cal. 516, 52 Pac. 816."

Gillespie v. Gouly declares that in an action, though brought under section 738 of the Code of Civil Procedure, if the plaintiff is out of possession and prosecutes his suit against the defendant claiming title and in possession and asks for a restitution of the premises, either party is entitled to a jury trial as matter of right. The inappositeness of these decisions is apparent, but the matter is aggravated by the circumstance that appellants' attorney falsely quotes a sentence as the language of one or the other of these decisions, which language is of course found in neither. The quotation is:

"In actions authorized by section 738 either party is entitled to jury trial as matter of right."

It would unduly and unnecessarily extend this opinion to make further mention of the contentions of these appellants. Some of them, as in the instance last cited, are based either upon gross ignorance of or a willful attempt to misrepresent the law.

We have recently had occasion to animadvert on the activities of the defendant Arthur Crane in the matter of litigation such as this. We need but refer to the case of *Crane v. State Savings & Commercial Bank*, S. F. No. 6951, 159 Pac. 585.

The judgment and orders appealed from are affirmed, with damages fixed in the sum of \$200 imposed upon defendant Arthur Crane.

We concur: LORIGAN, J.; MELVIN, J.

BONNELL et al. v. McLAUGHLIN et al.
(S. F. 6902.)

(Supreme Court of California. July 27, 1916.
Rehearing Denied Aug. 24, 1916.)

DEEDS §124(3)—CONSTRUCTION AND OPERATION — CONDITIONS — VALIDITY — REPUGNANCY TO GRANTING CLAUSE.

Where a deed conveys property to the grantees and their heirs forever, a subsequent provision that the grantees may not sell or mortgage it during their natural lives, but may devise it, is void because repugnant to the granting clause.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 439; Dec. Dig. §124(3).]

Department 2. Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by Isabelle M. Bonnell, Mary C. Osborne, and Kate Breen, against Thomas McLaughlin and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Peter A. Breen and Percy E. Towne, both of San Francisco, for appellants. Jean & Moore, of Hollister, for respondents.

HENSHAW, J. Plaintiffs, as devisees under the will of James McMahon, deceased, brought this action against the defendants to recover property, title to which vested in Thomas McLaughlin and Anna McLaughlin, his wife, under deed to them by James McMahon, plaintiffs' testate. They charge a forfeiture of the title in the McLaughlins for their breach of a condition subsequent contained in McMahon's deed to them. The other defendants are grantees of the McLaughlins of certain parts of the land conveyed in the McMahon deed. The complaint set up the McMahon conveyance in full, and the court sustained a general demurrer to the complaint, and from the judgment which followed this appeal has been taken.

The deed of McMahon to these defendants was, so far as is here important, in the following language:

For a money consideration expressed as being ten dollars, McMahon "does by these presents grant, bargain, sell, convey and confirm, unto the said parties of the second part, and to their heirs and assigns, forever, subject to the conditions herein named, all that certain lot, piece or parcel of land," etc. "This grant is made upon the express condition and limitation, that said second parties or either of them, shall not sell, hypothecate, mortgage, convey or alienate the whole or any portion of said premises during their natural lives but they may make testamentary disposition of the same. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion, and reversions, remainder and remainders, rents, issue and profits thereof. To have and to hold all and singular the said premises together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever, subject to the limitation and conditions herein expressed."

The general demurrer was sustained by the court under the conviction that the con-

dition subsequent contained a restriction repugnant to the grant itself, and of the soundness of its conclusion in this regard no doubt can be entertained. In this state it has been declared that where the granting clause in a deed purports to convey title in fee simple and is followed by a clause prohibiting the grantee from conveying without the consent of the grantor, the latter clause is repugnant to the interest created by the former, and, being in restraint of alienation, is void. Civ. Code, § 711; *Murray v. Green*, 64 Cal. 363, 28 Pac. 118. In *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451, the deed contained the proviso that if the grantee "should ever sell any of the vested property, it should be sold to the said De Peyster." Says this court: "Construed as a covenant, it was merely personal, and not binding upon the heirs or assigns of Cooper."

As a condition "it is unreasonable, and contrary to the policy of the law, because in restraint of alienation." In *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908, the restriction was that the grantee should sell or convey no part of the land without the consent of W. H. Stanley. This restriction was not contained in the deed itself, but was in form a separate covenant, this court saying that the rule that conditions in restraint of alienation when repugnant to an interest created, are void (Civ. Code, § 711)—

"does not depend upon the mere form in which the restraint is imposed. It avoids, as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor; such covenants, if not within the letter of section 711 of the Civil Code, are yet obnoxious to the policy of which that section is a partial expression. *Greenhood on Public Policy*, 606, note 2 et seq.; *Hunt v. Wright*, 47 N. H. 400, 93 Am. Dec. 451, and cases cited. The parties to the contract of February 23, 1892, seem to have made the mistake of leaving the absolute title in Mrs. Stanley, and at the same time attempting to destroy an inseparable incident of such title."

As is pointed out in 24 Am. & Eng. Ency. of Law (2d Ed.) p. 868 et seq., and note to 2 In re Walkerly, 49 Am. St. Rep. 97, this rule is of well-nigh universal acceptance. In the latter it is said:

"Hence, if a deed or devise is attended with an express condition that the beneficiaries shall not sell or convey the property, no perpetuity is created, because the condition itself is void, and the fee and absolute power of disposition vest in him."

Further reference may be made to *Ernst v. Shinkle*, 95 Ky. 608, 26 S. W. 813; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668; *Camp v. Cleary*, 76 Va. 140; *Hardy v. Gallo-way*, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828, and *Wakefield v. Van Tassel*, 202 Ill. 41, 66 N. E. 830, 65 L. R. A. 511, 93 Am. St. Rep. 207. Even in Kentucky, where the court of last resort has for a long time adopted a modified rule to the effect that the restraint will be upheld if it appear to the chancellor to be not unreasonable, it is rec-

ognized that the views of that court are against the great weight of authority, and indeed this is expressly declared in *Lawson v. Lightfoot*, 84 S. W. 739, in the following language:

"It must be conceded that the great weight of authority outside of Kentucky is to the effect that, where the fee-simple title to real estate passes under a deed or will, any restraint attempted to be imposed by the instrument upon its alienation by the grantee or devisee is to be treated as void; and such is clearly the rule announced by Mr. Gray in his excellent work on Restraints of Alienation. But the contrary view has been adopted by this court in repeated decisions."

No doubt can be entertained but that this limitation or restriction upon the power of alienation, which is so important a right of ownership where a fee simple is conveyed, does violence to the interest conveyed, and is therefore void.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

TRIPLER v. MacDONALD LUMBER CO. et al. (S. F. 6956.)

(Supreme Court of California. July 26, 1916.)

1. TRUSTS \S 357(1)—BONA FIDE PURCHASERS—ESTATES CONVEYED—SALE CONTRACT.

A contract to purchase realty on which payments have been made, being transferable, may be mortgaged, under Civ. Code, \S 2947, permitting mortgage of any transferable interest in realty, and the mortgagee may therefore be an innocent purchaser, so that, under section 2413, making persons to whom property is transferred in violation of a trust involuntary trustees, unless they are innocent purchasers, no trust is created in him, though the property was transferred in violation of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. $\S\S$ 539-542, 550-552; Dec. Dig. \S 357(1).]

2. MORTGAGES \S 155—BONA FIDE PURCHASERS—CONSIDERATION—EXTENSION OF TIME.

Extension of time on a debt is sufficient consideration for a mortgage given to secure it, and the mortgagee may, therefore, be an innocent purchaser for value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. $\S\S$ 355-359; Dec. Dig. \S 155.]

3. TRUSTS \S 357(1)—MORTGAGES—PRIORITY—BONA FIDE PURCHASERS.

In the absence of proof of notice to the mortgagee of a trust as against the mortgagors, the court must give effect to the mortgage when it antedates of record the title acquired by a deed to another, since under Civ. Code, \S 856, the incumbrancer's rights could not be prejudiced without notice.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. $\S\S$ 539-542, 550-552; Dec. Dig. \S 357(1).]

4. MORTGAGES \S 154(1)—VALIDITY—NOTICE OF OUTSTANDING EQUITIES.

The mere fact that defendant accepted a note and mortgage from individuals shortly before insolvency of the corporation of which they were owners, and failed to examine records to ascertain the interests of such parties, is insufficient to show that defendant had knowledge of such insolvency or the interest of the corporation in the property mortgaged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. $\S\S$ 344-346; Dec. Dig. \S 154(1).]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Charles S. Tripler, trustee of the estate of Little & Walpert, Incorporated, in bankruptcy, against the MacDonald Lumber Company and others. From a judgment for plaintiff, and an order denying motion for new trial, defendants appeal. Judgment and order reversed.

Randolph V. Whiting, of San Francisco, for appellants. Henry A. Jacobs and Louis H. Brownstone, both of San Francisco, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying its motion for a new trial.

Plaintiff is the trustee in bankruptcy of Little & Walpert, a corporation. He sued to quiet title to certain real property in the county of San Mateo. MacDonald Lumber Company (a corporation) answered, setting up a promissory note executed by Fannie E. Little and Walter J. Little, her husband, and a mortgage on the property here involved to secure payment of said note. Defendant also pleaded that in another action between the Littles and the MacDonald Lumber Company there had been a judgment that the said promissory note was a good and valid promissory note, constituting a good, valid, and binding obligation upon Fannie E. and Walter J. Little, and that the said mortgage was a good, valid, and legal one and a subsisting lien upon the property.

The cause was duly tried and the court found, among other things, that plaintiff became trustee in bankruptcy of the estate of Little & Walpert, Incorporated, a corporation, on May 4, 1910; that on the 19th of June, 1907, Burlingame Realty Company, a corporation, then the owner of the real property which is the subject of this litigation, entered into a written agreement with Fannie E. Little, by which the said corporation agreed to sell and Mrs. Little promised to buy the land at a total purchase price of \$1,800, plus certain interest and taxes; that on June 29, 1910, this agreement was transferred by Mrs. Little to plaintiff as trustee in bankruptcy of the estate of Little & Walpert, Incorporated; that up to said date last specified Walter J. Little, president of Little & Walpert, paid \$1,346.10 on account of the purchase price of the land; that said money was drawn without authority from the funds of the corporation; that the corporation received no consideration for it; and that no charge was made against any person or persons whomsoever for the sums so withdrawn. It was also found that on August 29, 1910, plaintiff paid \$674.30, the balance due on the purchase price of said property to the successor of the Burlingame Realty Company's interest, and received a deed

which was placed of record October 27, 1910; that between June 19, 1907, and August 29, 1910, Walter J. Little caused a building to be erected on the property at a cost of approximately \$4,000; that this building was paid for, in the same manner as payments had been made on Mrs. Little's behalf on the purchase price of the land by moneys drawn without authority and without charge from the funds of Little & Walpert, Incorporated; that none of the moneys drawn for either purpose from the treasury of said corporation had ever been repaid; that on February 26, 1910, the Littles gave their promissory note to MacDonald Lumber Company for \$3,315, secured by their mortgage on said real property, which said mortgage was duly recorded in the following month; that the note and mortgage were executed to secure the payment of an existing indebtedness then owned and held by MacDonald Lumber Company against Little & Walpert, Incorporated, and MacDonald Lumber Company, in consideration of the execution and delivery of the note and mortgage, extended the time of payment of the indebtedness for a period of two years; that the mortgage was executed within four months prior to the adjudication of Little & Walpert, Incorporated, as a bankrupt; that the lumber company had knowledge of the insolvency of the other corporation; that there was no valuable consideration for the execution of the mortgage; that the said mortgage was not accepted by the MacDonald Lumber Company in good faith to the existing creditors of Little & Walpert, Incorporated, but said mortgage was executed by the mortgagors with intent to prefer the lumber company over the other creditors of the insolvent corporation. The court found also that the Littles, on the 11th day of March, 1910, brought an action whereby they sought to have the note and mortgage canceled; that plaintiff had actual knowledge of the pendency of said action; that said action had been prosecuted to a final judgment between the parties thereto; and that by said judgment it was determined—

"that said promissory note was a good and valid promissory note, and that the same constitutes a good, legal, and binding obligation of Fannie E. Little and Walter J. Little, her husband, and that the aforesaid mortgage, given to secure the payment of said note as aforesaid, was a valid, legal, and subsisting mortgage upon the real property."

Appellant contends: (1) That the evidence does not disclose a resulting or a constructive trust in favor of plaintiff; (2) that if such trust is shown defendant is not prejudiced because that corporation is an innocent mortgagee for value without notice of said trust; (3) that the evidence does not sustain the finding that the property was purchased by the money of Little & Walpert; (4) that no unlawful preference is shown to have been given to appellant; (5) that plaintiff is es-

topped by the former judgment; and (6) that plaintiff's assignor's laches should bar recovery.

[1] It will not be necessary to consider all of these alleged errors because we find no evidence in the record to support the finding that the MacDonald Lumber Company was a purchaser with notice of the fact that the money paid for the property was drawn from the funds of Little & Walpert, or with notice of the insolvency of the last-named corporation. Respondent insists that under sections 853 and 2224 of the Civil Code, the appellant was an involuntary trustee into whose possession the property might be followed. Assuming, but not conceding, that such a trust was established in favor of Little & Walpert, and that Mrs. Little and her husband were the trustees, MacDonald Lumber Company invokes section 2243 of the Civil Code, which is as follows:

"Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."

It is true that Mrs. Little held merely a contract for the purchase of the property upon which certain payments had been made, but that was an interest which might be mortgaged. Section 2947 of the Civil Code provides that:

"Any interest in real property which is capable of being transferred may be mortgaged."

MacDonald Lumber Company therefore acquired a real interest in the land.

[2] Respondent cites 27 Cyc. 1051 to the effect that, although a pre-existing debt will support a mortgage given as security therefor, a creditor who takes a mortgage to secure such a debt without furnishing any new consideration is not regarded as a bona fide purchaser for value. It is argued that the MacDonald Lumber Company, having taken the mortgage to secure a pre-existing debt, is not entitled to the equities of an innocent purchaser for value. The answer to this argument is that, as the court duly found, a new consideration was created by the extension of the time of payment of the indebtedness. Such a consideration is a good and sufficient one for a mortgage. 27 Cyc. 1052; *Burke v. Levy*, 70 Cal. 250, 11 Pac. 643; *Rohrbacher v. Aitken*, 145 Cal. 485-489, 78 Pac. 1054. The defendant, therefore, was the mortgagee of an interest in the land, and the mortgage was supported by a valid consideration.

[3] Unless there was proof that said defendant had notice of the existence of a trust in favor of Little & Walpert, the court was bound to give effect to the mortgage because it antedated of record the title which plaintiff acquired by his deed. Without notice of a trust the incumbrancer's rights could not be prejudiced. Section 856, Civ. Code. We find in the record no testimony to support the finding that defendant had

notice of the rights of the Little & Walpert corporation when the note and mortgage were executed and delivered. The defendant's president, Mr. McDonald, who conducted the negotiations, testified that he had no idea that any one had any interest in the land except Mrs. Little.

[4] Respondent's counsel say that the acceptance of the note and mortgage at a time when the corporation known as Little & Walpert was in financial difficulties, and the failure of appellant's officers even to make any examination of the records to ascertain the interest of Mrs. Little and her husband, argues that the officers of defendant were fully cognizant of the facts. We are unable to see how these circumstances have any force in support of the findings respecting defendant's knowledge. It appears that Mr. and Mrs. Little were actually residing on the property when the note and mortgage were delivered, and that the former told Mr. MacDonald that it was Mrs. Little's property. But respondent's counsel say:

"To prove actual notice is, in many instances, very difficult, but in this regard one must take into consideration all of the facts and circumstances surrounding the particular transaction. The very circumstances of this case, to wit, the relationship between MacDonald Lumber Company, a corporation, and Little & Walpert, Incorporated, a corporation, was such as beyond any reasonable doubt, to have made the MacDonald Lumber Company aware of the financial condition of Little & Walpert, Incorporated, a corporation, and the lower court, taking all things into consideration, so held."

The relationship between the corporations is not shown by the record, except that at the time of the execution of the mortgage, as the books revealed, Little & Walpert owed the other corporation a little more than the principal sum written in the note. No testimony or documentary showing that we have been able to find in the record has any tendency to prove that the officers of the lumber company should or could have known that the moneys of the corporation, and not the funds of Mr. and Mrs. Little, were invested in the property, or that said officers had notice of the insolvent condition of Little & Walpert.

It follows that the judgment and order must be reversed; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

LA MESA HOMES CO. v. LA MESA, LEMON GROVE & SPRING VALLEY
IRR. DIST. et al. (L. A. 4524.)

(Supreme Court of California. July 25, 1916.)

WATERS AND WATER COURSES §226—IRRIGATION DISTRICTS—INCLUSION OF LAND IN MUNICIPALITIES—"MUNICIPAL PURPOSE."

An irrigation district may include within its boundaries a previously existing municipality and assess for district purposes land therein, notwithstanding Const. art. 11, § 19, as

amended in 1911, giving municipalities constitutional power to build and operate works for supplying their inhabitants with water, a system of irrigation not being a "municipal purpose" within the scope of the organization of a municipality, and the water supply for the two corporations being distinct and for different purposes.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 818; Dec. Dig. §226.

For other definitions, see Words and Phrases, First and Second Series, Municipal Purposes.]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Suit by La Mesa Homes Company against the La Mesa, Lemon Grove & Spring Valley Irrigation District and others. From judgment for defendants, plaintiff appeals. Affirmed.

L. L. Boone, of San Diego, for appellant. Luce & Luce, of San Diego, for respondents.

MELVIN, J. The defendants demurred to the complaint in this case, and the court sustained the demurrer without leave to amend. From the judgment which followed plaintiff appeals.

The plaintiff corporation, according to the averments in the complaint, owns real property within the boundaries of La Mesa, a city of the sixth class, which is situated wholly within the territory of the defendant corporation. The irrigation district was created under the act of March 31, 1897, and statutes amendatory thereto. The organization of the municipality antedated the formation of the irrigation district, and it is alleged in the complaint that the city of La Mesa did not consent to the establishment of the said district. There has never been any contract between the city and the district for the supply of water for said municipality for any purpose or for the construction of any waterworks within the city or to establish and operate public works for supplying the inhabitants of La Mesa with water. Plaintiff's property within the city of La Mesa was assessed by the officers of the defendant, and, the assessment being unpaid and delinquent, the land was sold and struck off to the district. Plaintiff prayed judgment for the cancellation of the assessment on the ground that it—

"was made contrary to the Constitution of the state of California and in derogation of the powers of municipal corporations under the Constitution of said state to establish and operate public works for supplying its inhabitants with water, and in derogation of the rights of said city to furnish water to inhabitants outside of its boundaries."

The sole question to be determined is whether or not, under the present provisions of the Constitution of California, a municipality may be included within the boundaries of an irrigation district and land within the territory of said municipality assessed for district purposes. Appellant's conten-

tion is that not until the amendment of section 19, art 11, of the Constitution in 1911 could a municipality constitutionally acquire and operate works for the supplying of water both within and outside of its own territory; but that since said amendment the city's power, under the Constitution, transcends any legislative grant of apparent authority to an irrigation district. It is argued, therefore, that within the city's territory the power of the irrigation district is suspended because two municipal corporations may not, within the same territory, exercise the same authority, jurisdiction, and privileges. Before the amendment to section 19, art. 11, of the Constitution that section was as follows:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

Since the amendment the section has been as follows:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

Appellant concedes that some cities had the authority to establish and actually had constructed water systems when the section was in its earlier form, but the argument is that they were operating under legislative authority only; that their dignity as suppliers of water was no greater than that of irrigation districts which were also creatures of legislative creation, but that, being now vested under the Constitution with power to supply water (for irrigation as well as for other purposes), they may not be brought under the dominion of irrigation districts within which their respective territories may be located. Granting appellant's premise

that the Constitution now gives to municipal corporations a right to build and operate works for supplying their inhabitants with water which such corporations could previously obtain only by legislative grace through general laws, special statutes, or charter provisions, it does not follow that a municipality such as the city of La Mesa may not be included within the territory of an irrigation district and its lands assessed for the purpose of carrying out a scheme of irrigation for the benefit of a large number of people and an area much greater than that within the limits of the city. There is no essential difference between the power to build waterworks and to supply water, given to a city by a statute and that conferred by the Constitution, except that in one case the source of the privilege is the Legislature and in the other the people themselves bestow it. Therefore the decisions cited by respondent are as apt now as they were before the change in the Constitution to which appellant has called our attention. It has been held that the inclusion of a city or town within the boundaries of such a district as this neither renders the act authorizing the formation of irrigation districts unconstitutional nor invalidates the organization of the district. *Board of Directors, etc., v. Tregoe*, 88 Cal. 334, 26 Pac. 237. In *re Madera Irrigation District*, 92 Cal. 296, 344, 28 Pac. 675, 676 (14 L. R. A. 755, 27 Am. St. Rep. 106), is authority for the same principle. In the opinion in that case the following language is used:

"Neither is it in violation of the Constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by the act in question cannot be considered as a 'municipal purpose' within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the act to produce a system of irrigation within the district, and the municipal incorporation of the town of Madera. A water supply for the two corporations is distinct and for different purposes. The liability of the inhabitants of the town of Madera for the bonded indebtedness of the Madera Irrigation District, as well as for that of their own municipality, does not impair the validity of the organization of the district. It is a liability of the same character as rests upon the inhabitants of any town for its proportion of all the indebtedness of the county within which it is situated."

The same rule has been followed in *Idaho. Nampa Irrigation District v. Brose*, 11 Idaho, 474, 485, 83 Pac. 490.

While there is not a complete analogy between sanitary districts and irrigation districts there are points of similarity which make some authorities applicable to both. One of these is *Pixley v. Saunders*, 168 Cal. 152, 160, 141 Pac. 815, 818, in which it was said that:

"In enacting the Sanitary District Acts, the Legislature had in mind the sanitation of any territory which might conveniently be served by a single system, whether wholly unincorporated or not, and that a sanitary district formed under said act preserves its identity and re-

tains its powers over the whole territory, except in the event of its complete absorption by a municipality."

The court was there considering the contention that a municipal corporation, clothed with constitutional ability to pass laws pertaining to public health, may not be subject to the authority of a sanitary district of which it forms a territorial fraction. Yet it was held that the powers and the identity of the district were preserved. By a parity of reasoning we may say that the functions and the autonomy of the respondent corporation at bar are not destroyed, nor even impaired, by the circumstance that the Constitution grants to the city in which appellant's lands are situated the privilege of building and operating waterworks.

It follows from the foregoing discussion that the judgment must be affirmed; and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

GALEENER v. HONEYCUTT, County Auditor. (Sac. 2510.)

(Supreme Court of California. July 22, 1916.)

1. OFFICERS — 100(1) — COMPENSATION — CHANGE.

The Legislature may change the mode of compensation of an officer after his election from fees or per diem to salary, but cannot, in view of Const. art. 11, § 9, increase his compensation.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. — 100(1).]

2. OFFICERS — 100(1) — COMPENSATION — STATUTES — VALIDITY.

Const. art. 11, § 9, prohibits increase of compensation after election or during term of county officer. Pol. Code, § 4271, fixed compensation of supervisors at \$1,200 per year, plus 25 cents per mile traveled while acting as road commissioner, not to exceed \$600 per annum. St. 1915, p. 1040, amended section 4271 to provide flat compensation of \$1,800 per year, declaring that as a fact the compensation was not increased, and applying the act to the then incumbents. *Held*, that, in view of the necessary presumption in favor of legislation, and in the absence of proof that it was not necessary for a supervisor to travel 2,400 miles per year as road commissioner, the statute was not invalid for increasing compensation during term.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. — 100(1).]

3. OFFICERS — 100(1) — COMPENSATION — STATUTES — VALIDITY.

No express finding by the Legislature that an act does not increase compensation of county officers is necessary to validate the act.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. — 100(1).]

4. OFFICERS — 100(1) — COMPENSATION — STATUTES — VALIDITY.

Although St. 1915, p. 1040, as to compensation of supervisions, in terms applied to all in-

cumbents, the mere fact that two of six members were elected under an earlier statute at a lower compensation does not invalidate the act under Const. art. 11, § 9, prohibiting increase of compensation during term, nor prevent application of the act to competent parties; the disability being personal.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. — 100(1).]

5. MANDAMUS — 23(1) — WHO MAY APPLY — "BENEFICIALLY INTERESTED."

Under St. 1915, p. 1040, providing a flat salary of \$1,800 to supervisors, amending Pol. Code, § 4271, allowing salary of \$1,200 and fees of \$600, although compensation was not increased, an incumbent is a person "beneficially interested" so as to entitle him to a writ of mandate to enforce his right.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 55-58; Dec. Dig. — 23(1).]

For other definitions, see Words and Phrases, First and Second Series, Beneficially Interested.]

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Petition for writ of mandate by J. P. Galeener against A. S. Honeycutt, Auditor of Madera County. From a judgment for plaintiff on defendant's refusal to answer after demurrer to the amended petition was overruled, defendant appealed to the Third District Court of Appeal, which, after decision, transferred the case to the Supreme Court. Judgment affirmed.

Stanley Murray, of Madera, for appellant.
F. A. Fee, of Madera, for respondent.

ANGELLOTTI, C. J. The court below overruled a demurrer to plaintiff's amended petition for a writ of mandate, and, defendant declining to answer, gave judgment for plaintiff. This is an appeal from said judgment, taken to the District Court of Appeal of the Third Appellate District, and transferred to this court for determination after decision by said district court of appeal.

Practically only two questions are raised by appellant's briefs. The facts material thereto are substantially alleged in the petition as follows: Plaintiff was elected to the office of supervisor of Madera county at the general state election in 1914, and ever since the 1st Monday of January, 1915, has been one of the five supervisors of that county. At the time of his election the statute fixing the compensation of supervisor of Madera county (section 4271, Pol. Code) was as follows:

"Each member of the board of supervisors, one thousand two hundred dollars per annum and twenty-five cents per mile while traveling from their respective residences to the county seat not more than once each month; and provided, further, that said supervisors shall act as road commissioners in their respective districts, which offices are hereby created and shall receive for the service of such road commissioner mileage at the rate of twenty-five cents per mile for all distances actually traveled by them in the discharge of their duty as such road commissioner; and provided, further, that such mileage as

road commissioner shall not in any one year exceed the sum of six hundred dollars for any one of said road commissioners."

By act approved June 1, 1915 (Stats. 1915, p. 1040), this provision was amended to read as follows:

"Each member of the board of supervisors, eighteen hundred dollars per annum, in full payment of services as member of the board of supervisors, as member of the board of equalization and as road commissioner, and twenty-five cents per mile while traveling from his residence to the county seat not more than once each month. It is hereby found as a fact that the changes provided for in this subdivision do not work an increase in compensation of this office, and it is intended that the same shall apply immediately to the present incumbents."

So far as services as a member of the board of equalization are concerned, they have at all times been required. Plaintiff demanded of defendant that he draw his warrant on the county treasurer for his compensation for September, 1915, in accord with the provisions of this amendment, and, defendant refusing to do so, this proceeding was instituted. It should be added that two of the five supervisors of Madera county were elected at the state election of the year 1912 for a term of four years, and that the fixed compensation of each member of the board of supervisors at that time was \$1,200 per annum, and 25 cents per mile while traveling from his residence to the county seat, not more than once each month, there being no allowance for his services or mileage as road commissioner. Stats. 1911, p. 230.

[1-3] Supervisors are county officers. By section 9, art. 11, of the Constitution, it is provided:

"The compensation of any county * * * officer shall not be increased after his election or during his term of office. * * *"

It is claimed that the application of the amendment of 1915 to plaintiff during the term that he is now serving would be to increase his compensation after his election and during his term of office, in violation of this constitutional provision. So far as any supervisor of Madera county elected at the general state election of 1914 is concerned, the only change made by the amendment of 1915 in the law as to his compensation as it existed at the time of his election was to make the same \$1,800 per annum for all services rendered by him as supervisor and road commissioner, instead of \$1,200, plus 25 cents per mile for all distances actually traveled by him in the discharge of his duty as road commissioner, not exceeding in any one year \$600. In the light of the presumption that obtains in favor of the validity of a legislative enactment, we must assume that the Legislature was simply adopting a different mode from that previously obtaining of compensating such officer for his services as road commissioner. Theretofore the compensation fixed for his "services" as road commissioner, which position every supervi-

or holds ex officio (Pol. Code, § 2641), was "mileage" at the rate of 25 cents per mile for each mile actually traveled in the discharge of his duty, not exceeding \$600 per annum. By the change he was given \$600 per annum for all such services. It is thoroughly settled that the Legislature may change the mode of compensation of an officer after his election from fees or per diem to salary, provided that in so doing it does not in fact increase his compensation. *Vall v. San Diego Co.*, 126 Cal. 35, 58 Pac. 392; *McCauley v. Culbert*, 144 Cal. 276, 77 Pac. 923; *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575. Of course, there is no distinction in principle in this connection between fees per diem and mileage. In doing this, however, the Legislature may not increase the officer's compensation, for the constitutional provision prohibits any increase. If the legislative enactment shows on its face that the change does in fact increase the compensation of an incumbent it is void as to him, and, of course, the Legislature in such a case could not avoid the inhibition of the Constitution by making a finding to the effect that no increase in compensation is accomplished by the change, when it is apparent from the law itself that there is an increase. But it is not apparent here that any increase in compensation was effected by the change. There is absolutely nothing on the face of the law to show that each supervisor of Madera county is not required to actually travel at least 2,400 miles each year in the proper discharge of his duties as road commissioner, and that such was the condition in both the years 1914 and 1915. If such a condition is possible, we must assume in favor of the legislative enactment that it existed, for as was said by Chief Justice Beatty in *Smith v. Mathews*, 155 Cal. 752, 756, 103 Pac. 199, 201, the doctrine of *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230, never since questioned by this court, is that:

"When the right to enact a law depends upon the existence of a fact the passage of the act implies, and the conclusive presumption is, that the Governor and the Legislature have performed their duty, and ascertained the existence of the fact before enacting or approving the law—a decision which the courts have no right to question or review."

Smith v. Mathews, supra, was a case involving a change in mode of compensation of justices and constables from per diem to salary, which finally was decided on the point that the change was not intended by the Legislature to affect incumbents, a result that cannot be reached in the case at bar, in view of the express language showing the contrary. But in the later case of *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575, involving a similar change in mode of compensation of justices and constables, where the intent to make it applicable to incumbents was apparent, the court held that

there was no prohibited increase of compensation. It was said in the opinion:

"Nor is it disputed, the act before us not disclosing whether or not the salary system of compensation substituted thereby for the fee system does produce an increase of compensation for justices and constables, that, if the act sufficiently shows the intent that the new system shall affect incumbents, the conclusive presumption is that the Governor and the Legislature have investigated, ascertained, and determined that the change does not result in an increase of compensation, a fact essential to a valid law affecting incumbents, and that the courts have no right to question or review the determination of the legislative branch of the state in that regard. This is the doctrine established by *Stevenson v. Colgan*, 91 Cal. 649 [27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230]. See, also, *Smith v. Mathews*, 155 Cal. 752 [103 Pac. 199]."

This would be true even in the absence of an express finding by the Legislature in the act itself, for no express finding is essential, and, indeed, we doubt if such express finding has any efficacy whatever, except in the way of making more emphatic the intent of the Legislature that the change shall be applicable to incumbents. In view of the authorities it cannot be held by the court that to give to petitioner the compensation fixed by the amendment of 1915 would be to increase the compensation fixed by the law in force at the time of his election.

[4] It may be conceded that as to the two supervisors elected in 1912 both the amendment of 1913 and that of 1915 were inoperative, because to apply them to such supervisors would increase their compensation beyond that fixed by the law in force at the time of their election. But this fact cannot operate to suspend the application of either amendment to the other supervisors elected subsequent to the amendment of 1913. The point appears to be that as the Legislature is required to regulate the compensation of officers "in proportion to their duties," and that as the courts must assume that the duties of each of the supervisors of Madera county are the same, a statute increasing the compensation of supervisors cannot be operatively effective until the situation is such that all of the supervisors may be entitled to the same compensation. We are satisfied that this claim must be held to be unfounded. Of course the Legislature in regulating the compensation of officers must regulate it "in proportion to duties" (section 5, art. 11, Const.), and any attempted discrimination by the Legislature between officers whose duties are the same in all respects would be a violation of this provision. For instance, if the Legislature had here provided that the salary of the supervisors of three of the supervisor districts of Madera county should be \$1,800 per annum, and that of the supervisors of the other two districts should be \$1,200 per annum, we would have a case in which appellant's contention would be pertinent. That is the kind of a case, in prin-

ciple, that the court had before it in *Tucker v. Barnum*, 144 Cal. 266, 77 Pac. 919, relative to compensation of justices of the peace, relied on by him, but which is not at all in point here. The law construed in this proceeding fixes the same compensation for each and all of the supervisors of Madera county. That by reason of the constitutional provision prohibiting an increase of compensation to an officer after his election, the change made thereby cannot affect two of the supervisors, but must remain in abeyance during the term of their particular offices for which they were elected, simply because it cannot constitutionally operate as to them for such terms (see *Harrison v. Colgan*, 148 Cal. 73, 82 Pac. 674) in no way affects its validity as a law, does not prevent it from operating in so far as it can constitutionally operate, and does not preclude the other supervisors as to whom no increase is forbidden by the Constitution from receiving thereunder. This is clearly intimated by language used in *Harrison v. Colgan*, supra. That an incumbent may not receive an increase of compensation in view of this constitutional provision is really a matter personal to him, which cannot fairly be said to affect the matter of compensation provided by law for the office. By the constitutional provision he is precluded from receiving the increase in compensation made for the office during the term for which he was elected. As to him, as has been said, the old law remains in full effect during such term. *Smith v. Mathews*, supra; *Harrison v. Colgan*, supra.

[5] There is no force whatever in the point made in the answer to the petition for a hearing in this court that petitioner is not a party "beneficially interested," and therefore not entitled to a writ of mandate, if it be true that no increase of compensation was effected by the change. Within the meaning of the term as used in our law, he is "beneficially interested" in obtaining the compensation incident to his office in the amount and according to the mode fixed by the law. The judgment is affirmed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

EASTON et al. v. UNITED TRADE
SCHOOL CONTRACTING CO.
(L. A. 3614.)

(Supreme Court of California. July 27, 1916.)

1. MASTER AND SERVANT §301(1)—INJURIES TO THIRD PERSON—SERVANT'S NEGLIGENCE.

A school, teaching automobile driving, is liable where its employé allows a student to operate a machine during an instruction trip, and his inexperience results in injury to plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210, 1216; Dec. Dig. §301(1).]

2. DAMAGES \S 52—GROUNDS—FRIGHT FOLLOWING PHYSICAL INJURY.

Fright is an element of damages where it accompanies or follows a wrongful physical injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 100, 255; Dec. Dig. \S 52.]

3. DAMAGES \S 52—REMOTE—FRIGHT WITHOUT PHYSICAL INJURY.

Mental suffering or fright alone will not support an action for damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 100, 255; Dec. Dig. \S 52.]

4. DAMAGES \S 132(5)—EXCESSIVE DAMAGES.

Five thousand dollars damages held not excessive where defendant's automobile knocked plaintiff out of her seat in a buggy and caused her to have one or two miscarriages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 376; Dec. Dig. \S 132(5).]

5. HUSBAND AND WIFE \S 238(2) — ACTION FOR INJURIES TO WIFE—RECOVERY OF HUSBAND'S EXPENSES.

In an action brought by a husband and wife to recover for injuries sustained by the wife, there can be no recovery for expenses incurred by the husband or for the value to him of his wife's services, etc.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 854; Dec. Dig. \S 238(2).]

6. EVIDENCE \S 528(2)—EXPERT TESTIMONY—EFFECT OF INJURY.

A physician's testimony that in his opinion plaintiff's second miscarriage, as well as the first, was due to the injury, is admissible; its weight being for the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 2387; Dec. Dig. \S 528(2).]

7. MASTER AND SERVANT \S 330(2)—INJURIES TO THIRD PERSON—EVIDENCE.

Where defendant's employé allowed a student to operate a machine during an instruction trip, testimony that such student was not a qualified driver is material on the question whether the car had a competent driver.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. \S 1271; Dec. Dig. \S 330(2).]

Department 2. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by C. M. Easton and Mary E. Easton, his wife, against the United Trade School Contracting Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. E. Coberly, B. A. Finch, and Scarborough & Bowen, all of Los Angeles, for appellant. Ray Howard, of Los Angeles, for respondents.

HENSHAW, J. The action is for damages growing out of injuries sustained by plaintiff C. M. Easton's wife. Trial was had before the court without a jury, and resulted in an award and judgment for plaintiffs. The items composing this judgment were \$5,000 for her bodily injuries, \$50 for her disability and loss of society, comfort, and service to her husband, \$75 for nursing during her illness, \$25 for physician's services, and \$10 for medicines. Each of these minor items was made an element of special damage in the complaint.

The charge was that while Mary E. Easton, plaintiff, was driving a horse attached to a buggy along a street in Los Angeles, an automobile of defendant, in charge of one of defendant's agents, was negligently and carelessly driven against the buggy, inflicting the injuries complained of, which injuries will hereinafter be more specifically described. The evidence established that Mrs. Easton was riding in a buggy on Central avenue in Los Angeles city. With her was her sister-in-law, who carried on her lap one of Mrs. Easton's daughters, about 5 years of age, while another daughter, about 8½ years of age, sat on a board at the feet of the women. The horse was going at a dog trot and the buggy was on the proper side of the street, as near to the curb as possible, as the ordinance of the city required.

The defendant was conducting a school for instruction, amongst other things, in the operation of automobiles. Elmer Harper, 17 years of age, was a student in the school under payment for the privilege of tuition. D. B. Sterling was also a student in the same school, but had advanced to the point where he describes his occupation to be that of chauffeur and his employment as driving and working in the garage or workshop of the defendant, and in instructing and driving defendant's students. All of this he did under the directions of B. A. Finch, defendant's president. Upon the day of the injury, acting under these directions, Sterling took Harper in an automobile to give him lessons in driving. Sterling himself drove the car into Central avenue, and there, as the street seemed clear, he surrendered the wheel and permitted Harper to drive it. Upon Central avenue was a street car line and on its tracks a street car, proceeding in the same direction as was the buggy. The automobile, going in the same direction as the car and buggy approached the two from behind. The automobile, under the management of the inexperienced student, Harper, apparently sought to pass between the street car and the buggy. Harper became confused, mismanaged the automobile, and collided with both the street car and the buggy. The collision knocked one child out of the buggy, broke the buggy wheel, bent the rear axle, knocked the tire off the front wheel, forced the horse to his haunches, and delivered so severe a shock to Mrs. Easton, who was leaning against the back of the seat of the buggy, that she was knocked forward out of her seat. Mrs. Easton was at the time pregnant. About a month thereafter she suffered a miscarriage. By the medical testimony the fetus had been dead about 2 or 3 weeks, and the miscarriage was the result of the fright and the shock of the collision.

[1] Appellant's principal argument is that there was no privity between Harper or Sterling and the defendant rendering defend-

ant liable for the negligence of either of them. But the facts above stated would seem conclusively to dispose of this argument. The defendant, as a part of its business, employed Sterling to give Harper instructions. It paid Sterling for so doing. Sterling, in the performance of this employment, used his own judgment, which by operation of law became the defendant's judgment, in turning the management of the car over to Harper when and as he did. That the accident resulted from the ignorance and inexperience of Harper may not for a moment be doubted, and while, of course, Harper would be responsible for his own act in the premises, and Sterling in turn responsible, none the less the defendant, under whose directions all of these things were done, is likewise responsible. *Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219, 39 L. R. A. (N. S.) 214; *Burnham v. Central Automobile Exchange (R. I.)* 67 Atl. 429; *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619; *Wooding v. Thom*, 148 App. Div. 21, 132 N. Y. Supp. 50.

[2, 3] Appellant's next proposition is that Mrs. Easton received no injuries as such; that she suffered merely from fright; that fright alone, without personal injury, cannot be made the foundation of an action for damages, but that whatever may be the rule in this respect "plaintiff cannot recover in this action because it appears that her fright was caused by apprehension of threatened danger not to herself, but only to her child." But appellant's position requires neither a discussion of the principle nor a detailed consideration of the authorities, for the reason that the facts do not show that plaintiff's injuries were occasioned by fright alone, nor fear of danger or injury to her child alone. True, she suffered fright and fear occasioned by the collision. True, a part of that fright and fear grew out of concern for her infant child which was thrown out of the buggy by the collision, but equally true it is that, leaning, as she was, against the back of the seat, she sustained a direct personal physical shock by the blow of the automobile against the buggy, which blow propelled her forward out of her seat, and which blow directly contributed to and aided in causing the miscarriage from which she afterwards suffered. Fright here was but a natural and direct consequence of defendant's injurious trespass, which trespass resulted in direct physical injury to Mrs. Easton. The fright was an inevitable concomitant of the trespass. This case, therefore, presents no feature in common with such cases relied upon by appellant as *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, where plaintiff, about to get on one of the cars of the defendant, sustained fright because of the approach of another car, which fright resulted in a miscarriage; nor *Phillips v. Dickerson*, 85 Ill.

11, 28 Am. Rep. 607, where the plaintiff, a married woman, sued for damages because of a miscarriage occasioned by her fright over a quarrel between the defendant and her husband, within her hearing but out of her sight; nor *Braun v. Craven*, 175 Ill. 401, 51 N. E. 637, 42 L. R. A. 199, where a recovery was sought against defendant because he had entered a house where plaintiff was, unannounced, and had demeaned himself improperly and in a violent and boisterous manner, causing her to become sick, sore, and disabled; nor *Miller v. Baltimore & Ohio S. R. Co.*, 78 Ohio St. 309, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699, where defendant was charged with having negligently shoved cars into the dwelling house of plaintiff so that plaintiff, who was standing near by, "suffered a severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health," and it was held that an act of negligence neither willful nor malicious, causing mere fright, unaccompanied by contemporaneous physical injury, is not actionable; nor in *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49, where the defendant borough in excavating a street exploded dynamite, and it was charged that the shock of the explosion so affected plaintiff's husband, who was recovering from typhoid fever, that he died within 2 weeks, and the holding is simply that there can be no recovery of damage from fright or other merely mental suffering, unconnected with physical injury; nor in *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. 13, 73 Atl. 4, 22 L. R. A. (N. S.) 1073, where plaintiff, sitting in her window, 200 or 300 feet distant, charged that she sustained fright and consequent injuries from the flash and explosion of an electric trolley wire. In all these cases and the like cases, fright alone was made the gravamen of the action, the physical injuries charged resulting merely from the fright. In no one of these cases, nor in any other well-adjudicated case—and certainly not by the courts of this state—is it held that where fright accompanies or follows a wrongful physical injury, that it is not an element of damage. To the contrary, fright under such circumstances is but one form of mental anguish, and the mental anguish as a direct reasonable outcome of the illegal physical injuries is always an element of damage. Such is the rule of decision in this state, where it is held that although mental suffering alone will not support an action for damages (and of course fright is but one form of mental suffering), yet mental suffering and mental anguish are an element of damage in aggravation thereof when they naturally ensue from the act complained of. *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 198; *Thomas v. Gates*, 126 Cal. 7, 58 Pac. 315.

And so the holding of all these cases which we have been briefly reviewing is simply to the effect, as declared by those courts, that they have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person caused by simple actionable negligence can sustain an action, "and the fact that no such case exists, and that no elementary writer asserts such doctrine, is a strong argument against it." *Wyman v. Leavitt*, 71 Me. 227. While touching the nature of the injuries in the case at bar it may be added that it is very properly declared in *Warren v. Boston & Maine Ry. Co.*, 163 Mass. 484, 40 N. E. 895, that:

"It is a physical injury to a person to be thrown out of a wagon, or to be compelled to jump out, even though the harm done consists mainly of nervous shock."

[4] Appellant's next contention is that the award of \$5,000 is excessive. The nature of the injury has been sufficiently outlined, and its character disposes of this argument without the need of elaboration.

[5] Appellant very justly complains that in this action for the recovery of damages for injuries occasioned to the wife the items of special damage have no place. *Matthew v. O. P. R. Co.*, 63 Cal. 450; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223; *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12. These minor items are damages occasioned to the husband alone and for which alone he is entitled to sue. But in this instance the court has segregated these items and elements of damage, and its total judgment of \$5,160 may therefore be reduced by striking out the special sums awarded. Thus modified the judgment will remain in the sum of \$5,000 damages for injuries sustained by plaintiff Mary E. Easton.

[6] Complaint is made that the court allowed evidence that Mrs. Easton suffered from a second miscarriage some months after the first miscarriage occasioned by the injury. The physician's testimony was to the effect that one miscarriage by injury and shock, and in particular where the fetus was carried for a considerable period of time dead in the womb, would create at least a tendency to cause a second miscarriage, and that in this specific case he attributed the second miscarriage to the condition of Mrs. Easton and her womb—a condition caused by the injuries. It may at once be said that this evidence is of doubtful weight, but it was not inadmissible, and its weight was for the jury. The hypothetical question as to the effect that shock and fright might or would have on a pregnant woman of Mrs. Easton's age and physical condition, even if objectionable, was not of such vital consequence as to demand a reversal of the case.

[7] Finally it is said that the court erred in permitting the witness Sterling to answer

the question whether Harper, who was driving the car at the time of the accident, was a qualified driver. It is said that the question was immaterial and the answer prejudicial. It was clearly material, it being evidence whether the car was under the management of a competent driver or not, and while doubtless prejudicial in the sense that it showed or tended to show that the car was not being properly managed, the injury which it may have worked to defendant's case was entirely within the purview of the law.

With a modification of the damages awarded, as above indicated, from \$5,160 to \$5,000, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

LOOP LUMBER CO. v. VAN LOBEN SELS et al. (S. F. 6906.)

(Supreme Court of California. July 28, 1916.)

1. BONDS — 27 — VALIDITY — STATUTORY BOND.

A bond, given in pursuance of and solely because of a statute ineffectual to require it, is without consideration and void.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 29, 30; Dec. Dig. — 27.]

2. MUNICIPAL CORPORATIONS — 345 — SEWER CONSTRUCTION—CHARTER AND CONFLICTING STATUTES—MUNICIPAL AFFAIRS.

St. 1897, p. 201, as amended by St. 1911, p. 1422, requiring a contractor for city work, before entering on performance, to give a bond for payment of materials and labor, is inconsistent with the city's freeholder's charter, purporting to provide all the conditions precedent for a contractor for city sewer construction proceeding with the work, including the giving of a bond, conditioned, however, only for faithful performance of the contract, and so inapplicable to such work in such city; Const. art. 11, § 6, making the freeholder's charter of a city absolutely controlling and free from impairment by general laws as to all "municipal affairs."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 875; Dec. Dig. — 345.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Loop Lumber Company against James F. Van Loben Sels and another. From an adverse judgment, defendant American Surety Company of New York appeals. Reversed.

Charles A. Shurtleff and O'Connor & Schwartz, all of San Francisco, for appellant. Weinmann, Wood & Cunha and L. R. Weinmann, all of San Francisco, for respondent.

ANGELLOTTI, C. J. The material facts shown by the complaint are as follows: The city and county of San Francisco, by the appropriate officers, awarded a contract for the doing of certain sewer work in said city

and county to the Keystone Construction Company, which assigned such award to defendant Van Loben Sels. The city and county on September 20, 1911, entered into a contract with Van Loben Sels for the doing of said work. The award and execution of the contract and the contract itself were all in accord with the provisions of the freeholders' charter of the city and county regulating such matters, which provisions appear to furnish a complete scheme therefor. At or about the time of entering into this contract, Van Loben Sels as principal and the appellant, American Surety Company of New York, as surety, gave the bond provided for by the act of the state Legislature entitled "An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work" approved March 27, 1897 (Stats. 1897, p. 201), as amended by act approved May 1, 1911 (Stats. 1911, p. 1422), said bond being in the sum of \$41,000. It is expressly alleged in the complaint that they made and executed such bond "in accordance with the provisions of" said act. This act provides that every contractor to whom is awarded a contract for the execution or performance "of any building, excavating or other mechanical work for this state, or by any county, city and county, city, town, or district therein shall, before entering upon the performance of such work," file with the officers by whom the contract was awarded a bond to be approved by them, in a sum not less than one-half of the total amount payable by the terms of the contract, conditioned that if the contractor fails to pay for any materials, supplies, work, or labor furnished in the matter, the sureties will pay the same in an amount not exceeding the sum specified in the bond, provided a claim therefor be filed in the manner specified in the act. The bond provided that if Van Loben Sels failed to pay for any materials, supplies or work or labor, the surety "will pay the same, to an amount not exceeding the sum specified in this bond, as provided by an act of the Legislature," etc., specifying the act by title, date of approval, and amendment. "Relying upon said bond," plaintiff furnished said Van Loben Sels certain labor and materials in the performance of the work contracted for, amounting to \$4,877.96, no part of which has ever been paid. For this plaintiff duly presented and filed its claim in the manner provided by the act. It demanded payment of the amount from the surety company and the company refused to pay any part thereof.

Subsequently this action was brought by plaintiff against Van Loben Sels and the surety company for the amount due, and judgment was given against both defendants for \$1,772. The surety company alone appeals from this judgment. The only claim made by it for reversal is that the facts stated in the complaint are insufficient to

constitute a cause of action in so far as it is concerned.

[1,2] The claim of the appellant is that the act in pursuance of which and solely because of which it is said the bond was given is void, or, in any event, inapplicable to contracts for public work entered into by the city and county of San Francisco. We think that it must be concluded, in view of the allegations of the complaint, that the bond was given solely to secure the right on the part of the contractor to proceed with the performance of his contract with the city and county of San Francisco, on the theory that under the provisions of the act the giving of such a bond was essential before the contractor could proceed with such performance. If for any reason such right to proceed with the work existed independent of said act and could not be affected or impaired thereby, it would seem to follow under our decisions that the bond was without consideration and void. See *Coburn v. Townsend*, 103 Cal. 233, 37 Pac. 202; *Keystone Company v. Darling et al.*, 154 Pac. 15, 19. We are speaking of a bond given solely to comply with a statute which is itself void, or which does not require the bond as supposed.

It would not be at all difficult to sustain the claim of respondent as to the validity of this act and its applicability to the city and county of San Francisco, were it not for the provisions of our Constitution exempting municipalities having freeholders' charters from control by the state Legislature in "municipal affairs." The right of a state through its Legislature to provide for security by bond for the protection of persons furnishing materials or labor for the construction of public works for itself or any subdivision of the state, subject to control in such matters by the Legislature, is well sustained by the authorities in other jurisdictions. But so far as we can see the exercise of such a right is based solely on the theory that it is a reasonable and proper requirement on the part of the public authorities entering into a contract for public work, or those having the right to prescribe as to the terms and conditions of such contracts. We find such an act in regard to contracts for public work for the United States, enacted by Congress, which of course has full power in such a matter, and this act is sustained by decisions of the federal courts. See *Hill v. American Surety Co.*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437; *Kansas City, etc., Co. v. National Surety Co.* (C. C.) 149 Fed. 507. Similar requirements by cities having full control of the matter of contracts for municipal work are sustained by the courts, and the authorities are such as to leave little room for doubt that a requirement of this kind as to contracts for municipal work in the charter of the city and county of San Francisco would be valid.

But at the time of the execution of this contract and the giving of this bond, section

6, art. 11, of our state Constitution was such as to make the freeholders' charter of cities and towns absolutely controlling and free from impairment by general laws of the state, as to all "municipal affairs." Although the phraseology of the section was changed by the amendment adopted November 3, 1914, the same result still obtains. In so far as such a charter makes provision relative to any "municipal affair," it is the supreme law, paramount to any law enacted by the state Legislature, and general laws enacted by the Legislature in regard thereto can have no application. It is unnecessary to cite authorities to sustain this proposition, which has been so often declared as to have become practically elementary. That street and sewer work in a municipality and the making of contracts therefor on the part of the municipality are "municipal affairs" within the meaning of the constitutional provision cannot be doubted. See *Byrne v. Drain*, 127 Cal. 663, 667, 60 Pac. 433; *Barber Asphalt Co. v. Costa*, 152 Pac. 296. Especially is this true where the expense of the work is to be borne by the municipality itself, as was the fact in this case. And we do not think it can be seriously questioned that a municipality may provide in its freeholders' charter for a complete scheme for the doing of such work that will be paramount to anything contained in any act of the state Legislature, and that in regard to such municipality anything contained in any general law of the state that is inconsistent with the charter provisions must be inoperative.

Examination of the freeholders' charter of the city and county of San Francisco discloses the fact that it contains, in article 6 thereof, a complete scheme for the doing of such work as was here contemplated, the award and letting of contracts therefor, and the terms and conditions upon which such contracts are to be let. The board of public works is given charge, superintendence, and control, under such ordinances as may be adopted by the supervisors, of all public ways and of all work done upon, over, or under the same, and of all sewers and of the work pertaining thereto (section 9). With certain exceptions, not material here, contracts for public work are to be awarded only after notice calling for sealed proposals, and all proposals must be accompanied by a certified check for an amount not less than 10 per centum of the aggregate of the proposal (sections 14 to 16). The contract may be awarded only to the lowest bidder, provided that the bid of any party who has been delinquent or unfaithful in any former contract must be rejected (section 17). Section 21 provides for the contract and its execution. It requires among other things that, at the same time with the execution of the contract, the contractor shall execute to the city and county a bond conditioned "for

the faithful performance of the contract." No other bond is required by the charter. The section further requires that "the contract shall specify the time within which the work shall be commenced, and when to be completed," and, further, that in case of failure on the part of the contractor to complete his contract within the time fixed in the contract, or within said extension as is allowed by the supervisors on recommendation of the board of public works, the contract shall be void. Section 22 provides that when the work shall have been completed to the satisfaction and acceptance of the board, it shall so declare by resolution, and thereupon the board shall deliver to the contractor a certificate to that effect. It is apparent that a complete scheme is thus provided by the charter for the doing of such work as is here involved, and that it was intended to specify all the terms and conditions upon which a contract was to be awarded and the work contracted for performed. It must be held to have been contemplated that upon compliance with all conditions prescribed by the charter, the contractor should proceed with his work, and the charter, as we have seen, expressly requires that the contract shall specify the time within which the work shall be commenced. It seems to us to be perfectly clear that a state statute imposing other conditions on the contractor, and prohibiting the commencement of work under the contract until he has complied therewith, is inconsistent with the charter provisions on the subject, and consequently ineffectual for any purpose. It is urged that the act is not in conflict with the charter for the reason that the latter contains no provision at all in regard to such a bond as is required by the act—neither requires such a bond nor in terms declares that no such bond is essential. But this in no degree affects the question. The charter does purport to provide all the conditions imposed on the contractor as a prerequisite to doing the work, including the giving of a bond for the faithful performance of the contract, and contemplates that upon compliance with those conditions he shall proceed with such work. Any law purporting to impose other conditions as a prerequisite to doing the work is necessarily inconsistent with the charter. It is not a case where the charter is silent upon the matter, and the authorities cited by respondent in this connection are therefore not in point. And the act does deal with "municipal affairs" when applied to a contract for the doing of sewer work for a municipality, for it purports to prescribe a condition prerequisite to the commencement of work under the contract with the municipality.

It has been held by this court that an act providing for security by bond of those performing labor for or furnishing materials to a contractor is not a regulation coming

"within what is called the police power." *Gibbs v. Tally*, 133 Cal. 373, 377, 65 Pac. 970, 60 L. R. A. 815. It has also been held that the requirement of such a bond is entirely outside the protection of the constitutional provision relative to mechanics' liens. *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 545, 69 Pac. 250, 71 Pac. 701. In view of the decisions we perceive no ground upon which the act can be sustained except as a reasonable and proper regulation in the matter of contracts for public work made by those having the right to prescribe the terms and conditions for such contracts. And as to contracts for such work in the city and county of San Francisco, the state Legislature is without power, because of the mandate of our state Constitution, to prescribe any such terms or conditions as are inconsistent with the charter provisions of said city and county.

It follows that the legislative act was ineffectual to require the giving of the bond in suit as a condition precedent to the doing of the work by the contractor, and, the city and county of San Francisco not having required any such bond, it must be held that the bond was without consideration and void.

We see no warrant in the allegations of the complaint for a conclusion that appellant is estopped to deny liability upon the bond.

The conclusion we have reached on the questions discussed renders it unnecessary to consider other points made against the legislative act.

The judgment is reversed.

We concur: SLOSS, J.; MELVIN, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

In re ROSS' ESTATE.
VAN DYKE v. ROSS et al.
(S. F. 7344.)

(Supreme Court of California. July 27, 1916.)

1. WILLS \Leftrightarrow 324(1) — CONTEST — SUBMISSION TO JURY.

The evidence presented by will contestants should be viewed most favorably to them, and all contradictory testimony disregarded before directing a nonsuit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 767; Dec. Dig. \Leftrightarrow 324(1).]

2. WILLS \Leftrightarrow 50 — TESTAMENTARY CAPACITY — REQUISITES.

A testator has the requisite mental capacity if he is able to understand the nature of his property, his relation to the natural objects of his bounty, and is free from any delusion which would affect the disposition of his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96-100; Dec. Dig. \Leftrightarrow 50.]

3. WILLS \Leftrightarrow 324(2) — MENTAL CAPACITY — QUESTION FOR JURY.

Testator's testamentary capacity held a jury question where he died 9 days after making the will, was 86 years old, had suf-

fered two paralytic strokes, and was unable to remember or carry on a connected conversation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 768; Dec. Dig. \Leftrightarrow 324(2).]

4. WITNESSES \Leftrightarrow 211(2) — PRIVILEGED COMMUNICATION — PHYSICIAN — PATIENT'S MENTAL CAPACITY.

In a suit to set aside a will because of testator's mental incapacity, a hypothetical question calling for an opinion regarding the testator's mental capacity was correctly excluded under Code Civ. Proc. § 1881, providing that a physician cannot, without the patient's consent, be examined as to information acquired while treating the patient.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 773; Dec. Dig. \Leftrightarrow 211(2).]

5. WILLS \Leftrightarrow 53(8) — TESTAMENTARY CAPACITY — ADMISSIBILITY OF EVIDENCE — BUSINESS TRANSACTION.

In a suit contesting a will for mental incapacity, exclusion of testimony regarding a real estate transaction by testator is proper where it was not shown, nor offered to be shown, that the testator's conduct was abnormal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 128; Dec. Dig. \Leftrightarrow 53(8).]

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the Matter of the Estate of Isaac J. Ross, deceased. The will was admitted to probate, and T. F. Ross and W. J. Ross instituted contest proceedings against B. F. Van Dyke, executor and proponent, to have such admission revoked. Judgment of nonsuit, and contestants appeal. Reversed and remanded.

Mastick & Partridge, of San Francisco, J. W. Dignan, of Oakland, and H. F. Chadbourne, of San Francisco, for appellants. Driver & Driver, of Sacramento, and John L. McNab, of San Francisco, for respondent.

HENSHAW, J. Appellants instituted a contest to revoke the probate of the will of their deceased father, upon the ground that at the time of the execution of the will he was incompetent and was not of sound and disposing mind and memory. They introduced evidence, and when they rested their case the court granted a motion for a nonsuit upon the ground of the insufficiency of the evidence.

[1] Opposing counsel do not agree upon the principles governing trial courts in granting or refusing to grant nonsuits for insufficiency of the evidence. So often and so clearly has this court spoken upon the subject that it had reason to hope that the guiding principles could not be misunderstood either by judges or attorneys, for the rule is not difficult of comprehension. As said in *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532:

"The rule is well established that in contests of wills, as in other civil actions, in determining whether the evidence presented was sufficient to take the case from a jury, the entire evidence presented is to be viewed from a point most favorable to the contestant. Disregard is had of any contradictory evidence. All facts support-

ing the case of contestant must be taken as true and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor. *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252."

In *Freese v. Hibernia Savings & Loan Society*, 139 Cal. 392, 73 Pac. 172, it is said:

"It is not disputed, and cannot well be under the decisions, that a motion for a nonsuit should not be granted where plaintiff's evidence is such that, if the case had gone to a jury on that evidence and a verdict had been rendered for him, the evidence would be held sufficient to support the judgment upon the verdict. The rules as to nonsuit are the same, whether the trial is by the court or by a jury."

To like effect are *Goldstone v. Merchants' Ice & Cold Storage Co.*, 123 Cal. 625, 56 Pac. 776, *Davis v. Crump*, 162 Cal. 513, 123 Pac. 294, *Burr v. United Railroads*, 163 Cal. 664, 126 Pac. 873, with other decisions too numerous to call for mention. Says this court, in *Burr v. United Railroads*, supra:

"It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true."

And finally it may be added that in *Estate of Caspar*, 155 Pac. 631, this court, discussing the right and power of the trial court in directing verdicts, in ordering nonsuits, and in granting new trials, said:

"Next, it is beyond controversy that the right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. Of course, if in such a case no motion for nonsuit has been made and the issues have been turned over to the consideration of the jury, and that jury has rendered a verdict in favor of plaintiff, such verdict being unsupported by any substantial evidence, it becomes the imperative duty of the court to set it aside. *Estate of Arnold*, supra; *Estate of Chevallier*, 159 Cal. 161 [113 Pac. 130]; *Marron v. Marron*, 19 Cal. App. 326 [125 Pac. 914]. But when, and only when, the evidence of the proponent is thus insufficient, the court may and should, as has been said, grant a nonsuit, and may and should on motion direct a verdict."

With this unquestioned law before us, we may proceed to a consideration of the facts in this case, as shown by the evidence of contestants and appellants.

[2] What constitutes the mental capacity to make a will has been declared by this court in *Estate of Motz*, 136 Cal. 562, 69 Pac. 294, from the able case of *Whitney v. Twombly*, 136 Mass. 145, in the following language:

"If he is able to understand and carry in mind the nature and situation of his property and his relation to his relatives and those around him, with clear remembrance as to those in whom and those things in which he has been mostly interested, capable of understanding the

act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, he has the capacity to make his will."

[3] It was shown that the testator was 86 years and 6 months of age at the time of his death. The will was executed upon the 31st of October and he died upon the 9th day of November following. For some time before his death he had been bedridden, afflicted with bed sores, totally unable to control his physical functions, and so little able to aid himself that he could not raise his hand to brush away the flies that lit on his face. The contestants are his two sons and only heirs at law. One son, W. J. Ross, is 63 years of age; the other son, T. F. Ross, 58 years of age. They had been and were to the time of their father's death devoted sons. They had helped by their own labors during their minority and thereafter to earn the property which their father possessed at the time of his death. They were in attendance upon him during his last sickness, and performed many of the trying but necessary services occasioned by that sickness. They were carpenters by trade, were advancing in years, were dependent upon their manual labor for their support, and had as property no more than home places to the value each of about \$10,000, which their father had given them. By his will he disposed of approximately \$20,000, a small part of which he left to a grandson, Elmer Ross, in trust for the education of Elmer's children—the testator's great grandchildren—the major portion of it being disposed of in the form of legacies to collateral relatives, to charitable institutions, and to friends. He expressly excluded his two sons, his sole heirs—

"for the reason that I have already provided for them by deeding to them certain real property in the town of San Leandro, the portion of each aggregating approximately the value of \$10,000. It is my express desire and intention that the above-mentioned W. J. Ross and T. F. Ross shall take nothing more of my property of any nature or description."

It appears that he died intestate as to certain property, and that by the terms of the will his sons were excluded from any share even in that. Coming more specifically to the details of the mental and physical condition of the testator at the time of the making of the will in question, the evidence of the sons concerning his physical condition has already been sufficiently outlined. Further they bear witness:

That his enfeebled physical condition was accompanied by a corresponding enfeebled mental condition. He could not remember. He frequently could not understand. He had to be carried, and when carried and placed on the bed he "screamed and kicked" and "raved and wanted to know what I was going to do with him." He did not recognize the witness' wife, whom he knew perfectly well, and pushed her away and protested against her presence in the room.

He would "sleep a little while and then would holler again." "Often there was nothing wrong with him." "The nurse would come running in to see what was the matter. There would not be anything wrong, only that he was flighty." "He was very often in a stupor. Sometimes he would be in a stupor for two or three hours and in talking his mind wandered. He got so bad two months before he passed out, so bad we had to deny people coming in. He would hold up for a few minutes before them and then go to pieces and talk at random. He was getting weaker and weaker. I think he was of unsound mind because of his actions that we saw every day there. He was getting weaker and worse and worse. He finally got so, when he got so he could not write his own name, he was what you might say paralyzed—just lay there like a dead man."

The testator was able to write, but the will was signed for him, he making his mark. The nurse in attendance testified to the care and devotion which the sons showed to their father, and his apparent gratitude at having them there in attendance upon him. She corroborated all of the testimony touching the physical condition of the testator, and with the statement of the law before her, as above given (*Estate of Motz*, 136 Cal. 562, 69 Pac. 294), testified:

That he was of unsound mind, and "had no memory at all." "Was very notional and flighty." He apparently had temporary control of his faculties to a certain extent, but was not capable of any continued effort of mind or memory. He remembered people, but almost immediately lost memory of passing events. "Each day he remembered less and took less interest in everything." "I felt that the condition of mind that he was in that at the end he would make just what he did make—a muddle of the thing, and I did not want to be a witness to his will as I had to be to-day."

He expressed his intention to the nurse to leave all his property to his sons—the same intention which he had expressed to the sons themselves. Elmer Ross, the grandson and legatee under the will, testified to his belief in his grandfather's unsoundness, based upon the way he acted. He testifies:

"He knew me and had lots of confidence in me; consulted me on many things. Yet, when I would go into the bedroom he wouldn't know me. He wouldn't know me until somebody informed him who I was; not on every visit, but I mean the last month of his sickness. During the last month of his sickness he was in bed practically all the time. He was very weak; couldn't stand alone during the last month, of course."

Edgar Ross, another grandson, testifies to his grandfather's unsoundness of mind on the 26th of October, 1913. At that time his grandfather was so weak that he could not answer—

"he could not say a long sentence. He had a habit, or I don't know whether a weakness or habit, but he had his eyes closed all the time or most all the time. I started to kill the flies in the room. He was not able to raise his hand and shoo the flies away from his face. He weighed in his prime from 165 to 185 pounds, and had become so emaciated at this time that he weighed no more than 75 or 80 pounds." He had had two paralytic strokes preceding his fatal illness, and he frequently complained of

pains in his head. "The principal reason I have for thinking his mind was unsound is that he was not able to carry on any conversation without going to sleep."

It does not seem to us that a discussion of this evidence is necessary. The cross-examination of these witnesses, while it may have impaired the weight to be given to their expressed opinion of the unsoundness of the mind of the testator, did no more than this. One and all the witnesses maintained their opinions and those opinions, taken with the other facts outlined, and with the inferences which might legitimately be drawn from those facts, demanded the submission of the case to the jury, for in ruling upon a nonsuit "all the evidence in favor of the contestant must be taken as true, and if contradictory evidence has been given it must be disregarded." *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252. The reason for this rule is that every litigant who has presented substantial evidence, even under conflict, is entitled as of right in the first instance to the opinion of the jury, voiced in its verdict upon the weight of that evidence. *Estate of Casper*, *supra*.

[4] In contemplation of the new trial two of the court's rulings upon the matter of evidence require attention. The first of these is the court's ruling sustaining an objection to a purported hypothetical question addressed to Dr. Michael, the testator's family physician. Aside from all objections to the form of the hypothetical question, it cannot be disputed but that if the hypothetical question correctly stated the truth, it was a direct effort to elicit from the testator's family physician in violation of the confidential relationship a statement which of necessity would be based, not upon the facts stated in the question, but on the facts as known to and believed by the physician himself—facts which the law forbade him to disclose. In other words, under the thinnest of disguises the question was an effort to have the witness declare that which the law has said that he should not declare. Code Civ. Proc. § 1881. The ruling excluding the inquiry was proper.

[5] A witness who had had a single transaction with the testator years before the making of the will, which transaction, as he describes it, was "simply a real estate transaction," was asked to tell the story. Objection was made and sustained. The objection was that the period was too remote for the purpose of showing the mentality of the testator at the time of the execution of the will. There was nothing to show, nor did contestants offer to show, that the conduct of the testator at that time was any different from the conduct of normal men under like circumstances. The ruling rejecting the evidence was therefore proper.

For the reasons already given the court

erred in granting the nonsuit. Wherefore the judgment is reversed, and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.

In re DARLING'S ESTATE.

BOOSEY v. DARLING et al.

(L. A. 4390.)

(Supreme Court of California. July 28, 1916.)

1. DESCENT AND DISTRIBUTION ¶1—NATURE OF RIGHT.

The right of inheritance is governed wholly by statute.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 1-6; Dec. Dig. ¶1.]

2. ADOPTION ¶1—NATURE OF PROCEEDING.

The subject of adoption is governed wholly by statute.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 15; Dec. Dig. ¶1.]

3. ADOPTION ¶21—INHERITANCE BY ADOPTED CHILD.

A child's inheritance rights are affected by its adoption only so far as the adoption statute expressly or impliedly provides.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35, 36, 38-40; Dec. Dig. ¶21.]

4. ADOPTION ¶21, 22 — INHERITANCE BETWEEN CHILD AND ADOPTED PARENTS.

Under Civ. Code, §§ 227-229, providing that an adopted child and the person adopting it shall sustain the legal relation of parent and child, and relieving the natural parents of any rights or obligations, the child and its adopted parents inherit from each other to the exclusion of the natural parents, under Succession Law, Civ. Code, § 1386.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35, 36, 38-41; Dec. Dig. ¶21, 22.]

5. ADOPTION ¶21—INHERITANCE BY ADOPTED CHILD FROM GRANDPARENTS BY BLOOD—"ISSUE."

Civ. Code, §§ 227-229, providing that in adoption cases the parties shall sustain the legal relation of parent and child, etc., fixes the child's inheritance rights only as between its natural and adopted parents, but his relationship to his grandparents by blood, on either side is unaffected and as to them he is the "issue" or child of their child, and may inherit under Succession Law, Civ. Code, § 1386.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35, 36, 38-40; Dec. Dig. ¶21.]

For other definitions, see Words and Phrases, First and Second Series, Issue.]

In Bank. Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

In the matter of the estate of John Darling, deceased. From a decree of distribution among David Darling and others William Boosey, as guardian of the estate of Arnold Darling, sometimes known as Arnold Darling Bennisson, a minor, appeals. Reversed and remanded.

Robert M. Clarke, of Los Angeles, for appellant. Chas. F. Blackstock, of Oxnard, for respondents.

ANGELLOTTI, C. J. This is an appeal from a decree of distribution by the guardian of one Arnold Darling Bennisson, a minor, sometimes known as Arnold Darling. The appeal really presents but one question, and there is no controversy as to the facts.

Deceased died February 11, 1914. He did not provide in his will for the disposition of his property. He left surviving him two sons and a daughter. Another son, John Darling, Jr., died prior to the death of deceased. Arnold Darling Bennisson is the issue of the marriage of said John Darling, Jr., and Carrie Arnold Darling (who died February 12, 1900), born November 23, 1897. On August 29, 1903, he was regularly adopted in accord with the laws of this state by H. G. Bennisson and Eda Bennisson, his wife, the order of the judge of the superior court declaring that he shall henceforth be regarded and treated in all respects as their child, and shall henceforth bear the name of Arnold Darling Bennisson. Both H. G. Bennisson and Eda Bennisson still survive. The minor claims upon these facts that he succeeded upon the death of deceased to one-fourth of his estate. The lower court concluded that this claim was unfounded, and distributed the estate in equal shares to the three surviving children of deceased.

The question then is, Does an adopted child succeed to the share in the estate of the father of his father by blood that such father by blood would have succeeded to had he survived his father? Our law of succession applicable here is that portion of subdivision 1 of section 1386, Civil Code, reading as follows:

"If the decedent leaves no surviving husband or wife, but leaves *issue*, the whole estate goes to such *issue*; and if such *issue* consists of more than one child living, or one child living and the *lawful issue* of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the *issue of the deceased child or children by right of representation*." (The italics are ours.)

The theory of the respondents, the surviving children of deceased, is that, by reason of the adoption of the minor by the Bennissons, he was thenceforth not "issue of the deceased child," Arnold Darling, Jr., within the meaning of that term as used in the provision quoted, and therefore not entitled to share in his grandfather's estate as the representative of his deceased natural father. If he is to be regarded as being at the date of the death of deceased "issue of the deceased child" within the meaning of that term as so used, it is clear that he succeeded to one-fourth of the estate of deceased.

[1-4] It is to be borne in mind that in this state both the right of inheritance and the subject of adoption with the rights and obligations springing therefrom are purely matters of statutory regulation. See Estate of Jobson, 164 Cal. 312, 128 Pac. 938, 43 L. R. A.

(N. S.) 1062. It appears to be well settled in all jurisdictions where the common law constitutes the rule of decision, that the right of inheritance of a child is affected by its adoption only to the extent that the statutes bearing on the matter in terms or by implication provide. There is no provision in any of our statutes of succession or those relating to adoption that in terms refers to the matter of inheritance. Our adoption statutes substantially provide simply that an order shall be made—"declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting"; that after adoption the child and the person adopting "shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation," and that:

"The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it." Civ. Code, §§ 227-229.

But it is settled that the necessary effect of these provisions is to establish as between the adopting parent and the adopted child the legal relation of parent and child, with all the incidents and consequences of that relation, including the right of the child to inherit as a child from the adopting parent (*Estate of Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146) and the right of the adopting parent to inherit as a father from the adopted child (*Estate of Jobson*, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. [N. S.] 1062). The adopting parent is by the adoption substituted for the parent by blood, with all of its logical results, that is, in so far as the parents by blood, the adopting parents, and the adopted child are concerned. As between these parties the child is thenceforth, in a legal sense, the child of the adopting parents; and, as said in *Estate of Jobson*, supra, the adopting parent is thenceforth, so far as concerns all legal rights and duties flowing from the relation of parent and child, the parent of the adopted child, while the parent by blood ceases to be in a legal sense the parent; his place being taken by the adopting parent. Such being the status of the adopted child, it necessarily follows, as held in *Younger v. Younger*, 106 Cal. 377, 39 Pac. 779, that the jurisdiction of a court in a divorce action between the parents by blood to give such direction for the custody, care, and education "of the children of the marriage" as may seem necessary or proper (section 138, Civ. Code) cannot exist as to any such child after its adoption by another. It was substantially said in the case just cited that the various provisions of the Code are to be construed in harmony, and so as to give all their appropriate and intended effect, and that section 138, Civil Code, must be considered in connection with the statutes relative to adoption, with the result that a child of the marriage adopted by another could

no longer be considered a child of the marriage within the meaning of said section. Of course the only relation here involved was that between the parents by blood, the parents by adoption, and the adopted child. It also necessarily follows that the adopted child must inherit just as a child by blood *from the adopting parents*, for otherwise it would not have all the rights of the legal relation of parent and child, as the adoption statute provides it shall have. Accordingly it was held in *Estate of Newman*, supra, that, construing subdivision 1, § 1386, Civil Code, in harmony with the adoption statute, the word "issue" therein "does not limit the right of inheritance to the natural children only," but was there used in the same sense as the word "child" or "children," and included an adopted child of the deceased to whose estate succession was claimed by such adopted child. Here the only relation involved was that between the person adopting and the adopted child. It also necessarily follows that the adopting parents must inherit from the adopted child to the exclusion of the parents by blood, and that on the question of succession to the estate of an adopted child, section 1386, Civil Code, construed in harmony with the adoption statutes when speaking of "father" or "mother," means the father or mother by adoption. Such was the ruling in *Estate of Jobson*, supra. Again, it is to be observed that the only relation involved was that between the parents by blood, the persons adopting, and the adopted child. The court took occasion to say:

"It should perhaps be added that the case before us presents no question of the effect of adoption upon the rights of any persons except the natural parents, the child, and the adopting parent inter sese. There is no occasion to express any opinion, and we express none, upon the existence of rights that might be claimed collaterally by either party to the adoption; that is to say, as against the natural kin of the other."

One other consequence in the matter of inheritance may be noted as arising from the same relation, viz., that the children of the *adopted child* take by inheritance *from the adopting parent* as issue of such adopting parent. This was practically the question decided in *Estate of Winchester*, 140 Cal. 468, 74 Pac. 10. See, also, *Power v. Hasley*, 85 Ky. 671, 4 S. W. 683; *Atchison v. Atchison's Ex'r*, 89 Ky. 488, 12 S. W. 942; *Gray v. Holmes*, 57 Kan. 220, 45 Pac. 596, 33 L. R. A. 207; *Pace v. Klink*, 51 Ga. 221. Here again it is to be observed that really the only relation involved is that of the adopting parent and the adopted child. If, as was observed in the *Winchester Case*, the two—

"sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation, it must follow that the children of an adopted child take by inheritance (from the adopting father) as issue of the adopting father."

And section 1386 Code of Civil Procedure, when construed in harmony with the adoption statutes, must be construed as so providing.

[5] The adoption statutes of this state do not purport to affect the relationship of any person other than that of the parents by blood, the adopting parents, and the child. It is the person adopting and the child who, by the express terms of the section, after adoption "shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation," and it is the parents by blood who, from the time of the adoption, are "relieved of all parental duties towards, and all responsibilities for the child so adopted, and have no right over it," and are, in the eyes of the law, no longer its parents. The adoption simply fixes the status of the child as to its former and adopted parents. To its grandparents by blood it continues to be a grandchild, and the child of its parents by blood. It does not acquire new grandparents in the persons of the father and mother of an adopting parent.

It is only in so far as it is necessary to protect the full rights of the child as a child of the adopting parents and the corresponding rights of the adopting parents as father and mother of the adopted child that the statutes relative to adoption can play any part in the construction of section 1386, Civil Code, the inheritance statute here involved. As was said in *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775:

"In fact, it may be laid down as a general conclusion that while the statute of adoption must be read into the statute of dower and that of descents and distribution, it is with this singularity, always to be observed, viz., that the adopted child is so left in only for the purpose of preserving in full its right of inheritance from its adoptive parent."

This was followed by the statement, "And the door to inheritance is shut and its bolt shot at that precise point," a statement which appears to be sustained by the authorities generally, in the absence of plain statutory provision to the contrary. The result would appear to be that within the meaning of subdivision 1, § 1386, Civil Code, Arnold Darling Bannison was, at the date of the death of deceased, so far as deceased himself was concerned, "issue" or a "child" of his deceased child, John Darling, Jr., and entitled to succeed as such to the share his father would have taken if alive, by right of representation.

So far as we have been able to find, there is no decision given under statutes anything like ours, to the effect that the adopted child has any right of inheritance as to the ancestors or collateral kindred of the adopting parents, or is deprived by the adoption of any right of inheritance that he had as to the ancestor and collateral kindred of his

parents by blood. In 1 *Corpus Juris*, 1401, it is said:

"In a few states the statutes expressly provide that an adopted child may inherit from certain relatives of the adoptive parent. In the absence, however, of such special provision, an adopted child cannot inherit from the collateral kindred of its adopted parent, nor from the ancestor of such parent, nor from his natural children."

In *Merritt v. Morton*, 143 Ky. 133, 136 S. W. 133, 33 L. R. A. (N. S.) 139, the statute provided that the child shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she was the child of such person, and it was held that the adopted child could not inherit from his adopting mother's mother. In *Sunderland Estate*, 60 Iowa, 732, 13 N. W. 655, it was held that the child could not inherit from the father of her deceased adopting father, for she was not by the adoption made the heir of such father's father, or given any right of inheritance by right of representation. In *Phillips v. McConica*, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753, it was held that the statute enables the adopted child to inherit from the adopting person, but not through him. In *Van Der lyn v. Mack*, 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879, *Moore v. Moore's Estate*, 35 Vt. 98, and *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775, the right of the adopted child to inherit from the brother of the deceased adopting parent was denied, while in *Helms v. Elliott*, 89 Tenn. 448, 14 S. W. 930, 10 L. R. A. 535, and *Keegan v. Geraghty*, 101 Ill. 26, it was held that the adopted child could not inherit from the other children of the adopting parent. No case has been cited or found by us that is opposed to any of these decisions where the statutes applicable were, in all material respects, similar to our own statutes. They all rest upon the doctrine that the rights of inheritance of the adopted child are affected by the adoption only in so far as the statutes expressly or by necessary implication affect them, and that the mere establishment of the relation of parent and child between the adopting parent and the child, with all its consequent rights and duties, affects only the relative rights of inheritance of the parties to the contract, the parents by blood, the adopting parents, and the child, and has no effect at all as to the rights of the child in so far as the ancestor or collateral kindred of its parents by blood are concerned. It is stated in the note to *Hockaday v. Lynn*, supra, in 118 Am. St. Rep. 672, 686, that the adoption of a child does not deprive him of his right to inherit from his relatives by blood, unless the statute provides otherwise, and clearly this must be so. Our statute does in effect provide, as we have seen, that he can no longer inherit from his parents by blood, because so far as they are concern-

ed he is no longer their child. But his relationship to his grandparents by blood on either side is not affected by the adoption. As to them he is, notwithstanding the adoption, the "issue" or child of their child within the meaning of section 1386, Civil Code.

In view of what we have said it is apparent that the minor child of John Darling, Jr., succeeded, by right of representation, to the share in the estate of deceased that said John Darling, Jr., would have succeeded to had he been living at the death of deceased.

The decree of distribution is reversed, with directions to the trial court to enter a decree in accord with the views herein expressed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

FARRAR v. WESTERN ASSUR. CO. (Civ. 1481.)

(District Court of Appeal, First District, California. May 18, 1916. Rehearing Denied by Supreme Court July 17, 1916.)

1. INSURANCE — 665(2)—RISK—PAROL CONTRACT—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to recover the amount of a fire insurance policy issued upon certain furniture, held to sustain a finding that the property was covered by a parol contract of insurance at the time of the fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1709; Dec. Dig. — 665(2).]

2. INSURANCE — 96—AGENCY FOR INSURED—AUTHORITY.

The direction of the owner of furniture to an insurance broker to place insurance for her, and take care of her insurance and see that she was covered to a certain amount constituted the broker a general agent to keep her insured in such amount.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. — 96.]

3. INSURANCE — 229(3)—AGENCY FOR INSURED—POWER.

A general agent to keep one insured to a certain amount was authorized, as an incident of his employment, to accept and act upon a notice of cancellation of a policy, and to procure insurance in another company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 503; Dec. Dig. — 229(3).]

4. INSURANCE — 112—AGENCY FOR INSURED—RATIFICATION AFTER LOSS.

A ratification of the action of an insurance broker in procuring a policy for the insured, though made subsequent to a loss, is valid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 134; Dec. Dig. — 112.]

5. INSURANCE — 112—AGENCY FOR INSURED—RATIFICATION.

Insured, by filing her claim of loss and demanding payment, thereby ratified the action of her broker in accepting a notice of the cancellation of a policy and in procuring a policy in defendant, another company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 134; Dec. Dig. — 112.]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by H. M. Farrar against the Western Assurance Company. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Rehearing denied in Supreme Court, 159 Pac. 611.

J. F. Riley, of San Francisco, for appellant. Bacigalupi & Elkus and Jewel Alexander, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying defendant's motion for a new trial in an action brought against the defendant to recover the sum of \$1,000, the amount of a fire insurance policy claimed by plaintiff to have been issued by the defendant upon certain furniture belonging to the former's assignor.

Several years before the fire which destroyed the furniture in question, Mrs. Margaret M. Plier, its owner, had authorized Clarence Coleman, an insurance broker, to place \$1,000 insurance thereon, the property being contained in a certain hotel in San Francisco. Coleman did so, selecting the St. Paul Fire & Marine Insurance Company. At that time, and up to the time of the fire, Mrs. Plier was carrying other insurance upon the furniture in the sum of \$500, which was placed independently of Coleman. Each year when the \$1,000 policy was about to expire Coleman would renew it, and Mrs. Plier would pay the premium. On one occasion, a small loss by fire having occurred, he attended to the matter of its adjustment in so satisfactory a manner to the insured that she told him to thereafter take care of her insurance and to keep her covered in good companies in the sum of \$1,000. On May 15, 1911, the St. Paul Fire & Marine Insurance Company notified Coleman in writing that, after an examination of the premises in which the insured property was situated, it felt constrained to cancel its policy, and thereby gave Coleman the five days' notice of cancellation as required by the terms of the policy. Coleman immediately attempted to see Mrs. Plier in order to obtain possession of the policy for the purpose of returning it to the company, whereupon she would be entitled to be repaid the unearned premium thereon. Failing to see Mrs. Plier, Coleman on May 18, 1911, offered to the defendant company this insurance. The latter's "countermand," who was authorized to accept insurance, refused to take the responsibility in this instance of accepting the risk, and referred Coleman to the manager of the company, one Miller. After some persuasion on the part of the broker Miller agreed to take the insurance, and on May 20th a written application was made to the company. On May 27th Coleman, not having received the policy, telephoned to the office of the de-

fendant and inquired about it, and was informed that the policy was ready but not signed, and that it would be sent over to him on the following Monday morning. Early that Monday morning (May 29, 1911), the fire occurred and the property insured was totally destroyed. From May 20th, when the application for the insurance was left with the company, up to the time of the fire, the defendant appears to have considered that it was carrying the risk. Entries in its books made in the ordinary course of business so indicated, and this insurance was included in a statement made to the home office of the company of business recently transacted, and after the fire a statement was sent to Coleman, showing that he had been charged with the premium on this insurance.

[1] We do not doubt from all the circumstances of the case that the finding of the court that this property was covered by a parol contract of insurance at the time of the fire is amply sustained by the evidence. Such contracts under similar circumstances are not uncommon. *Field v. Lamson, Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136. They are valid and enforceable in this state. *Harron v. City of London Fire Ins. Co.*, 88 Cal. 16, 25 Pac. 982; *Gold v. Sun Ins. Co.*, 73 Cal. 218, 14 Pac. 786; *American C. Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720.

"If an agent, authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy." *Western Assurance Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

[2, 3] The only really serious question in this case is whether or not Clarence Coleman was acting within the scope of his authority in placing this insurance. Notwithstanding that the property which it covered according to the findings of the court—based on sufficient evidence—was reasonably worth approximately \$2,500, its owner intended to carry no more than \$1,500 insurance upon it, of which she had personally attended to placing \$500, and was relying upon Coleman to take care of the remainder. At the time of the fire she knew nothing about the contemplated cancellation or the new insurance. Upon learning of the fire and of the condition of her insurance she filed proofs of loss with all three companies. From the other companies she obtained in settlement of the loss approximately the amount of the face of the policies, but the defendant denied responsibility upon its policy and refused to pay, whereupon the insured assigned her claim to the plaintiff, who at once commenced this action.

We think the defendant is liable. Perhaps when Coleman placed the first insurance for Mrs. Plier he was merely an insur-

ance solicitor, whose authority was quite limited, but later, as we have seen, she extended his authority by telling him "to take care of her insurance and to see that she was covered to the amount of \$1,000." At another place in the record she is shown to have testified as follows:

"A. About the Western Assurance, I never told him what company to insure me in. I just said, 'insure me for \$1,000,' and that was all. As long as it was covered, that is all I cared. Q. As long as it was covered? A. Yes, sir. Q. It says, 'I looked upon him as a solicitor only.' A. I don't know about solicitor—I only told him to insure me and keep me insured. Q. To keep you insured? A. To keep me covered—that is all I cared—as long as I was in a good company."

Coleman's testimony we think tends to corroborate the testimony of Mrs. Plier; but we are satisfied that the direction by Mrs. Plier to Coleman just referred to made him more than a mere soliciting insurance agent, and constituted him, as found by the court, her general agent to keep her insured to the extent of \$1,000 in respect to the property here involved. Being her general agent for this purpose, we think he was authorized, as an incident of his employment, to accept and to act upon a notice of cancellation. *Stevenson v. Sun Ins. Office*, 17 Cal. App. 280, 119 Pac. 529.

"A general agent with power to insure property and to keep it insured may accept notice of cancellation and procure substituted insurance or renewal of insurance in another company." 22 Cyc. 1447; *Altna Ins. Co. v. Renne*, 96 Miss. 172, 50 South. 563; *Phoenix Ins. Co. v. State*, 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440; *Schauer v. Queen's Ins. Co.*, 88 Wis. 561, 60 N. W. 994; *Todd v. German-Am. Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94.

The record does not show upon what ground the insured, after the cancellation of the policy, obtained a settlement of her claim against the St. Paul Company. Evidently for some good reason it deemed itself responsible on the policy and paid the loss. The trial court found that the policy in that company had been canceled. However, the circumstances of that transaction are not before us, and therefore have no bearing upon the determination of this case. Here it appears that Coleman, in the careful discharge of his duty as general agent, effected a valid contract of insurance with the defendant upon his principal's property, the obligation of which is not dependent upon the transaction with the St. Paul Company.

[4, 5] But even if Coleman were not the general agent for the assured, still the finding of the court as to his authority would have to be sustained on the theory that his action in procuring the policy in the defendant company was ratified by his principal. In filing her claim of loss and demanding payment, she ratified the action of her agent. The authorities seem to hold that a ratification, though made subsequent to a loss, is valid.

In the case of *Boutwell v. Globe & Rutgers' Fire Ins. Co. of N. Y.*, 193 N. Y. 323, 85 N. E. 1087, an agent was instructed by his principal to carry a certain amount of insurance on each of two certain barges. The agent, being in some doubt as to the amount in force on the barges, and endeavoring to carry out his instructions, took out other insurance, and advised his principal of what he had done. Upon discovering that he had contracted for a larger amount than his instructions warranted—which was on the following day—he returned the policies to the insurance company, requesting in effect that the transaction be treated as if the policies had never been issued, and so be without premium charge. This the defendant refused, but suggested that the insurance would be canceled at short rates. With the proposition in this shape one of the barges was destroyed, whereupon the owner tendered defendant the premium upon the policy issued, and later duly presented proof thereunder. In that case the agent does not seem to have been given as wide a power as the broker here; and, while the opinion proceeds upon the theory that under the circumstances of the case the defendant was estopped from denying its liability, still to so hold it was necessary—and accordingly the court did hold—that the owner had a legal right to ratify the acts of his agent and accept the contract even after the occurring of the loss.

In the case of *Todd v. German-American Ins. Co. of N. Y.*, 2 Ga. App. 789, 59 S. E. 94, the court say that, assuming that Turpin (the agent) acted for Todd, and procured from the defendant a policy of insurance in Todd's favor, and paid the premium or became responsible to pay the same, Todd could after the fire, upon discovery of the fact that Turpin had assumed to act for him, ratify the contract and hold the insurance company upon it. The court observes that it must be admitted that in the case of a ratification the parties do not generally stand upon even terms, since the principal may always elect to ratify the act if it is to his benefit, and disavow it if it is to his injury, but this consequence has never been allowed to overcome the force of the general doctrine.

In the case of *Phoenix Ins. Co. v. Hancock*, 123 Cal. 222, 55 Pac. 905, the defendant took out insurance in favor of an estate in which he was an heir. Later upon demand he refused to pay the premium, whereupon suit was commenced to compel him so to do. In sustaining a judgment against him the court thus states the law:

"Although defendant had no authority to procure insurance for the administratrix, yet she could have ratified his act even after the occurrence of a loss."

See, also, 1 Joyce on Insurance, § 642; 1 May on Insurance (4th Ed.) § 122A; 2 Clem-

ent on Fire Insurance, 481; 1 Wood on Fire Insurance, § 186, p. 320.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

FARRAR v. WESTERN ASSUR. CO.

(S. F. 7940.)

(Supreme Court of California. July 17, 1916.)

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by H. M. Farrar against the Western Assurance Company. Application by defendant for a hearing after decision by the District Court of Appeal of the First Appellate District (159 Pac. 609), affirming a judgment for plaintiff. Application denied.

J. F. Riley, of San Francisco, for appellant. Bacigalupi & Elkus and Jewel Alexander, all of San Francisco, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District (159 Pac. 609) is denied. In denying the application we deem it proper to say that we do not express any view on the question of ratification discussed in the opinion. A decision on that question is not essential to a determination of the case, in view of what is correctly held in the opinion as to the status and authority of Coleman.

FREITAS v. FREITAS et al. (Civ. 1754.)

(District Court of Appeal, First District, California. June 28, 1916. Rehearing Denied by Supreme Court Aug. 25, 1916.)

1. APPEAL AND ERROR ⇐843(2)—DETERMINATION OF CAUSE—NECESSITY OF DECISION.

Where defendant benefit association paid the proceeds of a policy into court and did not appeal from a judgment awarding it to plaintiff, held that, upon appeal by other defendants, it is unnecessary to determine whether the complaint stated a cause of action against the insurer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331, 3333; Dec. Dig. ⇐843(2).]

2. INSURANCE ⇐782—MUTUAL BENEFIT—CHANGE OF BENEFICIARIES—RIGHTS OF PREVIOUS BENEFICIARY.

A complaint, alleging that deceased, pursuant to an antenuptial agreement, made plaintiff his beneficiary in an insurance policy, but later substituted his children as beneficiaries, states a cause of action against the children in action to determine conflicting claims.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. ⇐782.]

3. FRAUDS, STATUTE OF ⇐148(2)—ACTIONS—PLEADING—ANTENUPTIAL CONTRACT.

Where a complaint alleges an antenuptial contract, required to be in writing under statute of frauds (Civ. Code, § 1624, and Code Civ. Proc. § 1973), held that the agreement will be presumed as a matter of pleading to be written.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 354; Dec. Dig. ⇐148(2).]

4. FRAUDS, STATUTE OF ⇐139(2)—ANTENUPTIAL CONTRACT—EXECUTION.

An antenuptial contract that deceased would make plaintiff his beneficiary in an insurance

policy is executed by their marriage and insertion of plaintiff's name as beneficiary.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 335; Dec. Dig. § 139(2).]

5. FRAUDS, STATUTE OF § 139(2)—OPERATION—EXECUTED ANTENUPTIAL CONTRACT.

The statute of frauds (Civ. Code, § 1624, and Code Civ. Proc. § 1973) is inapplicable to an executed antenuptial oral contract.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 335; Dec. Dig. § 139(2).]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Louisa R. Freitas against M. F. Freitas, Jr., and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Louis B. Diavila, of Oakland (Jos. P. Lucey, of San Francisco, of counsel), for appellants. Rose & Silverstein, of Oakland, for respondent.

PER CURIAM. The plaintiff in this case is the widow of Manuel T. Freitas, deceased. The defendants Manuel F. Freitas, Jr., Mary Freitas Lopez, Francisco Freitas, and Anna Freitas Nula are the children of said deceased by a former marriage. The defendant Unica Portuguesa de Estado da California is a beneficiary corporation. The complaint in substance alleged, and the trial court in effect found, that the plaintiff was induced to marry Manuel T. Freitas, since deceased, by an antenuptial agreement, wherein he promised the plaintiff that if she would marry him he would make her the beneficiary of a policy of life insurance in the sum of \$1,000, which he then held and which had been issued to him by the corporation defendant. Upon his marriage to the plaintiff Freitas, with the intent and purpose of performing his antenuptial promise, caused the plaintiff to be named as the beneficiary in the policy of insurance, and thereupon delivered the same to her. Subsequently he secured possession of the policy and, without the consent or knowledge of the plaintiff, caused the children above mentioned to be substituted as beneficiaries, and they were the beneficiaries named in the policy at the time of his death. The corporation defendant did not defend against the action, but deposited in court the amount called for in the policy subject to a determination of the conflicting claims of the plaintiff and the other defendants. Judgment was rendered for the plaintiff, from which the individual defendants alone have appealed.

[1] The demurrer of these last-named defendants to the complaint was rightly overruled. Having paid the fund in controversy

into court, the corporation defendant in effect waived any defense it might have had against either or both of the conflicting claimants; and, being apparently satisfied with the lower court's adjudication of the controversy, it is of no consequence whether or not the complaint stated a cause of action against the corporation. *Jory v. Supreme Council, etc.*, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; *Adams v. Grand Lodge*, 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45; *Hoelt v. Supreme Lodge*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; *Supreme Council v. Murphy*, 65 N. J. Eq. 60, 55 Atl. 507, 509.

[2] The complaint as between the plaintiff and the appealing defendants stated a cause of action. The case of *Gagossian v. Arakelian*, 9 Cal. App. 571, 99 Pac. 1113, has no application to the facts of the present case. Here the cause of action relied upon proceeded upon the theory that the plaintiff had acquired an equitable right to the sum secured by the policy of insurance which the insured could not defeat by any act of his, and which the individual defendants, as mere voluntary beneficiaries possessing no equities, could not deny. That such a right may be acquired under the facts pleaded here, and will when established receive recognition and protection at the hands of a court of equity, is settled in this state. *Adams v. Grand Lodge*, supra; *Jory v. Supreme Council*, supra.

[3] The complaint states a cause of action notwithstanding the fact that the antenuptial agreement pleaded was not alleged to have been reduced to writing as required by section 1624, Civ. Code, and section 1973 of the Code of Civil Procedure. As a matter of pleading the agreement was presumed to be in writing.

[4, 5] The evidence supports the findings, and the findings support the judgment. While the evidence shows, and the court in effect found, that the antenuptial agreement was not expressed in writing, nevertheless the evidence further shows, and the court found, that in keeping with his agreement and the consideration of the plaintiff's marriage to him, Freitas, the insured, procured her to be designated as a beneficiary of the sum secured by the policy of insurance. The antenuptial contract thereby became fully executed (*Supreme Lodge K. of P. v. Ferrell*, 83 Kan. 491, 83 L. R. A. [N. S.] 777, 112 Pac. 155), and it is settled law that the statute of frauds has no application to an executed oral agreement (*Bates v. Babcock*, 95 Cal. 479, 488, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133).

The judgment appealed from is affirmed.

FREITAS v. FREITAS et al. (Civ. 1755.)

(District Court of Appeal, First District, California. June 28, 1916. Rehearing Denied by Supreme Court Aug. 25, 1916.)

MONEY RECEIVED — MUTUAL BENEFIT INSURANCE — CHANGE OF BENEFICIARIES — RIGHTS OF PREVIOUS BENEFICIARY.

Where plaintiff, a former beneficiary, was entitled to insurance proceeds which the insurer had paid to substituted beneficiaries, held that plaintiff could recover from such beneficiaries upon an implied promise, although there was no privity of contract between them.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 14-20; Dec. Dig. § 5.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Louisa R. Freitas against Manuel F. Freitas, Jr., and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Louis B. Diavila, of Oakland (Jos. P. Lucey, of San Francisco, of counsel), for appellants. Rose & Silverstein, of Oakland, for respondent.

PER CURIAM. Save in one particular the facts in this case, as shown by the pleadings and proof, are in their essential features substantially the same as those pleaded and proven in the case of *Freitas v. Freitas*, No. 1754, 159 Pac. 611, this day decided, the present case being different only in the particular that the beneficial society in which the deceased was insured had, upon the death of the deceased, paid to the defendants the sum of \$1,500 called for by the policy of insurance. As a consequence the society was not made a party defendant. Judgment went for the plaintiff, from which the defendants severally appeal upon the grounds that the complaint does not state a cause of action, and that the findings do not support the judgment.

Here, as in the case above mentioned, the plaintiff's cause of action proceeded, upon the theory that the plaintiff had acquired a superior equitable title to the sum in suit; and, for the reasons stated in said case numbered 1754, and upon the authority of the cases therein cited, we are of the opinion that the facts pleaded in the present case are sufficient to constitute a cause of action against the defendants, who were alleged and shown to be mere voluntary beneficiaries. True it is, as counsel for the defendants contend, that the plaintiff's cause of action pleaded savors strongly of an action for money had and received. Such an action, however, may be successfully maintained even though not founded upon allegations showing an express privity of contract between the parties. This is so upon the theory that if one of the parties has received money due and owing to the other under circumstances which make it his duty to

surrender the money to the rightful owner, the law will imply the promise to do so, and thereby create the requisite contractual privity. *Commissioners v. Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 477; *Kreutz v. Livingston*, 15 Cal. 344; *Colusa Co. v. Glenn County*, 117 Cal. 434, 49 Pac. 457; *Whittle v. Whittle*, 5 Cal. App. 696, 91 Pac. 170.

It is conceded that the evidence supports the findings; and, if we be correct in the conclusion that the facts stated in the complaint show a cause of action, then it follows that the findings, which are in substantial accord with the allegations of the complaint, support the judgment.

The point made concerning the invalidity of the antenuptial contract, and the consequences claimed to flow therefrom, was also made in the case previously decided, and therein determined adversely to the contention of the defendants. It need not therefore be again adverted to.

The judgment appealed from is affirmed.

WHITCOMB v. WORTHING et al.

(Civ. 1984.)

(District Court of Appeal, Second District, California. June 2, 1916. Rehearing Denied by Supreme Court July 31, 1916.)

1. DEEDS — 129(1) — CONSTRUCTION — ESTATE CREATED — LIFE ESTATE.

A deed of grant providing that the grantee should hold the property until his death, when it should revert to the grantor's heirs, held to convey only a life estate, notwithstanding general expressions conveying the property to the grantee and his heirs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 416, 434; Dec. Dig. § 129(1).]

2. DEEDS — 90 — CONSTRUCTION — CONFLICTING CLAUSES.

A deed is to be construed like any other contract, and its intent arrived at by a consideration of the entire instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. § 90.]

3. LIFE ESTATES — 8 — ADVERSE POSSESSION — HOSTILE CHARACTER — PURCHASER OF LIFE ESTATE.

Possession by the purchaser of a life estate is not adverse to the reversioner's heirs, and the statute does not run against them until the life tenant's death.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.]

4. ESTOPPEL — 71 — EQUITABLE ESTOPPEL — GROUNDS — DISCLAIMER.

Previous ex parte statements that they claimed no interest in a certain lot does not estop the defendants in a suit to quiet title from asserting an interest.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 173-182; Dec. Dig. § 71.]

5. JUDGMENT — 533 — DECREE — CONSTRUCTION — MATTERS DETERMINED.

An adjudication that plaintiff's predecessor was granted only a life estate in certain lots except one, as to which no determination was made, did not operate to decree in him the absolute title to that lot.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 978, 983; Dec. Dig. § 533.]

6. APPEAL AND ERROR §706(1)—REVIEW — RESERVING GROUND FOR REVIEW.

An order denying a new trial will be reviewed where the transcript shows that notice of intention to move for new trial was served and filed, and the notice is set out with general specifications of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2944; Dec. Dig. §706(1).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action to quiet title by Fred S. Whitcomb against Chastina M. Worthing, Clinton G. Gaylord, John L. Gaylord, and F. C. Howes, trustee. Judgment for plaintiff, and all the defendants, except the trustee, appeal from the judgment and an order denying their motion for new trial. Order denying new trial reversed.

The appeal from the judgment was heretofore dismissed upon a motion made in open court and covered by a minute order only.

Tobias R. Archer, of Los Angeles, for appellants. George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, for respondent.

JAMES, J. Action to quiet title to a town lot located in the county of Los Angeles. Plaintiff had judgment, from which certain of the defendants appealed. There was also an appeal from an order denying a motion for a new trial. This court heretofore dismissed the appeal from the judgment, and we have to consider questions presented by the motion for a new trial.

The appellants are heirs of Mary A. Gaylord, in whom title to the lot in question was absolutely vested in the year 1889. Subsequent to the year referred to said Gaylord became the wife of J. F. Twitchell. On December 3, 1891, she by deed conveyed to her husband four lots of land, which included the lot in question, and thereafter, on December 9, 1891, she died. The surviving heirs were her said husband and five children, among the latter these appellants.

[1, 2] The deed given by Mrs. Twitchell to her husband in 1891 was as to its general form a deed of grant, with the usual preliminary recitations that the grantor did—"give, grant, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all those certain lots, pieces, or parcels of land situate," etc.

A description of the property conveyed followed, and then occurred this clause:

"Together with all water rights thereunto belonging, to the party of the second part, so long as he shall live, but at his death the said above-described property to revert to the heirs of the said party of the first part."

Other general terms followed to the effect that all and singular the tenements, appurtenances, etc., were to pass "unto the said party of the second part, his heirs and assigns, forever." The question as to whether this deed passed a fee title or only a life

estate is one of the propositions argued in the briefs, the importance of which will appear in our later statements.

As we construe the instrument, however, we are satisfied that the intent was to restrict the estate in the hands of Twitchell, the husband, with the result that the only interest acquired by him in the real property was one which terminated upon his death. Deeds are to be construed like any other contract, and the intent of the parties arrived at by a consideration of the whole instrument, and not of detached clauses. *Firth v. Los Angeles Pacific Land Co.*, 152 Pac. 935.

[3] Having announced this preliminary conclusion as to our construction of the deed given by Mrs. Twitchell to her husband, a further statement of the undisputed facts is as follows: On July 7, 1893, the lot in question was sold for the nonpayment of state and county taxes to S. M. Patten and a certificate of tax sale was issued to the purchaser. So far as the record shows, no tax deed was ever issued thereon. On August 14, 1895, J. F. Twitchell, the holder of the life estate, by quitclaim deed, conveyed his interest in the lot, to the wife of Patten, the purchaser at the delinquent tax sale. It is not shown when the Pattens or either of them took actual possession of the lot, but it may be assumed that they did so in 1895, upon receiving the quitclaim deed from Twitchell. On April 21, 1896, the plaintiff purchased the lot from Patten and his wife, and took an assignment of the certificate of tax sale, and also a quitclaim deed from the Pattens. This quitclaim deed contained the following clause:

"This conveyance is made to release all claim which the said parties of the first part have to the above described property on account of the life interest in the same of J. F. Twitchell, a widower, which said interest was duly assigned to the said Jefferson Patten on the 14th day of August, A. D. 1895, and also to release all claims acquired by the said parties of the first part or either of them on account of any tax sales of the above-described property prior to the date of this instrument."

The plaintiff, upon receiving the assignment of the tax sale certificate and the quitclaim deed from the Pattens, entered upon possession of the lot, and continuously thereafter farmed and cultivated the same and paid all taxes which had been levied and assessed since the year 1895. He claimed to be the absolute owner of the property, notwithstanding the fact in his quitclaim deed from the Pattens it was expressly stated that the intent was in part to transfer the estate which the Pattens had acquired "on account of the life interest" of Twitchell. Twitchell died in February, 1912, and this action was commenced on October 7, 1912. No claim is made, and indeed none could be maintained, that title was acquired under the transfer of the certificate of tax sale. Twitchell

during his lifetime possessed the right to use and occupy the property; therefore his possession could in no case have been adverse to the claim which these appellants, the heirs of Mrs. Twitchell, had in the property. His grantee necessarily would be in no better situation with respect to that matter. The conclusion must necessarily follow that, so far as this plaintiff is concerned, or his immediate predecessors in interest, the Patens, possession of the lot as against the title of the heirs of Mary Twitchell did not and could not begin to be adverse until the death of Twitchell, which occurred, as before stated, in February, 1912. The statute of limitations, the running of which would confer prescriptive title upon the plaintiff, was not therefore set in motion until Twitchell died. *Mann et al. v. Mann et al.*, 141 Cal. 326, 74 Pac. 995. The plaintiff did not wait for the period to expire requisite to sustain a prescriptive title, but about eight months after the death of Twitchell brought this action.

[4, 5] That the appellants may have, prior to the trial of the action, declared in an ex parte manner that they claimed no interest in the lot, was not an admission which would estop them from asserting title by pleading and proof, as they did in this action. There was a suit brought by Twitchell against the heirs to determine the respective rights in the lots included in the deed given Twitchell by his wife, which suit resulted in its being adjudicated that the interest granted was a life estate only. There was no determination made in that action as to the condition of the title to lot 23, that being the lot now in controversy. Twitchell therein alleged in his complaint that the lot was of "little or no value and which has been sold for taxes and not redeemed." The failure of the court to include this lot in its judgment in that action cannot be held to amount to a confirmation of the absolute title in Twitchell, or in the plaintiff or his predecessors in interest. There was simply a failure to determine the legal condition of the title—made, no doubt, for the reason that the parties assumed that the tax sale had foreclosed their rights in that property.

[6] Objection is made that the ruling on the motion for a new trial should not be considered, in that the grounds of the motion are not stated. It does appear on page 44 of the transcript, and as a part of the statement settled by the trial judge, that the appellants served and filed their notice of intention to move for a new trial, and such notice is set out, with general specifications of error. In the case cited by respondent (*Morcom v. Balersky*, 16 Cal. App. 480, 117 Pac. 560), where this court declined to review the ruling on a motion for a new trial, the notice of intention did not appear in the transcript, nor were any of the grounds stat-

ed from which it could be determined what questions were before the trial court on the motion. The record here is not deficient in the same respects as was that in the case last cited. The decision in *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283, is an authority as to the sufficiency of a record like that here presented to authorize the court to review the order made on motion for a new trial.

For the foregoing reasons we conclude that the trial court was in error in its judgment, and that the motion for a new trial should have been granted.

The order denying the motion for a new trial is reversed.

We concur: CONREY, P. J.; SHAW, J.

U'REN v. STATE BOARD OF CONTROL et al. (Civ. 1630.)

(District Court of Appeal, First District, California. June 26, 1916. Rehearing Denied by Supreme Court, Aug. 25, 1916.)

1. STATES \S 67—CONSERVATION COMMISSION—POWERS AND DUTIES—STATUTE.

Under Pol. Code, \S 472, providing that the Attorney General shall have charge of all legal matters in which the state is in any wise interested, and that no board shall employ an attorney other than the Attorney General, or one of his assistants or deputies in any matter in which the state is interested, and that such provision should not be construed to deny to any board, etc., the right to employ counsel in any matter of the state after having first obtained the attorney's written consent to do so, the state conservation commission, created by St. 1911, p. 822, and thereby authorized to employ professional and clerical assistants, might employ an attorney at law to compile the laws of different states, the federal government, and of other nations affecting conservation generally, as such services were not strictly professional, or such as only a licensed attorney at law could perform.

[Ed. Note.—For other cases, see *States*, Cent. Dig. \S 69; Dec. Dig. \S 67.]

2. STATES \S 175—STATE BOARDS—CLAIMS—FORM.

Where the claim of an attorney employed in compilation work by the state conservation commission was made out, verified, and presented to the state board of control in the form and method which had been prescribed for previous months under its rules, the board, if it intended to require a different form or method of presenting the claim, should have based its rejection of it upon that ground, and permitted the plaintiff to remedy any defects in form, and, not having done so, could not be heard upon application for a writ of mandate to urge for the first time mere formal defects in the presentation of the plaintiff's claim.

[Ed. Note.—For other cases, see *States*, Cent. Dig. \S 164, 165; Dec. Dig. \S 175.]

3. STATES \S 173—STATE BOARD OF CONTROL—ALLOWANCE OF CLAIMS—DISCRETION.

The state board of control, created by St. 1911, p. 590, embracing Pol. Code, \S 654-691, and with power to approve and allow claims for which no appropriation has been made and for which no fund is available, and claims for which an appropriation has been made or for which a state fund is available, as to a claim against the

state treasury for his salary for one month as an employé of the state conservation commission, created by St. p. 823, with the power to enter into contracts of employment upon such terms as it might deem proper, and setting aside a specific fund in the state treasury for the payment of obligations created by it, upon approval of the claim, as evidenced by the commission's requisition upon the state treasury for its payment, was limited to the powers of an auditing body, passing only upon the sufficiency of the form of the claim.

[Ed. Note.—For other cases, see States, Cent. Dig. § 163; Dec. Dig. ¶173.]

4. MANDAMUS ¶101—PUBLIC BOARDS AND OFFICERS—ALLOWANCE OF CLAIMS.

Where an official or board is authorized by statute to create an obligation against a specific fund in the state treasury, and another official or board is intrusted with the powers of an auditor in respect to claims generally against the state, the powers and duties of the latter may be controlled by the courts, and be compelled by writs of mandate.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 211-216; Dec. Dig. ¶101.]

5. STATES ¶191(1)—CLAIMS AGAINST STATE—ACTION.

Where the state, by act of the Legislature, has set apart a specific fund for the payment of such obligations as the conservation commission had the power to create, through the employment of the plaintiff to assist in carrying into effect the objects of its existence, the state was in a position of having assented to the plaintiff's claim for salary, and he might maintain mandamus to compel the state board of control, as the official auditor, to perform a duty expressly enjoined upon it by law, without the consent of the state.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179, 180, 182-184; Dec. Dig. ¶191(1).]

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Mandamus by Milton T. U'Ren against the State Board of Control, John F. Neylan, Clyde L. Seavey and F. H. Bloodgood, as members thereof. Writ of mandate directed to issue and the defendants appeal. Affirmed.

U. S. Webb, Atty. Gen. (Robert W. Harrison, Deputy Atty. Gen., and Sullivan & Sullivan and Theo. J. Roche, of San Francisco, of counsel), for appellants. Fred J. Goble, of Oakland (U'Ren & Beard, of Napa, of counsel), for respondent.

RICHARDS, J. This is an appeal from a judgment ordering the issuance of a writ of mandate directed to the defendants, the state board of control, and also the members of said board, requiring them to audit and allow the claim of the plaintiff against the state treasury for the sum of \$200 for his salary as an employé of the California state conservation commission for the month of July, 1912. Concerning the facts of the case there is no material dispute. The plaintiff, who is an attorney at law, was employed on or about July 1, 1911, by the California state conservation commission under the provisions of an act creating said commission

(Stats. 1911, p. 822), by the terms of which it was authorized to employ—"for the purposes for which it was created such expert, technical, professional and clerical assistants, and upon such terms as it may deem proper." The particular service which the plaintiff was employed to perform was "to compile for the use of said state conservation commission the laws of the different nations, the federal government and the states of the Union affecting conservation generally." The plaintiff proceeded under such employment to do such work, and continued therein up to August 1, 1912. The salary claims for the intervening months up to July 1, 1912, were presented to and audited and approved by the board of control without objection but when on July 30, 1912, his salary claim for July was presented in the same form and manner in which his salary claims for previous months had been presented and allowed, it was refused allowance by the board of control, which action on the part of said last-named board led to this application for a writ of mandate to the superior court, which, upon hearing, was directed to be issued, whereupon the defendants took and now prosecute this appeal.

[1] There are two contentions of the appellants which may be disposed of upon the threshold. The first is that the plaintiff, being an attorney at law, and the services being in the nature of legal services, he could not be legally employed by the conservation commission without first having obtained the written consent so to do from the Attorney General under the express provisions of section 472 of the Political Code, which consent was not in fact obtained. We are of the opinion that this section of the Political Code has no application to the case at bar, nor to the plaintiff's employment. While it is true that the plaintiff was and is an attorney at law, and while it is true that the services which he was engaged to perform were of such a nature as might best be performed by one skilled in knowledge of the law, still they were not such services as were strictly professional in their nature, or as only a licensed attorney at law could perform, but, on the contrary, were in the main clerical in character which the plaintiff, or any one else with his ability, could well have performed without the possession of the title or license of an attorney at law. This being so, we hold with plaintiff that compliance with section 472 of the Political Code was not a prerequisite to the plaintiff's employment.

[2] The next contention of the appellant is that the claim of the plaintiff was properly rejected, for the reason that it was not presented in the form and manner provided by law. We find no merit in this contention, for the reasons that it is conceded that the claim was made out and verified and pre-

sented in the same form and method which had been pursued for several previous months under the rules of the state board of control, and upon which it had theretofore acted approvingly. If in this instance such board intended to require a different form or method of verifying and presenting this particular claim, it should have based its rejection of it upon that ground, and permitted plaintiff to remedy whatever defects in form existed, and, not having done this, it cannot be heard upon application for a writ of mandate to urge for the first time mere formal defects in the presentation of the plaintiff's claim.

This brings us to the main question involved in this appeal, which is as to the scope of the powers with which the board of control is invested in the matter of the allowance and rejection of claims on the state treasury in payment for services rendered to other boards and commissions of the state within the sphere of their respective functions, and for which they are by the several acts of their creation invested with the power to contract upon such terms as they may deem proper.

[3] It is the contention of the appellant that its powers in this respect are absolute, and that with its discretion in the allowance or rejection of any claim against the state treasury the courts have not the right or power to interfere. We cannot give our support to this contention. The state board of control was created under the provisions of the act of 1911, embracing sections 654 to 691 of the Political Code (Stats. 1911, p. 590), which act repealed all prior statutes relating to the creation, powers, and duties of prior auditing and examining boards, of which the state board of control was to be the successor. The powers and duties of this board were more ample and varied under the act of their creation than those of prior commissions or boards exercising similar functions had been; but in the matter of its relation to the various kinds of claims upon the state treasury, these are classified, and the powers and duties of the board with respect to them are set forth in the following sections of the Political Code:

Sec. 663. *Claims against State.* Every claim against the state for which an appropriation has been made or for which a state fund is available, must be presented to the board for its scrutiny before being paid. The board may for cause postpone action upon a claim for not exceeding one month.

Sec. 664. Any person having a claim against the state for which an appropriation has been made, may present the same to the board in the form of an account or petition, and the secretary of the board must date, number, and file such claim. The board must allow or reject the same within thirty days. The concurrence of two members of the board shall be required to approve and allow any claim against the state in whole or in part.

Sec. 667. If no appropriation has been made, or if no fund is available for the payment of any claim against the state, the settlement of which is provided by law, or if an appropriation or

fund has been exhausted, such claim must be presented to the board, which shall audit the same, and if approved by at least a majority vote thereof, it shall, with the sanction of the Governor, be transmitted to the Legislature with a brief statement of the reasons for such approval.

Sec. 669. Any person having a claim against the state, the settlement of which is not otherwise provided for by law, must present the same to the board at least four months before the meeting of the Legislature, accompanied by a statement showing the facts constituting the claim, verified in the same manner as complaints in civil actions. Before finally passing upon any such claim, notice of the time and place of hearing must be mailed to the claimant at least fifteen days prior to the date set for final action. At the time designated the board must proceed to examine and adjust such claims. It may hear evidence in support of or against them, and, with the sanction of the Governor, report to the Legislature such facts and recommendations concerning them as may be proper. In making such recommendations the board may state and use any official or personal knowledge which any member thereof may have touching such claims.

An examination of these sections of the Political Code will show that there are two classes of claims which come within the purview of the state board of control. These are: First, claims for which an appropriation has been made or for which a state fund is available; and, second, claims for which no appropriation has been made, or for which for any reason no fund is available. The claim in question in the instant case comes within the first of these classes. The plaintiff was employed by the California state conservation commission to do certain work within the scope of its functions and at the fixed monthly sum for salary for which his claim was presented to the state board of control; the conservation commission having already approved said claim. The purposes for which the state board of control was created, and the powers with which it was invested, are, so far as may be discoverable from the terms of the statutes, in no very essential sense different from those governing the creation and defining the powers and duties of the state board of examiners, the final predecessor of the board of control. In the early case of *Lawrence v. Booth*, 46 Cal. 187, it was held that as to that class of claims against the state treasury of which the power of creation and propriety as to amount were matters intrusted to the discretion of other departments of the state government, the functions of the state board of examiners were merely those of an auditing body, with power to pass upon the regularity in form of the claim, but with no discretion nor control over the amount for which the claim should be allowed. In the comparatively recent case of *Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537, the case of *Lawrence v. Booth* was commented upon, and the distinction clearly drawn between those classes of claims with reference to which the validity of the action of the official, body, or board, creating the obligation, or its amount, were not called

into question; and those classes of claims wherein the validity of the order creating them was in controversy; and as to the former the views of the court in the case of *Lawrence v. Booth* were upheld.

In the instant case the power and authority of the conservation commission to employ the expert, professional, and clerical services of the plaintiff in the course of and for the purpose of carrying into effect the objects of its creation has not been, and cannot seriously be, called into question. Having the power to enter into the contract of employment "upon such terms as it might deem proper" (Stats. 1911, p. 823), and having had set apart a specific fund in the state treasury for the payment of such obligations as it might thus create, it must follow that the approval of the plaintiff's claim as evidenced by the requisition of the conservation commission upon the state treasury for the payment thereof constituted the final determination as to the validity and propriety of the obligation; and hence that the powers of the board of control in respect to said claim were limited to those of an auditing body passing only upon the sufficiency in form of the plaintiff's demand.

[4] The doctrine is well settled in numerous cases that where one official, board, or body is given authority by statute to create an obligation against a specific fund in the state treasury, and another official, board, or body is intrusted with the powers of an auditor in respect to claims generally against the state, the powers and duties of the latter in respect to such claims may be controlled by the courts and compelled by writs of mandate. *Lewis v. Colgan*, 115 Cal. 529, 47 Pac. 357; *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941, and cases cited.

[5] In the closing brief of appellant it is earnestly and elaborately contended that, since as a fundamental proposition the state cannot be sued without its consent, and since this action is in the nature of a suit to compel the payment of money to plaintiff by the state, that it cannot therefore be maintained. But to our minds this principle has no application to the instant case. This is not in form or substance an action against the state to determine a contested claim against its treasury. The state has already by the act of its Legislature set apart a specific fund for the payment of such obligations as the conservation commission had power to create; and the state has also by legislative act invested said conservation commission with the express power to create this specific obligation through its employment of the plaintiff to assist in carrying into effect the objects of its existence. The state is thus in a position of having assented to this claim; and this is an action or proceeding merely to compel the official auditor in the form of the board of control to per-

form a duty expressly enjoined upon it by law.

We can perceive no reason why the action of the trial court was not proper in directing the issuance of the writ.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

HAMMEL v. NEYLAN et al., State Board of Control. (Civ. 2052.)

(District Court of Appeal, Second District, California. June 28, 1916. Rehearing Denied by Supreme Court Aug. 25, 1916.)

1. MANDAMUS §72 — FUNCTION OF WRIT — DISCRETIONARY ORDERS.

Where an officer, board, or tribunal is vested with power to determine a question upon which a right depends, mandamus will not lie to control the discretion exercised.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. §72.]

2. MANDAMUS §72—FUNCTION OF WRIT—DISCRETIONARY ORDERS.

Mandamus will lie where, in determining a matter confided to a board, its discretion has been controlled by a consideration of questions not relating to the subject involved.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. §72.]

3. STATES §173—ALLOWANCE OF CLAIMS — POWERS OF BOARD OF CONTROL.

Under Pol. Code, § 4290, providing for compensation of sheriff, and section 683, providing for examination of his accounts by board of control, the board, on finding that he has rendered the services set forth in his claim, and that the amount claimed for expenses was necessarily incurred, has no discretion other than to allow the claim, and cannot refuse to allow it on account of alleged prior fraud of the sheriff in securing allowance of other claims, although section 682 gives such board supervision of financial matters.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 163; Dec. Dig. §173.]

4. STATES §185—BOARD OF CONTROL—ALLOWANCE OF CLAIMS—COLLATERAL ATTACK.

In regularly approving and allowing claims presented by a sheriff for services during certain years, the board of control to a limited extent acts judicially, and its decision is final and conclusive as against collateral attack.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 176; Dec. Dig. §185.]

5. STATES §199 — ACTIONS — POWER OF BOARD OF CONTROL—RECOVERY OF STATE FUNDS.

The board of control cannot sue to recover money obtained from the state by fraud, and therefore, in action to compel it to allow sheriff's claim for services for later years, it cannot set up as a counterclaim that the compensation in the earlier years was obtained through fraud.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 189; Dec. Dig. §199.]

6. MANDAMUS §4(5) — WHO ENTITLED TO WRIT—EXISTENCE OF OTHER REMEDY.

Under Pol. Code, § 4290, in which the Legislature declared the conditions on which compensation should be allowed to sheriffs, the right of a sheriff, whose claim has been found to be correct and allowed, to mandamus the board of control to order payment thereof is not affected

by section 671, allowing an appeal from disapproval of claims to the Legislature.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 20, 21, 24-34; Dec. Dig. § 4(5).]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Mandamus by W. A. Hammel against John Francis Neylan and others, as members of the State Board of Control. From a judgment dismissing the proceeding, petitioner appeals. Reversed.

Leon F. Moss, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., and John F. Neylan, for respondents.

SHAW, J. Plaintiff filed his petition in the superior court of Los Angeles county, praying for a writ of mandate against the state board of control and members thereof, commanding it and them to allow and approve certain claims, the aggregate amount of which was the sum of \$2,199.26, presented by him as sheriff of said county against the state for services rendered by him as such sheriff in the month of December, 1914, and expenses necessarily incurred in conveying persons, adjudged by the superior court of said county to be committed, to state prisons and other state institutions. Defendants answered, alleging, among other things, that on January 21, 1914, they, in the performance of the duty imposed upon them by law, discovered, determined, and adjudged that petitioner was indebted to the state of California in the sum of \$2,199.26, paid to and received by him as sheriff from the state of California upon claims presented during the years 1911, 1912, and 1913, for alleged services and necessary expenses incurred by him as such official for conveying prisoners to state institutions, which claims were, to the extent of \$2,199.26, in excess of that to which he was justly and legally entitled, and the allowance of which by said board was obtained by means of fraudulent representations made with intent to deceive and defraud, and which did deceive and defraud, these defendants and the state of California; that petitioner has refused to recognize such payments as being in excess of the sum to which he was entitled during said years of 1911, 1912, and 1913, or repay the same, although demand had been made therefor by respondents upon an itemized list of said alleged overcharges delivered to petitioner; that by reason of such fact respondents claim the right to withhold from petitioner, to the extent of \$2,199.26, the allowance and payment of other claims due him under section 4290 of the Political Code. The answer further alleged that:

"Respondents deny that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law for the enforcement of right in the premises, and allege that petitioner has no rights in the premises or as claimed and alleged by him in his petition for writ of mandate

herein; that said petition does not state facts sufficient to constitute a cause of action against these respondents, or any or either of them, or against the state of California, nor does said petition state facts sufficient to entitle petitioner to the relief sought therein, nor to any relief."

And further alleged—

"that this honorable court has no jurisdiction of the subject-matter set forth in said petition, nor to grant the plaintiff the relief sought therein."

Attached to each of the nine claims so presented and showing the action of respondents had thereon and reasons therefor, as required by section 668 of the Political Code, was a statement as follows:

"Office of State Board of Control.

"Sacramento, Cal., Feb. 2, 1915.

"The annexed account for 207.85/100, two hundred seven & 85/100, presented by Wm. A. Hammel for transportation of prisoners to Folsom, is rejected and disallowed under section 668, Political Code of the state of California, and section 682 of the Political Code of the state of California, for the reason that said claimant is now indebted to the state of California in the sum of \$2,199.26, moneys by him had and received for the use and benefit of the said state of California, prior to the date hereof, all of which said claimant has heretofore refused, and does now refuse, to repay to the state despite demand made of him for such repayment."

It must be conceded, upon admitted allegations of the petition, stipulations made, and uncontroverted evidence offered by petitioner, that the claims in question were found and determined by the board of control to be properly made out and presented in full compliance with the law and the rules governing the same as adopted by said board, and no question is raised as to the truth and correctness thereof, or petitioner's right to have the same allowed, save and except that respondents assert, without offering any proof thereof, that petitioner is indebted to the state for the collection of overcharges for services rendered and expenditures made during the years 1911, 1912, and 1913, claims for which, had at the time been duly approved and allowed by said board of control, warrants issued therefor by the controller and paid in usual course.

Upon trial, and after petitioner had introduced his evidence, the respondents, without offering any evidence, moved the court to dismiss the petition and said proceeding upon the ground—

"that this court has no jurisdiction of the subject-matter set forth in said petition, nor to grant to petitioner the relief sought therein, and that this court has no jurisdiction of the parties respondent to this proceeding; that the petition does not state facts sufficient to constitute a cause of action against these respondents, or any or either of them, or against the state of California; nor does said petition state facts sufficient to entitle petitioner to the relief therein sought, nor to any relief."

The court made an order granting the motion, and caused a judgment to be entered dismissing the proceeding, from which petitioner prosecutes this appeal.

In support of the court's ruling, respondents insist: First, that the state board of

control, in acting upon claims presented for its allowance, is vested with judicial powers, and, having in its discretion refused to allow the claims, mandamus will not lie to compel other action than that taken; second, that under the provisions of section 671 of the Political Code petitioner's remedy, if aggrieved by the action of the board, was an appeal to the Legislature.

[1, 2] As to the first proposition, it is undoubtedly the general rule that where an officer, board, or tribunal is vested with power to determine a question upon which a right depends, mandamus will not lie to control the discretion of such officer, board, or tribunal in the determination thereof. *Inglin v. Hopplin*, 156 Cal. 483, 105 Pac. 582. Nevertheless, as stated in the above-entitled case:

"The above cases [cited in the opinion] abundantly show that mandamus will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, when the law clearly establishes the petitioner's right to such action"

—or, we may add, where in determining the matter confided to such board its discretion has been controlled by a consideration of questions not relating to the subject involved, and therefore not properly within its discretion (26 Cyc. 161); or, as stated in *State v. Stutsman*, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776, "where the discretion is made to turn upon matters which, under the law, should not be considered." And this we conceive to be the vice of respondents' position.

[3] Section 4290 of the Political Code provides:

"The sheriff shall be entitled to receive and retain for his own use, five dollars per diem for conveying prisoners to and from the state prisons, and for conveying persons to and from the insane asylums, or other state institutions not otherwise provided for by law; also, all expenses necessarily incurred in conveying insane persons to and from the insane asylums, and in conveying persons to and from the state prisons, or other state institutions, which per diem and expenses shall be allowed by the board of examiners and collected from the state."

Under this provision the sheriff is entitled to collect and receive from the state for the services specified \$5 per day and expenses necessarily incurred in the performance thereof, subject only to the condition that his claim therefor is properly presented, as here done, to the board of control, as provided in section 663, Political Code, for its scrutiny, which scrutiny and examination under the provision quoted, is limited to an inquiry as to whether the sheriff has rendered the services set forth in his claim, and whether the amount claimed for expenses was necessarily incurred in such performance, and upon a finding favorable to claimant, then, as provided by section 4290, the board of control has no discretion other than to allow such "per diem and expenses." *Hensley v. Superior Court*, 111 Cal. 541, 44 Pac. 232. Since as to such claims the right to scrutinize is thus

limited, it must follow that the board may not refuse to allow a claim concededly correct and properly presented, upon grounds other than those specified; that is, where it finds the services were not performed or the expenses not necessarily incurred. *Lawrence v. Booth*, 46 Cal. 187. The mere assertion, such as here made, that the claimant is indebted to the state, whether by reason of his having theretofore wrongfully obtained its funds or negligently operated a motor car as a result of which state property was damaged, furnishes no reason for disallowing his claim, for the reason that under the statute it is not made to depend upon a determination of such questions. Therefore, if it be conceded the petitioner as such sheriff was indebted to the state on account of other dealings, such fact is no ground for disallowing the claims presented for services rendered and expenses incurred by him for and on behalf of the state.

While under section 682 the board is vested with powers of supervision over matters concerning the financial and business policies of the state and may institute investigations and proceedings to conserve the interests thereof, no power, however, is vested in it to institute or maintain actions for the recovery of funds due the state. Such powers of supervision and investigation so given it under section 682 must, in a case of the character here involved, be exercised subject to and controlled by the provisions of section 4290.

[4, 5] Moreover, in regularly approving and allowing the claims presented by Hammel for services and expenses rendered and incurred during the years 1911, 1912, and 1913, for which warrants had been issued and paid, the board of control, to a limited extent, acted judicially in exercising the powers of investigation vested in it, and its decision in such matter was final and conclusive so far as a collateral attack thereon is concerned. *Black on Judgments*, § 532; *Sullivan v. Gage*, 145 Cal. 766, 79 Pac. 537; *Cahill v. Colgan*, 3 Cal. Unrep. 622, 31 Pac. 614. Conceding that the controller might, in a proper case (section 433, Pol. Code), where it was made to appear that a claimant had by fraud obtained moneys of the state, institute an action to recover the same, no such power is vested in the board of control. And if it has no power to institute such action, it is likewise wanting in power to interpose, as a defense in a proceeding for mandamus, a counterclaim based upon such alleged fraud.

[6] Coming now to the second proposition which, as shown by the record, is that upon which the trial court based its judgment and order that the proceeding be dismissed: Section 671, Political Code, provides that:

"Any person interested, who is aggrieved by the disapproval of a claim by the board, may appeal from the decision to the Legislature of the state, by filing with the board a notice thereof, and upon the receipt of such notice the board

must transmit the demand and all the papers accompanying the same, with a statement of the evidence taken before it to the Legislature."

Respondents insist, and the court held, that by virtue of this provision, and conceding as found by the board of control that petitioner had performed services the per diem for which and expenses necessarily incurred in connection therewith, as fixed by section 4290, Political Code, amounted to the sum of \$2,199.26, which claims therefor the board refused to allow for the alleged reason that he had theretofore in other dealings had with the state fraudulently obtained a sum of money in amount equal to such claims, his remedy, and only remedy, was an appeal to the Legislature. We cannot consent to this proposition. Had the board found that petitioner had not performed the services claimed, or found the expenses incurred in the performance thereof were unnecessary, then, upon its determination of the question so confided to it, petitioner's only remedy would be an appeal to the Legislature to pass a law for his relief, since in the absence of such facts the allowance of his claim would be clearly unauthorized. As said by the learned trial judge, the Legislature has the right to fix the conditions upon which state funds will be paid out. By section 4290 it has prescribed such conditions, and the board of control has, as stated, found that those conditions were complied with by petitioner, but disallowed the claims upon grounds other than those prescribed. Hence, on an appeal to the Legislature, it would be called upon, not to review the questions as to whether petitioner had complied with the conditions upon which it had directed the board of control to allow the claims, but whether petitioner had been guilty of the alleged fraud with which he is charged by the board of control. Except as to the Senate when sitting as a court of impeachment (section 1, art. 6, Const.), the Legislature possesses no judicial power, and hence could not try the question as to whether or not petitioner had, as claimed, by means of fraud looted the state treasury. Nor by such provision was it ever intended that this subordinate agency of the state, vested with limited powers, should ignore the plain import of the language used in section 4290, thus leaving one aggrieved by its unwarranted action with no remedy or redress other than to appeal to, that is, petition (Magna Charta, and section 10, art. 1, state Constitution) the Legislature for the enactment of another law, in effect declaring that it (the Legislature) meant and intended just what was said in section 4290, Political Code. To so apply the provision of section 671 would not only place the state board of control above the law, but lead to an absurdity. One may readily conceive of claims presented to the board where its disallowance thereof would be final, leaving the

claimant with no remedy other than to petition the Legislature for relief. To such cases only the provision must be held applicable. Where, however, the Legislature has, as here, provided that a sheriff shall, for services designated, receive a per diem of \$5, together with the expenses necessarily incurred in the performance of such services, and directed that the board of control shall allow claims therefor, it leaves to the board no discretion other than to allow such claims upon finding facts the existence of which is made the only condition upon which such allowance is directed by the Legislature, and the absence thereof the only ground for refusal to allow the same. For such refusal in a proper case an appeal to the Legislature provides no adequate remedy. The allowance under the circumstances is one "specially enjoined" by law upon respondents, and for its refusal to perform the act so enjoined, a writ of mandate lies to compel such performance. Section 1085, Code Civ. Proc.; *Lawrence v. Booth*, supra; *Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

PEOPLE v. FERRARA. (Cr. 339.)

(District Court of Appeal, Third District, California, June 22, 1916. Rehearing Denied July 22, 1916. Rehearing Denied by Supreme Court Aug. 21, 1916.)

1. ROBBERY \Leftrightarrow 24(4)—EVIDENCE—OWNERSHIP OF PROPERTY—SUFFICIENCY.

Evidence that prosecuting witness got two checks, had them cashed, and that the money in his pocket when attacked was a part of their proceeds is sufficient to show that the money was his property.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 35; Dec. Dig. \Leftrightarrow 24(4).]

2. ROBBERY \Leftrightarrow 24(5)—FORCE AND FEAR—EVIDENCE—SUFFICIENCY.

Evidence held to justify finding that money was taken from person of prosecuting witness by force and fear.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 36; Dec. Dig. \Leftrightarrow 24(5).]

3. ROBBERY \Leftrightarrow 24(1) — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to justify conviction of crime of robbery.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 32; Dec. Dig. \Leftrightarrow 24(1).]

4. CRIMINAL LAW \Leftrightarrow 400(4)—EVIDENCE—ADMISSIBILITY—CONTENTS OF DOCUMENTS.

Witness may testify that accused signed a name other than his own to a hotel register, such evidence being of an act witnessed, and not of the contents of the register.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. \Leftrightarrow 400(4).]

5. CRIMINAL LAW \Leftrightarrow 417(1) — EVIDENCE — STATEMENTS OF THIRD PERSONS—ADMISSIBILITY.

Statements of third persons and their conversations with accused and prosecuting witness,

before the offense, and on which defendant acted, are admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 950; Dec. Dig. ¶417(1).]

6. WITNESSES ¶259—REFRESHING MEMORY—STENOGRAPHIC NOTES.

The reporter may use his notes in testifying, to refresh his memory, as provided in Code Civ. Proc. § 2047, and, on objection that they had not been filed, it is not error to direct him to file them, and then overrule the objection.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 894; Dec. Dig. ¶259.]

7. CRIMINAL LAW ¶414—EVIDENCE—STATEMENTS OF ACCUSED—PRELIMINARY EVIDENCE.

It is not necessary to fix time, place, and circumstances of alleged statements of defendant by first questioning him thereon, since they are original evidence against him, and the rules as to impeachment of witnesses do not apply.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 862, 936; Dec. Dig. ¶414.]

8. CRIMINAL LAW ¶783(1)—EVIDENCE—EFFECT—CONTRADICTORY EVIDENCE.

Instruction that contradictory testimony is admissible only for the purpose of impeaching the credibility of the witness and not to consider it as evidence of the truth of such statements, is properly refused; such evidence being of truth of facts stated therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1872-1874, 1876; Dec. Dig. ¶783(1).]

9. ROBBERY ¶27(6)—INSTRUCTIONS—DISJUNCTIVE AS TO FORCE AND FEAR.

Under Pen. Code, § 211, defining robbery as felonious taking of personalty from person against his will by force or fear, instruction, permitting conviction if the offense was accomplished by "force or fear," is proper, though the information alleged "force and fear."

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 39; Dec. Dig. ¶27(6).]

For other definitions, see Words and Phrases, First and Second Series, Robbery.]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Albert Francis Ferrara was convicted of robbery, and from such judgment and an order denying motion for new trial, he appeals. Affirmed.

Cross & Lynch, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

ELLISON, Judge pro tem. The defendant has been convicted of the crime of robbery and sentenced to imprisonment for the term of 15 years. He prosecutes this appeal from the judgment and order denying his motion for a new trial.

In view of the youth of the defendant and the judgment rendered the record has been examined with great care, the result of which is that no reversible error has been found. In fact, the trial seems to have been conducted with unusual care and regard for the defendant's rights. Many points are made by appellant for a reversal, and they will be given such consideration as seems proper.

[1-3] It is claimed that the corpus delicti

was not proved. A brief narrative of the salient facts of the case will show that this position is not well taken.

The prosecuting witness, Duffy, came from Merced to Stockton on the afternoon of the 2d day of September, 1915, arriving there about 4 o'clock, and went to a saloon kept by a man named Grohmans. There he met the defendant, and they had several drinks. At about 4:30 p. m. Duffy, in company with the defendant, left the saloon and went to the boat landing for the purpose of taking a boat to San Francisco. The defendant bought a boat ticket for himself and one for Duffy. The officers at the boat landing refused to let Duffy go on the boat because of his intoxicated condition, and took up his ticket, returning to him the price thereof, \$1. The two then returned to the Grohmans saloon, and were there informed that a Southern Pacific train would leave for San Francisco at about 7 o'clock. The two walked to the Southern Pacific Depot and when they reached it learned that the train they expected to take had gone; they were told that a Santa Fé train would leave at about 8:30. The defendant told Duffy he knew the way to the Santa Fé Depot, and they started to walk there, the defendant taking the lead. When they were within about 150 yards of the Santa Fé Depot the defendant said, "Give me a smoke." While sitting there on the side of the railroad track smoking, a man came along with a lantern and the defendant asked him what time the train would leave, and defendant told Duffy he said about 9 o'clock. (It seems Duffy is somewhat deaf.) Shortly after this man left, the defendant attracted Duffy's attention to something up the track, and when Duffy turned his head the defendant struck him just back of the ear. Duffy jumped up, and the defendant struck him again between the eyes and once on the hand. After Duffy had been thus struck he felt "everything going—everything kind of commenced to get dark for me." Duffy testified that after this he had a faint recollection of defendant going through his pockets. After some time Duffy regained consciousness, and managed, after several efforts, to get to his feet. The defendant was gone, and Duffy did not see him again until after his arrest. Duffy testified that when he was struck by the defendant he had in his pocket about \$28; that when he came to his money was all gone; there was none in his pockets. He testified that just before he left Modesto he got two checks, which he cashed, one for \$30 and one for \$12.50, and then detailed, as best he could, what he spent from that time until he was struck and figured he had about \$28 left. There was much other testimony in the case, among which were statements of the defendant to the officers, which are manifestly false, but the above recital is

sufficient for the purpose of noticing the points relied upon for a reversal.

It is claimed that the proof is insufficient to show that the money alleged to have been taken was the property of the complaining witness. But the evidence that Duffy got two checks in Modesto, had them cashed, and that the money in his pocket at the time he was struck was a part of the proceeds of these checks, is sufficient to show that the money was his property.

The evidence is amply sufficient to justify the jury in finding that it was taken from his person by force or fear. The evidence was sufficient to justify a conviction of the defendant. It is claimed that certain statements of the accused were given in evidence before the corpus delicti had been proved. None was admitted before the complaining witness had testified to the facts above recited.

[4] It is claimed that the court erred in allowing verbal proof of the contents of a certain hotel register. A witness, James Farley, testified that on the night of the alleged robbery the defendant went with him in an auto to the town of Tracy. He testified that at the hotel in Tracy to which they went and spent the night the defendant wrote something on the hotel register. He did not write the name Ferrara, but witness did not know what name he did write. This testimony was objected to on the ground that the hotel register was the best evidence of its contents. The witness was testifying to an act of the defendant witnessed by him. The witness did not know what particular name he signed on the register, and it was immaterial. The material thing was that he signed a name other than his own or, to put it another way, that he registered but did not write his own name. We think this was primary evidence of the fact, and that the act was material.

[5] Nor was there any error in allowing in evidence the statements of third persons. The record shows that witness Corlett, over objection, testified that when prosecuting witness and defendant were standing at the bar close together, defendant stated that he had a couple of packages—was going away on the train—but did not know where they were located. Witness told defendant to "go down the street and see if you can locate the packages" and defendant said "all right. So they went together and come back with the packages." We see nothing in this of which the defendant can complain. He heard the conversation and statements and acted upon them.

[6] During the trial the phonographic reporter, who acted as such at the preliminary examination, was sworn and asked if the defendant as such hearing made certain statements, and to enable him to answer was requested to and did get his original notes of such examination. Objection was made

to the use of the notes upon the ground that "they had not been filed." The reporter was directed to file his notes, and the objection was overruled. In this we perceive no error. The witness was present at the examination and made notes of the testimony and was using them as a basis for the testimony he was giving. He had a right to refresh his memory from such notes, and if he had no independent recollection of what the defendant testified to, he could read his notes of the testimony. In thus using his notes he stood in no different position from any other person who might have been present and made notes of what the defendant said. Code Civ. Proc. § 2047. If it had been sought to use the transcript of the notes as a deposition, the questions raised by counsel might require fuller consideration.

[7] It was not necessary to fix time, place, and circumstances of alleged statements made by defendant by questioning him thereon before proving such statements. His declarations and statements were original evidence against him, and the rules as to impeachment of witnesses did not apply.

[8] The court refused to give the following instruction asked by the defendant:

"The jury is instructed that contradictory testimony is admissible only for the purpose of impeaching the credibility of the witness, and you may not consider it as evidence of the truth of such statements."

This instruction was properly refused. The evidence of the prosecuting witness (to illustrate) was contradictory of the testimony of the defendant, but it was evidence of the truth of the facts he testified to, and was to be so considered by the jury. Counsel evidently had in mind the rule as to proof of statements made by a witness at other times contradicting his testimony given at the trial. If so, he was unfortunate in expressing the rule.

[9] The court instructed the jury that they could find a verdict of guilty if the taking of the money was—

"accomplished by means of force or fear used upon or against the said John Duffy by the said defendant, or by said defendant putting said John Duffy in fear."

Counsel claim that the instruction was erroneous, in that it used the disjunctive "or" instead of the conjunctive "and" between the words "force" and "fear." The instruction as to this feature of it is in the language of the statute (Pen. Code, § 211), wherein it is provided:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

But, while the statute is thus worded, counsel takes the position that as the information alleged that the taking was accomplished by means of force and fear, "force and fear" were words descriptive of the manner in which the offense was committed and had to be proved as alleged. The instruction

as given was a correct statement of the law, and while it was alleged that *fear and force* were the means used, the offense was complete if either was proved as the means by which the taking was accomplished.

We find no error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

FARGO et al. v. WADE

(Supreme Court of Oregon. July 25, 1916.)

VENDOR AND PURCHASER \Leftrightarrow 351(1) — DAMAGES—REMOTE AND UNCERTAIN.

Injury to F., given an option on land by E. subject to lease given by E. to H., by reason of H. not breaking the sod, is not the direct and necessary result of E. not furnishing a man to assist H. in farming, as required by the lease, but is remote and uncertain; the lease merely providing that H. shall break so much of the sod ground "as he can, weather conditions and other conditions considered."

[Ed. Note.—For other cases, see Vendor and Purchaser. Cent. Dig. §§ 1047, 1048, 1052; Dec. Dig. \Leftrightarrow 351(1).]

Department 1. Appeal from Circuit Court, Multnomah County; T. E. J. McDuffy, Judge.

Action by George K. Fargo and another against W. T. Wade. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 72 Or. 477, 142 Pac. 830, L. R. A. 1915A, 271.

This is an action to recover one installment of \$250 alleged to be due on an option contract executed January 3, 1910, whereby the predecessor in title of the plaintiffs granted to the defendant the option of purchasing some land in Wallowa county, in consideration that he would pay certain amounts annually for the privilege extended. This chose in action was assigned to the plaintiffs. The making of the option contract is admitted, together with its assignment to the plaintiffs. Otherwise the complaint is denied, except as stated in the further and separate answer. The defendant alleges that at the time the contract was made the land was under lease to C. W. Harvey for five years, one of the terms of which demise was that Ewing—

"is to furnish a man for 8 months during each year to assist party of the second part in farming said place and, in the event of not furnishing said man, to pay party of the second part a sum equal to the wages of a farm hand for said period of time during each year. The party of the second part [Harvey] is to break out each year so much of the sod ground on said place as he can, weather conditions and other conditions considered, and plant the same to crops on same conditions as other land is farmed."

The answer is further to the effect that the plaintiffs bought from Ewing the land and the chose in action under the option contract, and covenanted with him to keep and perform all the terms of the lease to Har-

vey. The defendant avers in conclusion that both Ewing and the plaintiffs failed to furnish the man or pay his wages at any time; that in consequence thereof Harvey did not plow any new ground and, accordingly, the land was rendered less valuable, so that he suffered damage in the sum of \$5,124, for which he demands judgment. The new matter in the answer is traversed by the reply. The court refused to allow testimony about the condition of the land and whether the sod had been broken or not, and generally refused proof of the allegations of the answer in connection with that stipulation in the lease. From a judgment for the plaintiffs, the defendant appeals.

Leroy Lomax, of Portland, for appellant.
C. A. Hart, of Portland, for respondents.

BURNETT, J. (after stating the facts as above). In order to recover damages the injury for which compensation is desired by a plaintiff must be the natural, direct, and necessary result of the alleged wrongful act or omission of the defendant. 13 Cyc. 25. If we could say that the breaking of new sod would have been the ordinary and normal consequence of furnishing the laborer to Harvey or paying him the money instead, then, if there were no further factors to consider, the conclusion would follow that the shortcoming of Ewing and the plaintiffs in failing to keep the covenant of the lease in that respect constitutes a basis upon which to recover damages. But, in the first place, Harvey only stipulated "to break out each year so much of the sod ground on said place as he can, weather conditions and other conditions considered." Nothing is stated in the answer showing that the weather and other conditions, whatever they may have been, were favorable to plowing sod, or that Harvey had the present ability or inclination to perform the labor. The lease does not specify that the hand to be furnished was for the purpose of breaking new land. Indeed, that document almost, if not quite, leaves the cultivation of the farm to the discretion and inclination of Harvey. With perfect propriety he could have employed both himself and the laborer at other work. Under such conditions, damage to the defendant is not the necessary result of failing to furnish the hand to assist the tenant in farming. The injury, if any, is too remote from any act or default of Ewing or the plaintiffs. The provisos involved are numerous and did not operate together or in succession so as to make a continuous sequence between the alleged fault of the plaintiffs and the stated damage to the defendant. If plaintiffs had procured the laborer; if the weather conditions had been favorable; if Harvey had been willing to plow the sod; if he had set the hired man at that work; if he had done a good job of plowing; if

he had plowed more or less, are diverse considerations not related to nor acting with each other, and render the possibility of damage to the defendant so remote and uncertain that he cannot interpose it as a counterclaim against a demand which he might have avoided at any time by surrendering his option, as we held in the former case. *Fargo v. Wade*, 72 Or. 477, 142 Pac. 830, L. R. A. 1915A, 271.

The judgment is affirmed.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

MACKENZIE et al. v. DOUGLAS COUNTY.*

(Supreme Court of Oregon. Aug. 1, 1916.)

1. COUNTIES \Leftrightarrow 1, 24—AGENTS OF STATE—OBLIGATIONS.

Counties are governmental agencies of the state, and where the state by enactment, for governmental purposes, imposes a constitutional obligation on the county, the county must fairly meet it.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 1, 24; Dec. Dig. \Leftrightarrow 1, 24.]

For other definitions, see Words and Phrases, First and Second Series, County.]

2. COUNTIES \Leftrightarrow 183—AUDIT OF BOOKS—POWERS OF INSURANCE COMMISSIONER.

Laws 1913, p. 546, § 12, providing that audit of books of a county for years before or after 1914, may be made by or under supervision of the state insurance commissioner upon proper assurance that the expense will be borne by the county, authorizes the audit for years prior to 1914 only if the county agrees to pay the expense thereof, and for years after 1914 only for special audits other than the annual, and section 14, authorizing employment of experts not to exceed the amount appropriated therefor, does not authorize the insurance commissioner to make a contract with expert accountants for a county, independent of its authorities so as to render the county liable for the cost, except where made by the commissioner.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 200, 201; Dec. Dig. \Leftrightarrow 133.]

3. STATUTES \Leftrightarrow 228—CONSTRUCTION—"PROVISO."

While a proviso is commonly found at the end of the act or section, and is usually introduced by the word "provided," that word is not necessary, the matter and not the form of the succeeding words controlling; a "proviso" necessarily containing a condition or limitation upon the preceding matter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. \Leftrightarrow 228.]

For other definitions, see Words and Phrases, First and Second Series, Proviso.]

4. STATUTES \Leftrightarrow 194—CONSTRUCTION—GENERAL WORDS.

The general intent will be controlled by the particular intent subsequently expressed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. \Leftrightarrow 194.]

5. OFFICERS \Leftrightarrow 103—GRANTS OF POWER—CONSTRUCTION.

Acts conferring statutory powers on an officer are strictly construed.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 163-172, 175; Dec. Dig. \Leftrightarrow 103.]

6. STATUTES \Leftrightarrow 200—CONSTRUCTION—PUNCTUATION.

Although punctuation may be resorted to as an aid in construction when it tends to throw light on the meaning, yet it may be disregarded when it would tend to convey a meaning not in consonance with the rest of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 278; Dec. Dig. \Leftrightarrow 200.]

7. COUNTIES \Leftrightarrow 133—STATUTES \Leftrightarrow 200—CONSTRUCTION—PUNCTUATION.

Laws 1913, p. 546, § 12, as to audit of books of any "city, county school district," etc., though there is no official comma between "county" and "school district," will be construed as if the comma were present, so as to apply to counties, as required by the later provisions of the act.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 200, 201; Dec. Dig. \Leftrightarrow 133; Statutes, Cent. Dig. § 278; Dec. Dig. \Leftrightarrow 200.]

8. OFFICERS \Leftrightarrow 94—COMPENSATION OF EXPERTS—LIABILITY.

The right of an officer to demand expenses incurred by him in the performance of official duty must be found in the Constitution or the statute conferring it, either directly or by necessary implication; and a private citizen cannot have any greater right in this respect.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 132, 133, 136-138, 140, 141; Dec. Dig. \Leftrightarrow 94.]

9. COUNTIES \Leftrightarrow 24—AUDIT OF BOOKS—COMPENSATION OF EXPERTS—LIABILITY.

A claim for compensation of experts who audited county books cannot be allowed under Laws 1913, p. 545, unless the complaint shows that the insurance commissioner made the audit, or that the county officials agreed to pay therefor.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 24; Dec. Dig. \Leftrightarrow 24.]

Department 2. Appeal from Circuit Court. Douglas County; J. W. Hamilton, Judge.

Action by W. R. Mackenzie and another, doing business as W. R. Mackenzie & Son, against Douglas County. From an order sustaining demurrer to the complaint and dismissing the action, plaintiffs appeal. Affirmed.

See, also, *Berridge v. Marion County*, 159 Pac. 628.

This is an action on a contract alleged to have been made on or about September 28, 1914, by plaintiffs and the state insurance commissioner on behalf of Douglas county under the provisions of chapter 286, Laws of 1913, p. 545, for the purpose of having a careful and accurate audit made of its books and accounts. Plaintiffs allege that the agreed compensation was to be \$10 a day with their expenses, and that 42½ days were occupied in making the audit mentioned, their expenses amounting to \$153.50, thus aggregating \$578.50. Defendant demurred to the complaint for insufficiency of facts stated therein. The circuit court sustained the demurrer, and dismissed the action. Plaintiffs appeal.

M. E. Crumpacker, of Portland (J. C. Fullerton, of Roseburg, on the brief), for appellants. George Neuner, Jr., of Roseburg (Dexter Rice, of Roseburg, on the brief), for respondent.

BEAN, J. (after stating the facts as above). [1] It may be stated that counties are but agencies of the state for governmental purposes. *Grant County v. Lake County*, 17 Or. 453, 458, 21 Pac. 447; 2 Words and Phrases, p. 1653; 11 Cyc. p. 343. Where a state by enactment, in furtherance of its governmental purposes, imposes an obligation upon a county not in conflict with the Constitution of the state, that obligation becomes one which the county must fairly meet. *Grant County v. Lake County*, supra; *Crosen v. Wasco County*, 10 Or. 111; *Wallowa County v. Oakes*, 46 Or. 33, 35, 78 Pac. 892.

Counsel for defendant claim: (1) That without the consent of the county the state insurance commissioner was not authorized by the act to make a contract for and incur liability on behalf of the county for the audit of its books; and (2) that plaintiffs' remedy, if any, is by a writ of review to re-examine the decision of the county court in refusing to pay the claim.

[2] The first question involves a construction of the act of 1913. In 1915 the Legislature repealed the law. See Laws 1915, pp. 123, 328. The enactment provided that the state insurance commissioner should formulate and prescribe a uniform system of accounting for all offices and institutions using state money, and also for all counties of the state, and permitted such a system for road and school districts. The first nine sections thereof are devoted principally to provisions for the inauguration of such a system to be accomplished by January 1, 1914. That part of the statute particularly applicable to the question involved herein is as follows:

"From and after January 1, 1914, the State insurance commissioner shall at least once each year make a careful and accurate audit of the books and accounts of each institution or officer, expending state money, and of the books and accounts of each county of the state." Section 10.

"The expense of each such audit shall be certified by the state insurance commissioner to the county of which such audit was made, and shall be paid by such county direct to the person making the audit." Section 11.

"The expense of auditing the books and accounts of the institutions and officers expending state money shall be paid by the state from the funds appropriated by this act, upon the proper voucher of the state insurance commissioner. An audit of the books and accounts of any city, county school district, road district, port or other taxpaying district for any year or years before or after 1914, may be made by or under the supervision of the state insurance commissioner, upon proper assurance that the expense thereof will be paid by the county, city or other branch of government or the deposit of a sufficient sum therefor, by any individual." Section 12.

Section 17 required a complete report showing the financial status of each county and state institution to be published by the insurance commissioner each year, beginning on or before the year 1915. The meaning of the act is not instantly apparent, and, in order to ascertain the legislative intent, it will be necessary to consider the whole plan

or scheme of the law. Provision was made for the payment of an audit in three different ways, namely: (1) An audit by the state insurance commissioner of the state books and accounts to be paid for by the state; (2) an annual audit by that official after January 1, 1914, of the books and accounts of each county of the state to be paid for by such county upon the certificate of the state insurance commissioner; and (3) an audit of the books and accounts of any city, county, school district, or taxpaying district which may be made by, or under the supervision of, the state insurance commissioner upon proper assurance that the expense thereof will be paid by the county. As to the second provision for such payment, section 10 provided for an official examination by the above commissioner of the books and accounts of each county of the state after January 1, 1914. Section 11 directed that the expense of such an audit should be certified by the insurance commissioner to the proper county, and by it paid directly to the person making the audit, and not to the state or through its usual official channels. It should be kept in mind that these provisions relate to the experting of county books by the commissioner, which will furnish that official with the information necessary as a basis for the annual report required by section 17.

After providing for the manner of payment of expenses relating to state accounts, in section 12 we find a proviso that:

"An audit of the books and accounts of any city, county school district, road district, port or other taxpaying district for any year or years before or after 1914, may be made by or under the supervision of the state insurance commissioner, upon proper assurance that the expense thereof will be paid by the county, city or other branch of government. * * *"

This quoted part of the section contains all the authorization found in the law for the experting of county books "under the supervision of the insurance commissioner" as distinguished from being done by that official.

It appears that the lawmakers had in mind that in many of the counties of the state an audit of the affairs of the county had already been made up to about the date of the passage of the act, and, by the latter part of section 12 it was intended to provide for the experting of county books by the insurance commissioner, or under his supervision, for years prior to 1914, dependent upon the assurance of the county authorities that the expense would be borne by that branch of the government. The provision for such an audit after 1914 is believed to apply to any city or taxpaying district other than a county, or to some special audit of county business, such as the expenditure of a large fund for some improvement, which its officials might desire to be experted without waiting for the annual audit. This view is strength-

ened when we remember that the law clearly contemplated that the system should be in vogue so that the financial affairs of the state and counties should be under the official eye of the insurance commissioner from and after January 1, 1914, and the expediting of the books of other taxpaying districts left conditional under the latter part of section 12. By section 14 the commissioner was authorized to employ such clerical and expert assistance on such terms as he might deem best, in the performance of the duties imposed upon him by the act, not to exceed in any year the total amount appropriated therefor. It is plain that this section does not relate to the employment of experts to be compensated by a county. Nowhere in the law do we find authority for the insurance commissioner to make a contract with expert accountants for a county, independent of its authorities, nor to so render the county liable for the cost of making such audit save when it is made by that official.

[3] The official auditing of the accounts of a county by the state insurance commissioner and the making of a contract for the expediting of such books by an independent accountant are two different things. The commissioner is empowered by section 16 to subpoena and examine witnesses in order to ascertain the true status of any item of account which it is his duty to audit. For this purpose that official is clothed with the same authority as a circuit judge, plainly providing for an official audit of the books and accounts to be made by the commissioner. By this construction of the statute it seems that every section and clause is given a meaning in accordance with the legislative intent. To turn on the light of some of the rules of construction in our aid, as the mechanical arrangement of the latter sections and clauses of the statute are not methodical, we note as authority for the term "proviso" which we have applied to the latter part of section 12 that:

"A proviso is a clause added to a statute, or to a section or part thereof, which introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of its extent." Black on Interpretation of Laws, § 107.

[4] A proviso is commonly found at the end of the act or section to which it applies, and it is usually introduced by the word "provided." This, however, is not necessary to determine its character. It is the matter of the succeeding words, and not the form, that determines its legal character. *Id.* p. 270. Section 110 of the same work reads thus:

"The natural and appropriate office of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Hence it is a rule of construction

that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the Legislature intended it to have a wider scope."

"The general intent will be controlled by the particular intent subsequently expressed." 2 Lewis' Sutherland, Stat. Const. § 351.

[5] Acts which confer statutory power upon an officer are strictly construed. *Id.* § 562.

If the portion of section 12 to which we have referred had been introduced by the word "provided," while it would not have changed the legal effect thereof, we doubt if this litigation would have resulted.

[6, 7] It is contended by counsel for the plaintiffs that, there being no official comma after the word "county," where it first appears in section 12, as shown by the session laws and legislative journal, the words "county school district" there used refer to a school district of the county, and that the limitation does not apply to auditing the books of a county. The word "county," appearing the second time in the proviso authorizing an audit "upon proper assurance that the expense thereof will be paid by the county," seems to refute such a contention. It is not usual for county authorities to assume the payment of such expenses for school districts or other taxpaying districts except for the county itself. The point is not well taken. The language of the act does not indicate the meaning as claimed. It is a well-known rule of statutory construction that, although punctuation may be resorted to as an aid in construction when it tends to throw light on the meaning, yet it may be disregarded when it would tend to convey a meaning to a section not in consonance with the other parts of the act. *Commonwealth v. Kelley*, 177 Mass. 221, 58 N. E. 691; *Stiles v. Guthrie*, 3 Okl. 26, 41 Pac. 383.

[8] It is an inflexible rule that the right even of an officer to demand expenses incurred by him in the performance of official duty must be found in the Constitution or the statute conferring it, either directly or by necessary implication; and a private citizen could not have any greater right in this respect. *Jackson v. Siglin*, 10 Or. 93; *Pugh v. Good*, 19 Or. 85, 92, 23 Pac. 827; *Houser v. Umatilla County*, 30 Or. 486, 489, 49 Pac. 867; *Baker County v. Benson*, 40 Or. 207, 212, 66 Pac. 815.

[9] The claim asserted in the complaint does not show that the audit of the county books and accounts was made by the state insurance commissioner, nor that the officials of the county of Douglas made assurance or agreed that the expenses thereof would be paid by the commissioner. The contract alleged in the complaint was not authorized by the statute. This conclusion renders unnecessary a discussion of the other question raised. The demurrer to the

complaint was therefore properly sustained by the trial court. The judgment is affirmed.

MOORE, C. J., and BURNETT and HARRIS, JJ., concur. EAKIN, J., absent.

BERRIDGE v. MARION COUNTY et al.

(Supreme Court of Oregon. Aug. 1, 1916.)

1. COUNTIES ⇨24—AUDIT OF BOOKS—POWERS OF INSURANCE COMMISSIONER—TIME OF AUDIT.

Under Laws 1913, p. 546, § 10, providing that the insurance commissioner shall at least once each year make a careful audit of books of each county, such officer is not restricted to making examination for an entire year.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 24; Dec. Dig. ⇨24.]

2. CERTIORARI ⇨24—SCOPE OF WRIT—QUESTIONS OF LAW.

A writ of review is an appropriate proceeding to present questions of law arising in relation to a disputed claim against the county after it has been presented and disallowed.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 37; Dec. Dig. ⇨24.]

3. CERTIORARI ⇨64(1)—SCOPE OF REVIEW—RECORD—EVIDENCE.

On re-examination on writ of review, the court will not consider evidence outside the record, unless it was submitted to the inferior tribunal prior to its decision.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 183, 184; Dec. Dig. ⇨64(1).]

4. CERTIORARI ⇨24—SCOPE OF WRIT—QUESTIONS OF LAW.

The question of law whether the state insurance commissioner may contract for audit of county books without assurance that county will pay therefor, so as to render the county liable for the expense, in view of Laws 1913, p. 545, as to audits, may properly be raised by writ of review directed to the order of the county court disallowing the claim.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 37; Dec. Dig. ⇨24.]

Department 2. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Claim of Arthur Berridge against Marion County and others. The plaintiff secured writ of review to re-examine the action of the county court disallowing his claim, and from the order dismissing the proceeding on return of the writ, the plaintiff appeals. Affirmed.

See, also, Mackenzie v. Douglas County, 159 Pac. 625.

S. T. Richardson, of Salem, for appellant. George G. Bingham, of Salem (Ernest R. Ringo, of Salem, on the brief), for respondents.

This is a proceeding by a writ of review to re-examine the action of the county court of Marion county in disallowing the claim of plaintiff for auditing the books and accounts of that county amounting to \$1,523.11. Upon the return to the writ the trial court dismissed the proceeding. Plaintiff appeals.

BEAN, J. Plaintiff submitted to the county court the following claim:

Portland, Oregon, Nov. 30, 1914.

Marion County, Oregon, to Arthur Berridge & Co., Dr.

Date.	Nature of Claim.	Amount.
	For auditing county books from Jan. 1, 1914, to Sept. 30, 1914.....	\$1,523 11

Details as follows.

Time:

L. E. Thompson 55 days at	\$10 00	\$ 550 00
Harry Stopp 59 days at	10 00	590 00
E. H. Collis 11½ days at	10 00	115 00
Arthur Berridge 6½ days at	10 00	65 00
		<u>\$1,320 00</u>

Subsistence:

Thompson	60 00
Stopp	65 00
Collis	18 20
Berridge	7 85
	<u>\$ 151 05</u>

Transportation:

Thompson	3 00
Stopp	3 00
Collis	13 00
Berridge	7 10
	<u>26 20</u>

Typewriting reports, etc...	25 88
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\$1,523 11

This claim was duly verified, and the same certified to by the state insurance commissioner. It is alleged in the petition for the writ that on September 12, 1914, under the provisions of chapter 286 of the General Laws of 1913, the state insurance commissioner employed the plaintiff as an expert assistant to make an audit for him of the books and accounts of Marion county for the year 1914, and—

"agreed to and fixed your petitioner's services therefor at \$10 per day therefor, with railroad fare and subsistence for your petitioner and assistants that your petitioner might require to assist your petitioner in said work, together with the expense of making typewritten reports in triplicate of said auditing. That the said wages so agreed were reasonable in amount and of the amount that is usually charged and paid to persons having the qualifications of your petitioner and of the persons employed by your petitioner to audit the said books and accounts of said county of Marion.

It appears that the plaintiff was occupied for 6½ days in making the audit, and employed other assistants to expert the books. The record does not disclose that the claim is made for an audit of the county accounts by the state insurance commissioner. It seems that the only connection that official had with the transaction was to employ plaintiff and make an agreement as to his compensation and that of his assistants, and that by virtue of this delegation of authority the plaintiff in turn engaged other experts, for what compensation is not stated. The commissioner also certified the account rendered by the plaintiff, but it does not appear that the commissioner was responsible in any

way for the audit or vouched for the same. On the other hand, as shown by the return, that officer advised the county court as follows:

"In connection with the inclosed claim for services rendered by Arthur Berridge & Co. in the matter of the examination of the accounts and financial affairs of Marion county, I advise that there was no definite arrangement made whereby they were to be paid for the subsistence of the men engaged upon the work. Railroad fare was to be allowed from Portland to county seat and return but once. It was understood that we would approve the subsistence expenses if it met with the approval of the county court and the cost of the work was within reason. In this case it appears that more time was spent in detail work than was necessary, and, as the cost of the actual service is high, I do not recommend that subsistence expenses be allowed them. * * *"

[1] The county court evidently had before it the report of the experts showing for what years or period and by whom the county affairs were audited. That report is not before us. The claim as presented by the record is not made for an official service under the provisions of sections 10 and 11 of the act of 1913 in making an audit by the state insurance commissioner of the books and accounts of the county. It is contended on behalf of defendants that the insurance commissioner was not authorized to make an audit of the county books for a portion of the year, or oftener than one a year. The language employed in section 10 of the law that "the state insurance commissioner shall at least once each year make a careful audit of the books and accounts of * * * each county of the state" indicates that such official is not restricted to making such an examination for an entire year. The contract set forth in the petition by virtue of which the claim is made against the county was not authorized by the law of 1913, nor by any official of the county. This case is governed by the ruling in the companion case of MacKenzie v. Douglas County, 159 Pac. 625, in which an opinion has this day been rendered, and the remarks made therein in considering the law of 1913 need not be repeated here.

[2-4] Defendants' counsel suggest that plaintiff's remedy, if any, is by an action at law. A writ of review is an appropriate proceeding to present questions of law arising in relation to a disputed claim against a county after the same has been presented and disallowed. Flagg v. Columbia County, 51 Or. 172, 94 Pac. 184; Houser v. Umatilla County, 30 Or. 486, 49 Pac. 867. On re-examination on writ of review the court will not consider evidence outside the record, unless it was submitted to the inferior tribunal prior to its decision. Curran v. State, 53 Or. 154, 99 Pac. 420. We hold that the question of law involved herein is properly raised in this proceeding.

For the reason given in the Douglas Coun-

ty Case, the judgment of the lower court is affirmed.

MOORE, C. J., and BURNETT and HARRIS, JJ., concur.

GLOCK v. ELGES. (No. 2219.)

(Supreme Court of Nevada. Aug. 1, 1916.)

1. APPEAL AND ERROR ⇨504(1)—STATEMENT—TIME FOR FILING—WAIVER OF DEFECTS IN NOTICE.

Under Rev. Laws, § 5331, requiring a proposed statement to be served and filed within 30 days after written notice of the judgment or order appealed from, any defect in such notice is waived by serving and filing a notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501, 2557; Dec. Dig. ⇨564(1).]

2. APPEAL AND ERROR ⇨564(4)—STATEMENT—TIME FOR FILING—FAILURE TO FILE—EFFECT.

A failure to serve and file a statement within the time prescribed by Rev. Laws, § 5331, does not defeat the appeal, where it was duly perfected under section 5330, by filing a notice of appeal and undertaking or waiver thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2504-2506; Dec. Dig. ⇨564(4).]

3. APPEAL AND ERROR ⇨564(4)—STATEMENT—TIME FOR FILING—FAILURE TO FILE—EFFECT.

A statement, not served and filed within the time prescribed by Rev. Laws, § 5331, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2504-2506; Dec. Dig. ⇨564(4).]

4. FORCIBLE ENTRY AND DETAINER ⇨29(1)—CIVIL LIABILITY—PERSONS ENTITLED TO SUE.

In an action to recover damages for forcible entry, plaintiff must prove his title or right to possession of the property where the pleadings raise that issue.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 134; Dec. Dig. ⇨29(1).]

5. APPEAL AND ERROR ⇨518(1)—NECESSITY OF STATEMENT—APPEAL FROM ORDER.

Upon appeal from an order denying costs, the pleadings cannot be considered unless embodied in a statement attached to the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2342; Dec. Dig. ⇨518(1).]

6. JUDGMENT ⇨279—JUDGMENT ROLL—MATTERS INCLUDED.

A judgment roll includes the pleadings and judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551; Dec. Dig. ⇨279.]

7. FORCIBLE ENTRY AND DETAINER ⇨47—COSTS—STATUTE.

Rev. Laws, § 5377, allowing plaintiff costs upon a favorable judgment in an action involving the title or possession of real estate, applies to recovery of damages for forcible entry, where plaintiff's title or right of possession was disputed.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 188, 189; Dec. Dig. ⇨47.]

8. COSTS ⇨208—ITEMS—CLERK'S FEES—STRIKING COST BILL.

Under Rev. Laws, § 5387, requiring the clerk to tax his fees, such fees should be taxed

in favor of a prevailing plaintiff, although his bill for costs was properly stricken.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 758, 767, 788; Dec. Dig. ¶208.]

9. FORCIBLE ENTRY AND DETAINER ¶30(5)—DAMAGES—STATUTE—"MAY."

Rev. Laws, § 5508, providing that in forcible entry cases, judgment "may" be entered for treble the actual damages, permits, but does not require, such penalty to be imposed.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 150; Dec. Dig. ¶30(5).]

For other definitions, see Words and Phrases, First and Second Series, May.]

10. FORCIBLE ENTRY AND DETAINER ¶43 (7½)—APPEAL—DETERMINATION OF CAUSE—MODIFICATION—INCREASING RECOVERY.

The Supreme Court will not modify a judgment to allow treble damages in a forcible entry case, under Rev. Laws, § 5508, where the facts are not before it.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 182; Dec. Dig. ¶43(7½).]

11. APPEAL AND ERROR ¶162(2)—RIGHT OF REVIEW—SATISFACTION IN PART.

Plaintiff does not waive his right of appeal from that portion of a judgment denying him costs by accepting payment for the damage and interest items, and satisfying the judgment to that extent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 988; Dec. Dig. ¶162(2).]

Appeal from District Court, Douglas County; Frank P. Langan, Judge.

Action by Alphons Glock against Fritz Elges. Judgment for plaintiff, and he appeals from that portion denying him costs and from those parts of an order which directed entry of judgment upon the verdict without costs and struck out his cost bill. Affirmed as modified.

George Springmeyer, of Reno, for appellant. Alfred Chartz, of Carson City, for respondent.

NORCROSS, C. J. From the notice of appeal it appears that this appeal is taken—"from that part and portion of the special order made and entered in the above-entitled action on July 29, 1914, after final judgment, and in the words following: 'The clerk of this court is ordered to enter judgment on the general verdict as rendered by the jury in favor of the plaintiff, and against the defendant, for the sum of \$236, with interest thereon at the rate of 7 per cent. per annum from the 11th day of September, A. D. 1913, but without costs. Defendant's motion to strike plaintiff's cost bill from the files is granted,' and, further, plaintiff hereby appeals * * * from that part of the judgment herein denying plaintiff his costs of the suit."

From the complaint it appears that this was an action to recover damages for an alleged forcible or unlawful entry upon the property of the plaintiff and an alleged malicious and wanton injury thereto. Actual damages are alleged in the sum of \$600. The judgment prayed that the damages be trebled, and that the plaintiff be awarded judgment for \$1,800 damages and costs of suit. The answer of defendant denied title in the plaintiff to the real property in con-

troversy, denied the alleged forcible or unlawful entry, and alleged ownership in himself to a certain building taken and removed by defendant from the real property in question. The case came on for trial before a jury which, on the 11th day of December, 1913, returned a verdict for plaintiff for \$236 actual damages, and also returned certain special verdicts.

From an opinion and order of the district judge filed in the case upon the 29th day of July, 1914, it appears that the court denied costs in favor of plaintiff upon the ground that the judgment was for less than \$300; that the special verdicts rendered by the jury were not inconsistent with the general verdict; and directed that judgment be entered in favor of plaintiff for the sum of \$236 with interest from the date of the verdict, but without costs; that defendant's motion to strike plaintiff's cost bill from the files is granted; and that defendant's motion for judgment and costs be denied. A formal judgment in accordance with the said order of July 29, 1914, was entered by the clerk on the 7th day of August, 1914. Notice of appeal was given, dated August 10, 1914, with an acknowledgment of service on the 11th day of August, 1914, together with a waiver of an undertaking on appeal, which was filed August 12, 1914. The statement on appeal appears, from the record, to have been served on counsel for the defendant February 1, 1915, and to have been settled by the judge on February 21, 1915. Counsel for respondent has moved to strike the statement because not filed nor served in time. The statute in force at the time the appeal was taken provides:

"When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within 20 days after the entry of such judgment or order, if he or his attorney was present at the time of the making or entry thereof, or if the appeal is from a judgment based upon a verdict, and in other cases within 20 days after receiving written notice of the entry of the judgment or order, prepare a proposed statement, * * * and shall file the same with the clerk and serve a copy thereof upon the adverse party. * * *"
Rev. Laws, § 5331.

It is contended by counsel for appellant that the statement was filed in time because no notice was served upon him of the order or judgment, as required by law. The certificate of the district judge attached to the record on appeal recites—

"that counsel for both plaintiff and defendant, by order of the court, were notified by letters sent by the county clerk of Douglas county, Nev., mailed from Genoa, Nev., on July 30, 1914, addressed to them at Reno, Nev., and Carson, Nev., respectively, of the decision of the court, said decision having been rendered and filed on July 29, 1914, and that in such letters were included certified copies of said decision."

[1] It is unnecessary to enter upon a consideration of the question of the legal sufficiency of the notice of order or judgment.

Counsel for the plaintiff, by the notice of appeal dated August 10, 1914, and filed August 12, 1914, acknowledged notice of the order and judgment. The filing of a notice of appeal was not only an acknowledgment of the notice, but a waiver of any other or additional notice, even assuming that the same might have otherwise been required.

[2] The contention of counsel for respondent that the appeal is not properly taken because no statement was filed within time is without merit. An appeal is taken by filing the notice of appeal, and is perfected by the filing of an undertaking or a stipulation waiving such undertaking. Rev. Laws, § 5330.

[3] The objection to the statement as not having been filed in time is well taken, and, as a statement, it cannot be considered.

Two questions of law have been presented upon the appeal, and we think they may be determined upon the judgment roll alone:

(a) Whether plaintiff was entitled to costs as a matter of right; (b) whether plaintiff was entitled to have judgment for treble the actual damages. Relative to the question of costs, Rev. Laws, § 5377, provides:

"Costs shall be allowed of course to the plaintiff [on a verdict] upon a judgment in his favor, in the following cases: * * *

"5. In an action which involves the title or possession of real estate."

[4] The complaint alleged ownership in the plaintiff of certain real estate upon which was situated a certain building, the destruction and removal of which constituted the main element of damage. The answer denied ownership of the land in the plaintiff. The answer of the defendant raised an issue as to the title or right of possession of plaintiff to the real property. Under the issues made by the pleadings, it was incumbent upon the plaintiff, in order to recover any judgment for damages, to establish his title or right of possession, to the real property upon which the building in question was situated. *Gibson v. Hammang*, 145 Cal. 454, 78 Pac. 953; *Coffman v. Bushard*, 164 Cal. 663, 130 Pac. 425; *Crossman v. Lander*, 3 Or. 495; *Powell v. Rust*, 8 Barb. (N. Y.) 567; *Bowen v. Holdredge*, 134 App. Div. 855, 119 N. Y. Supp. 199; *Grosso v. City of Lead*, 9 S. D. 165, 68 N. W. 310; *Willard v. Baker*, 68 Mass. (2 Gray) 336. Numerous other cases, supporting the same view, are cited in the brief of appellant.

[5] As the appeal is taken in part from the order of July 29, 1914, and another part from the judgment entered on the 7th day of August following, a question arises as to what part of the record on appeal may be considered in determining the appeal from the order, and what part may be considered in determining the appeal from a portion of the final judgment. The order is not a part of the judgment roll. Assuming that an appeal can be taken directly from the order without a statement or bill of exceptions,

it would seem that any error in the alleged order must be determined from the motion upon which it is based and the order itself. If this were an appeal from the order of July 29th alone, we are of the opinion that the pleadings could not be considered in connection therewith, unless embodied in a statement to be attached to the order. From the motion of counsel for defendant of September 15, 1913, and from the order itself it cannot be determined that the order was erroneous; for neither from the motion nor from the order themselves does it appear that the question of the title of the real property was involved in the action, and, if not so involved, the order was not erroneous.

[6-8] The appeal from the judgment, however, denying plaintiff's costs, presents a question of law heretofore discussed, for the reason that the pleadings and judgment are a part of the judgment roll, and from the pleadings it appears that title was involved in the suit. Plaintiff is necessarily entitled to some costs, regardless of whether the court erred in striking the cost bill or not. The plaintiff is entitled to recover the fees of the clerk whether they are embodied in the cost bill or not, and to this extent plaintiff is clearly entitled to recover. Rev. Laws, § 5387.

[9, 10] We think it cannot be said that there is any error in the judgment because of failure to treble the actual damages allowed by the verdict of the jury. The pertinent portion of section 5508 of the Revised Laws reads as follows:

"If a person recover damages for a forcible or unlawful entry in or upon * * * any building or uncultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed."

Penalties are not favored in the law, and we think the use of the word "may" in the statute was intended to permit, but not require, treble damages. Whether treble damages should be approved in any case would depend upon the peculiar facts of the particular case. It is doubtful whether an appellate court would, in any case, be justified in modifying a judgment so as to allow treble damages, where such damages had not been allowed by the trial court. The facts are not before us; and, as the plaintiff is not entitled to treble damages as a matter of right, it is clear that no error appears in this regard.

[11] The contention that the judgment was satisfied by the payment and acceptance of the amount of damages with interest is without merit. Satisfaction was entered to the extent of amount paid, but without waiving plaintiff's right of appeal in the matter of costs. *Coffman v. Bushard*, 164 Cal. 663, 130 Pac. 425.

The order appealed from is affirmed. The judgment should be modified by allowing the plaintiff the clerk's costs in the court below;

and, as so modified, the judgment is affirmed. Appellant is allowed his costs on appeal.

McCARRAN and COLEMAN, JJ., concur.

**YOWELL v. DISTRICT COURT OF
FOURTH JUDICIAL DIST. IN AND FOR
ELKO COUNTY et al. (No. 2198.)**

(Supreme Court of Nevada. Aug. 1, 1916.)

**1. CERTIORARI \S 28(2)—GROUNDS—WANT OF
JURISDICTION—COURTS.**

Certiorari will lie to review the erroneous assumption of jurisdiction by a district court, where a statutory step was omitted upon appealing to it from a justice court.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. \S 41; Dec. Dig. \S 28(2).]

**2. JUSTICES OF THE PEACE \S 159(6)—APPEAL
—JUSTIFICATION OF SURETIES—STATUTE.**

Under Rev. Laws, \S 5792, providing that an appeal from a justice to a district court will be regarded as if no undertaking was given, unless the sureties, when challenged, justify after notice, etc., held that their justification in the prescribed manner is essential to the district court's jurisdiction, where their sufficiency was properly challenged.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 555; Dec. Dig. \S 159(6).]

**3. JUSTICES OF THE PEACE \S 159(5)—APPEAL
—JUSTIFICATION OF SURETIES—STATUTE.**

Where the sureties' sufficiency is not excepted to within five days, as required by Rev. Laws, \S 5792, the district court acquires jurisdiction, notwithstanding that two days later appellant admits due service of such exceptions before the justice has certified the case.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 554; Dec. Dig. \S 159(5).]

Certiorari proceedings by Thomas Yowell against the District Court of the Fourth Judicial District, in and for the County of Elko, and E. J. L. Taber, Judge of said District Court, to review an order denying petitioner's motion to dismiss an appeal from a justice court. Order sustained.

Milton B. Badt, of Elko, for petitioner. Henderson & Caine and Cary Van Fleete, all of Elko, for respondents.

McCARRAN, J. This is a proceeding in certiorari. Petitioner herein obtained a judgment in the justice court of Metropolis township, in Elko county, for the sum of \$100, together with costs in the sum of \$31 and attorney's fees. A notice of appeal was filed in the justice court by the defendant in the action, the party against whom the judgment was rendered, and an undertaking on appeal, with two sureties, was filed. Petitioner filed and served a notice of exception to the sufficiency of the sureties on the appeal bond. It appears from the record that the sureties on said appeal bond filed in the justice court an instrument over their signatures, entitled "Certification of Justifica-

tion of Sureties." This, however, was filed without notice to petitioner, who had excepted to the sufficiency of the sureties. No further proceedings appear to have been had in the justice court on petitioner's notice of exception to sufficiency of the sureties, and the record was certified to the district court. The matter coming up in the district court, petitioner moved to dismiss upon the ground that the court had no jurisdiction, for the reason that, the sureties upon the appeal bond having failed to justify upon notice, the appeal from the justice court had not been perfected. The motion to dismiss the appeal having been overruled, the writ of certiorari is invoked to review the action of the lower court in this respect.

[1] The respondents herein contend that certiorari will not lie to review the action of the trial court in this proceeding, for the reason that the question passed upon by the district court was one in which that court might properly exercise jurisdiction; and, having passed upon the same, its action in that respect is not reviewable.

In the case of Floyd & Guthrie v. Sixth Judicial District Court, 36 Nev. 349, 135 Pac. 922, we had occasion to review this question, as it might be affected by a writ of mandamus. In that case, we held that where an inferior court erroneously refuses to entertain jurisdiction on a matter preliminary to a hearing on the merits, it may be required to proceed by mandamus. We think the reasoning set forth there may apply with equal force where certiorari is relied upon to review the action of an inferior court in erroneously assuming jurisdiction. If mandamus is the proper remedy to require an inferior tribunal to proceed where it has erroneously divested itself of jurisdiction, manifestly certiorari is the proper remedy to review the action of an inferior tribunal, where it has erroneously assumed jurisdiction.

The vital question here is, Did the district court entertain a matter of which it had no jurisdiction? It was said by this court in the case of Andrews v. Cook, 28 Nev. 270, 31 Pac. 304:

"When an appeal is regularly taken, the court not only has jurisdiction to try the cause upon its merits, but it has entire and complete jurisdiction of the cause for any and all purposes."

But where the appeal is not regularly taken, as where some statutory step in the proceedings has been omitted in the court of first instance, then the converse of the rule asserted in Andrews v. Cook, supra, is true, and if the district court assumes jurisdiction, its act in that respect is, in our judgment, in excess of jurisdiction, and hence reviewable on certiorari.

[2] A very thorough and comprehensive analysis of the question at bar is presented in the case of Hoffman v. Lewis, 31 Utah,

179, 87 Pac. 167. In that case the Supreme Court of Utah was dealing with the identical question presented here, and the statute of the state of Utah is similar to ours. The court there passed upon the propriety of the writ of certiorari to review the action of the district court in matters of this kind. In this respect, the court said:

"If the court should proceed to the trial of an appeal case where no appeal had been taken as required by law, the court would exceed its jurisdiction or power in doing so, and its act in doing so, being in excess of jurisdiction, would be reviewable on a writ of certiorari, upon the ground that the court presumes to act where the law withholds the right to do so."

The question here is, Did the district court erroneously invest itself with jurisdiction where, by reason of some omission of a prescribed statutory requisite, an appeal had not been perfected? The provision of our Code (section 5792, Revised Laws), having to do with the filing of an undertaking on appeal from the justice court to the district court, among other things prescribes:

"* * * The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

The record in the proceeding before us discloses that, whatever attempt was made by the sureties to justify on the undertaking after exception had been filed by petitioner to the sufficiency thereof, no notice was given to or served upon petitioner.

So far as we are able to ascertain, this particular question has never been passed upon by this court. A similar statutory provision is contained in the Civil Practice Act of other states, and the courts therein have had occasion to pass upon the identical question presented here. In the case of Townsend Wood et al. v. Superior Court of Monterey County, 67 Cal. 115, 7 Pac. 200, the Supreme Court of California had presented in certiorari proceedings a question identical to the one at bar. Section 978 of the Code of Civil Procedure of California contains a provision identical to that found in our Civil Practice Act, § 850 (section 5792, Revised Laws). The court there held that under such a provision, the statute was peremptory. The court said:

"Without the justification of the sureties named in the undertaking, or other sureties in their stead, upon notice to the adverse party, the appeal was not perfected, and the superior court has no jurisdiction of the case."

The expression of the Supreme Court of California in the Wood Case, supra, was again emphasized in the case of McCracken v. Superior Court, 86 Cal. 73, 24 Pac. 845. In the last-named case, the court, quoting approvingly from its decision in the case of Coker v. Superior Court, 58 Cal. 178, held that the provisions of the statute relative to

the filing of notice of appeal and the perfecting of an undertaking on appeal from a justice court to the superior court were jurisdictional prerequisites, and "until all the prerequisites are completed, the appeal is not effectual for any purpose."

The district court in the matter at bar was limited in its jurisdiction to a dismissal of the appeal upon motion of petitioner. Its power to act otherwise in the proceedings had been terminated by the failure on the part of the appellant to comply with the statutory provisions in the justice court. *Moffat v. Greenwalt*, 90 Cal. 368, 27 Pac. 296.

In the case of *Hoffman v. Lewis*, supra, the court, after referring to the provisions of the statute, held that, without an undertaking as provided for in the act, there is no appeal, and a failure to have the sureties justify within the time prescribed in the statute after an exception had been filed to their sufficiency nullifies the undertaking given, and leaves the whole matter as though no undertaking had ever been made or filed.

In the case of *Bennett v. Superior Court of San Diego County*, 113 Cal. 440, 45 Pac. 808, the Supreme Court of California, in a proceeding in certiorari, reviewing the action of the superior court in a matter quite analogous to that at bar, wherein, after an objection had been filed to the sufficiency of the sureties to an undertaking, only one of the sureties appeared to justify, held that the appeal must fail as lacking the essential requisite of a valid undertaking; and, the superior court having assumed jurisdiction, its action in this respect should be annulled.

[3] The case at bar presents a condition not found in either of the authorities cited. The record discloses that prior to the filing of petitioner's exception to the sufficiency of sureties, and seven days after the bond had been filed, the attorneys for respondent were served with the exception to the sufficiency of the sureties; and the instrument sets forth as follows:

"Due service of the within notice and receipt of a copy thereof are hereby acknowledged this 2d day of February, 1915.

"[Signed] Henderson & Caine,

"J. L. Darrr,

"Attorneys for Defendant."

It is contended by petitioner that this admission of "due service" was in effect a waiver of any objection as to time. The time in which for petitioner to except to the sufficiency of the sureties expired two days prior to the date set forth in the admission of service hereinabove quoted. The filing of the notice of appeal in the justice court by the respondents and the filing of the undertaking on appeal perfected the appeal in so far as the justice court was concerned.

True; the justice court retained jurisdiction of the matter until the expiration of the time set forth by the statute in which for petitioner to except to the sufficiency of the sureties on the undertaking on appeal. When that time had expired, the appeal had been perfected; and it devolved upon the justice of the peace to certify the proceedings to the district court at once. The fact that the justice of the peace might have deferred action in certifying the proceedings to the district court would not, in our judgment, afford opportunity for the parties in the action to proceed to do something for the doing of which the time prescribed by statute had expired.

Let us assume that immediately upon the expiration of the time in which for petitioner to have filed his exception to the sureties, and without further delay, the justice of the peace had, in compliance with the statute, certified the proceedings to the district court. Under such condition, could it be seriously contended that an acknowledgment of service such as that found in the record here would afford any relief to the party filing the instrument, or would confer any authority upon the justice of the peace to proceed further in the matter after the proceedings had been by him certified to the higher court? We think not. We deem it unnecessary to dwell at length upon the proposition as asserted by petitioner that the term "due service," as used in the admission of service signed by the attorneys for respondent, constituted a waiver as to the time within which the objection should have been filed. The time within which for petitioner to except to the sufficiency of the sureties had expired; the jurisdiction of the justice court, in so far as it might affect the proceedings other than to certify the same to the district court, had terminated; petitioner was too late with his exception to the sufficiency of the sureties, nor would any admission of "due service" of an instrument, purporting to be an exception to the sufficiency of sureties, relieve petitioner of his tardiness.

We might have disposed of the case by a mere consideration of this particular phase as it is presented by the record, but we deemed the case of sufficient importance to dwell on other phases of the case; hence our consideration and interpretation of the statute, particularly section 5792, Revised Laws.

The order of the district court in denying the motion to dismiss the appeal will be sustained.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

BOEDDCHER v. FRANK. (No. 2851.)

(Supreme Court of Utah. Aug. 25, 1916.)

1. MUNICIPAL CORPORATIONS — 706(6) — STREETS — ACTIONS FOR NEGLIGENT USE — JURY QUESTION.

Defendant's negligence in running his automobile into plaintiff's vehicle held a jury question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ¶ 706(6).]

2. DAMAGES — 208(2) — PERSONAL INJURIES — JURY QUESTION — PROXIMATE CAUSE.

Where there was evidence that defendant's automobile hit plaintiff's buggy with some force rendering her unconscious, held that whether the collision proximately caused a miscarriage was a jury question.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 533, 534; Dec. Dig. ¶ 208(2).]

3. APPEAL AND ERROR — 1052(5) — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE — CURE BY VERDICT.

Any error in admitting testimony that defendant was protected by automobile accident insurance is harmless, where only a \$1,500 verdict was returned for a miscarriage and injuries that may be permanent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4175; Dec. Dig. ¶ 1052(5).]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Martha Boeddcher against Arthur Frank. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff brought this action to recover for personal injuries alleged to have been sustained by her because of the negligence of defendant in permitting an automobile he was driving to collide with an express wagon in which she, in company with a small boy, was riding along one of the streets in Salt Lake City.

The facts upon which plaintiff bases her claim for damages are alleged, in substance, as follows: That plaintiff was driving a horse and wagon south on the west side of Ninth East street, Salt Lake City; that a street car going in the same direction approached her, and at the same time the defendant was rapidly driving an automobile in the same direction and on the same side, the west side of the street; that he overtook the plaintiff about the time the street car was passing her, and that the plaintiff was injured while defendant was negligently attempting to pass the street car and vehicle. The negligence alleged is driving at a great rate of speed, to wit, 12 miles an hour, failure to have the automobile under control and to reduce its speed, and want of caution in trying to pass the plaintiff's vehicle; that in attempting to pass between the street car and the vehicle, because running too fast, and in failing to pass on the left side of plaintiff's wagon, and to have

the automobile under control, the defendant struck the rear end of plaintiff's vehicle with force sufficient to jerk her backwards toward the rear of the wagon, the shock causing a miscarriage and permanent injuries. The defendant filed an answer admitting that the plaintiff was driving south on Ninth East street, and that a street car approached her vehicle from the north, that the defendant was also driving south, and that his automobile came in contact with plaintiff's wagon. The answer denied the other allegations of the complaint. The evidence shows that the street where the alleged accident occurred was paved, that there was a curb and gutter on either side of the pavement, and that a double street car track was maintained thereon. An ordinance of Salt Lake City (section 1242) was admitted in evidence which provides that:

"Every driver of a vehicle overtaking another vehicle should pass on the left side of the overtaken vehicle and not pull over to the right until entirely clear of the overtaken vehicle."

The case was tried to a jury, who returned a verdict of \$1,500 in favor of plaintiff. From the judgment entered on the verdict defendant prosecutes this appeal.

Evans, Evans & Folland, of Salt Lake City, for appellant. Weber & Olson, of Salt Lake City, for respondent.

MCCARTY, J. (after stating the facts as above). [1, 2] Eight errors are assigned, but only two contain sufficient merit to warrant consideration. The error we shall first consider is directed to the refusal of the court to direct a verdict for defendant. The evidence, without conflict, shows that at the time defendant passed the street car just prior to the alleged accident plaintiff was from 100 to 125 feet in advance of the automobile and street car; that after passing the car defendant turned the automobile to the left and crossed the west rail of the street car track, and proceeded south along the track; that the motorman sounded the gong, signaled, several times for defendant to get off the car track; that at the time the first signal was given defendant was from 20 to 30 feet in advance of the street car, and from 70 to 100 feet to the rear of plaintiff's wagon. The evidence also shows that at the time the gong was sounded there were no cars or vehicles on the east side of the street in the immediate vicinity of the street car, the automobile, or express wagon; nothing to prevent defendant from turning to the left and passing plaintiff's wagon and at the same time avoiding every possibility of a collision with the street car. The evidence further shows that before the automobile came in contact with the wagon the street car had overtaken the automobile, and at the time of the accident was alongside of the wagon. There is evidence tending to show that at the time the automobile came

in contact with the wagon the right wheels of the wagon were in the gutter and close to the curb, and that there was ample space between the wagon and the street car track for the automobile to pass without coming in contact with either the street car or the wagon. This evidence, however, is disputed by defendant, who testified that the wagon was several feet east of the gutter and curb; that it was "about halfway between the curb and track," and that there was not sufficient room for him to pass between the street car and wagon. Defendant testified in part as follows:

"It is 16½ feet from the car track to the curb. That would be 15½ feet between the car and curb. My auto is between 5 and 6 feet wide and the wagon 5 feet wide. * * * I saw Mrs. Boeddcher's wagon first when I went off the track; that is, when I heard the whistle. * * * I turned to the left on the car track, and then as I heard the whistle I turned to the right. * * * I thought the car was close to me, and went off the track and started to put on the brake. I thought I could stop before reaching the wagon, but my car touched the wagon."

The jury, however, might well have found from the evidence that defendant saw, or by the exercise of ordinary care could and would have seen, plaintiff's wagon at the time he was alongside of and in the act of passing the street car, in ample time to have reduced the speed of his automobile, and thus could have avoided coming in contact with the wagon.

There is some discrepancy in the evidence respecting the degree of force with which the automobile came in contact with the wagon. Defendant's evidence was to the effect that the impact was so slight that neither the wagon nor the plaintiff was disturbed by it. The evidence offered by plaintiff tended to show that the automobile came against the wagon with considerable force. One witness testified that when the car struck the wagon it threw the wagon ahead, and the plaintiff, having hold of the lines, was thrown back and the shafts were thrown "up and around the top of the horse's neck," and that plaintiff appeared to be in pain; that "she was kind of doubled forward, acting as if her back was hurt." Another witness testified that the impact pushed the horse and wagon ahead 2 or 3 feet, and that the little boy fell backwards and "grabbed hold of his mother's clothes to keep from falling," and that plaintiff had the appearance of being in pain. Plaintiff testified that on the occasion in question she lost consciousness and—

"when I came to I realized that something had happened. * * * I received a pain that lasted from Saturday until Wednesday. * * * Then I was taken to the hospital."

Dr. Howells, who was summoned to plaintiff's home soon after the accident, testified in part as follows:

"She was at home suffering from pain in her back and pelvis. It seemed to be a case of miscarriage. * * * I took her to the hospital, where she was operated on by Dr. Cannon."

He also testified that "a blow or shock" might have caused the miscarriage. Dr. Cannon was called as a witness. We do not deem it necessary to here review his evidence in detail. We think it sufficient to say that his evidence, when considered in connection with other facts in evidence, was ample to support a finding by the jury that the collision referred to was the proximate cause of the miscarriage. We also think that the jury were amply justified in finding from the whole evidence that the defendant was negligent; that he could, by the exercise of ordinary care in the management of his automobile, have avoided coming in contact with plaintiff's wagon. The court, therefore, did not err in refusing to direct a verdict for defendant.

[3] On cross-examination plaintiff's husband related a part of a conversation he had with the defendant about the accident the day after it occurred. On redirect he was asked by plaintiff's counsel if the defendant, in that conversation, said "anything about any insurance company." The question was objected to on the ground that it was incompetent and immaterial. The objection was overruled, and the witness answered: "Yes; insurance company paid for it—he was insured." The ruling of the court admitting this evidence is assigned as error. Assuming, but not holding or conceding, that the evidence, as an academic proposition, was inadmissible, we are of the opinion, and so hold, that it could not have influenced the jury in arriving at their verdict. The amount of the verdict, we think, conclusively shows that the jury did not enhance the award for damages because of the fact that the insurance company might ultimately be compelled to save harmless the defendant by paying to him the amount of the judgment. It must be conceded that \$1,500 is a moderate sum as compensation for the injuries which the jury were justified in finding plaintiff suffered as a result of the accident, which injuries, they might well find from the evidence, have permanently impaired her health.

We find no reversible error in the record; hence the judgment is affirmed. Respondent to recover costs.

STRAUP, C. J., and FRICK, J., concur.

PATTERSON v. ROUSNEY. (No. 4233.)
(Supreme Court of Oklahoma. July 11, 1916.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS §2(1)—LIMITATIONS APPLICABLE—WHAT LAW GOVERNS.

Where a promissory note executed and payable in the Indian Territory was subjected to the running of the statute of limitation, as contained in section 4483, Mansfield's Digest, Statutes of Arkansas, for a period of time prior

to the erection of the state, an action was instituted thereon after the admission of the state into the Union in the courts of this state. Held, that the cause of action on said note was governed, as to the length of time necessary to constitute a bar thereto, by section 4483, Mansfield's Digest, and not by the laws of Oklahoma Territory extended over the state by the Constitution.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4, 6; Dec. Dig. §2(1).]

Error from District Court, Ottawa County; Preston S. Davis, Judge.

Action by D. W. Rousney against M. L. Patterson. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Kornegay, of Vinita, for plaintiff in error. O. F. Mason, Gray Carroll, H. D. Mason, C. S. Walker, Remington Rogers, and Horace Speed, all of Tulsa, for defendant in error.

HARDY, J. Defendant in error, who was plaintiff in the trial court, commenced this suit on the 21st day of July, 1911, against plaintiff in error, as defendant, on a promissory note that had then been past due since December 11, 1905, which was almost 2 years before the admission of the state into the Union, and which had been subjected to the running of the limitation prescribed by section 4483, Mansfield's Digest of the state of Arkansas. The trial resulted in a verdict for plaintiff, under instructions that notwithstanding plaintiff's cause of action had accrued more than 5 years before action was commenced, the same was not barred upon the theory that the Oklahoma statute of limitations was applicable thereto and was not retrospective in its operation, and that the period prescribed by section 5550, Comp. Laws 1909, section 4657, Rev. Laws 1910, should be computed from the date plaintiff's cause of action was first subjected to the operation of said statute.

The preamble to the Schedule of the Constitution is as follows:

"In order that no inconvenience may arise by reason of a change from the forms of government now existing in the Indian Territory and in the territory of Oklahoma, it is hereby declared as follows:

"Section 1. No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place. * * *

"Sec. 2. All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma, until they expire by their own limitation or are altered or repealed by law."

The functions of the Schedule were considered by this court in *Arie v. State*, 23 Okl. 166, 100 Pac. 23, and it was there said:

"To determine the meaning of this provision of the Schedule and the intention of the fram-

ers it would not be amiss to consider what the office of a schedule is. It is a temporary provision for the preparatory machinery necessary to put the principles of government under the Constitution in motion without disorder or collision, not to control the principles of the organic law or to limit the same where it may be in conflict therewith, but to carry the whole into effect without break or interval; to shift the machinery gradually into another track, and having done its office, it is stowed away in the lumber room of the government."

This seems to be a clear statement of the purpose and intention of the framers of the Constitution in inserting same therein: That is to avoid the confusion and collision that would be occasioned by a sudden transition from one form of government to another and by a substitution of a full set of laws for those in existence. So the Schedule provided that existing rights, actions, suits, proceedings, contracts, or claims should not be affected, but should continue as if no change in the form of government had taken place. The effect of the Schedule was not to enact or re-adopt the laws of Oklahoma Territory for the state in the sense that a law is enacted when passed by the Legislature, or adopted from another jurisdiction, but on the contrary said laws being already in force in Oklahoma Territory, were to remain in force in that portion of the state as if no change in the form of government had taken place without in any way affecting existing rights, actions, suits, proceedings, contracts, or claims by reason of the change, and were to be extended to that portion of the state formerly known as the Indian Territory, with a like provision that rights, actions, suits, proceedings, contracts, and claims on that side of the state should not be affected thereby, but should likewise continue as if no change in the form of government theretofore existing in that part of the state had taken place.

In *Frick Co. v. Oats et al.*, 20 Okl. 473, 94 Pac. 682, in construing section 2 of the Schedule and section 21 of the Enabling Act considered together, it was held that on the admission of the state into the Union the laws in force in the territory of Oklahoma at that time "remained in force," and were not adopted from anywhere, and after citing the case of *State v. Ellis et al.*, 22 Wash. 129, 60 Pac. 136, construing a similar provision in the Schedule of the Constitution of the state of Washington, the court said:

"If then article 27, § 2, of the Constitution of Washington, which provides as follows: 'That all laws which are now in force in the territory of Washington which are not repugnant to the Constitution, shall remain in force until they expire by their own limitation, or are repealed by the Legislature'—could not be construed as re-enacting a statute, as all the force it had was to continue in force all valid laws which were then in existence, we must conclude that the part of our schedule which is practically the same in substance and reads: 'Sec. 2. All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to this Consti-

tution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitations, or are altered or repealed by law'—is entitled to a like construction, that 'All laws in force in the territory of Oklahoma, on the admission of the state into the Union, * * * shall be extended to and remain in force,' upon the admission of the state into the Union. Clearly these laws cannot be said to be adopted or re-enacted from anywhere but were already 'in force.'"

It cannot be doubted, in view of these decisions, that all rights, actions, suits, proceedings, contracts, and claims were intended to be preserved and continue the same as if no change in the form of government in either portion of the state had taken place. The plaintiff's right, contract and claim in the present case existed prior to statehood when *Mansfield's Digest* was in force and was intended that it should remain in effect by the change in the form of government.

In *Blanchard & Co. v. Ezell*, 25 Okl. 434, 106 Pac. 960, the plaintiff was a copartnership which existed prior to statehood, and was engaged in the mercantile business in the Indian Territory, and continued in said business after the admission of the state. Prior to statehood the defendant became indebted to plaintiffs on a promissory note. After statehood action was brought thereon, and the defendant contended that section 3901, *Wilson R. & Ann. Stat. 1903*, requiring partnerships engaged in business under a fictitious name or designation, not showing the names of the partners, to file with the clerk of the district court a certificate showing the names in full of all members of such partnership and their places of residence, and to publish the same for four successive weeks in a newspaper published in the county was applicable and it was contended because plaintiffs had failed to comply with that statute, it was not entitled to recover. The court denied this contention, placing its decision upon the ground that the Schedule preserved the existing right to maintain an action thereon, and that the right was not affected by the change in the form of government. After quoting section 1 of the Schedule the opinion proceeds:

"The purpose of this section of the Schedule is to preserve all rights already accrued and either in action or capable of being enforced by the ordinary remedies provided for this purpose, as effectively as if the Constitution had not been adopted. The language is broad enough to include all rights and claims whatever their nature. No distinction is made between statutory rights and those existing at common law, nor between those arising out of torts and those founded upon contract. As the firm under the laws of the Indian Territory prior to statehood had a right to recover on its promissory note, either in the courts of the Indian Territory or Oklahoma Territory, this right continued after statehood and was not affected by the foregoing sections of the Oklahoma statutes."

In *M., K. & T. Ry. Co. v. Hancock & Goodbar*, 26 Okl. 265, 109 Pac. 223, action was brought to recover certain damages caused

by negligence of the company in transporting certain shipments of beef steers from Welch, Indian Territory, to Kansas City, Mo., about November 7, 1909. The company urged in defense of the action a contract containing a stipulation that as a condition precedent to the right of recovery, the shipper should, within 60 days after the happening of the injuries complained of, file his claim for damages and further stipulation that no suit should be brought against the carrier after the lapse of 90 days from the happening of the injury. Claim was not filed within 60 days nor suit commenced within 90 days. It was contended that as the action was not commenced until after statehood, said provisions were void as being in contravention of section 9, art. 23, of the Constitution, providing that any provision of any contract or agreement stipulating for notice or demand other than such as may be provided by law shall be null and void. This provision of the Constitution was held not applicable thereto, and, further, that said stipulation was valid and operated as a limitation of the time in which action should be brought, though brought after statehood.

In *Western Union Telegraph Co. v. Hollis*, 28 Okl. 613, 115 Pac. 774, action was commenced after statehood to recover damages for delay in the transmission of a telegram. The company pleaded in defense of the action a stipulation on its printed forms that the company should not be liable for damages or statutory penalties growing out of said contract where the claim was not presented within 60 days after the message was filed for transmission, and it was held that said provision was valid and the company was entitled to urge same in bar of the suit notwithstanding the action was begun after statehood.

In *Summers v. Alexander*, 30 Okl. 198, 120 Pac. 601, 38 L. R. A. (N. S.) 787, action was commenced in the justice court after statehood upon two promissory notes. The defense was that the notes were obtained by misrepresentation. It was held that as the transaction occurred prior to statehood, the rights of the parties were to be determined by the law then in force, and those rights were continued by section 1 of the Schedule.

In *Turk v. Mayberry*, 32 Okl. 66, 121 Pac. 665, judgment was rendered in mayor's court of Purcell prior to statehood and appeal prosecuted to the United States Court for the Southern District of Indian Territory. The case was thereafter transferred to the district court of McLain county, which latter court dismissed the appeal. On April 18, 1908, the judgment of the mayor's court was placed on the judgment rolls of the district court and execution issued and levied upon certain real estate in the city of Purcell, which was advertised and sold, and one of the questions presented was whether on a judgment rendered prior to statehood a judg-

ment debtor had a right to redeem property sold under execution after statehood. Execution was not issued nor the property sold until after statehood, and thus was presented squarely the question whether the right to redeem was an existing right preserved by the Schedule. The court said:

"We therefore conclude that the right of redemption under execution sale of land, upon process issued since statehood on judgments rendered prior to statehood remains in the judgment debtor, and that the change of law at the time of the adoption of the Constitution did not affect this right, and that the confirmation of the sale in this case prior to the expiration of the time allowed by the law, in force at the time of judgment, for the exercise of the right of redemption, was prejudicial to that right."

A comparison of the statutes in force in the Indian Territory and those extended over the state is not amiss. The period of limitation prescribed by Mansfield's Digest on promissory notes was 5 years, being the same as that prescribed by the Oklahoma statutes. Actions upon judgments were required to be brought within 10 years, while by the Oklahoma statutes the period in which actions could be brought upon foreign judgments was limited to one year, so in actions upon writings under seal the time was placed at 10 years, while by the Oklahoma law the time was reduced to 5 years. In actions upon the bonds of executors and administrators, the time was fixed at 8 years, and same was placed by the Oklahoma statute at 5 years. Actions on penal statutes were required to be commenced within 2 years, while the period under the Oklahoma law was one year. In actions for trespass upon real estate, the former period was 3 years, while it was changed to 2 years; and for taking or injuring personal property actions formerly must be commenced within 3 years, while the time limit was changed to 2 years; and actions of forcible entry and detainer might be begun within 3 years, while the time is now limited to 2 years.

Under Mansfield's Digest persons to whom a right of action accrued while under disability, such as minority, coverture, etc., had the same period of time after the disability was removed as was fixed by the statute, in which to commence actions, which might in some cases be 10 years, while under the Oklahoma statutes the time was limited to one year after the removal of disability.

In the instance given where the time is materially shortened the right has been affected. The fact that defendant is urging this question does not bring about a different situation. If plaintiff had lost in the trial and was here urging error, the question would be squarely presented. Having won, the defendant is entitled to present the question whether section 4483, Mansfield's Digest, applies, and, if so, whether the time fixed thereby had run, and plaintiff's right of action was barred. If we are right in construing the provisions of the Schedule to

mean that existing rights, actions, suits, proceedings, contracts, and claims shall continue to exist, free from the defense of limitation, for the same length of time prescribed by the statutes in force prior to the adoption of the Constitution, it would follow that upon the expiration of that time, an action based upon any such right, contract, or claim would be subject to such defense, and, this being true, the defendant would be in position to urge that defense when the time prescribed by the law then in force had run; that is, if the statutes in force in the Indian Territory be the governing statute, then the period prescribed thereby had run at the time this action was instituted, and defendant would be entitled to plead such statute in bar of plaintiff's action.

If the statutes of limitation of Oklahoma Territory be held applicable to existing rights, contracts, and claims on the date of statehood, and be given a retrospective operation, the time thereby prescribed in many instances would already have expired, and thus the right of action thereon be destroyed. Such a construction would render the statutes inoperative and unconstitutional as to such rights, contracts, or claims. *Murray v. Gibson*, 15 How. 426, 14 L. Ed. 757; *Sohn v. Waterson et al.*, 17 Wall. 596, 21 L. Ed. 737.

If such statutes be held to apply and to fix a new period from which the time fixed thereby should begin to run as to existing rights, contracts, or claims, the time in many instances would be so materially shortened as to be unreasonable, and thus would be presented a difficulty almost insurmountable in requiring the court to determine what was or was not a reasonable time in which to begin suit, in each particular case. *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886.

That the right of action continues after statehood is not controverted, but it is contended that the laws of Oklahoma apply and the period of limitation begins to run from the date of statehood, and that plaintiff was entitled thereafter to the period prescribed by said statute to commence his action. To determine the correctness of this proposition it is necessary to ascertain the meaning of the preamble and the provisions of the Schedule heretofore quoted. Oklahoma Territory was an organized form of government with a highly developed citizenship and a system of laws of its own materially different from those in existence on the east side. On the Indian Territory side there existed five separate and distinct semidependent political communities known as the Five Civilized Tribes, with separate and distinct forms of government and customs and laws widely divergent from each other and from those in existence on the west side, and there was also a large element of the population composed of noncitizens who had been per-

mitted to settle in the Indian Territory and for the regulation of whose conduct certain laws of Arkansas as contained in Mansfield's Digest had been extended over and put in force in that territory. In addition thereto certain general statutes of the United States had operation therein. The people on each side of the state were familiar with the laws in force and had regulated their conduct in accordance therewith, and it was recognized that a sudden change of the law, if permitted to affect existing rights, actions, proceedings, contracts, and claims, would bring about confusion and uncertainty. The people on that side of the state formerly known as Oklahoma Territory knew their rights under the contracts they had entered into in conformity with existing laws, and under those laws the payee of a note knew he would have a right to institute an action thereon at any time within 5 years from the date of its maturity, and it was expressly enacted that this right should continue as if no change had taken place in that portion of the state; and in *Frick Co. v. Oats et al.*, supra, it was held that the laws of Oklahoma Territory remained in force and were not re-enacted or re-adopted, and it follows did not renew existing rights or fix a new period from which the statute commenced to run, and thus the right to institute suit on a cause of action of this character on the Oklahoma Territory side of the state continued as if no change had taken place in the form of government. The same provision was applicable to the Indian Territory, and is expressly made so by its language. The plaintiff knew when this note matured that his right to institute suit thereon would continue for a period of 5 years, had no change occurred, and he knew when the Constitution was adopted that under the provision of the Schedule his right to institute suit thereon would remain as if no change in the form of government had taken place; that is, it was continued for the length of time it would have continued without such change, to wit, 5 years from the date it first accrued. This was true on the Oklahoma Territory side, and no good reason can exist and none does exist why a different rule should apply on the Indian Territory side of the state.

Webster defines the word "continue" to mean:

"(2) To protract or extend in duration; to preserve or persist in; to cease not; (3) to carry onward or extend; to prolong or produce; to add to, or draw out in length, duration, or development; (4) to retain, suffer, or cause to remain."

Giving the word "continue" the meaning ascribed thereto by Webster, it means that the right to institute an action upon an existing right, contract or claim shall remain or extend or be prolonged the same length of time as if no change had taken place. Had no change taken place the plaintiff's right to institute suit upon the note

would have been extended, continued, or prolonged for a period of 5 years from the date it matured, and this construction gives harmony and symmetry to the Constitution, effects the change without confusion, and brings about a result that is just, equal, and right. We are not without legal definition of the word "continue" to support us in this view. In *Williams, Adm'r, v. United States*, 154 U. S. 648, 14 Sup. Ct. 1188, 25 L. Ed. 309, a surgeon in the Continental Army who accepted an appointment in the new regiment of guards authorized by the resolution of January 9, 1799, was held "not to continue in service until the end of the war," within the meaning of the resolution of Congress under which the claim in that case was made, the reason that the service was not continuous but was interrupted and broken by his re-enlistment in another branch of the service.

In *Bridges v. Koppelman*, 117 N. Y. Supp. 306 (63 Misc. Rep. 27) the sixth paragraph of the syllabus is as follows:

"The word 'continue,' as used in Civil Code Procedure, § 26, providing that a special proceeding pending may be continued from time to time before one or more of the judges of the court, means to keep up, to protract or extend in duration, to extend, or prolong."

In *Engmann v. Estate of John Immel*, Deceased, 59 Wis. 249, 18 N. W. 182, in defining the word "continue" under a statute providing that payment upon an existing claim shall be sufficient evidence upon a new or continuing contract, said:

"The word 'continuing,' as here used, has the natural meaning of perpetrating, protracting, or prolonging from one time to another."

It appears that the purpose of adopting the provisions of the Schedule is, as expressed therein, to declare that existing rights, contracts, and claims shall continue as if no change in the form of government had taken place; that is, they shall continue to exist and be capable of enforcement without being liable to be defeated by the plea of limitation for the same period of time they would have thus continued under the laws in force at the time the cause of action accrued.

The statutes of limitation of Oklahoma Territory extended over the state have been construed in former opinions of the territorial Supreme Court to be prospective in their operation, and to embrace within their terms existing rights of actions and were said to have the effect of renewing such rights so that the full period of time in which to institute suit thereon would run from the time the cause of action was first subjected to their operation. This was true because when the Statutes of 1893 were adopted they were held to effect a repeal of the statutes theretofore in force. *Southgate v. Frier*, 8 Okl. 435, 57 Pac. 841; *Huber v. Zimmerman*, 8 Okl. 573, 58 Pac. 737; *Fuller v. Johnson*, 8 Okl. 601, 58 Pac. 745.

The statutes having been construed as prospective in their operation must still be

given that effect and cannot be construed as retrospective. This is so because the laws were not re-enacted or re-adopted, but merely remained in force as if no change had taken place, and therefore did not renew existing rights of action nor fix a new period from which the statute should begin to run in the west part of the state. They must be given a like construction on the east side of the state and held not to fix a new period from which the statute begins to run because any other construction would render them obnoxious to the uniformity clause of the Constitution. Not being retrospective on the west side, they cannot be retrospective on the east side. *Anderson v. Bitterbusch*, 22 Okl. 761, 98 Pac. 1002.

This construction is in harmony with well-established rules and violates no precedent. Indeed no precedent exists upon a similar state of facts, for to our knowledge there has not heretofore been presented to the courts a similar situation such as we are considering, and therefore precedents can only be persuasive so far as by analogy they are like the present situation, and so far as their reasoning may be applicable and convincing. A standard rule of construction applied to statutes of limitation is stated by Mr. Wood in his work on Limitations, § 11, p. 38, as follows:

"Another rule in reference to all statutes is that they are to be construed as to have a prospective effect merely and will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed."

And in support of this rule he cites many authorities. The Supreme Court of the United States in *Murray v. Gibson*, 15 How. 421, 14 L. Ed. 755, stated the same rule in the following language:

"As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only. Especially should this rule of interpretation prevail where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of these rights."

In the face of the previous decisions of the territorial court and of the general rule for construction above stated, this court cannot give said statutes a retrospective operation so as to make them relate back and operate upon causes of action existing prior to statehood on the east side of the state. Neither is the court justified in holding that the statutes in one portion of the state have the effect of supplanting other statutes then in existence and fixing a new period from which the time limit shall begin to run.

Section 2 of the Schedule declares that the laws of Oklahoma Territory are extended over and shall remain in force in the state which are not repugnant to the Constitution or locally inapplicable. The preamble and section 1 declare that such laws shall not

affect existing rights, actions, suits, proceedings, contracts, or claims, and this operates as a modification of the statutes of limitations so extended to the extent that they are not permitted to bring within their terms existing rights of actions, contracts, or claims, but permits them to continue as if such laws had not been extended to that portion of the state.

Section 59, art. 5, of the Constitution (section 148, Wm. Ann.) declares:

"Laws of a general nature shall have a uniform operation throughout the state, and where a general law can be made applicable, no special law shall be enacted."

This constitutional provision operates upon all laws extended over and put in force in that portion of the state formerly known as the Indian Territory, and for such laws to have such uniform operation, it is necessary that they shall affect alike all persons and localities of the state brought within their terms; that is to say, the period of limitation provided by the act in question must be the same upon like rights, contracts, and claims in each portion of the state, and in all other ways the operation of said laws must be uniform; to be more specific: If the period of limitation upon a contract or claim were 5 years from the date it first accrued on the Oklahoma Territory side of the state, 5 years must be the period of limitation on the Indian Territory side.

It is true in the present case the time prescribed in the Indian Territory was 5 years, and a like period was prescribed by the statute in Oklahoma Territory, and it may be said the distinction is of no importance. If the Oklahoma statute be held to apply and to fix a new period from which the statute would commence to run, it would have the effect of prescribing a longer period in which action might be brought in the present case than would accrue to the payee of a note maturing on the same date in what was formerly Oklahoma Territory, and thereby said laws would not be uniform in their operation. To further illustrate: If a debtor on the east side had executed his note maturing 4 years before the date of statehood and a debtor on the west side had executed his note maturing on the same date, had no change in the form of government taken place the right of the respective payees to institute suit would have continued, and expired on the same date in each instance; but if the other view be taken, the period of limitation in Oklahoma Territory would have been 5 years, as provided by statute, while on the Indian Territory side it would have been 9 years, which would clearly make the statute with this construction obnoxious to the uniformity clause of the Constitution.

Another complication may be illustrated thus: Had the debtor living on the Oklahoma Territory side continued to reside there until the bar of the statute had fallen and

then moved to the Indian Territory side, the cause of action would not have been renewed, but the bar having once attached could be availed of at any point within the state. On the other hand, had the debtor living on the east side continued to live there until the period of 5 years had run, and then moved to the west side, he would not be entitled to plead the bar of the statute. The statute of limitations for certain classes of actions concerning real estate in the Indian Territory was 7 years, while in Oklahoma Territory it was 15 years. Should the statute applicable thereto be construed as the trial court did in this case, it would result in this situation.

Where plaintiff's cause of action had accrued 6 years and 11 months prior to statehood in the Indian Territory, should the right continue as if no change in the form of government had taken place, it would be barred within 7 years from the date it first accrued; while taking the other view, it would be extended for a period of 15 years, thus making the period of limitation in effect 23 years, while a like cause of action accruing on the same date in Oklahoma Territory would be barred in 15 years. It was to avoid such conditions as these and those heretofore pointed out, the Schedule declared that existing rights, actions, suits, proceedings, contracts, and claims should continue as if no change had taken place.

The question here is not like that presented in cases involving matters of procedure merely. The right of action had accrued and was in existence and was to be protected and continued the same as if no change had taken place. In actions commenced before statehood the rights of the parties to existing procedure was preserved by the same provision of the Schedule. No right had attached or vested to any specific mode of procedure prior to the time action was commenced, and therefore authorities of that nature are not controlling here.

The decision in *Thels v. Board of County Com'rs*, 22 Okl. 333, 97 Pac. 973, simply determined the section 3, art. 7, c. 28, p. 328, Sess. Laws 1905, providing that, "Such set-off or counterclaim shall not be barred by the statute of limitations until the claim of the plaintiff is so barred," only affects set-offs or counterclaims existing at the time of its passage, and did not revive a set-off already barred by a former statute.

The question (*In re Mosher*, 24 Okl. 61, 102 Pac. 705, 24 L. R. A. [N. S.] 530, 20 Ann. Cas. 209) was whether the statute of limitations had run against certain acts alleged against an attorney in a disbarment proceeding, and it was held that the statute did not apply in cases of that kind.

In *Anderson et al. v. Kennedy et al.*, 152 Pac. 123, the question here presented was submitted, and in an opinion by the commission, it was held that the statute of limita-

tion therefore in force in Oklahoma Territory, which were by the Schedule extended to that part of the state formerly known as Indian Territory, applied to causes of action then existing and had the effect of renewing such existing rights. This statement of the law in our opinion is incorrect.

The judgment should be reversed.

KANE, C. J., and TURNER, J., concur.
THACKER, J., concurs in the conclusion.

THACKER, J. I concur in the conclusion reached in the opinion of the court in this case; but I am unable to concur in the reasoning on which the same is based, and especially do I dissent from the holding that section 4483, Statutes of Arkansas of 1884, is the law of this forum in this case.

In discussing this subject the plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

The plaintiff commenced this action on July 22, 1911, against defendant for the principal sum of \$600, besides interest and attorney's fees, which had then been past due since December 15, 1905, a period of 5 years, 7 months, and 7 days; and the defendant's answer raised the question as to whether the same was barred by the statute of limitation.

The cause of action on this note for nearly 2 years was subject to the running of the 5-year period of limitation prescribed by Mansfield's Digest of the Statutes of Arkansas of 1884, in force in the Indian Territory prior to statehood, at which time this note lacked a little more than 3 years of being barred.

The case was tried to a jury, and the trial resulted in a verdict for plaintiff under instructions that, notwithstanding plaintiff's cause of action on the note had originally accrued more than 5 years before the action was commenced, the same was not barred by any statute of limitation; and judgment was accordingly entered against defendant upon this verdict.

This instruction was evidently predicated upon the theory that the said Arkansas statute is not the law of this forum; that at the time of the admission of Oklahoma to statehood the defendant had acquired no vested right by virtue of the running of that statute for nearly 2 years which was preserved to him by section 1, art. 25 (Williams', § 365), in the Schedule of the Constitution of Oklahoma; that section 3890, Statutes of 1893 (section 4657, Rev. Laws 1910), is the law of the forum in this case and prescribes the only limitation the defendant would in any event be entitled to invoke; and that within the meaning of this last-mentioned statute the plaintiff's cause of action did not accrue until it became subject to the running thereof upon the admission of Oklahoma to statehood on

November 16, 1907, so that under this statute the computation of the time from the commencement of this action can extend no further back than that date and does not bar this action.

The questions presented in this case, as will be understood from the foregoing, are: (1) Was section 4483 of Mansfield's Digest of the Statutes of Arkansas of 1884 brought forward as the law of this state in such cases, or did defendant acquire any right thereunder, by virtue of section 1, art. 25 (Williams', § 365), in the Schedule of our Constitution, so as to bar this action? (2) If not, and if section 3890, Statutes 1893 (section 4657, Rev. Laws 1910), is applicable, as the law of this forum, must the period of limitation be computed from the commencement of this action back to the original accrual of plaintiff's cause, that is, to December 15, 1905, or only back to its accrual, or coming under the laws of the state of Oklahoma, that is, to November 16, 1907, when this cause of action first became subject to the statutes of limitation of this state?

The aforesaid section 4483, Statutes of Arkansas of 1884, reads:

"Actions on promissory notes, and other instruments in writing, not under seal, shall be commenced within 5 years after the cause of action shall accrue, and not afterward."

The aforesaid section 3890, Statutes 1893 (section 4657, Rev. Laws 1910), reads:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterward:

"First. Within 5 years: An action upon any contract, agreement or promise in writing."

The aforesaid section 1, art. 25 (Williams', § 365), in the Schedule of our Constitution reads:

"No existing rights, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but shall continue as if no change in the forms of government had taken place."

Before answering the above-stated questions, which are decisive of the instant case, a few general observations may be helpful to a clearer understanding of the discussion of the same and of the conclusions reached upon each of these questions.

It must be borne in mind that neither a plaintiff nor a defendant is denied or acquires any right whatever under any such statutes (which merely limit the remedy for the enforcement of rights not dependent upon the limiting statute) until the full period of limitation has run and the action is completely barred, nor then, except that adverse possession of real or personal property or of an easement in the former for the full period of limitation operates in effect to transfer the title to such possessor, unless (as, for instance, our own Constitution, § 52, art. 5, the same being Williams', § 142, and our own statutes, section 3894, Statutes 1893, the same being section 4661, Rev. Laws 1910) there is some constitutional or statutory pro-

vision giving such statutes of limitations the effect of barring or otherwise affecting the right of action contrary to the common law. In *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, where the full period of a Texas statute of limitation had run against a personal debt and thereafter that statute was suspended by an amendment to the state Constitution, the Supreme Court of the United States held that the debtor acquired no right under such statute and therefore said subsequent suspension deprived him of no right, and that said constitutional amendment left the plaintiff free to sue and recover against him just as if the full period of limitation had not run. This is merely well-settled law, usually expressed as, for instance, in *Wood on Limitations* (4th Ed.) § 1, p. 3, in something like the following form:

"The weight of authority now is that the statute of limitations as to personal actions affects only the remedy and does not extinguish the right. Statutes of limitations act on the remedy. They are designed to affect the remedy, and not the right of contract. They only apply to the remedy, without canceling the obligation."

In *Angell on Limitation* (6th Ed.) § 7, p. 4, the same principle is stated in the following form:

"Prescriptions may extend to remedies only, and be rather the means of exemptions from the servitude of an action than of the acquisition of a positive and absolute title. The statute 21 James I, applies only to remedies."

Also, see, *Limitations and Adverse Possession*, *Buswell*, § 1, p. 1.

Another proposition, which is closely related to the foregoing and equally well-settled, is that the law of the forum alone determines whether a personal action (unless a foreign statute has barred the right itself) is barred by limitation. In other words, the law of the present time and of the court in which the action is commenced, and not the law of any past time or other court, governs in determining questions of limitations in personal actions. In 1 *Wood on Limitations* (4th Ed.) § 8, pp. 31-36, this rule is stated as follows:

"It is well settled that personal contracts are to be interpreted by the law of the place where they are made; and it is a rule equally well settled that remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted and not by the law of the place of the contract. The reason of this rule, according to *Story, J.*, is obvious, and it is in conformity with the universal rule that, if the statute (of limitation) operates merely upon the remedy, the law of the forum and not the law of the situs of the contract controls. But, if the statutes extinguish the right itself, it may be set up as a bar to an action thereon whenever brought. This rule is forcibly illustrated in another way, and that is, that where by the laws of the forum a shorter period for the limitation of a claim is fixed than by the law of the situs of the contract, the statute of the forum will bar the claim if the party setting it up brings himself within it, although the statute of the place of contract has not run * * * and is distin-

guished as suggested in *Story's Conflict of Laws*, and as suggested in reference to the preceding rule, in cases where the right as well as the remedy of the claimant is barred by the law existing at the place of contract, this, however, is not perhaps a frequent case in regard to personal actions."

Also, see, *Angell on Limitations*, §§ 64-67, pp. 56-67.

The foregoing general observation brings us right down to the answer to the first question to be decided in this case, namely:

"Was section 4483 of *Mansfield's Digest* of the Statutes of Arkansas of 1884 brought forward as the law of this state in such cases, or did defendant acquire any right thereunder, by virtue of section 1, art. 25 (*Williams*, § 365), in the Schedule of our Constitution so as to bar this action?"

It must be obvious from what has already been said that neither the plaintiff nor defendant had lost or acquired any right whatever under the Arkansas statute of limitations prior to statehood, and that if either one of them since has lost or acquired any right under it it is because that statute was brought forward and has been running against plaintiff's remedy by action in court since statehood by virtue of said section 1, art. 25 (*Williams*, § 365), in the Schedule of our Constitution. No "right, contract, or claim" the plaintiff has was "affected" by the adoption of section 3890, Stats. 1893 (section 4657, Rev. Laws 1910), instead of section 4483, Statutes of Arkansas of 1884, as the law of this forum; and if the new statute had shortened the period within which he might have resorted to the courts for the enforcement of his "right, contract, or claim," such "right, contract, or claim" would not have been "affected," unless the time he had previously had in which to sue had been entirely cut off or unreasonably reduced, as such statutes relate only to the remedy—the plaintiff's "right, contract, or claim" would remain intact and enforceable by action at law within the period allowed by the new statute, and thereafter, in the absence of a statute under which the right itself would be lost, in any other available way as, for instance, by applying any applicable funds he might have in hand belonging to the defendant to the satisfaction of the same.

The defendant had and is urging no "right," or "contract," or "claim" against the plaintiff's right of action on the note in question; and, in effect, he is simply saying here that plaintiff has lost his remedy for a breach of a contract by virtue of some statute of limitation. If at the time of statehood the full bar of the statute of Arkansas had expired and the plaintiff's right had been thus extinguished under the laws of the Indian Territory, it is clear that this section of our Constitution would have preserved to defendant the right to invoke that statute against plaintiff's remedy, so as to defeat his action; but as no right had accrued to either the plaintiff or the defendant under the laws of the Indian Territory in respect

to the limitation upon plaintiff's remedy by action at law against the defendant which could have been effected by a change from the territorial to a state form of government, there was nothing in the instant case to be preserved to defendant by that constitutional provision.

That, except as to pending "actions," "suits," and "proceedings," no prior remedy (that is, no means by which the violation of a right is prevented, redressed, or compensated) in the Indian Territory or elsewhere was brought forward or preserved by said section 1, art. 25 (Williams', § 365), in the Schedule of our Constitution is too well settled to be open to discussion at this time. That, except as to pending "actions," "suits," and "proceedings," this section of the Constitution preserves only rights and not remedies will be seen from the following cases: Independent Cotton Oil Co. v. Beacham, 31 Okl. 388, 120 Pac. 969; Chicago, R. I. & Pac. Ry. Co. v. Baroni, 32 Okl. 540, 122 Pac. 926; Chicago, R. I. & P. Ry. Co. v. Bankers' National Bank, 32 Okl. 290, 122 Pac. 499; Muskogee Vitrified Brick Co. v. Napier, 34 Okl. 618, 136 Pac. 792; McLeod v. Spencer, 34 Okl. 647, 126 Pac. 753; Farmers' State Bank of Ingersoll v. Wilson, 34 Okl. 755, 127 Pac. 395; Hillis v. Addle, 35 Okl. 122, 128 Pac. 702; Metropolitan Ry. Co. v. Fonville, 36 Okl. 76, 125 Pac. 1125; Mullen v. Glass, 43 Okl. 549, 143 Pac. 679.

It follows that section 4483, Statutes of Arkansas of 1884, is not the law of this forum nor of this case, and that the defendant cannot here urge that statute in bar of plaintiff's action.

Section 3890, Statutes 1893 (section 4657, Rev. Laws 1910), which became the law of this state by virtue of section 2, art. 25 (Williams', § 366), in the Schedule of our Constitution, prescribes the only limitation there is in this jurisdiction upon such causes of action, when the same were not completely barred by the statute of some other jurisdiction.

This brings us to the second and only remaining question in this case, namely:

"Must the period of limitation be computed from the commencement of this action back to the original accrual of plaintiff's cause of action, that is, to December 15, 1905, or only back to its accrual, or coming, under the laws of the state of Oklahoma, that is, to November 16, 1907, when the state of Oklahoma came into existence?"

Upon this question there is admittedly room for reasonable difference of opinion; but the better reasoning leads to the conclusion that time should be computed under this section of our statutes from the commencement of this action, that is, from July 22, 1911, back to the original accrual of plaintiff's cause of action upon this note, that is, to December 15, 1905.

It may be well to state at the outset of the discussion of this question that when a succeeding statute of limitation prescribes

a shorter period than the prior statute prescribed, such a retrospective construction may result in barring at the instant that the new statute takes effect some unbarred cause of action theretofore accrued and thus affect a right or claim and so offend and to that extent fall against both the state and federal constitutional inhibitions against legislative impairment of obligations of contracts (which are rights), and, also, against deprivation of property (which is a right) without the due process of law. State Const. art. 2, §§ 7, 15 (Williams', §§ 15, 23); Fed. Const. art. 1, § 10, and Amendment 14, § 1; 6 Enc. U. S. Sup. Ct. 880-884; 5 idem, 589; 8 Fed. Stat. Ann. 868; 9 Fed. Ann. 553; Sohn v. Waterson et al., 17 Wall. 596, 21 L. Ed. 737; Koshkonong v. Burton, 104 U. S. 668, 26 L. Ed. 886; Milbourne v. Kelley, 93 Kan. 753, 145 Pac. 816.

And it may be further stated here that, while the statute of limitations in force in the Indian Territory prior to statehood is identical with the succeeding statute in force in the state of Oklahoma in respect to the time allowed for commencement of actions in cases of this character, our statutes prescribe a shorter period in some instances for other classes of causes of actions.

In Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737, where a Kansas statute of limitation practically identical in language with our own was considered and construed, the Supreme Court of the United States said:

"A statute of limitations may, undoubtedly, have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the Legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class, shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future."

After thus stating that such statutes, construed literally, are both retrospective and prospective in their operation, that court approves the judgment of the Circuit Court of the United States for the District of Kansas, holding the statute under consideration to be not retrospective but prospective only, reaching its conclusion by the following course of reasoning:

"But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the Legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act, without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is, to construe

the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires—which reasonable time is to be estimated by the court—leaving all other actions accruing prior to the statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others."

But in the later case of *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886, in discussing this question, the same court said:

"* * * If the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is therefore unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire act would fall and become inoperative. The result, in such case, would be, that the plaintiff, and other holders of the coupons, would have not simply one year, but * * * a reasonable time after its passage within which to sue."

And in 6 Enc. U. S. Sup. Ct. Reps. 884, it is said:

"Although a statute of limitation subsequently passed may be obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is therefore unconstitutional, as impairing the obligation of a contract, yet it does not follow that the entire act would for this reason fall and become inoperative. The result would be that the holders of the contract held to be barred by the unconstitutional statute would have a reasonable time after its passage within which to sue."

In *Milbourne v. Kelley*, 93 Kan. 753, 145 Pac. 816, decided on January 9, 1915, the Supreme Court of Kansas declined to follow the rule adopted in *Sohn v. Waterson*, supra, and adhered to that announced in *Morton v. Sharkey*, *McCahon*, 113, 1 Kan. (Dass. Ed.) 536, and said:

"The Legislature must give a reasonable time to bring suits on causes of action which are not barred by the existing law when the new one is enacted' (syl. 4), and it was held that where the act fails so to provide, suit may be brought within a reasonable time after the passage of the new act. The case was cited with approval in *Shepard v. Gibson*, 88 Kan. 305, 128 Pac. 371. * * *

Our own territorial Supreme Court followed *Sohn v. Waterson*, supra, in *Southgate v. Frier*, 8 Okl. 435, 57 Pac. 841, *Huber v. Zimmerman*, 8 Okl. 573, 58 Pac. 737, and *Fuller v. Johnson*, 8 Okl. 601, 58 Pac. 745, and, although the precise question has not been squarely decided since statehood, the same view of the law is indicated in *Theis v. Board of County Com'rs of Beaver Co.*, 22 Okl. 333, 97 Pac. 973, and *In re Mosher*, 24 Okl. 61, 102 Pac. 705, 24 L. R. A. (N. S.) 530, 20 Ann. Cas. 209. But the instant case necessarily involves this question and presents the somewhat anomalous situation of a statute of limitation that has been in force in that territorial portion of the state which

was formerly Oklahoma Territory since 1893, and in that portion which was formerly Indian Territory only since the admission of these territories to statehood on November 16, 1907; and this situation seems to require a re-examination of the question as to which of the foregoing rules of construction should be applied in the instant case, where neither the plaintiff nor the defendant acquired any right in respect to the limitation upon plaintiff's remedy by suit prior to statehood and said section 3890, Stat. 1893 (section 4657, Rev. Laws 1910), was the law of this state at the time this action was commenced and is therefore the law of this case in this regard. The Indian Territory and the territory of Oklahoma each bear practically the same relation as antecedents to the state of Oklahoma; and, as it is the law of this state that must govern this question of limitation upon plaintiff's remedy, it seems better to construe this statute literally, subject to the qualification stated in *Koshkonong v. Burton*, supra, and compute time from the commencement of the action back to the original accrual of the cause of action, and thus have the same rule of construction whether the cause accrued in the one or the other territory—thus alone can any approximation of uniformity in the remedies of creditors and other claimants throughout the state be attained.

Section 2, art. 25 (Williams', § 366), in the Schedule of the Constitution reads:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, * * * shall be extended to and remain in force in the state of Oklahoma. * * *

Section 21 of the Enabling Act (Williams', § 433, in our Constitution) also provides:

"* * * All laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state. * * *

It appears from these provisions that if plaintiff's cause of action had accrued in Oklahoma Territory and had been subject to the running of said section 3890, Statutes 1893 (section 4657, Rev. Laws 1910), until statehood, time would be computed under this statute in this action from the commencement of the action back to December 15, 1905, although the plaintiff's remedy would not have been barred and the defendant would have acquired no right under this statute prior to statehood, when there was a change in jurisdictions; and the better reasoning seems to require that time should be computed back to the same date in the instant case, notwithstanding plaintiff's cause of action originally accrued under and was subject to the statutes of limitations of Arkansas in force in Indian Territory prior to statehood and a retrospective construction is generally to be avoided.

Sections 46 and 46z, art. 5 (Williams', §§ 108 and 134), of our Constitution reads:

"(108) Sec. 46. * * * The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: * * *

"(134) Sec. 46z. * * * For limitation of civil or criminal actions. * * *

Section 59, art. 5 (Williams', § 148), of our Constitution reads:

"Laws of a general nature shall have a uniform operation throughout the state, and where a general law can be made applicable, no special laws shall be enacted."

The rule of uniformity prescribed by the foregoing provisions of our Constitution seems to require computation of time in such cases as the instant one from the commencement of the action back to the original accrual of the cause of action alike in every part of the state (and not only to the admission of Oklahoma to statehood or to one time in one part of the state and to another time in another part of the state), as the language warrants it, and this statute merely relates to the remedy for the enforcement of rights—it is merely the law of the forum relating to the question as to whether a plaintiff has a remedy by action at law at the time such an action is commenced.

It cannot be thought that the framers of said Constitution intended to renew, in effect, all unbarred causes of action in the Indian Territory upon its admission to statehood without renewing such causes of action existing at the time in Oklahoma Territory; and neither can it be thought that the intent was to renew, in effect, all unbarred causes of action existing in both territories at the time of statehood, although our statute, as a law of this state, was not in force anywhere until November 16, 1907; but, in view of our constitutional requirement of uniformity, this appears to be the only alternative to a disregard of this requirement unless, as seems reasonable, our present statute be given a retrospective as well as prospective effect throughout the state.

This subdivision of section 3890, Statutes 1893 (section 4657, Rev. Laws 1910), is both retrospective and prospective, when considered from November 16, 1907, when it first became a law of this state; and it is applicable alike in all cases of this character commenced in the courts of this state since statehood; but, if this statute had shortened the period of limitation prescribed by the prior statute so as to completely bar at the time of the admission of Oklahoma to statehood any cause of action as literally applied, the result would be that in such a case time would be computed from the commencement of the action only back to a point of time at which plaintiff already had had a reasonable time within which to commence his action, as the statute would be unconstitutional and void in respect to time back of that point.

For the reasons stated, I agree that the

judgment of the trial court should be reversed.

SHARP, J., concurs in the above concurring opinion.

DAVIS v. FOLEY. (No. 6412.)

(Supreme Court of Oklahoma. July 25, 1918.)

(Syllabus by the Court.)

1. JUDGMENT ~~§~~903—ACTION ON JUDGMENT—RIGHT OF ACTION.

An action may be maintained upon a judgment, although the judgment creditor has the right to issue an execution thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1722, 1723; Dec. Dig. ~~§~~903.]

2. LIMITATION OF ACTIONS ~~§~~2(1)—ACTION ON JUDGMENT—LIMITATIONS.

An action may be brought in the courts of this state upon a judgment obtained in the United States court for the Indian Territory, at any time within 10 years after the rendition of such judgment; the proper statute of limitations applicable thereto being section 4487, Mansfield's Digest of the Laws of Arkansas, in force in the Indian Territory at the time the judgment was rendered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4, 6; Dec. Dig. ~~§~~2(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Tulsa County; L. M. Poe, Judge.

Action by C. E. Foley against Samuel C. Davis. Judgment for plaintiff, and defendant appeals. Affirmed.

Biddison & Campbell, of Tulsa, for plaintiff in error. Gray Carroll, H. D. Mason, and Horace Speed, all of Tulsa, for defendant in error.

BURFORD, C. On September 9, 1901, C. E. Foley obtained judgment against Samuel C. Davis in the United States District Court for the Northern District of the Indian Territory, sitting at Muskogee, Okl. On June 13, 1911, Foley commenced an action against Davis on said judgment in the district court of Tulsa county, Okl. The defendant demurred to the petition which was overruled, and then pleaded the statute of limitation. The cause was submitted to the court upon the pleadings and judgment given for plaintiff, from which judgment defendant appeals.

But two questions are raised upon the appeal: First. Could the plaintiff maintain an action on his judgment during the time that he had the right to issue an execution thereon? Second. Was the statute of limitation of Oklahoma, extended in force at statehood over the whole state, comprising in part what was originally Indian Territory, a bar to plaintiff's cause of action, or is the same governed by that portion of Mansfield's Digest of the Laws of Arkansas in force in the Indian Territory at the time the judgment was recovered?

[1] Upon the first proposition we have no

doubt of the plaintiff's right to maintain the action. Although the question has apparently not been directly passed upon in this state, actions upon judgments have been upheld in this court (*Reaves v. Turner*, 20 Okl. 492, 94 Pac. 543; *Chitty v. Gillett*, 148 Pac. 1048, L. R. A. 1916A, 1181), and in the courts of the Indian Territory (*Minter v. Green*, 3 Ind. T. 761, 49 S. W. 48). The exact question raised has been passed upon against the contention of plaintiff in error by the Circuit Court of Appeals of the Eighth Circuit in *Town of Fletcher v. Hickman*, 165 Fed. 403, 91 C. C. A. 353, and again in the same case reported in *Hickman v. Fletcher*, 195 Fed. 907, 115 C. C. A. 595. So the question was decided in the same way, at least inferentially, in *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466, and has been directly passed upon in many of the states. See *Hummer v. Lamphear*, 32 Kan. 439, 4 Pac. 865, 49 Am. Rep. 491; *Ames v. Hoy*, 12 Cal. 11; *Field v. Sims*, 96 Ala. 540, 11 South. 763; *Davidson v. Nebaker*, 21 Ind. 334, 83 Am. Dec. 350; *Simpson v. Cochran*, 23 Iowa, 81, 92 Am. Dec. 410; *Greathouse v. Smith*, 4 Ill. (3 Scam.) 541; *Clark v. Goodwin*, 14 Mass. 237; *Sheeham Co. v. Sims*, 28 Mo. App. 64; *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491; *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 Pac. 849; *Hickman v. Macon County (C. C.)* 42 Fed. 759; *Denton v. Baker*, 79 Fed. 189-194, 24 C. C. A. 476. Many other authorities are collected in 2 Black on Judgments, § 958, and 2 Freeman on Judgments, § 432.

A few of the states of the Union hold to the other doctrine, but the great weight of authority, both at common law and under various statutes, is in favor of the right of action. Upon principle it would seem that the right to sue upon a judgment ought to be maintained. The judgment is an evidence of indebtedness which the plaintiff ought to be allowed to enforce in any lawful way possible. The remedy by execution is but one way of enforcing it; that remedy may be inadequate. It is not to be assumed that the plaintiff will continue to renew his judgment by suit upon it where the remedy by execution would be to afford him full relief. If he does use this right for the purpose of harassing the judgment debtor such party may relieve himself of his embarrassment by paying the debt which the judgment of the court has said was just and due to the plaintiff.

[2] The second proposition as to the application of the statute of limitation is clearly determined by *Patterson v. Rousney*, No. 4233, 159 Pac. 636, recently decided upon rehearing, and not yet reported. In that case it was said:

"Where a promissory note, executed and payable in the Indian Territory, was subjected to the running of the statute of limitation as contained in section 4483, Mansfield's Digest, Stat-

utes of Arkansas, for a period of time prior to the erection of the state, an action was instituted thereon after the admission of the state into the Union in the courts of this state. Held that the cause of action on said note was governed, as to the length of time necessary to constitute a bar thereto, by section 4483, Mansfield's Digest, and not by the laws of Oklahoma Territory extended over the state by the Constitution."

The section of Mansfield's Digest in force in the Indian Territory applicable to the present case is section 4487, which reads as follows:

"Actions on all judgments and decrees shall be commenced within 10 years after the cause of action shall accrue, and not afterwards."

It is apparent, therefore, that this being the controlling statute of limitation under the doctrine of *Patterson v. Rousney*, supra, the plaintiff brought his action within time, and the court properly rendered judgment for him.

Judgment affirmed.

PER CURIAM. Adopted in whole.

MERCHANTS' NAT. BANK OF SALLISAW v. FRAZIER et al. (No. 7479.)

(Supreme Court of Oklahoma. July 25, 1916. Rehearing Denied Aug. 25, 1916.)

(Syllabus by the Court.)

1. REPLEVIN \S 71(2)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In any replevin action, the subject of inquiry is the right of possession to the property involved, and in the trial thereof any evidence is admissible which properly determines the ownership and the right of possession thereof.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 289, 290; Dec. Dig. \S 71(2).]

2. CHATTEL MORTGAGES \S 150(1) — BONA FIDE PURCHASERS—RECORD AS NOTICE.

The chattel mortgage, not acknowledged before a notary public and attested by only one witness, where good between the parties, is not subject to record, and if recorded is not constructive notice of its contents so as to entitle the mortgagee therein named to a lien superior to a subsequent incumbrancer in good faith and without notice.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 246-248, 252; Dec. Dig. \S 150(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by the Merchants' National Bank of Sallisaw against G. F. Frazier and W. E. McConnell and others intervene. From an adverse judgment, the plaintiff brings error. Affirmed.

Franklin & Carey, of Muskogee, and Frye & Frye, of Sallisaw, for plaintiff in error. McCombs & McCombs, of Sallisaw, for defendants in error.

HOOKER, C. This suit in replevin was instituted by the bank against G. F. Frazier to recover the possession of certain personal

property in which the bank claimed a special interest by virtue of certain notes and chattel mortgages executed by one Frazier to other parties and thereafter assigned to the bank. After the filing of said action the other defendants intervened and claimed all of the property sought to be recovered in this action, and executed redelivery bonds therefor, and obtained possession of the property.

It appears from the evidence that in 1911 one W. S. Coombs made a contract for the purchase of certain real estate from one John Coombs, and that W. S. Coombs entered into possession of said property, and in the fall of 1911 made a contract with G. F. Frazier to cultivate said real estate for the year 1912, and by the terms of his contract he obligated himself to furnish Frazier certain provisions, etc., to enable him to cultivate said land, and he also sold to Frazier certain stock, and in order to secure the payment for the stock, provisions, and rent of the land the said Frazier executed to W. S. Coombs his note, and secured the same by chattel mortgage on certain personal property. Frazier took possession of the real estate under the lease, and attempted to cultivate the same for the year 1912, but in the month of May thereof, a flood destroyed the crop which he had planted on said place, and thereafter Frazier requested W. S. Coombs for further assistance, in order that he might plant and cultivate said land in crops, and it is contended by the defendants in error that the said W. S. Coombs refused to comply with this request, and informed the defendants in error and other parties that he intended to turn said place back to his vendor, John Coombs, and sue him for damages for misrepresentations, and that the said W. S. Coombs did surrender the possession of said place to John Coombs, and refused to have anything further to do with said farm, either in complying with his trade with John Coombs or in the cultivation of the crops by Frazier, and that thereupon the defendants in error McConnell and Bradshaw leased the farm from John Coombs and hired Frazier by the month to work the crops, and that the crops thus cultivated by Frazier on said land belonged to them and not to Frazier, but upon the other hand, the bank contended that W. S. Coombs continued as the landlord of Frazier, and made arrangements whereby Frazier was enabled to cultivate his crops, and that he did not surrender possession of said property until in the fall of 1912 to John Coombs. As to the crops grown on said property by Frazier in 1912, an issue of fact was here raised between the bank, as the assignee of the note and mortgage given by Frazier to W. S. Coombs, and McConnell and Bradshaw, claiming to have leased the same from John Coombs after the flood in May, 1912, the bank claiming a lien on said crops by virtue of the mortgage aforesaid, and the other to be the absolute owner of said

crops by virtue of a lease from John Coombs and having hired the crops cultivated.

[1] Upon the evidence presented in the trial below the court found as a fact that W. S. Coombs did surrender the land, after the flood in 1912, to John Coombs, and that Frazier did thereafter work for wages for McConnell and Bradshaw in the cultivation of said crops, who leased the same from John Coombs, and that Frazier did not have any interest in said crops at the time of the institution of this suit. We cannot say that this evidence does not support the finding of the court upon that proposition. It must be borne in mind that before the bank is entitled to recover, it must show that Frazier had an interest in the crops, which it did not do, but upon the contrary the court found as a fact that Frazier did not have any such interest, and, the finding of the court being supported by the evidence, this court cannot disturb the same.

The position assumed by the bank that the evidence introduced by the defendants in error, going to show that W. S. Coombs abandoned the farm and that John Coombs rented the same to McConnell and Bradshaw after the flood, and that Frazier cultivated said crops for wages as the servant of McConnell and Bradshaw, is an attempt to vary the terms of a written contract is not well taken, and is not tenable in this case. If any one without his consent cultivated the land of W. S. Coombs in 1912, the law affords him a remedy to collect his rent, but that fact of itself cannot give Frazier an interest in the crops grown thereon, when as a matter of fact he did not have any. Some one might be liable to him for rent, but that would not give the bank here a lien upon the crops by virtue of a mortgage given by Frazier as claimed by the bank.

It is also urged that the title of the landlord cannot be disputed in this case by Frazier, and that the defense offered by Frazier and his codefendants, to the effect that W. S. Coombs, after the flood in May, 1912, ceased to be the landlord of Frazier, is not permissible. In *Welch v. Johnson*, 27 Okl. 520, 112 Pac. 989, this court said:

"It is a general rule that a tenant who does not surrender back to his landlord possession of the demised premises will not be permitted, so long as he holds the possession which he originally derived from his landlord, to deny his landlord's title. But this rule is limited to the title that the landlord had at the inception of the tenancy. The tenant is only estopped to deny that which he has once admitted. When he takes possession under the landlord, he thereby admits the title under which the landlord then holds, and the landlord's right to execute the contract under which defendant takes possession; and the tenant is forbidden to thereafter deny such title or right as long as he retains possession of the premises and enjoys the benefit of the contract; but he may show that the right and title of the landlord existing at the creation of the tenancy has, since that time been terminated, expired, or extinguished."

See, also, *Indian Land & Trust Co. v. Clement*, 22 Okl. 40, 109 Pac. 1089.

In 24 Cyc. 951, it is said:

"The rule that a tenant will not be permitted to deny his landlord's title so long as he holds the possession originally derived from him does not forbid the tenant from showing that the landlord's title has expired or been extinguished since the creation of the tenancy. The tenant may show that the landlord's estate has expired by limitation since the creation of the tenancy, as by the death of the landlord."

The same author at page 952 said:

"A tenant may show that the title of his landlord under which he entered has passed by operation of law to a third person, and that he holds under the new owner."

See *Farris v. Houston*, 74 Ala. 162; *Rhyne v. Guevara*, 67 Miss. 139, 6 South. 736; *Walker v. Fisher*, 117 Mich. 72, 75 N. W. 144; *Lancashire v. Mason*, 75 N. C. 455; and other authorities cited in notes 80 and 81, page 952 of 24 Cyc.

This rule is also approved by Underhill pages 927 and 934 of his work on *Landlord and Tenant*.

Under the authorities it was permissible for Frazier and the codefendants to show that W. S. Coombs had surrendered or abandoned the title which he claimed to the property at the time he made the contract with G. F. Frazier to cultivate the same, and under which Frazier took possession of said property. The trial court having found this issue adverse to the bank, and there being no error apparent to us, the judgment of the lower court upon this issue is affirmed.

The same situation presents itself as to the contentions of Allen-Mayer Bros. and Anderson Skipper.

[2] Upon the issue between the bank and W. E. McConnell, who claimed to be the owner of the two mules in question, another proposition is presented. This mortgage to McConnell was executed in 1910, and the same was never acknowledged, and is attested by the signature of one witness. Under the law then in force this mortgage was not entitled to record, and although it was erroneously placed upon record, the same did not give constructive notice of its existence to subsequent incumbrancers in good faith. The record here shows that in 1912, W. S. Coombs sold certain personal property to Frazier, and furnished him certain provisions in order to secure which Frazier executed a mortgage to him upon the mules, being the same property claimed by McConnell in this action. Under this evidence we are unable to say that the claim of McConnell, based upon said mortgage, is superior to that of the bank, for the contrary is true unless W. S. Coombs knew at the time said mortgage was executed to him, that McConnell had a mortgage on said property. The bank here holds the note and mortgage as an innocent purchaser before maturity, and without any notice of intervening equities; and, unless it can be shown that W. S. Coombs knew of the existence of the McCon-

nell mortgage at the time Frazier executed this mortgage to him in 1912 upon the mules in question, the bank is entitled to recover the possession of said mules. The judgment of the trial court in favor of W. E. McConnell and against the plaintiff in error as to the two mules is reversed and remanded, but affirmed as to the black horse, and the judgment of the court in all other matters is affirmed.

PER CURIAM. Adopted in whole.

WILLIAMS v. GIBSON BROS. (No. 7655.)
(Supreme Court of Oklahoma. Aug. 8, 1916.)

(Syllabus by the Court.)

1. REPLEVIN \S 60(4)—ACTION—ISSUES AND PROOF

Under a general denial in a replevin action, the defendant may make any defense which will defeat the plaintiff's claim of right to possession as against the defendant.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. \S 272-277; Dec. Dig. \S 69(4).]

2. PLEADING \S 345(2)—JUDGMENT ON PLEADINGS—ANSWER.

In an action in replevin, the defendant answered by general denial and in addition pleaded affirmative defenses. In the latter he admitted the execution and delivery of the note and mortgage, default in payment of which is made the basis of plaintiff's claim to right of possession. Held, that such answer raises a question of fact, and a judgment rendered upon the pleadings is improper.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 1056; Dec. Dig. \S 345(2).]

Commissioners' Opinion, Division No. 4. Error from County Court, Garvin County; W. R. Wallace, Judge.

Action by Gibson Bros. against B. H. Williams. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. W. Field and Geo. I. Jordan, both of Pauls Valley for plaintiff in error. O. W. Patchell, of Pauls Valley, and Stephen C. Treadwell, of Oklahoma City, for defendant in error.

EDWARDS, C. The plaintiff below brought a simple action in replevin, based upon a promissory note secured by a chattel mortgage. The pleadings disclose that the note and mortgage were the joint obligation of E. G. Sublette and B. H. Williams, and the property mortgaged the joint property of said parties. The answer of the defendant is: First, a general denial; second, the defendant pleads that the note and mortgage sued on are the joint obligation of the defendant and E. G. Sublette, and that the plaintiff, without the knowledge or consent of the defendant, had executed to said Sublette a release upon certain of the property mortgaged, and had released said Sublette from personal liability on the note; third,

the defendant alleges that on the 27th day of May, 1914, the note and mortgage set up as a basis of plaintiff's action were canceled and settled by a new contract, a copy of which is attached to the answer as a part thereof. The said contract, however, appears to be no more than an extension agreement of the original note and mortgage between the plaintiff and defendant. No reply was filed to this answer, but the plaintiff filed a motion for judgment on the pleadings, which motion was sustained, and judgment entered in favor of plaintiff for the possession of certain of the personal property mortgaged and involved in the action, and for costs. The defendant filed a motion for new trial, which was overruled, and in due time the case was appealed to this court. The only error assigned is that the court erred in rendering judgment on the pleadings. The argument by plaintiff in error upon this assignment is that the defense set up in the second and third counts of the answer do not affect the general denial pleaded in the first count, and that as a general denial in an action in replevin puts in issue every material allegation of the petition, it was manifest error to render a judgment on the pleadings.

[1] It is well settled that under a general denial in a replevin action, a defendant may interpose any defense which will defeat the plaintiff's claim: *Payne v. McCormick Harv. Co.*, 11 Okl. 318, 66 Pac. 287; *Broyles v. McInteer*, 29 Okl. 769, 120 Pac. 233; *Bancroft-Whitney Co. v. Mayfield*, 36 Okl. 535, 129 Pac. 702; *De Hart Oil Co. v. Smith*, 42 Okl. 201, 140 Pac. 1154; *Francis v. Guaranty State Bank*, 44 Okl. 446, 145 Pac. 324.

[2] It is true that in an action in replevin a general denial, filed by way of answer, might be coupled with such admissions as would render a judgment on the pleadings proper. In the case at bar, however, we do not think this condition exists. The only admission materially affecting the general denial is the admission of the execution of the note and mortgage, and if the second count of the answer be held insufficient, the further admission that a portion of the indebtedness represented thereby is unpaid. But, with these admissions, the general denial is, we think, still sufficient to put in issue the right of plaintiff to the possession of the property mortgaged. In the case of *First State Bank of Mannsville v. Howell et al.*, 41 Okl. 216, 137 Pac. 657, it is said:

"Judgment on the pleadings is a permissible practice in the courts of this jurisdiction when the state of the pleadings warrant such disposition of the case. The case in hand being one in replevin, the gist of the action is the wrongful detention of the property. Defendants answered by general denial, and, in addition, pleaded affirmative defenses. In the latter they admit the execution and delivery of the notes and mortgage, default in payment of which is made the basis of plaintiff's claim to the right of pos-

session. At any event, it was incumbent on plaintiff, before it could recover, to establish its right of possession. Even though the special defenses set up in the answer should fail, yet the defendants, under the general denial, had a right to defeat plaintiff's claim by showing right of possession in some third party. Hence such an answer, containing different defenses, is not an inconsistent pleading in replevin, and, where an issue of fact is raised, as it was in this case, by the general denial, it is not error for the trial court to overrule a motion for judgment on the pleadings. Ordinarily a motion for judgment on the pleadings is proper where the answer admits, or leaves wholly undenied, the material allegations of the petition; but in this case no such condition exists. It might, in some cases, be proper to award judgment on the pleadings where the answer does not deny all the facts alleged, but denies legal conclusions only; but we are again, in this case, met with the principle that a general denial in replevin puts in issue every fact pleaded in the petition."

Even though the plaintiff in error admits the execution of the note and mortgage set up as a basis of the cause of action, and that the same are unpaid, there might still be sufficient reasons why the plaintiff below would not be entitled to the possession of the property, and these reasons the plaintiff in error might show under the general denial pleaded; but whether or not such reasons existed, the answer raises a question of fact, and a judgment on the pleadings was improper. *Noland v. Owens*, 13 Okl. 408, 74 Pac. 954; *Fenton v. Burleson*, 33 Okl. 230, 124 Pac. 1087; *Peck v. First National Bank*, 150 Pac. 1039; *Shipman v. Porter*, 149 Pac. 901.

For the reasons assigned, the judgment is reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

HEFFNER et al. v. HARMON. (No. 7547.)
(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Aug. 25, 1916.)

(Syllabus by the Court.)

1. INDIANS — §13 — CONVEYANCES — MINORS — EFFECT OF ENROLLMENT.

"Under Act May 27, 1908, c. 199, § 3, 35 Stat. 313, providing that the enrollment records of the Commissioner to the Five Civilized Tribes should be conclusive evidence as to the age of an enrolled citizen or freedman, the enrollment record, giving the age of an Indian as 9 years, is conclusive that on that date he had passed his ninth birthday and had not yet reached his tenth, but is not conclusive that he was exactly 9 years of age on that day, and does not establish that he was a minor when he made a conveyance of land one month less than 12 years thereafter."

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. —13.]

2. STATUTES — §219 — ENROLLMENT OF INDIANS — EXECUTIVE CONSTRUCTION.

"A ruling of the Commissioner of the General Land Office that the department should hold that the age of a citizen of the Five Civilized Tribes as given in the application for enrollment should be construed, for the purposes of

the government, as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of the birth, except where the records show otherwise, was not a construction of Act May 27, 1908, c. 190, § 3, 35 Stat. 313, providing that the enrollment should be conclusive evidence as to the age of the Indian and entitled to weight as a construction by the department having charge of the enforcement of the act, but was merely an administrative plan, adopted for the purposes of the government, and does not render the enrollment showing the age only by years conclusive as to the date of birth against a purchaser of land from the Indian."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.]

Commissioners' Opinion, Division No. 3. Error from District Court, Nowata County; T. L. Brown, Judge.

Action by O. C. Harmon against Lula M. Heffner and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded for new trial.

Seymour Riddle, of Vincennes, Ind., A. D. Bennett, of Vinita, and C. B. Mitchell, of Oswego, Kan., for plaintiffs in error. Glass & Weaver, of Nowata, and Gray & McVay, of Oklahoma City, for defendant in error.

HOOKER, C. The defendant in error, C. C. Harmon, instituted his suit in the district court of Nowata county against Lula M. Heffner and David Etchen, plaintiffs in error, and in his petition he alleged that he was the owner of the real estate involved here, and that he obtained his title from the grantee of Robert Ross, who was a freedman and an allottee of the Cherokee Nation; that he became the owner of said property on the 30th day of October, 1912, and had been the owner thereof from that time until the institution of the suit; that the defendant, Lula M. Heffner, claimed and held an oil and gas lease covering said lands of date February 21, 1912, and that David Etchen held a deed of conveyance covering said lands of date April 30, 1910, and the plaintiff in this action sought to set aside and declare said oil lease and conveyance void for the reason that they were executed by Robert Ross, the allottee of said land, while he was a minor, and for that reason the same was void. The said Lula M. Heffner filed an answer, in which she interposed a general denial, and further answered that she held an oil and gas lease upon said land of date February 21, 1912, and asserted its validity. She further alleged that if said oil and gas lease was executed by Robert Ross, the allottee, before he had reached the age of 21 years, the plaintiff, C. C. Harmon, had ratified and conceded said lease as valid, and had recognized the validity and existence thereof on October 28, 1912, on which date the grantor of the said C. C. Harmon, to wit, Mark Matheson, secured a warranty deed of conveyance, covering said lands from said allottee, Robert Ross, and that by the terms of said warranty deed took said lands and ac-

cepted said deed subject to said oil and gas lease so held by the said Lula M. Heffner. She further averred that the clause which the allottee, Robert Ross, caused to be incorporated in said deed had been changed by the said Harmon, and that by reason of the acceptance of said deed with this clause inserted, whereby the said Harmon accepted said property subject to the oil and gas lease of the said Lula M. Heffner, did now estop said Harmon from denying the validity of said lease, and she further alleged that the issues as to the alterations and erasures of the recital and exception of the oil and gas lease of Lula M. Heffner in the said deed of conveyance made by the said Ross to Matheson, as the grantee of said Harmon on the 28th day of October, 1912, had been decided and finally adjudicated in case No. 1466, in the district court of Nowata county, and she pleaded the judgment as res adjudicata here. A reply was filed to said answer, and thereafter the cause was tried to the court without a jury, and a judgment was awarded by the court in favor of the said Harmon and against the plaintiffs in error, to reverse which an appeal is had to this court.

It appears from the evidence: (1) That on February 21, 1912, Robert Ross executed an oil and gas lease to the property involved here to Lula M. Heffner; (2) that on October 28, 1912, Robert Ross executed a warranty deed of conveyance to Mark Matheson; (3) that on the same date, October 28, 1912, Sarah Ross executed a quitclaim deed to Mark Matheson; (4) that on October 30, 1912, Mark Matheson and wife executed a warranty deed to C. C. Harmon; (5) that on March 19, 1913, Robert Ross executed a warranty deed to Lula M. Heffner.

[1, 2] It was incumbent upon the plaintiff below to establish by competent evidence that the allottee, Robert Ross, was a minor at the time he executed the oil and gas lease to Lula M. Heffner, on February 21, 1912. In an effort to do this he introduced the enrollment record of the Commissioner to the Five Civilized Tribes, and according thereto the said Robert Ross, the allottee, was enrolled as of 10 years of age on April 4th, 1901. The lower court held that Robert Ross became of age on April 4, 1912, and that the lease executed by him on February 21, 1912, was void for the reason that he was a minor at the time of its execution. We do not think that the lower court was justified in finding from this evidence here that Robert Ross arrived at his majority on the 4th of April, 1912, and not before. This question was before the Circuit Court of Appeals for the Eighth Circuit in the case of *McDaniel v. Holland*, reported in 230 Fed. 948, and it is there said:

"The right of the plaintiff to recover possession of the land in controversy is based upon the following claim: That the enrollment record shows the age of Robert Lee Holland to have been 9 years at the date of enrollment, to wit: October 11, 1900, and also that this date was

his ninth birthday. Hence Holland would not arrive at the age of 21 years until October 11, 1912; therefore his deed to McDaniel, made on the 25th of September of that year, is null and void under the act of Congress of May 27, 1908. The important question, therefore, is whether the evidence introduced at the trial showed the plaintiff, Robert Lee Holland, to have been less than 21 years of age when he executed and delivered the deed to McDaniel for the land in question, and not whether he was 9 years of age on October 11th, the date of his enrollment. Section 3 of the above act of Congress provides: 'That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedmen.' We may accept the record introduced as conclusive that the plaintiff was 9 years of age at the date of the enrollment October 11, 1900; but this does not prove that he was a minor on September 25, 1912, as the finding by the Commission that he was 9 years of age on October 11, 1900, is entirely consistent with the fact that he had arrived at the age of 9 years at any time within 1 year prior to October 11, 1900, for after arriving at the age of 9 years he would be 9 until he arrived at the age of 10, which would be a period of 1 year. The claim on the part of counsel for plaintiff that the date October 11, 1900, must be conclusively held to be the ninth birthday of the plaintiff seems to have arisen in this way: On the 24th day of August, 1908, and within one month after the act of May 27, 1908, above referred to, went into effect, Mr. Leupp, Commissioner of the General Land Office, addressed the following letter to the Secretary of the Interior:

"Land 56330-1908 E. B. H.

August 24, 1908.

"Subject: Computation of Ages of Citizens of Five Civilized Tribes.

"The Honorable, the Secretary of the Interior: Sir: I have the honor to invite your attention to the inclosed letter of August 14, 1908, from J. G. Wright, Commissioner to the Five Civilized Tribes, inclosing letters from R. D. Wellborne, Chickasha, Okla., of August 12, 1908, and C. D. Wolfe, Wewoka, Okla., of August 13, 1908, asking that a rule be laid down for a computation of the ages of citizens of the Five Civilized Tribes. He says that these are but two of numerous inquiries that he has received regarding the same subject, and he believes that the department should pass on the question at an early date. He presents the proposition in this manner: Whether a citizen of the Cherokee Nation whose age appears on the final roll as fourteen years, the roll being approved as of September 1, 1902, should be considered as not having reached his majority until September 1, 1908, even though it could be clearly established that he was born on April 15, 1887, and would be twenty-one years of age on April 15, 1908. He reports that there is nothing in the records of his office to establish the exact age of any citizen except where birth affidavits have been required, and in all these cases the persons in connection with whose enrollment such affidavits were required, still lack several years of their majority. In the other cases, testimony was taken regarding the age of persons for whom application was made, but the answer given in every case, so far as an examination of the records shows, is given in years only, and, while the age is probably that of the nearest year, Mr. Wright says he believes that it may refer to the age of the applicant on his last birthday or

his next subsequent birthday, and he expresses the opinion that this character of record leaves the question of age in doubt. It is very seldom that a person on being asked his own age, or the age of any one else, gives any other than the age at the last birthday. The rule is so universal, in the opinion of the office, as to justify a holding that in all cases where the age of a minor is given by parents or relatives, the age given relates to the last preceding birthday. The act of Congress approved May 27, 1908 (Public No. 140) provides (section 3): " * * * The enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman." It was necessary that a rule be laid down with reference to the determining of ages of enrolled minors in the Five Civilized Tribes to prevent the production of fraudulent proof as to age by persons who purported to take advantage of the lack of age and experience of allottees, and Congress decided that the records of the Commissioner to the Five Civilized Tribes should be the criterion of age because the presumption would be that at the time application was made for enrollment no circumstances existed that tended to induce misrepresentations regarding the ages of persons in behalf of whom proof was being submitted. The office recommends that the department hold that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment shall be construed for the purposes of the government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth, except where the records show otherwise.

"Very respectfully,

"F. E. Leupp, Commissioner."

"On August 27, 1908, the recommendation of the Commissioner was approved by the Secretary of the Interior. This recommendation of the Commissioner, approved by the Secretary, is claimed to be a construction of section 3 of the act of May 27, 1908, by the department of the government having charge of the enforcement thereof, and as such to be entitled to great weight, but the clause reading, 'and that the date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise,' was not a construction of the statute, but was a plan adopted by the Land Department 'for the purposes of the government,' in the administration of the duties devolved upon it in connection with Indian lands. It may be conceded to have been a convenient plan for the purposes of the government, and no doubt as between the government and the Indian it was workable, but as against the defendants in this action it was, and is, a pure fiction, not supported by even a probability. If in this case the question was whether or not the plaintiff was 9 years of age on October 11, 1900, the judgment of the Commission under the statute would be conclusive, but as we have before indicated that is not the question. The question here is, Was the plaintiff a minor on September 25, 1912? That question the enrollment record introduced in evidence did not determine, and, of course, is not conclusive. The enrollment record introduced in evidence left the date of birth of the plaintiff an open question to be established by competent evidence."

In the instant case the age of the allottee on February 21, 1912, was an important question to be determined. The date of the birth of Robert Ross was an open question to be decided by competent evidence. Under the record here, there was no competent evidence from which the trial court could determine that Robert Ross was not of age on

February 21, 1912, the day upon which he executed the gas lease to Lula M. Heffner. For these reasons the judgment of the lower court should be reversed, and this cause remanded for a new trial, in order that the parties may introduce competent evidence, seeking to establish the age of the allottee, Robert Ross, on February 21, 1912.

PER CURIAM. Adopted in whole.

LONG et al. v. McFARLIN et al.
(No. 6801.)

(Supreme Court of Oklahoma. June 6, 1916.
Rehearing Denied Aug. 29, 1916.)

(Syllabus by the Court.)

1. PLEADING \Rightarrow 364(6) — **SURPLUSAGE—STRIKING OUT.**

Petition examined, and *held*: That certain allegations therein contained are surplusage, and that the court did right in striking them therefrom.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1161, 1162; Dec. Dig. \Rightarrow 364(6).]

2. PLEADING \Rightarrow 362(5) — **MOTIONS—STRIKING OUT AMENDMENT.**

Where plaintiffs obtained leave to amend their petition by making it more definite and certain in certain particulars ordered by the court, and the amendment fails so to do, *held*, that the court did right in striking the amendment from the files.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. \Rightarrow 362(5).]

Error from District Court, Hughes County; John Caruthers, Judge.

Action by Kizzie Long and others against R. M. McFarlin and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Lewis O. Lawson, of Holdenville, for plaintiffs in error. Harry H. Rogers, of Tulsa, for defendant in error McFarlin.

TURNER, J. On March 31, 1913, in the district court of Hughes county, Kizzie Long, Ellen Robinson, and Loday Long, plaintiffs in error, sued R. D. McFarlin and Wisey Long, defendants in error, to clear their title to 640 acres of land, and for partition thereof and for rents and profits since May 18, 1910. Their petition, comprising some dozen pages of typewritten matter, substantially states:

That they are full-blood Creek Indians, duly enrolled as such under certain acts of Congress approved March 1, 1901, and June 30, 1902, known as the "Original" and "Supplemental" Creek Agreements, that in the fall of 1899 Richard Long, an infant, died intestate, after which there was selected for him and patented to his heirs a certain tract of land in that Nation as his allotment; that he left surviving the plaintiffs, Kizzie Long, his mother, Loday Long, his sister, and Ellen Robinson, his half-sister, also Sam Long his father, Joshway, Hannah, Thomas,

and Coley Long, his brothers and sister; that thereupon the title to his allotment descended to plaintiff Kizzie Long, his mother, under the laws of descent and distribution of the Creek Nation therein set forth; that on June 3, 1902, Sam Long, the father, died intestate in the Creek Nation, leaving plaintiff Kizzie Long, his widow, and his children as stated, leaving also a certain tract of land described in the petition as his allotment, which was duly selected prior to his death, but for which patent thereafter issued to his heirs; and that one-seventh of said land descended to Kizzie Long, his wife, and the remaining six-sevenths to the other of his heirs above set forth under the laws of the Creek Nation.

The petition further states that on March 3, 1902, Joshway Long died intestate after receiving his allotment of 160 acres (described), leaving no wife, child, or children or their descendants, but leaving him surviving plaintiff, his mother, Kizzie Long, also Ellen Robinson, Loday Long, Hannah Long, Thomas Long and Coley Long, his brothers and sisters; that on the death of said Joshway, the title to his allotment descended to petitioner, Kizzie Long, either in fee simple or for life, with fee-simple title thereto in plaintiffs Ellen Robinson and Loday Long, and to Thomas Long, Hannah Long, and Coley Long, under the act of Congress of June 30, 1902.

It is further alleged that on June 23, 1907, Hannah Long died intestate, after receiving her allotment of 160 acres of land (described), leaving her surviving one child, who died the next day, and a husband, Jackson McGirt who died the next year intestate, without wife, child, or children, or their descendants; that upon the death of said Hannah, the lands thus allotted to her descended to her child as an ancestral estate, and upon the death of the child, in equal parts to plaintiffs and the said Thomas Long and Coley Long to the exclusion of her husband and his heirs; that on August 2, 1909, Thomas Long died sole and intestate, leaving surviving no child or children or their descendants, leaving him surviving as his only heir at law the plaintiff Kizzie Long, his mother, "to whom alone all the right, title and interest of said Thomas Long in and to said lands allotted to said Sam Long, Joshway and Hannah Long, as aforesaid, descended"; that on February —, 1913, Coley Long died intestate, without child or children or their descendants, leaving him surviving his widow, Wisey Long, to whom, on the death of Coley "one-half of his allotments and one-half of his right, title, and interest in and to said lands of Sam Long, Joshway Long and Hannah Long descended to plaintiff Kizzie Long, and the remaining one-half descended to his wife, the said Wisey Long," who is also a member of

the Creek tribe of Indians duly enrolled as such.

The petition further alleges that on May 18, 1910, the defendant McFarlin took an instrument purporting to be a deed, executed by plaintiff Kizzie Long, purporting to convey to him a great portion of said lands for a recited consideration of \$1 and other valuable considerations, which was duly recorded and filed as an exhibit to the petition, and on January 11, 1911, took another instrument in writing from plaintiffs Kizzie Long and Loday Long "for all of the lands allotted as aforesaid to the heirs of Richard Long, to said Sam Long, Hannah Long, and Joshway Long, except the interest therein of Ellen Robinson and Coley Long" for a recited consideration of \$3,455.35, purporting to have been paid cash in hand, "but which was not so paid at the time of the execution thereof, nor has the same been paid at any time since said date or otherwise"; that said deed has been duly recorded; that the last-named deed purports to have been approved by the county court of Hughes county on January 13, 1911, and the approval duly admitted to record; "that said last-named instrument was taken in part consideration of and for said first-named instrument, and the consideration therefor was never all paid to the grantors therein named."

The petition further alleged that the prior instrument was taken pursuant to a contract made and entered into by and between said grantors and McFarlin long prior to the date thereof, and that, after the same was delivered to McFarlin, he took possession of the lands described in the second instrument, all of which comprise 640 acres, and has continuously kept possession and control thereof, receiving the rents and profits arising therefrom after May 18, 1910, without accounting therefor, all of which it is alleged amounted to \$1,000, and that same is now due and unpaid plaintiffs and defendant Wisey Long in the proportion each now owns of the land; that both of said purported deeds are void, and the approval thereof likewise void (for certain reasons stated in the petition,) and for that reason the county court of Hughes county was without jurisdiction in the premises. By reason of all of which, plaintiffs say they are entitled to the immediate possession of said lands which are wrongfully withheld from them by McFarlin. Wherefore they pray that said deeds may be set aside and for partition of the lands, that a receiver be appointed, and that they have judgment against McFarlin for the rents and profits and for costs.

From all of which it seems the theory of plaintiff's case is that, as all these allottees were full-bloods, neither they nor their heirs could convey their lands for 25 years from April 26, 1906, and, as to nearly all of them descent was cast prior to the act of May 27, 1908 (35 Stat. 312, c. 199) the county court

was without jurisdiction to approve the deeds complained of, and hence the same were void and should be set aside, and, besides, were unsupported by consideration.

[1] If the court erred in sustaining the motion of defendant to require plaintiffs to make their petition more definite and certain by showing the date of the selection of the allotments of Richard Long and Sam Long, the same was harmless, as was also his action in overruling plaintiffs' motion to strike defendants' said motion from the files. As the allegation in paragraph 8 of the petition, referring to the last deed, that "the consideration therefor was never paid to the grantors therein named," and the allegation in same paragraph, referring to the recited cash consideration for that deed, "but which was not so paid at the time of the execution thereof, nor has the same been paid at any time since said date or otherwise," were foreign to plaintiffs' theory of his case and unnecessary in the statement of the cause of action in view of that theory, the same were surplusage, and hence the court did not err in striking them as he did.

[2] But there were two deeds executed on different dates and, as plaintiffs' theory of the case was not so clear, and might have been that the first was illegal and that the taint of illegality therein entered into the second deed, defendant's counsel was anxious to know precisely what plaintiffs meant when in the same paragraph they alleged:

"That said last-named instrument was taken in part consideration of and for said first-named instrument, and the consideration therefor was never all paid to the grantor therein, and said first-named instrument was made and taken in pursuance to a contract made and entered into by and between said grantor and said McFarlin long prior to the date thereof."

And so they filed their motion to require plaintiffs to make the same more definite and certain to state—

"in what respect said last-named instrument was taken in part consideration of and for said first-named instrument, and state if said first-named instrument was made and taken in pursuance of a written or oral contract, and, if written, to attach a copy to their petition, and, if oral, to set forth the date and the terms thereof and parties thereto."

Which the court sustained, whereupon plaintiffs obtained leave to amend the paragraph, which they undertook to do "as directed by the court," by filing some 10 pages of typewritten matter containing 8 paragraphs, and, if it conformed to the order of the court, such was not made clear to him, for on motion he struck it from the files. And, for the reason that neither has it been made clear to us, we hold the court was right.

As counsel for plaintiffs in error have cited no authority in support of any assignment of error in their 57-page brief and we can find none, and as there is no merit in the remaining assignments of error, the judgment of the trial court is affirmed, with in-

structions to the trial court to proceed pursuant to the views herein expressed. All the Justices concur.

WESTERN CASUALTY & GUARANTY INS. CO. v. BOARD OF COM'RS OF MUSKOGEE COUNTY et al. (No. 7619.)

(Supreme Court of Oklahoma. Aug. 8, 1916.)

(Syllabus by the Court.)

1. DEPOSITARIES §13—BONDS—ESTOPPEL TO DENY LIABILITY.

One who guarantees by bond the payment of public funds deposited by a county treasurer in a bank designated as a county depository, under the provisions of section 1540, R. L. 1910, may not defeat liability on the bond by showing that the designation of such bank as a county depository was irregular or illegal.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 27; Dec. Dig. §13.]

2. DEPOSITARIES §7—BONDS—VALIDITY—STATUTORY PROVISIONS.

Where a depository bond executed pursuant to the provisions of said section 1540, contains the exact conditions imposed by the statute and, in addition, other conditions which are not provided by the statute, tending to limit or evade liability, the bond will be upheld as to the conditions imposed by statute, and the other provisions will be treated as surplusage.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 21; Dec. Dig. §7.]

Commissioners' Opinion, Division No. 4. Error from District Court, Muskogee County; H. C. Thurman, Judge.

Action by the Board of County Commissioners of Muskogee County against the First State Bank of Wainwright and others. Judgment for plaintiff, and defendant Western Casualty & Guaranty Insurance Company brings error. Affirmed.

Zevely, Givens & Stutz, of Muskogee, for plaintiff in error. Fred P. Branson, Co. Atty., W. E. Disney, B. B. Blakeney, and J. H. Maxey, all of Muskogee, for defendants in error.

EDWARDS, C. For convenience and brevity the board of county commissioners will be referred to as the Board, the Western Casualty & Guaranty Insurance Company as the Western Company, and the First State Bank of Wainwright as the Bank.

This is an action in which the board of county commissioners of Muskogee county brought suit against the First State Bank of Wainwright and the Western Casualty & Guaranty Insurance Company upon a depository bond, the petition alleging that on December 1, 1912, W. H. Wainwright was the duly elected, qualified, and acting county treasurer of Muskogee county, and continued to act as such until the 31st day of October, 1913; that on or about said 1st day of December, 1912, the said bank was a corporation under the banking laws of the state of Oklahoma, engaged in the banking business, at

Wainwright, Muskogee county; that the defendant the Western Casualty & Guaranty Insurance Company was a corporation under the laws of Oklahoma, authorized and empowered to write indemnity and depository bonds; that on or about the 1st day of December, 1912, the board of county commissioners of Muskogee county designated the said Bank as a county depository for the deposit of county and other funds in the hands of the treasurer of said county, and that said Board at the time of designating said Bank required that said Bank should execute a bond with good and sufficient surety, in the sum of \$10,000, to secure the deposit of the county funds and funds deposited with said Bank by the said treasurer, and that on the 3d day of December, 1912, the Bank tendered to the county treasurer a bond in said sum executed by it and the said Western Company, as surety, the said bond containing conditions as follows:

"Now, therefore, the condition of this obligation is such that if the said First State Bank of Wainwright, Oklahoma, shall safely keep the moneys constituting the county funds of Muskogee county, Oklahoma, and shall promptly pay all checks and drafts drawn by said treasurer against such county funds, including all interest to accrue thereon at the agreed upon rate per centum per annum on all monthly balances, then this obligation to be void; otherwise to remain in full force and virtue. Provided, however, and upon the following conditions: First. That in the event of any default on the part of the principal, written notice thereof, with a certified statement of the facts showing such default and the date thereof, shall within thirty days after such default, be delivered to the surety at its office in the city of Oklahoma City, Okla."

Then follow allegations of a conspiracy between the county treasurer and the president of said Bank and allegations of embezzlements and of the forging, altering, and mutilating the records of said Bank. It is alleged further that the county treasurer was, in fact, the owner of the stock of said Bank, and had secretly transferred the same to other parties, and made the Bank's records show that other parties were the owners of the stock of said Bank; that the records of the county treasurer were falsified to show that no money belonging to said county was on deposit in said Bank. Then it is alleged that on the 16th day of October, 1913, the said Bank closed its doors and refused the payments of money on deposit in said Bank, refused to pay checks and drafts drawn by the said county treasurer, and that on the 19th day of December, 1913, this plaintiff discovered that an amount in excess of \$10,000 of the funds of said county was actually on deposit in said Bank, and had been continuously since the execution and approval of said bond; that plaintiff at once served written notice of said default upon the said Western Company at its office in Oklahoma City, and attached thereto a certified statement,

showing the facts so far as known by the plaintiff.

Plaintiff alleges: That it did not discover that there was any money of said county on deposit in said Bank prior to December 19, 1913, and sets out at length the concealment practiced which prevented it from knowing of such deposit. Plaintiff alleges that it has done and performed all the conditions of the said bond, but that the said Bank has refused to pay checks drawn by the treasurer on said deposit, and that there has accrued upon said deposit, at the agreed rate, interest in the sum of \$600. Judgment is prayed against the said Bank for the sum of \$60,600, and against the Western Company for \$10,000, with interest. Motions to strike out certain portions of the answer were filed by the defendant Western Company, and, after being overruled, a demurrer was filed, which was overruled, and the said defendant then answered, setting up four separate defenses, the first being a general denial, except as to the execution of the bond sued upon and the corporate existence of the parties; second, the defendant alleges, in substance, that at the time the said Bank was designated as a county depository, W. H. Wainwright, the county treasurer, owned a large amount of the stock of said Bank, and that the designation of said Bank was therefore in violation of the provisions of section 1540 of the Revised Laws of Oklahoma, and the bond, being in furtherance of said unlawful purpose, was without validity and not binding; third, that the said bond sued upon provided that in the event of default on the part of the principal, written notice, with a certified statement of the facts showing such default, should, within 30 days after such default, be delivered to the surety at Oklahoma City; that the said Bank, on the 16th day of October, closed its doors and refused all payments of money on deposit in said Bank, and the plaintiff, not having within 30 days thereafter given notice as provided in said bond, is not entitled to recover; fourth, that the bond was procured by fraud, in that the county treasurer was the owner of a part of the capital stock of the said Bank, and the designation thereof as a depository was illegal. That the defendant Western Company was not aware of the ownership of stock by the county treasurer and, if such fact had been known, would not have executed said bond. That it was the duty of the county commissioners to know whether said county treasurer was interested in said Bank, and whether said Bank might be legally designated a depository. That by reason of the fraud as aforesaid the bond is null and void. The plaintiff filed a general denial by way of reply. Judgment was entered by default against the Bank, express reservation being made of the cause of action upon the depository bond upon which the Western Company is here sued.

At the time of the rendering of the judgment against the Bank, an amended petition was filed by the plaintiff, which amounts in effect to a severance of the causes of action against the Bank and the defendant, the Western Company. The cause as between the plaintiff and the Western Company was referred to and tried by a referee, who took the evidence and made findings of fact and conclusions of law, which were duly transcribed and filed in the superior court. Later, upon motion, the report was confirmed, and judgment entered for the plaintiff and against the defendants, the Bank and the Western Company, jointly and severally, for the sum of \$10,000, with interest thereon at 2½ per cent. per annum, from the 17th day of October, 1913. Proper motions for new trial were filed and overruled and exceptions saved, and within due time the cause was appealed to this court. The record is voluminous, containing about 800 pages.

The contentions of plaintiff in error may be summarized as follows: First, that the company is not bound except for legal deposits; second, that the bond is not valid; third, that the county failed to give notice as the bond provides.

[1] These contentions will be noticed in the order presented. Upon the first proposition, that the company is not bound except for legal deposits, the plaintiff in error contends that the bond in question is one to guarantee the payment of deposits only, and, as it appears that there was no legal authority for making the deposits by the county treasurer in the bank, that the bond is not liable, whether such lack of legal authority be based upon violation of law or lack of facts justifying the deposit; that the title to the funds never passed, and the relation of debtor and creditors never arose; that the funds illegally deposited can be followed as far as they can be traced, and if they are lost, the official bond of the treasurer is liable. The pertinent part of the law with reference to county depositories to be here considered is found in section 1540, Rev. Laws 1910, and is:

"In all counties the county treasurer shall deposit daily all the funds and money of whatsoever kind that shall come into his possession by virtue of his office as such county treasurer in his name as such county treasurer, in one or more responsible banks located in the county and designated by the board of county commissioners as the county depositories: Provided, that there shall not be deposited of such funds in any one bank at any one time, a greater amount than the capital stock of said bank. Such bank shall receive all moneys, checks or drafts at par and pay interest on the average daily balances at the rate of two and one-half per cent. per annum, and shall credit the same monthly to the account of such treasurer. Before directing or authorizing the deposit of any such funds aforesaid the board of county commissioners shall take from each such bank a bond in a sum equal to the largest approximate amount that may be deposited in each respectively, at any one time; said bond may be that of some surety company empowered to do busi-

ness in the state. * * * The condition of said bond shall be that such deposit shall be promptly paid on the check or draft of the treasurer of such county, and the bondsmen of said treasurer shall not be liable for such deposit. * * * Provided, that it shall be unlawful for the board of county commissioners of any county to deposit any funds of their county in any bank in which the county treasurer or any member of the board of county commissioners shall be the owner of any stock or otherwise pecuniarily interested."

Plaintiff in error cites the case of *Watts v. Commissioners of Cleveland Co.*, 21 Okl. 231, 95 Pac. 771, 16 L. R. A. (N. S.) 918, as authority for the proposition advanced; but that case is based upon the law as it existed prior to the passage of the present law authorizing the designation of depositories, section 1540, supra, and the holding is virtually to the effect that it was unlawful for a county treasurer to make a general deposit of county funds, the court saying:

"The deposit fund involved in this case was placed in the bank as a general deposit by Mr. Hughes as treasurer of Cleveland county. Under ordinary circumstances such a deposit would constitute a loan, and would create the relation of debtor and creditor between Cleveland county and the bank. We are convinced, though, that under the laws of the territory of Oklahoma, as they existed at the time of this transaction, such relation was not thereby created. 'A general deposit in a bank is a loan.' *Bank of Blackwell v. Dean*, 9 Okl. 626, 60 Pac. 226. Section 6062, *Wilson's Revised & Annotated Statutes of Oklahoma of 1903*, makes it a crime for a county treasurer to loan public funds. Section 1239, *Wilson's Revised & Annotated Statutes of 1903*, provides that: 'The books, accounts, and vouchers of the county treasurer, and all moneys, warrants or orders remaining in the treasury, shall at all times be subject to the inspection and examination of the board of county commissioners, and at the regular meetings of the board in January and July of each year, and at such other times as they may direct, he shall settle with them his accounts as treasurer, and for that purpose he shall exhibit to them all his books, accounts and money, and all the vouchers relating to the same, to be audited and allowed, which vouchers shall be retained by them for evidence of his settlement: and if found correct the accounts shall be so certified; if not he shall be liable on his bond.' It would seem from this section and the section making it a crime to loan public funds that the statutes of Oklahoma, prior to the passage of the bill providing for the creation of public depositories, did not permit county treasurers to make general deposits of public funds, but it was his duty to at all times have the funds of the county under his control so that, immediately upon being directed to do so by the board of county commissioners, he may exhibit such funds to said board."

Subsequently to that decision the present law was enacted, in 1905. Plaintiff in error also cites the case of *Hinton v. State of Oklahoma ex rel.*, etc. (No. 6125) 156 Pac. 161 (not yet officially reported), in which it is held:

"The condition of said bond shall be, that such deposit shall be promptly paid on the check or draft of the treasurer of such county, and the bondsmen of said treasurer shall not be liable for such deposit." *Held*, that the sentence, 'the county commissioners shall take from each such bank (depository) a bond in a sum equal to the largest approximate amount that

may be deposited in each respectively, at any one time,' was intended to, and does by implication, limit the amount that may be legally deposited in each bank, respectively, to the amount of the depository bond; and, held, further, that if the county treasurer deposits the funds of the county in such depository, an amount in excess of such bond, and the same is lost by the failure of the bank, the treasurer and his surety are liable for the amount so lost in excess of the depository bond."

We are unable to see how the holding in this case will avail plaintiff in error, for here the court simply holds that the bond of the county treasurer is not liable for the amount of a deposit covered by a depository bond, but is liable for a deposit in a designated bank in excess of the depository bond. Following the rule of limitations as expressed in *Board of Com'rs v. Dunlop*, 17 Okl. 53, 87 Pac. 590, where it is said:

"When the depositories are designated, and their bonds approved, it becomes the duty of the county treasurer to use these banks as depositories for the county money in his hands, but it is left to his discretion to fix the amount to be placed in any given bank, subject, however, to the provisions that he shall not deposit an amount greater than the capital stock of such bank, nor greater than the bond given as security."

But the case at bar is not upon the treasurer's bond, but upon the depository bond, and it is not sought to hold the depository bond liable for any sum in excess of the amount expressed therein, but merely to the extent of such bond, while the *Hinton Case*, supra, holds that for deposits in excess of the depository bond, the treasurer's bond is liable. The referee, to whom this action was referred and whose findings have the force and effect of the verdict of a jury, has found that from the time of the execution of the bond in controversy until the closing of the Bank by the bank commissioner, there was on deposit in said Bank funds of Muskogee county in excess of the amount designated in the depository bond.

The mere fact that the treasurer had on deposit in the depository Bank an amount in excess of the bond of such depository Bank would not make the deposit unlawful. In *Yellowstone County v. First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 506, the court had under consideration a statute making it a felony for a treasurer to deposit in a bank more money than he had received security for, and the court there held that neither the validity nor the sufficiency of the bond was impaired, and permitted the recovery to the extent of the penalty named in the bond, and permitted a trust to be imposed for the remainder of the deposit in excess of the bond. In the case at bar, neither an excessive deposit nor the fact that the books of the Bank and of the county treasurer fail to show the true status of the account will affect the legality of the deposit.

Upon the second proposition argued, that the bond is not valid, it is urged that the designation of the Bank as a depository is

illegal; that it is against the plain letter of the law (section 1540, supra) that the board of commissioners must know that a bank is a proper depository before designating it, and that in this case the designation was wholly illegal and a fraud, and the bond sued upon, having been procured and given in furtherance of said fraud, is wholly void, and the depositing of money in the Bank by the county treasurer, while owning stock therein, is an embezzlement by the treasurer for which the depository bond is not liable. If the Board in making the designation had knowledge of the ownership of stock in the Bank by the county treasurer, there might be some force in the contention; but it is nowhere intimated that the Board had any such knowledge or information. If the Surety Company which signed the bond was deceived, so also was the Board deceived. The mere designation of the Bank as a depository, by the Board is not, in contemplation of law, the reason for depositing the county funds in such bank. Such designation is but one of the necessary steps preceding a deposit. The giving of a depository bond is another step, and if the Board must know before making the designation that the Bank is a proper one to be designated, it would seem to follow that the bonding company also should know that the Bank is a proper one to bond, and yet the bond sued upon contains this recital:

"Whereas, the board of county commissioners of Muskogee county, state of Oklahoma, duly acting in accordance with law, has designated the First State Bank of Wainwright, Oklahoma, as a depository of the county funds of Muskogee county, state of Oklahoma, and has designated the sum of \$10,000 as the amount of the bond to be given by said Bank: Now, therefore," etc.

We are not at all sure that had the Board known at the time it designated said Bank as a depository that stock was owned therein by the county treasurer, even this knowledge would have rendered the bond void. In the case of *Henry County v. Salmon*, 201 Mo. 136, 100 S. W. 20, the court in discussing the case of *County Com'rs v. State Bank*, 64 Minn. 180, 66 N. W. 143, says:

"In *County Commissioners v. State Bank*, supra, the board of county commissioners had designated the depository in the teeth of a statute requiring the board of auditors to make the designation. In a suit on the bond the sureties defended on the theory the designation was void. What was said in disposing of that contention is applicable in this case, viz.: 'In principle, this case falls within the rule that the sureties upon an official bond, by virtue of which the officer has been inducted into office, cannot, when called upon to answer for his official defaults, escape liability upon the ground that their principal was not duly elected or appointed, or did not legally qualify. *Mechem*, Pub. Off., § 341; 2 *Brandt*, Sur. § 521; *State v. Bates*, 36 Vt. 387; *People v. Evans*, 29 Cal. 429; *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79.'"

The case of *Buhrer v. Baldwin*, 137 Mich. 263, 100 N. W. 468, is very much in point, in which case it is held:

"One who guarantees the payment of county funds, to be deposited in an unincorporated bank, is liable to the county therefor, although the contract to deposit in such bank was prohibited by statute and void."

In the body of the opinion the court says:

"It is insisted that no action can be maintained on the writing signed by defendants, because it was executed in violation of law. The law in question is Act No. 393 of the Local Acts of 1879, § 1. This act made it 'the duty of the county treasurer of the county of Wayne to deposit daily his entire receipts from all sources, and all moneys, drafts, or checks on hand, to the credit of the county of Wayne, in such bank or banks, incorporated under the laws of this state or the United States, as may be designated by the treasurer and the board of auditors of said county as the depository of the funds of the county.' The act makes it a felony for the county treasurer to violate its provisions. It is contended that as *A. Ives & Sons* was a partnership, the deposit in question in its bank was prohibited and made a felony by this statute, and that, as a consequence, the undertaking of the defendants was an illegal contract, which cannot be enforced. If this suit is to be regarded as the personal suit of the county treasurer, who has violated the statute, there would be great force in this contention. It is earnestly insisted that the court should so regard it; and it is said that, if this action should fail, the county will lose nothing, since it is fully indemnified by the bond of the county treasurer. We cannot regard this suit as the personal suit of the county treasurer. The form of the declaration, the prosecution of the suit by the prosecuting attorney, the objection already discussed and disposed of, all indicate that it is a suit by the county to recover its money. The fact, if it be a fact, that the people of the county of Wayne have double security for this money is a circumstance of no legal importance. If they are so secured, the officials of that county, and not this court, have the right to determine to which security they will first resort. They have determined to resort to the obligation of defendants. Nor does this record enable us to say with certainty that the sureties on the treasurer's bond are now responsible. It cannot therefore be said that the county will not lose its money if defeated in the present action.

"Assuming this suit to be the suit of the county to recover the money illegally deposited with *A. Ives & Sons*, does the statute prevent the enforcement of the contract? Did the Legislature, in enacting the statute of 1879, intend that those who agreed to make good a loss to the people, caused by a violation of that law, should be released from their contract? No such legislative intent is expressly declared in the statute. Shall it be inferred? The learned trial judge, in speaking of the statute, said: 'It simply means that this was a protection to the money of the people * * * against the county treasurer depositing it in a place that the lawmakers deemed insecure. * * * This statute was not enacted for the purpose of preventing the county getting back their money. * * * It seems to me it would be a very unreasonable interpretation of the statute' to hold, 'because a public officer violates the law, and does an act that he has no right to do, that therefore the people lose their money.' This reasoning, in our judgment, is sound, and is sustained by authority."

We believe that the surety on the bond cannot question the validity of the bond for this reason, and that the validity of the bond is not affected by any error on the part of the Board in the designation of the Bank as a depository.

[2] Upon the third proposition argued, that the county failed to give notice, as in the bond specified, it is urged by plaintiff in error that, as provided by section 1152, R. L. 1910, a surety cannot be held beyond the express terms of his bond; that he has liberty of contract, and that a sensible construction of the contract (bond), must be that the surety is liable only on condition that notice of default be given within 30 days thereafter. That the default does not create the liability, but it is the default, plus the compliance with the contract of suretyship, which creates the liability. In answer the Board contends that the provision requiring notice is too indefinite, in that the bond does not designate by whom such notice should be given, and that if it is contemplated by the bond to impose additional duties on a county officer, whose duties are fixed by law, that such condition is for that reason void; that conditions and exceptions are to be strictly construed in favor of the insured, to avoid forfeiture and to afford indemnity (19 Cyc. 657); that the bond, being given for a public purpose and pursuant to the provisions of law, is to be construed as a statutory bond and any conditions, exceptions, or limitations in excess of the requirements of law are unauthorized and inoperative and are to be treated as surplusage. The Board further contends that the proviso requiring notice is in conflict with section 9, art. 23, of the Constitution, and for that reason is void, and, lastly, contends, that as the record disclosed that notice was given within 30 days from the time the board discovered the character of the default, the notice is timely given.

Numerous authorities are cited by both parties in support of their respective contentions. We are impressed with the importance of the questions raised, and have sought to give careful consideration to the authorities cited and the arguments advanced. We believe, however, that there is a distinction to be observed between bonds given to private concerns, where both parties have full liberty of contract, and bonds given pursuant to a statute, as in this case, for the public benefit. We believe that a bonding company, giving a bond under the provisions of a law and for a public purpose, is bound to know the law and to know the limitations fixed by the law upon the authority of the agents for the public, with whom it contracts. Here the statute fixes the conditions of the depository bond. Section 1540, *supra*. This law, with all its terms, no more and no less, becomes a part of the bonding contract. The Board has no authority to waive any part of the statute nor add anything to it. The bond in controversy, as executed, contains all the conditions required by the statute, with the addition of a condition requiring notice, which tends to modify the statute and to limit the liability. This addition-

al condition, we think, may not be imposed. In the recent case of *Southwestern Surety Ins. Co. v. Davis*, 156 Pac. 213, this court, speaking through Mr. Justice Hardy, held:

"The bond sued on being a statutory one, and given in an attempt to comply with the statute, in order to avoid such a result, the court will read into the bond the statutory conditions and construe the same to guarantee the fulfillment of contracts entered into within the year."

In the case of *Henry Co. v. Salmon*, *supra*, it is said (syllabus):

"To ascertain the liability of the sureties on the bond given by a banker as depository of county funds, Laws 1901, p. 101 (Ann. St. 1906, pp. 3344, 3345), providing for the selection of county depositories, must be read into the bond and the liability of the sureties must be determined by its provisions."

The Supreme Court of New York, in the case of *Trustees of the Village of Bath v. McBride*, 81 Misc. Rep. 618, 142 N. Y. Supp. 1014, holds (syllabus):

"Where the form of an official bond differs from that prescribed in the statute, if founded upon a good consideration, the liability of the surety is measured by the provisions of the statute rather than the language of the obligation itself."

In the case of *Higdon v. Fields*, 6 Ala. App. 281, 60 South. 594, it is held that a bond, intended by the obligors to be the official bond of a public officer, is operative as such, though not conditioned as prescribed by the Code prescribing the condition of official bonds.

In the case of *Board of County Commissioners v. Security Bank*, 75 Minn. 174, 77 N. W. 815, the surety had entered into an obligation conditioned that the bank—

"shall well and truly hold said funds, with accrued interest, subject to draft, and payable at all times on demand, and shall well and truly pay over on demand according to law all of said funds which shall be deposited in said bank pursuant to said designation."

The treasurer of the county had \$13,000 of sinking funds which were held to meet county bonds maturing in the future. He found that he could deposit this money on time deposit and take a time certificate of deposit and receive 3 per cent. interest when moneys deposited subject to check only drew 2 per cent. interest. The bank failed, and the bond company claimed this money had not been deposited subject to check, and was not within the obligations of the bond. The court said, referring to that defense:

"This would undoubtedly be so if the county treasurer has authority to make a deposit on such terms, or the board of county commissioners had the power to authorize him to do so; for the bond clearly refers to and covers only deposits subject to draft, and payable on demand, and on which the Bank was to pay interest on monthly balances at 2 per cent. in accordance with its proposal to the county commissioners pursuant to Gen. St. 1894, § 731. The only authority of either the county treasurer or the board of county commissioners to lend county funds (for that is what it amounts to) is that given by Laws 1881, c. 124, as amended (G. S. 1894, §§ 729-736, inclusive). They have no authority to deposit county funds in any other place or on any other terms than those

prescribed by the statute. This applies to all county funds, whatever the purpose for which they were raised. It is apparent from various provisions of the statute that it neither contemplates nor authorizes time deposits, and section 729 expressly provides that all deposits are to be on condition that they 'shall be held subject to draft and payment at all times, on demand; and every one is bound to know the law. The Security Bank was bound to receive on deposit, up to the statutory limit, all county funds offered in accordance with the provisions of the statute, and on the terms of its proposal.'

We think that this case squarely strikes down the provision of the bond requiring any notice to be given. As said by the court, the bonding company was bound to know the law, and to know that the Bank obligated itself to pay upon demand, and therefore secured the performance of that duty. It could not restrict its obligation in any form because the county officers were without power to consent to such restriction. In the same case (Board of County Commissioners v. Security Bank, *supra*), the court said, in discussing whether or not this bond should be measured as public bonds, as follows:

"While the Bank may not have been a 'public officer,' in the popular sense of that term, yet in the matter of the county money deposited with it, it was performing public duties, or duties to the public, and *pro hac vice* was a public officer. Its duty was to the public, and its bond to secure the performance of that duty was for the benefit and protection of the public. The case falls within all the reasons of the rule, founded on public policy, which makes certain distinctions between the rights and liabilities of sureties on private bonds and sureties on bonds given to secure the performance by public officers of their official duties to the public. The case must be determined by the rules applicable to the latter."

It is true, of course, that if a bond omitted the statutory obligations, it could not be held to be a statutory bond. In such case it would be a common-law bond, and would be measured, of course, by the terms of its obligations; but when the bond contains the exact language of the statute, and follows with other provisions which are not required by statute, it is generally held that such a bond is a statutory bond, and the other provisions will be treated as surplusage. Being then a statutory bond under the terms of the statute, the liabilities imposed by the statute become a part of the bond. In other words, the statute defines the duties of the public officer, to wit, the county depository, and a bond conditioned in the language of the statute will be held to protect the county against the nonperformance of these duties, and clauses attempting to limit and restrict that right will be ineffective and inoperative.

We are further of the opinion that if the provisions in regard to notice were sustained, that notice, given within 30 days after the discovery that the county had money on deposit in the Bank, with a certified statement of the facts, would be timely; that the

condition of the bond requiring notice, if it were upheld, would not require the performance of impossible conditions, nor the performance of conditions which would render the insurance of the bond practically worthless, but calls only for a reasonable construction. Having held, however, that the Board is without power to barter away the benefits of the statute, and that the conditions in excess of the statute sought to be imposed are inoperative, it is not necessary to pursue the latter proposition further.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

MCLEAN v. SOUTHWESTERN CASUALTY INS. CO. OF OKLAHOMA et al.*
(No. 5435.)

(Supreme Court of Oklahoma. Nov. 30, 1915.
Rehearing Denied Aug. 29, 1916.)

(Syllabus by the Court.)

1. EVIDENCE \S 434(S)—PAROL EVIDENCE AFFECTING WRITINGS — SHOWING INVALIDITY OF CONTRACT—FRAUD.

The effect of evidence introduced to show that a written contract was induced and obtained by material false and fraudulent representations is not to contradict or vary the terms of the written contract, but to show that the party signing the contract was imposed upon, and that fraud was practiced in obtaining his signature thereto; and such evidence is always admissible to show that contracts have been fraudulently obtained. No exact rule can be laid down by which every case of fraud can be tested; but the court must determine, under the broad principles of equity, whether or not what was done in each particular case amounts to cognizable fraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2012; Dec. Dig. \S 434(S).]

2. FRAUD \S 12—ELEMENTS—FALSE PROMISE.

There is a wide distinction between the non-performance of a promise and a promise made *mala fide*, and without any intention at the time of making it to perform it. And while ordinarily a statement upon which fraud may be predicated must be of an existing fact, yet if a promise is made to be performed in the future, as an inducement to obtain a contract, if the intention not to perform the promise be shown to have existed at the time the promise was made, such false promise constitutes cognizable fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 14; Dec. Dig. \S 12.]

3. CORPORATIONS \S 426(10) — AGENTS — AUTHORITY—RATIFICATION.

Where a corporation arms persons with blank contracts to take stock subscriptions for the company, and they obtain subscriptions, through false and fraudulent representations, and promises to do certain things, it is immaterial whether they were authorized by the company to make these representations and promises or not. If the company accepts the benefits of their misrepresentations, it must also bear the burdens of the same; and if the company is unwilling to be bound by their misrepresentations, it must surrender the benefits obtained under them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1702, 1704, 1714; Dec. Dig. \S 426(10).]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by George D. McLean against the Southwestern Casualty Insurance Company of Oklahoma and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Stuart, Cruce & Cruce and Gilbert & Bond, all of Oklahoma City, for plaintiff in error. Ledbetter, Stuart & Bell, of Oklahoma City, for defendants in error.

BRETT, C. This action was commenced in the superior court of Oklahoma county by the plaintiff in error, as plaintiff, against the defendants in error, as defendants, to rescind a certain contract and recover the sum of \$1,375, alleged to have been obtained under said contract. The ground alleged for rescission is that the contract was induced and obtained by fraud. The facts material to the issues before us are: That the defendant company the Southwestern Casualty Insurance Company of Oklahoma had, prior to March 7, 1910, been duly incorporated as an accident and casualty company, and was perfecting its organization by the sale of stock, and through its agents sold to the plaintiff, who was a physician, \$5,000 worth of stock, under the promise and agreement that if he would take the stock the company would employ him as its medical examiner at an agreed salary of \$1,500 per year. That plaintiff paid \$1,375 in cash on said subscription, and gave his notes for the deferred payments. The plaintiff alleges further that the sole inducement and consideration prompting him to purchase this stock was the agreement to employ him at the stipulated salary as medical examiner, that after obtaining his subscription and the cash payments the defendants refused to employ him, and that the representation of the intention of the defendant to employ him as its medical examiner was false, and known to the defendant to be false at the time of making same, and was made without any intention on the part of the defendant of performing the same, and that it was through no fault of his that he was not employed; that he had never received any stock of the company; and asks for a rescission of the contract, and the return of the \$1,375 paid. The defendants answered by general denial, and alleged that if any promise or contract to employ the plaintiff at a salary of \$1,500 per year was made, it was made without the authority of the company, and was therefore not binding upon the company. Plaintiff filed a reply, denying all affirmative allegations in the defendant's answer. The cause came on for trial to the court and a jury. The testimony of the plaintiff fully sustains the allegations of his petition. On cross-examination the defendant produced, and introduced, in evidence, among other

documents as part of its cross-examination, the contract of stock subscription, which is as follows:

"I, Dr. Geo. D. McLean of Oklahoma City, Okl., hereby subscribe for 90 shares of the capital stock of the Southwestern Casualty Insurance Company, of Oklahoma City, Oklahoma, at and for the price of \$50.00 per share (par \$25) upon the following terms and conditions: I agree to pay \$15.00 per share in cash with this subscription, and give two notes for the remainder of the purchase price, as follows: One note for \$10.00 per share due April 1st, 1910, and the other for \$25.00 per share due on demand after September 1st, 1910. As soon as the full purchase price is paid hereon in cash, a certificate for the stock showing same to be fully paid and nonassessable to be issued and delivered to me. It is further understood and agreed that no conditions other than those printed herein shall be binding on the company, and that all cash payments hereon shall be the liquidated damages to the company should I fail or refuse to complete this subscription.

"Dated and signed this 7th day of March, 1910, at Oklahoma City, Okl.

"Geo. D. McLean, Subscriber.

"Physician and Surgeon, Occupation."

At the close of plaintiff's evidence defendant demurred to the evidence on the ground that it sought to vary the terms of a written contract, and because the allegations of fraud were insufficient to raise the issue of fraud, sufficient to go to the jury. The demurrer was sustained, and judgment rendered for defendants, and the plaintiff appeals to this court.

[1] There are a number of assignments of error, but the decisive question in the case is whether or not the allegations and evidence of the plaintiff sufficiently raised the question of fraud to go to the jury. We think they did. The defendants argue that:

"The written contract entered into by plaintiff is clear and explicit, and expressly forbids any agreement or conditions other than those printed therein being binding on the company, and that the plaintiff is a physician of high standing, and thorough education, and was capable of reading and understanding the contract signed, and therefore should be bound by the written contract signed by him,"

—and cite *McNinch v. Northwest Thresher Co.*, 23 Okl. 386, 100 Pac. 524, 138 Am. St. Rep. 803, and other cases to the same effect, in support of their contention. But the rule of law in these cases is not applicable, where the party alleges and proves that he was induced, by material, false, and fraudulent representations, to enter into a contract which he would not have entered into but for such false and fraudulent representations. The purpose and effect of the evidence introduced in the case at bar is not to contradict or vary the terms of the written contract, but to show that the plaintiff was imposed upon, and that fraud was practiced in obtaining his signature thereto. Fraud vitiates everything it touches, and a contract obtained thereby is voidable. And evidence is always admissible to show that contracts have been fraudulently obtained. In *Cooper v. Ft. Smith & Western Ry. Co.*, 23 Okl. 139,

99 Pac. 785, Mr. Justice Turner, speaking for the court, says:

"In an English case (*Canham v. Barry*, 15 C. B. 597) the gauge by which the materiality of a statement is to be determined is stated, in substance, as follows: A contract may be avoided by a false and fraudulent representation, though not relating directly to the nature and character of its subject-matter, if it is so closely connected with the contract that the party sued would not, but for the representations, have entered into it, and was induced to enter into it, to the knowledge of the other party, by such representation—citing *Hammond v. Pennock*, 61 N. Y. 152; *Moen v. Heyworth*, 10 M. & W. 147; *Valton v. National Fund Life Ass'n*, 20 N. Y. 32. Further in that case, the court says: 'Under the rule as stated in these cases, either party to a contract may make a collateral statement, made by the other party during the negotiations as to the existence or nonexistence of a particular fact, a material one in his own judgment. So if it turns out to be untrue, and was falsely and fraudulently made, it will vitiate the contract if he relied upon the same as true, and would not have entered into the contract but for the statement.'"

Mr. Justice Turner in this opinion further says:

"*John C. Smith v. William Countryman*, 30 N. Y. 670, was an action to recover damages for the breach of a contract to deliver a quantity of hops, the buyer represented that he had purchased E.'s hops for 12½ cents a pound. The seller was ignorant of the price of hops, reluctant to sell, and, relying on such representation and believing it to be true, and having confidence in the prudence and judgment of E., agreed to sell his hops to the buyer for 12½ cents a pound. The statement as to the purchase of E.'s hops was untrue. It was held that the seller was at liberty to refuse to fulfill the contract on the discovery of fraud. The court, in passing, quoted approvingly from the language of Mr. Justice Story in *Doggett v. Emerson*, 3 Story, 733, Fed. Cas. No. 3,900, where the eminent jurist said: 'It is equally promotive of sound morals, fair dealing, and public justice and policy that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberima fides*, in every representation made by him as an inducement to the sale. He should literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable, and it is usually immaterial whether the representation be willfully and designedly false or ignorantly and negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters or proclaims, or knowingly impresses upon the vendee, as a true or decisive motive for the bargain.'"

Many other cases might be cited and quoted to the same effect, but we deem it unnecessary, since, we think, this is the sound rule and the established doctrine of this court. And it is not in conflict with the cases cited by the defendants.

It is not the policy of the law to lay down fast and specific rules by which every case of fraud arising may be tested, but to leave it largely to the conscience of the court to determine, under the broad principles of equity, whether or not what was done in each

particular case amounts to cognizable fraud. As stated by Mr. Parsons:

"It is of the very nature and essence of fraud to elude all laws, and violate them in fact without appearing to break them in form, and if there were a technical definition of fraud, and everything must come within the scope of its words before the law could deal with it as fraud, the very definition would give to the crafty just what they wanted, for it would tell precisely how to avoid the grasp of the law. Whenever, therefore, any court has before it a case in which one has injured another, directly or indirectly, by falsehood or artifice, it is for the court to determine in that case whether what was done amounts to cognizable fraud." 2 Parsons on Contracts, 767.

And we think the allegations of the petition and the evidence in the case at bar raise the issue of fraud sufficient to go to the jury.

[2] 2. But it is argued by the defendants that representations, to be fraudulent, must be made concerning existing facts, and that promises made to be performed in the future do not constitute fraud. We are aware that many respectable courts without any qualifications lay down this broad rule. But we think the error into which these courts have fallen consists in not distinguishing between the nonperformance of a promise and a promise made *mala fide*, and without any intention at the time of making it to perform it. The latter class of promises have repeatedly been held to constitute actionable fraud. In *Edginton v. Fitzmaurice*, 29 Ch. Div. 459, the learned judge, in speaking of a misrepresentation of a certain company as to its intention with reference to the future conduct of its business, says:

"There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact."

And in *Cooper v. Ft. Smith & Western Ry. Co.*, supra, where Cooper was seeking to avoid the payment of a note on the ground that it was obtained by false representations respecting the intention of the railroad company, the court says:

"It might be contended that the misrepresentation here relied upon as vitiating this contract, i. e., that if the bonus notes were not given the road would not be built to Guthrie, but probably to a rival town, was simply a misstatement of an intention and not a fact, and hence not sufficient for that purpose. That there must be a misstatement of a material fact goes without further saying, but is not the misstatement of an intention a fact? Is it not a misstatement of the state of mind, and is not the state of a man's mind a fact? * * * We say that if defendant was misled into executing the note sued on by the false and fraudulent representations of plaintiff as to the state of its intentions with reference to the point to which its road was to be extended, as in his answer he says he was, then plaintiff was guilty of making a material misrepresentation of such fact as will vitiate the contract and release defendant from such promise to pay." *Webb's Pollock on Torts*, page 359.

In *Tanner v. Clark*, 13 Ky. Law Rep. 922, the syllabus is in part:

"A statement of intention merely cannot be a misrepresentation amounting to fraud, but the statement of matter in the future, if affirmed as a fact, may, as well as a statement of a fact existing at present, amount to a fraudulent misrepresentation."

The syllabus in *Pollard v. McKenney et al.*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9, states the distinction as follows:

"Ordinarily a false promise, upon which fraud may be predicated, must be of an existing fact, or a fact alleged at the time to exist, and cannot consist of a mere promise to be performed in the future; but, if the intention not to perform the promise be shown to have existed at the time the promise was made, the promise is fraudulent." 55 Law Journal, 650; *Ayres v. French*, 41 Conn. 142; *Cockrill v. Hall*, 65 Cal. 326, 4 Pac. 33; *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Hill v. Chamberlain*, 64 App. Div. 609, 71 N. Y. Supp. 639; *Gage v. Lewis*, 68 Ill. 604.

We think in the case at bar that the evidence clearly raised a question for the jury to pass upon, namely, the character of the promise and agreement of the defendant to employ the plaintiff at a salary of \$1,500 per year. And if the defendant misstated its intention, and made this promise mala fide, for the purpose of inducing the plaintiff to subscribe for its stock, and without the intention of carrying it out in good faith, and the plaintiff relied upon it and was thus induced to subscribe for the stock, it is such a fraud as a court will take cognizance of, and from which it will give relief.

[3] 3. It is also pleaded in the answer of defendants, and insisted upon, that the person or persons making this promise and agreement with plaintiff were without authority to do so, and the company is not bound thereby. But there is some evidence that one of the parties making the representation was a director of the company. But whether he was or not, and whether he was authorized to make such representation or not, the directors delivered to the party taking the subscription blank contracts for the purpose of taking subscriptions of stock; and, under the view we take of the case, it is immaterial whether he was authorized to make this agreement or not; the company accepted the contract induced by these representations, and the \$1,375 paid by plaintiff, and must also bear the burdens accompanying this transaction as well as its benefits. In *Wickham v. Grant*, 28 Kan. 517, a railroad company was selling stock, and one of the directors gave some blank notes to a Swedish friend who, under false representations, induced another Swede to sign one of the notes, which the company accepted; and the court, speaking through Chief Justice Horton, says:

"As the board of directors of the railroad company delivered to Swanson, a resident director at Lindsborg, the blank notes, and as he chose Carlson to take the notes and obtain subscriptions thereby, the company could not accept

such notes and obtain the benefits therefrom, and at the same time disown or disregard the representations and means by which the signers were induced to execute them. * * * It is immaterial, in our view, upon the findings of fact, whether Swanson had any authority to employ Carlson to take subscriptions and to direct him to make the representations so made, or not; and it is likewise immaterial whether he informed the railroad company of the representations made to secure and obtain the subscriptions. The company accepted the notes and must take them, as was well said by the court below, 'with their burdens, as well as their benefits.'" *Highland University Co. v. Long*, 7 Kan. App. 173, 53 Pac. 766; *Hoover et al. v. Deffenbaugh et al.*, 83 Neb. 476, 119 N. W. 1130; *Meeker & Co. v. Ashley et al.*, 56 Iowa, 188, 9 N. W. 124; *Curry v. Board of Supervisors Decatur Co. et al.*, 61 Iowa, 71, 15 N. W. 602.

And in the case at bar, assuming, without deciding, that the person or persons making the representations did so without authority, there is no rule of equity and fair dealing that would permit the company to arm persons with blank contracts to take stock subscriptions, and then permit the company to accept the benefits of their misrepresentations and escape the burdens. If the company is unwilling to be bound by their representations, it must surrender the benefits obtained under them.

We think it was error to sustain the demurrer to the evidence, and that the judgment should be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

DEMING INV. CO. v. CHRISTENSEN et ux. (No. 6037.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Aug. 25, 1916.)

(Syllabus by the Court.)

1. BROKERS —11—RIGHT TO COMPENSATION —PERFORMANCE OF CONTRACT.

A contract, whereby C. and wife appoint D. as their agent to procure a loan of money uncoupled with an interest, may be revoked by the principal at will without liability for damages, but where, according to its terms, it is contemplated that the agent shall expend time and money to carry it out, and the agent accepts said contract and does expend time and money in pursuance of the object of the agency, and does procure a party who is willing to loan the money for the time and according to the terms of the contract, the principal cannot revoke the same except upon the burden of responding to the agent for such damages as he may suffer by reason thereof. Such contract in that state of case is not void for want of mutuality but the same is an enforceable, valid, and binding contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 58; Dec. Dig. —11.]

2. BROKERS —77—COMPENSATION—LIENS— PROVISIONS OF CONTRACT.

The contract in this case examined, and held to be valid, supported by a sufficient consideration, but that D. is entitled to recover only \$350 thereunder, provided no fraud was prac-

ticed upon C. and wife in the execution of said contract, and provided, further, that C. and wife were not justified in refusing to comply with said contract, on account of the mortgage presented to them to sign, containing impositions in its terms not contemplated by the contract between the parties, and to secure the payment thereof is entitled to a lien on the real estate named in the contract not released by D.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 98; Dec. Dig. ¶77.]

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; James B. Cullison, Judge.

Action by Henry C. Christensen and wife against the Deming Investment Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Charles B. Mitchell, of Oswego, Kan., and H. A. Kroeger, of Oklahoma City, for plaintiff in error. C. H. Mauntel, of Alva, for defendants in error.

HOOKER, C. On December 16, 1912, the parties hereto made and entered into the following contract:

"To the Deming Investment Company:

"I hereby appoint you my agent to negotiate for me either in your own name or in that of any one whom you may choose, a loan of seven thousand dollars, on 7 years' time, bearing interest at the rate of 5 per cent. per annum, payable annually, on the first day of January, and — in each year, to be secured by first mortgage on land hereinafter described; note and mortgage to be made payable to any one the lender may desire, with the principal made payable wherever the lender may designate, and on such blanks, i. e., notes and mortgages, as the lender may furnish.

"My land upon which I desire this first mortgage loan is as follows:

"The lots 3 and 4 and E. $\frac{1}{2}$ S. W. $\frac{1}{4}$, Sec. 18, and lots 1 and 2 and E. $\frac{1}{2}$ N. W. $\frac{1}{4}$, Sec. 19, Twp. 28, N. R. 10 W. in Alfalfa county, Oklahoma.

"As compensation for your services in negotiating this loan I hereby agree to pay you or the assignees of this contract, the sum of nine hundred eighty dollars, payable in four notes as follows:

"\$245.00 due Jan. 1st, 1914, \$245.00 due Jan. 1st, 1915, \$245.00 due Jan. 1st, 1916, \$245.00 due Jan. 1st, 1917, to bear 10 per cent. interest from maturity, until paid, and to be secured by second mortgage on the above-described land, subject only to the principal loan of \$7,000.00.

"I further agree to furnish and pay all expenses of abstract of title to the property offered as security in my application, and as above described. I also agree to pay for recording the mortgage or mortgages, and each and every other instrument necessary to clear the title of all incumbrances and perfect said title in me.

"I further agree to pay interest on money from Jan. 10, 1913, or from any date thereafter that the papers in said loan may designate.

"For value received, I do hereby promise and agree to pay such actual expenses as you have incurred in the negotiation of the loan and examination of the property, and title, if I do not obtain said loan by reason of defect in my title, or by reason of my being unable to remove all incumbrances from said land, and if you or any negotiator to whom you may apply for me for above loan, notify me of acceptance of said, and I am unable to or refuse to complete the said loan, then I agree to pay 5 per cent. on amount of loan applied for, and all other expenses

you or the assignees of this contract may have incurred for such refusal or inability to complete said loan.

"And I do authorize you or the assignee of this contract to receive all money due me on said loan and to pay off to the mortgagee, or the firm, or the company which negotiated said loans, all incumbrances, leases, taxes and liens of every kind on my said land, necessary to be paid to perfect my title to said lands or any part thereof. And if the loan hereby applied for should not be sufficient to pay off all liens I agree to pay the deficiency within ten days after the said note and mortgage are executed. If said premises are occupied by any person, or child of legal age, or are rented or leased, I agree to obtain and deliver to you the written disclaimer of said tenant or person, in favor of lender.

"I agree to keep the buildings on said premises insured against fire, lightning and windstorm, until the said loan is fully paid, in the sum of \$1,500.00, all policies to be written for not less than three years term in reliable insurance companies, approved by you or the lender and to have to each attached a subrogation mortgage clause with loss, if any, made payable to the said lender or assigns. Said policies with premiums prepaid shall be delivered prior to payment to me of the proceeds of said loan and if, for any reason, I should fail to deliver such insurance policies, you or the lender or assigns are hereby authorized to have all policies written and the premium therefor deducted from the proceeds of said loan.

"It is also agreed that your authority to negotiate said loan as my agent be irrevocable for thirty days after I shall have furnished you complete and satisfactory abstract of title, showing perfect title in applicant.

"As security for the payment of any and all sum or sums of money to which you may be entitled under this contract, I hereby pledge and mortgage to you the above-described real estate.

"In witness whereof, I have hereunto set my hand Dec. 16, A. D. 1912.

"Henry C. Christensen,

"Applicant.

"Minnie Christensen.

"Signed in the presence of

"Tyler T. Wales.

"J. D. Fouraker."

In the petition it is alleged that the defendants in error on the 16th day of December, 1912, and at the time of the institution of this action, owned a part of the real estate described in said contract, and occupied the same as a homestead, and that on the 16th day of December, 1912, they negotiated with an agent of the company for a loan on said property, with which they intended to purchase another farm, and that it was understood and agreed that if the title to said additional farm was not good, the loan was not to be made to them, and that the application for said loan was to be destroyed; that thereafter the agents of the company called upon said defendants in error and destroyed the old contract, and thereupon a new contract was agreed upon and signed by the parties, but that the defendants in error signed said new contract upon the representation made by the agents of the company that the new contract was similar to the old except as to number, amount, and date of the payment of the notes to be executed for the commission; that the title to said farm which they desired to purchase was defective, and

on account thereof, and for the further reason that they were requested to sign papers not contemplated by the contract, they refused said loan, and so notified the company; that said contract was not the contract signed by them, and that their signature thereto was procured by fraud and misrepresentations. And it is further claimed by said defendants in error that said contract was without consideration, and that the same was placed upon the records in the office of the register of deeds in order to compel the defendants in error to pay something for its release. It was sought by the petition to cancel the contract and to remove the same from the record as a cloud upon the title. The company filed its answer and cross-petition, consisting of a general denial, and admitting the contract and asserting the same was executed for a valuable consideration and was a binding, valid, and enforceable contract, and the company further alleged that it had complied with the terms thereof, but that the defendants had failed to comply therewith, and that under the contract there was due to it the sum of \$980 for its services for which it sought judgment, and it also sought to have the same declared a lien upon the real estate named in the contract not released by the company as under the contract provided. The lower court after hearing the evidence rendered the following judgment:

"The court finds from the evidence in this case that the loan contract on which the defendant bases its claim to a lien on the land in question is without consideration, and void.

"The court further finds that said loan contract was never acknowledged, or that any attempt was made by the notary public to take the acknowledgment of the parties who signed the contract; that said contract was signed by the notary in an eating house six or eight miles away from the home of the plaintiffs herein; that the same has no binding force or effect upon the land in question, and is not a lien upon the land; that the same is, by the court, adjudged and decreed to be not a lien.

"It is by the court ordered and adjudged that said loan contract be canceled, set aside, and held for naught.

"It is further ordered and adjudged by the court that the plaintiffs have judgment against the defendant for the cancellation of said loan contract, and the costs of suit."

[1] The first question to be determined here is whether this contract is a valid, binding, and an enforceable contract between the parties under the record as presented to this court. By this contract Christensen and wife employed the Deming Investment Company as their agent for the purpose of procuring a loan upon certain real estate, and agreed to pay said company for its services a specified sum. It is alleged in the petition and established by the evidence that, after the execution of this contract, the company undertook to perform the services contemplated by it, and it did procure a party financially able and willing to loan the money desired by the defendants in error, and in accordance with the contract entered into between Christensen and wife and the com-

pany, and it further appears that when the company called upon the defendants in error to close the deal, they refused to do so. This court in the case of *Cloe v. Rogers*, 31 Okl. 280, 121 Pac. 203, 38 L. R. A. (N. S.) 386, said:

"We may say the general rule seems to be that, where an agency is uncoupled with an interest, it may be revoked by the principal at will, without liability for damages; but where it is for a fixed time, and contemplates on the part of the agent the expenditure of time and money to carry it out, and is accepted and the duties imposed are entered upon by the agent, and money and time are expended in pursuance of the object of the agency, although the principal has the power to revoke and bring to a termination the contract, yet he lacks the right of so doing, except upon the burden of responding to the agent for such damages as he may suffer by reason thereof."

See authorities cited in 31 Okl. 261.

In the case of *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015, the Supreme Court of Georgia said:

"After part performance, to the extent of going to New York and opening business, mutuality is not wanting in a contract which stipulates that one party shall go to that city and there open and conduct a business on his own account for the sale of a commodity not an article of general commerce, and that the other party shall furnish and deliver to him, at a specified price, so much of the commodity, not exceeding a given quantity monthly, as he (the proprietor of the new business) shall pre-engage to his customers during the period of one year, the mode of conducting the new business contemplated being that the proprietor of that business is to discover purchasers, make binding contracts with them, and then order and receive enough of the commodity from the other party to fill such contracts."

In the case of *Smith v. Bangham et al.*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522, the Supreme Court of California said:

"An option to plaintiff to purchase certain real estate for a specified price, on or before February 26, 1906, when the grantor agreed to furnish an unlimited certificate of title, etc., was a unilateral agreement, which was not binding on the holder until he exercised the option and elected to purchase. The election of the holder of an option to purchase real estate, to exercise the option within the time limited thereby, was sufficient to bind him and to constitute an enforceable mutual contract."

In the case of *Goward v. Waters*, 98 Mass. 598, it is said:

"The position of the defendant's counsel is undoubtedly true that at the time the contract was signed it was a mere nudum pactum. The plaintiffs paid nothing, incurred no expense or loss, and entered into no obligation on their part. They were at liberty to act or not as they pleased, and would incur no liability by failing to do anything. But it is also apparent that the writing contemplated services to be rendered and expenses to be incurred by the plaintiffs for the defendant, and that the promises were made in view of such future services and expenses. The writing is merely a stipulation, by the defendant, of the terms upon which compensation shall be made by him. Subsequent performance of services and expenditure of money, in prosecution of the employment thus authorized, furnish a sufficient consideration for the promises of the defendant. *Train v. Gold*, 5 Pick. [Mass.] 380; *Gardner v. Webber*, 17 Pick. [Mass.] 407."

In *Des Moines Valley R. R. Co. v. Graff et al.*, 27 Iowa, 99, 1 Am. Rep. 256, it is held:

"If one promise to pay another a sum of money if he will do a particular act, and he does the act, the contract is not void for want of mutuality, and the promisor is liable, though the promisee did not, at the time of the promise, engage to do the act; for, upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory."

In the case of *Attix, Noyes & Co. v. Pelan et al.*, 5 Iowa, 337, it is held:

"Where the defendants entered into a contract with the plaintiffs, granting the exclusive authority to negotiate a sale of certain property for two months, and thereafter until withdrawn in writing, the plaintiffs to be allowed 2½ per cent. commission, and providing that if any sale negotiated by plaintiffs shall fail by reason of defective title, commissions shall be allowed as though the same had been consummated, also that commissions should be allowed if defendants availed themselves after withdrawal of any negotiations had by plaintiffs before such withdrawal, or if defendants should in any way fail to confirm a sale negotiated by plaintiffs, and also providing that plaintiffs should have all over the price named, and if the excess should not amount to 2½ per cent., then defendants were to make it that amount, signed, 'Pelan & Anderson;' and where in an action on the contract, the plaintiffs aver performance by effecting a good and profitable sale, but that defendants without advising plaintiffs sold the property before the said two months had expired, and thereby rendered themselves unable to comply with the sale of said lands, which would have yielded plaintiffs a compensation of \$3,000, whereby the defendants have become liable to pay the plaintiffs said sum as damages, to which petition a demurrer was sustained by the court—held: (1) That the contract was not void, for want of mutuality; (2) not void for want of consideration; (3) that during the two months the defendants could not revoke the contract, nor sell the property without compensating plaintiffs for the services rendered, and that if the acts of the defendants hindered or prevented any sale the plaintiffs might or could have made, they are liable for all the compensation such sale, if made, would have brought the plaintiffs."

In *Andreas v. Holcombe*, 22 Minn. 339, it is said:

"1. A writing promissory to pay to A. a specified sum when A. shall perform certain acts, though it contains no promise of A. to do the acts, and shows no past or present consideration, becomes binding upon the promisor if, before it is revoked, A. perform the acts pursuant to it.

"2. An allegation in the complaint that the plaintiff 'has fully performed all the terms and conditions of said contract to be done and performed by him in accordance therewith' is a sufficient averment of the doing of the things required to render the promise obligatory."

In the case of *Jones v. Snow et al.*, 64 Cal. 456, 2 Pac. 28, it is said:

"A promise may be a consideration for a promise, and where a promise of money is made for doing a certain act, the performance of which is not promised, yet, if it is performed, the plea of *nudum pactum* is not available in a court of law."

In the case of *Wheeler & Wilson Mfg. Co. v. Lyon (C. C.)* 71 Fed. 874, it is held:

"Alleged want of mutuality in an agreement guarantying the performance of the contract

of another is no defense, where the contract had become executed."

In *Varney v. Bradford*, 86 Me. 510, 30 Atl. 115, the Supreme Court of Maine, said:

"In a contract under seal, containing mutual covenants, and which imposes an obligation upon one party to pay money to the other, but contains no covenant or promise to pay it, the contract having been wholly performed in all other respects, the money may be recovered in an action of *assumpsit*, upon an implied promise."

[2] Is the plaintiff in error under this contract entitled to a lien upon the real estate named therein not released by it to secure the payment of whatever sum of money may be due to it by the defendants in error for services performed? Upon an examination of the contract we find that:

"As security for the payment of any and all sum or sums of money to which you may be entitled under this contract, I hereby pledge and mortgage to you the above-described real estate."

It is contended by the company that this is a mortgage upon this real estate to secure the payment of whatever sums may be due it for the services rendered by it for the defendants in error. But the defendants in error contend that the same cannot be considered a mortgage, for the reason that the contract was never acknowledged, and that the same is a homestead, and the contract is not properly signed or executed in order to waive the homestead lien given to them by the laws of this state. By reference to the statute (section 1143 of the Revised Laws of 1910), we find the only requirement named therein is that the deed, mortgage or contract relating to the homestead, in order to be valid, must be in writing and subscribed by both husband and wife, and by section 1154 of the Revised Laws of 1910, it is expressly provided that no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract, relating to real estate between the parties thereto. Hence under the statute we must hold that the acknowledgment of the contract was not necessary in order for the same to be binding between the parties thereto, and inasmuch as it is clear from the language used that it was the intention of the parties to mortgage this real estate in order to secure the payment of the amount due by them to the company, we are of the opinion that the same constitutes a lien thereon. In 27 Cyc. p. 987, it is said:

"As a general rule, any written contract entered into for the purpose of pledging property or some interest therein as security for a debt, which is informal or insufficient as a common-law or statutory mortgage, but which shows that it was the intention of the parties that it should operate as a charge on the property, will constitute an equitable mortgage and be enforced as such in a court of equity."

See the authorities cited in the note on said page from the states of Illinois, Indiana, South Carolina, Virginia, West Virginia, Wis-

consin and Minnesota. And in the same volume (page 976) it is said:

"An equitable mortgage may be constituted by any writing from which the intention to do so may be gathered. Thus a contract in writing to secure a debt specified therein, in which the parties expressly declare their intention to create a lien, by way of mortgage, upon real estate particularly described, upon the failure of conditions fully set forth, is an equitable mortgage, which, on nonpayment and breach of the conditions, may be foreclosed in the ordinary way in a court of equity."

And in the note on page 977 it is said:

"Any formula of words which plainly shows the intention to transfer property by way of security will suffice to raise a mortgage in equity. It was so held in a case where the contract between the parties undertook to 'pledge the real and personal estate' of one as security for the payment of a sum of money to the other. *Mobile, etc., R. Co. v. Talman*, 15 Ala. 472. So where A., having received the property of B. to invest it for B.'s advantage, gave a paper, not in form of a mortgage, acknowledging the receipt of the property, and declaring that certain specified property of his own was mortgaged to secure B., it was held that this would operate as a mortgage upon the death of A. insolvent. *Menude v. Delaire*, 2 Desaus. (S. C.) 564. Where a husband and wife made a release deed of their real estate, containing the following clause: 'On condition that, whereas, the said grantees have lent us one thousand dollars to be paid three years from this date, without interest, they taking in lieu thereof the rents and profits of said land, if we shall pay said money, this deed shall be void, else valid; if not paid and a forfeiture occurs, the land shall be taken in full payment of debt and interest, without further claim upon us, or either of us'—and the grantees took possession, it was adjudged to constitute an equitable mortgage. *Jarvis v. Woodruff*, 22 Conn. 548."

And in the case of *Preschbaker v. Feaman*, 32 Ill. 475, it is held, in equity, in determining whether or not a given transaction is to be treated as a mortgage, the form of the transaction is not regarded, but the substance must control. The intention of the parties, to be gathered in the light of surrounding circumstances, must give character to the contract in that regard. In the case of *Donald v. Hewitt*, 33 Ala. 534, 78 Am. Dec. 431, it is held:

"Where, by the terms of a contract, expressly giving a lien on certain property, such property is not to remain in the possession of the one to whom the lien is given, the contract will be construed to amount to an equitable mortgage, and not to a common-law lien."

Also in *Jones on Liens*, § 77, it is said:

"An agreement, or a sufficient consideration, to give a mortgage on specific property, creates an equitable lien upon such property, which takes precedence of the claims of the promisor's general creditors, and of the claims of subsequent purchasers and incumbrancers with notice of the lien."

See authorities cited at note 19 on page 177 of *Jones on Liens*.

Under the view that we take of this contract the plaintiff in error is entitled to a lien upon this property named in the contract, not released by it to secure the payment of whatever sums of money is due to the company.

By reference to the contract we find that it is provided "that in the event the defendants in error are notified of the acceptance of said loan and they are unable to or refuse to complete the transaction that they will pay five per cent. on the amount of the loan applied for," and under this provision of the contract there would be due the company the sum of \$350.

Where a party bound to the future performance of a contract puts it out of his power to perform it, the other party may treat this as a breach and sue him at once, for there is an immediate right of action for a breach of contract by anticipation. And the cases go a step farther, although technically and strictly speaking there can be no breach of contract until the time for performance has arrived, yet if before that time arrives the promisor expressly renounces the contract and declares his intention not to perform it, the promisee may, in most jurisdictions, treat this as a breach, and may at once bring an action for damages; that is, positive notice of an intended breach of a contract to be performed in the future may be treated as an actual breach. See 9 Cyc. 698, and authorities there cited.

Applying this rule to the instant case, a cause of action in favor of the company and against the defendants in error arose when they refused to comply with their contract by executing the note and mortgage in order to accept the loan negotiated for by them, as stipulated in the contract between them and the company. If the defendants in error had not changed their minds with reference to negotiating this loan, they could have procured the same from the Prudential Life Insurance Company through the negotiations of the plaintiff in error. The Deming Investment Company complied with its part of this contract, or as much thereof as it could have complied with, and failure of defendants in error to procure this loan was due exclusively to their refusal to complete this contract, and so when they refused to complete said contract and signified their intention not to comply therewith by accepting said loan or to complete any negotiations whatever therefor, they breached the contract, and a cause of action arose in favor of the company against them for whatever sum was due to it under the contract agreement.

As we view this contract and this agreement, the plaintiff in error is not entitled to recover \$980, as prayed for in its petition, but is only entitled to recover in any state of case the sum of \$350, provided in the execution of said contract. The company practiced no fraud upon the defendants in error, nor sought to induce or compel them to execute other papers than those contemplated by the contract, which they should not have executed.

If the mortgage when tendered by the com-

pany to the defendants in error for execution contained conditions not contemplated by the contract between the parties, such as obligating defendants in error to pay the tax on the mortgage or note to be executed by them, then the defendants in error were justified in refusing to sign said note and mortgage, and properly refused to comply with the contract with the company. This cause is therefore reversed and remanded.

PER CURIAM. Adopted in whole.

SMITH v. STATE. (No. A-2517.)

(Criminal Court of Appeals of Oklahoma. Aug. 28, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 778(5)—INSTRUCTIONS—BURDEN OF PROOF.

In a homicide case, where defendant denied firing the fatal shot and there was evidence tending to show that the homicide was justifiable on the ground of self-defense, the court instructed the jury in part as follows:

"If they believe from the evidence beyond a reasonable doubt that at the time the said shooting was done, it was done in self-defense as defined and set out in the instructions herein, you should find the defendant not guilty."

"No. 18. The court instructs the jury, that if they believe from the evidence in this case beyond a reasonable doubt that the defendant and one Charles Williams were just immediately prior to the firing of the shots which caused the death of the deceased, engaged in a difficulty, and that the deceased, armed with a deadly weapon, voluntarily engaged in said difficulty and struck the defendant over the head and knocked him down, and that both the said Charles Williams and the deceased jumped or fell upon the defendant and all three while on the ground engaged in a scramble, and during the said scuffle or scramble the shots were fired which produced the death of the deceased, and shall further believe from the evidence, beyond a reasonable doubt, that defendant did not fire the shot that took deceased's life, then and in that event, they should find the defendant not guilty."

Held, prejudicial error, as placing the burden of proof upon the defendant, and requiring the jury, before finding for acquittal, to believe from the evidence beyond a reasonable doubt that the defendant was innocent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1848, 1849, 1960, 1967; Dec. Dig. 778(5); Homicide, Cent. Dig. § 632.]

2. CRIMINAL LAW — 571—BURDEN OF PROOF—DEGREE OF OFFENSE.

The burden does not rest upon the defendant to establish, even to a reasonable probability, the truth of an affirmative defense. If, upon the evidence both for the state and the defendant a reasonable doubt is created as to the guilt of the defendant, he is entitled to the benefit of it; and, where the crime charged is distinguished into degrees, the defendant is entitled to the benefit of that doubt, as well with respect to the degree of the crime as to every essential element of that degree; and in these respects the burden never shifts from the state to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1272; Dec. Dig. 571.]

Appeal from District Court, Pawnee County; Conn Linn, Judge.

Grover C. Smith was convicted of manslaughter in the first degree, and appeals. Reversed, and new trial ordered.

McNeill & McNeill, of Pawnee, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Grover C. Smith, herein referred to as defendant, was informed against for the crime of murder, alleged to have been committed on the 28th day of August, 1914, in Pawnee county, by killing one J. W. Brooks, by shooting him with a pistol. Upon the trial the jury by their verdict found defendant guilty of manslaughter in the first degree, and assessed his punishment at 4 years' imprisonment in the penitentiary. Motion for new trial was duly filed, overruled, and judgment was rendered in pursuance of the verdict on the 10th day of February, 1915. From the judgment defendant appealed by filing in this court August 9, 1915, a petition in error with case-made.

The evidence shows: That defendant was a farmer boy about 21 years of age, residing in Osage county near the east end of the bridge across the Arkansas river at the town of Ralston, in Pawnee county; that on the 28th day of August, 1914, a carnival company was exhibiting at Ralston, and in connection therewith the deceased, J. W. Brooks, was operating what was known as a "Hoop-Lah-Stand," and adjacent thereto his wife was conducting a game of chance, and with them was Charley Williams, a negro minstrel. That evening defendant came across the Arkansas river to Ralston and went to the park where the carnival was being held, and, after visiting several stands, came to the stand that the wife of the deceased was operating, and purchased three rings and threw the same for the prizes, and one ring dropped over a prize clock. This prize defendant claimed, but Mrs. Brooks claimed that the ring did not drop clear over the clock, and she refused to give the clock to defendant. The deceased came up and had some conversation with defendant, but no difficulty arose. Defendant then went on to the dance platform, and from there to the merry-go-round, and then went towards the deceased's stand. As to what happened then the evidence is conflicting.

The wife of the deceased, Mrs. Florence Brooks, testified that when defendant returned, a couple of Indians were quarreling with the negro Williams, and her husband called to the negro to come away, and defendant then fired two shots at the negro, and her husband rushed in between defendant and the negro, and then all three clinched, and as they fell her husband was on top, and as she ran for help, she heard three more shots

fired; that her husband died the next day as the result of a gunshot wound which passed through his body.

The negro, Williams, disappeared at the time of the tragedy, and did not testify as a witness.

As a witness in his own behalf the defendant testified that he was passing the stand operated by the deceased and saw the negro, Williams, holding Tom Butler, an Indian boy, by the coat collar shaking him, and he told the negro to turn the boy loose, and the negro said, "Maybe you want some of it," and drew a gun and shot at him, and some one struck him on the head, cutting a large gash across the top of his head, knocking him senseless, and he did not regain consciousness for some time; that he never owned a gun or pistol, and never carried a pistol, and did not have one at that time; that he did not shoot the deceased, and did not fire any of the shots.

Several witnesses for defendant testified that when the defendant and the negro were fighting the deceased ran from his stand with a hatchet, and struck defendant on the head with it; that during the *mélée* several shots were fired; that officers arrived and pulled the deceased and the negro off of defendant, and defendant's head at the time was covered with blood.

A reversal is asked on account of alleged errors in the instructions given by the court in its charge to the jury.

In answer to plaintiff in error's brief, the Attorney General has filed a confession of error, for the reason that under the instructions given the defendant was required to prove his defense beyond a reasonable doubt.

[1, 2] After a careful examination of the record, including the charge of the court, we are of opinion that the confession of error is well taken, and should be sustained. The latter part of instruction No. 14 was in the following language:

"But if they believe from the evidence beyond a reasonable doubt that at the time the said shooting was done, it was done in self-defense as defined and set out in the instructions herein, you should find the defendant not guilty."

The court also gave the following instruction to which an exception was taken:

"No. 18. The court instructs the jury that if they believe from the evidence in this case beyond a reasonable doubt that the defendant and one Charles Williams were, just immediately prior to the firing of the shots which caused the death of the deceased, engaged in a difficulty, and that the deceased, armed with a deadly weapon, voluntarily engaged in said difficulty and struck the defendant over the head and knocked him down, and that both the said Charles Williams and the deceased jumped or fell upon the defendant and all three while on the ground engaged in a scramble, and during the said scuffle or scramble the shots were fired which produced the death of the deceased, and shall further believe from the evidence, beyond a reasonable doubt, that defendant did not fire the shot that took deceased's life, then and in

that event they should find the defendant not guilty."

The effect of these instructions given by the court was to place the burden of proof of justifiable homicide in self-defense on the defendant. The law only requires the defendant to raise a reasonable doubt as to his guilt; if he does this he should be acquitted. The burden does not rest upon the defendant to establish even to a reasonable probability the truth of an affirmative defense; if upon the evidence both for the state and the defendant a reasonable doubt is created as to the guilt of the defendant, he is entitled to the benefit of it. The instructions quoted deprived the defendant, not only of the presumption of innocence, but placed the burden on him to prove that he did not fire the shot that took the life of the deceased, and not only placed upon him the burden of proof, but required him to prove the same beyond a reasonable doubt. See *McClatchey v. State*, 12 Okl. Cr. —, 152 Pac. 1136; *Washmood v. United States*, 10 Okl. Cr. 254, 156 Pac. 184.

For the reasons stated we are of opinion that the defendant has not had that fair and impartial trial which the law guarantees to one accused of crime. It follows that the judgment of conviction should be reversed, and a new trial ordered. Judgment reversed.

ARMSTRONG and BRETT, JJ., concur.

SANCHEZ v. SANCHEZ. (No. 1892.)
(Supreme Court of New Mexico. July 18, 1916.)

(Syllabus by the Court.)

CANCELLATION OF INSTRUMENTS §37(1)—PLEADING—COMPLAINT.

A complaint for cancellation of a deed, conveying real estate from a mother to a son, which alleges that such conveyance was made in consideration of an agreement on the part of the son to live with and care for the mother, and that said son has wholly failed and refused to comply with his part of the agreement, and has abandoned the mother and removed to a distant city, states a good cause of action, and is sufficient to withstand a demurrer.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-68, 71; Dec. Dig. §37(1).]

Appeal from District Court, Bernalillo County; H. F. Reynolds, Judge.

Action by Barbara Chaves de Sanchez against Manuel A. Sanchez. From a judgment for defendant; plaintiff appeals. Reversed, with directions.

Rodey & Rodey, of Albuquerque, for appellant.

ROBERTS, C. J. Mrs. Barbara Chaves de Sanchez, the appellant, an old lady of more than 80 years of age, in 1910, having no other relative other than the appellee, her son,

conveyed to him the real estate involved in this suit, which was a house and lot in the city of Albuquerque. In the deed she reserved a life estate in the premises. The consideration for the conveyance was an agreement on the part of her son that he and his wife would remain in Albuquerque and take care of her, or if they went away to some other place to live, they would take her with them. The son left Albuquerque and took up his residence in the city of St. Louis, Mo., and refused to take his mother with him and care for her, and since the execution of the deed the said son has wholly failed and refused to perform his part of the agreement, which was the consideration for such conveyance. On the 21st day of January, 1915, the mother filed her complaint in the district court of Bernalillo county for cancellation of such deed, and to quiet her title to such real estate. In said complaint all the facts were stated, and it was alleged that such conveyance was upon a condition subsequent, which was defeated by failure of the son to perform. The appellee demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and appellant declined to plead further, whereupon judgment was entered for the defendant dismissing the complaint. From this judgment appellant prosecutes this appeal.

It is but fair to the trial court to say that the order sustaining the demurrer was entered prior to the decision by this court in the case of *Anderson v. Reed*, 20 N. M. 202, 148 Pac. 502, L. R. A. 1916B, 862. That case is decisive of this appeal. There the complaint proceeded upon the theory of fraud in the inception of the contract, and, in sustaining the sufficiency of the complaint, said:

"The necessity of avoiding such contracts, in cases where there is an intentional and inexcusable failure to perform by the grantee, in order to do justice, is so paramount, and cancellation being the only adequate and complete remedy in such a case, the court will give the remedy upon any reasonable theory. In other words, the court in such a case, upon intentional and inexcusable failure to perform such a contract, will decree cancellation without much regard to or consideration of the theory upon which such cancellation is sought. This being true, this court will uphold cancellation in such cases where the complaint proceeds upon any reasonable theory."

In the opinion in that case the various theories upon which courts decree cancellation of such contracts are discussed, and and the reason for the rule announced is given. Repetition here would avail nothing. Some of the courts, as therein shown, decree cancellation upon the theory adopted by appellant in her complaint herein.

We think the complaint stated facts sufficient to entitle appellant to equitable relief. Hence the cause will be reversed, with directions to the trial court to overrule the

demurrer to the complaint and to proceed in accordance with this opinion; and it is so ordered.

HANNA and PARKER, JJ., concur.

GLASGOW v. PEYTON et al. (No. 1789.)
(Supreme Court of New Mexico. July 18, 1916.)

(Syllabus by the Court.)

1. TAXATION \S 573—COLLECTION OF TAXES—
STATUTORY PROVISIONS—REPEAL.

Section 4157, Comp. Laws 1897 (section 5509, Code 1915), was not repealed by chapter 84, Laws 1913. *Case of Crane v. Cox*, 18 N. M. 377, 137 Pac. 589, distinguished.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1141-1144; Dec. Dig. \S 573.]

2. ATTACHMENT \S 101, 209(8)—PROCEEDINGS
TO PROCURE—AFFIDAVIT—SERVICE OF PRO-
CESS.

In an affidavit for attachment, under section 4311, Code 1915, it is not necessary, where defendant is a nonresident, to state in such affidavit the residence of the defendant, if known, or the fact that his place of residence is unknown, where such is the fact, nor is it necessary for a copy of the complaint and summons to be mailed to such defendant, as required in ordinary civil actions by section 4096, Code 1915.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. \S 258-262, 687; Dec. Dig. \S 101, 209(8).]

3. TAXATION \S 809(2)—QUIETING TITLE—
PLEADING—COMPLAINT.

Where the state proceeds in attachment, and sells property of the attachment defendant to satisfy a claim for taxes, and such defendant later brings suit to quiet his title to such property so sold, against the purchaser thereof, under such sale, and alleges facts attacking the right of the state to proceed in a given statutory method (section 5509, Code 1915), and the complaint shows on its face that the state did not thus proceed, such complaint is demurrable because it states no facts showing that the judgment in attachment was void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1601; Dec. Dig. \S 809(2).]

Error to District Court, Otero County;
E. L. Medler, Judge.

Action by J. D. Glasgow against J. C. Peyton and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Edwin Mechem, of Alamogordo, for plaintiff in error. W. H. Winter, of El Paso, Tex., and Holt & Sutherland, of Las Cruces, for defendants in error.

ROBERTS, C. J. This action was instituted in the court below by the plaintiff in error, against the defendants in error, to quiet title to certain real estate situate in Otero county, this state, and to enjoin defendants in error from removing certain fixtures and personal property from said real estate. Demurrer was filed by defendants in error to the second amended complaint, which was sustained by the court, and plain-

tiff in error elected to stand upon his complaint. Thereupon the court entered a judgment dismissing the complaint and dissolving the temporary injunction theretofore issued. From this judgment this writ of error is prosecuted.

The facts may be briefly stated as follows: In the years 1910, 1911, and 1912, the property involved in this litigation was owned by the Orogrande Smelting Company, and the same was assessed for taxation purposes by the taxing authorities of Otero county. Such taxes had not been paid in April, 1913, and the district attorney instituted suit in the district court of Otero county against said company and A. G. Wilcox and J. G. Glasgow, the two last-named defendants having purchased said property from the smelting company, or at least were claiming some right or interest in the property. The complaint alleged that there was due and unpaid, for taxes, the sum of \$2,556.55, together with interest and costs of suit. The state of New Mexico was named as plaintiff. Apparently the suit was instituted under the provisions of section 5509, Code 1915, which reads as follows:

"Whenever, in his judgment, it may be proper, the Attorney General, district or state attorney shall bring suit at law for the recovery of taxes which may be due from any person, or upon any property, where the amount exceeds one hundred dollars. Such suit shall be in the name of the state, and shall be against the person assessed, except where the assessment is against unknown owners, in which case the suit shall be against the property which is liable for the tax. If the tax be a lien upon any real estate, the fact shall be stated in the complaint, together with a description of such real estate. The suit shall be for the full amount of state, county, school, or license taxes, then due and unpaid, whether by reason of one, or more than one, assessment. The judgment in such a case, if in favor of the state, shall, in addition to other ordinary requisites, contain a description of the real estate, if any, upon which such taxes are a lien, and shall itself be a lien thereon, and shall contain an order for the sale thereof. The order of sale shall likewise contain a description of such real estate, and shall be directed to the sheriff of the county wherein such real estate is situate: Provided, that in such cases no appraisal shall be required. The judgment rendered in such suit shall also have the effect of a general judgment against the person. When suit is brought under this section against real estate, process shall be served upon any person residing upon, or exercising authority over, the premises, if any there be, and by publication, as required by law in the case of non-resident defendants, and such service shall bind all persons having interest in such real estate."

Summons was issued, as required by such section, and service was had upon the agent of the smelting company and Wilcox, but no service of such summons was obtained upon Glasgow. All the defendants were nonresidents of the state of New Mexico. No further attempt was made, under such section, to obtain service upon such defendants by publication, but thereafter, on the 15th day of April, 1913, an affidavit in attachment was filed by the county treasurer of said county, with the clerk of said court, wherein he al-

leged that said defendants were indebted to the state of New Mexico in the sum named, and that such defendants were nonresidents of the said state. Thereafter a writ of attachment was issued by the district court, under which the sheriff seized all the real estate and property involved in this litigation. Thereafter service by publication was made in accordance with the provisions of section 4311, Code 1915, which reads as follows:

"Whenever property of a defendant has been attached and it shall appear from the affidavit for attachment and the return of the sheriff, that such defendant cannot be personally served with process, the court shall order a publication to be made stating the nature and amount of the plaintiff's demand, and notifying the defendant that his property has been attached, and that unless he appears at the return day named in said publication, judgment will be rendered against him and his property sold to satisfy the same; which notice by publication shall be published in the manner prescribed by law for the publication of other notices from the district courts."

Thereafter, on the 14th day of February, 1914, judgment was entered for the state for said sum of \$2,556.55, and certain stated amounts as costs, and the attached property was ordered sold to satisfy the same. The property was sold by the sheriff to J. C. Payton for an amount sufficient to satisfy the judgment, costs, etc., and deed to the same was executed by the sheriff and approved by the court. On the 20th day of July, 1914, Glasgow filed his second amended complaint herein, in which he sets forth substantially the above facts and other facts not material, and made all the pleadings, papers and judgment in the tax case parts of his complaint, as exhibits. He alleged that the decree and sale in said cause, 1228, the original tax suit, were void for the following reasons:

"(a) That as to the date of the commencement of said action and of said sale the only procedure for the sale of property delinquent for taxes was the procedure provided in chapter 84 of the 1913 session of the Legislature of New Mexico, the same being the second regular session of the First Legislature of the state of New Mexico, and at said time there was no provision of law for the collection of taxes by suits at law; (b) that there was no service in said cause upon this plaintiff, either by publication or otherwise, for the reason that the notice of pendency of suit was published without authority, because no affidavit was filed with the clerk of this court, as provided by law in cases of suits against nonresident defendants, and no copy of said complaint and summons in said cause was deposited in the post office addressed to this plaintiff at his place of residence, and that the summons served on J. J. Murray was not served on him as the agent of this plaintiff; (c) that the property on which said taxes were said to be a lien were not described in said complaint; (d) that the said decree does not describe the property upon which the taxes were claimed to be a lien; (e) that the publication of the notice of the pendency of said suit did not contain a description of the property upon which said taxes were claimed to be a lien; (f) that said notice of sale did not contain a description of the property upon which said taxes were claimed to be a lien; (g) that at the time of the commencement of the said action the taxes for the last half of the year 1912 were not delinquent; (h) that at the time of making of

the said decree the taxes for the last half of the year 1912 were not delinquent; (i) that there was no advertisement made by the treasurer and ex officio collector of Otero county, advertising said property as delinquent for the years 1910, 1911, and 1912, and stating that he would apply to the judge of the district court at the next return day thereof for judgment against the said land for taxes; (j) that this plaintiff acquired said property after the lien for taxes had attached, and therefore no personal judgment could be entered against him and the property upon which the taxes were not a lien for taxes upon property upon which he was not personally liable; (k) that all of the said property described in paragraph 5 is a part of the realty of said south half of the southeast quarter of section 14, township 22 south, range 8 east, which said realty is owned in fee-simple title by this plaintiff, and was not described in said decree or notice of sale nor was the same purchased by the defendant at the said sheriff's sale; (l) the said James Hunter in selling said property did not offer the personal property for sale first, or offer said real estate in parcels to see if a part of said property would bring an amount sufficient to satisfy said judgment, but sold all of said property in bulk, to the great and irreparable loss and injury of this plaintiff, for the reason that said property is reasonably worth the sum of \$20,000, and this plaintiff believes and alleges that if said personal property had been offered separately, or if said real estate had been sold in parcels, a small portion thereof would have brought the amount necessary to satisfy said judgment; (m) that the amount of taxes for which said property was sold was \$2,558.55, whereas the amount of taxes due and owing upon said property was the sum of \$2,471.29; (n) that said complaint shows upon its face that this plaintiff acquired said property after the lien for taxes had attached, and therefore no personal judgment could be rendered against him."

To this complaint defendants in error demurred upon the ground that it failed to state facts sufficient to constitute a cause of action, and, under a second specification of ground of demurrer, several distinct grounds were specified. However, in the view we take of the case, it is not necessary to consider or refer to these several specific specifications. The demurrer was sustained generally; hence we are required to determine whether the complaint stated facts sufficient to constitute a cause of action.

[1] Plaintiff in error, in his complaint, proceeded upon the theory that the original judgment, rendered in the attachment suit, was void because section 5509, Code 1915, had been repealed by chapter 84, S. L. 1913, and that section 34 of said act (section 5495, Code 1915), provides the exclusive method for the sale of property for nonpayment of taxes. In the case of *Crane v. Cox*, 18 N. M. 377, 137 Pac. 589, Mechem, District Judge, who wrote the opinion for this court, said:

"Chapter 84, Laws 1913, went into effect immediately upon its approval, March 18, 1913, and as it expressly repealed chapter 22, Laws 1899, it provides the only procedure for the sale of property for delinquent taxes."

In that case, however, section 5509, *supra*, was not involved, and was not called to the attention of the court. The court correctly held that chapter 22, Laws 1899, was repealed, and as the question before the court was

as to whether the act of 1913 applied and prescribed the method and procedure for the sale of real estate for taxes which has become a lien prior to the passage of said act, by the county treasurer, in a summary manner, upon publication of the prescribed notice, it was properly said that the later act provides the only method of procedure for the sale of property for delinquent taxes.

Section 5509, *supra*, was originally enacted March 1, 1882, and was carried into the Compilation of 1897 as section 4157, and was designed to afford the state a remedy, by judicial proceeding, for the collection of taxes due it. It provided a remedy for the foreclosure of the lien and the sale of the property, and, where such statute is followed, it gives the state a right to a personal judgment for the taxes. If the statute is repealed by the act of 1913, it is only by implication, for there is no express repeal. Since its enactment in 1882 many changes have been made in the taxing laws, and different methods have been provided for the summary enforcement of the collection of taxes by advertisement and sale by the county treasurer, but this section has been retained and frequently resorted to by district attorneys for the enforcement of payment. In *Lewis' Sutherland Statutory Construction*, § 247, it is said:

"Repeals by implication are not favored. This means that it is the duty of the court to so construe the acts, if possible, that both shall be operative. When some office or function can, by fair construction, be assigned to both acts and they confer different powers to be exercised for different purposes, both must stand, though they were designated to operate upon the same general subject."

Section 5509 we believe falls within this rule. While it is true the act of 1913 provides a remedy for the sale of real estate for taxes, by the county treasurer, upon prescribed notice published as required by the act, this section furnishes a remedy, by judicial proceeding, in which the lien of the state may be established by decree of a court of competent jurisdiction, thereby establishing beyond question the validity of the lien, and giving to the purchaser at the sale a perfect title, as against the delinquent taxpayer.

[2] The procedure adopted by the district attorney in cause 1228, the original suit, was most remarkable. Apparently he intended to institute suit under section 5509, which certainly afforded the state an ample remedy. The taxes were a lien on the real estate, and by following the simple procedure prescribed by that section he could have accomplished all that he sought. He did not give notice as required by such section, however, but elected to file an affidavit in attachment, setting up the fact that defendants were non-residents of the state of New Mexico. Upon this publication was issued which conformed to section 4311, Code 1915. This section, it will be observed, provides the manner and

method of obtaining service where it appears from the affidavit for attachment and the return of the sheriff that such defendant cannot be personally served with process, which is by publication. This is somewhat different from the requirements in ordinary actions which are governed by sections 4095 and 4096, in that it is not necessary to state in the affidavit the residence of the defendant, if known, nor is it necessary to mail a copy of the complaint and summons to the defendant when his residence is known. Apparently all the provisions of the statute, relating to attachment proceedings, were followed by the district attorney.

[3] Plaintiff in error, in his complaint, evidently proceeds upon the theory that the district attorney was attempting to follow section 5509, and that, not having done so, the judgment rendered was void. He sets up repeated allegations, stating wherein such section was not observed, and, upon these departures from the statute, or failure to comply therewith, he bases his right to quiet his title to the real estate. In this he is in error, for clearly there was no attempt to follow this section, and the files in cause 1228, which he makes a part of his cause of action, show, as we have stated, that the state proceeded under the attachment statute, and the complaint herein so alleged. Whether the state could thus proceed would present a very interesting question were it here for consideration, but its right to do so was not challenged by any allegation in the complaint; hence cannot be considered in passing upon the questions raised by the demurrer. All that plaintiff in error has alleged in his complaint might be true and still not affect the right of the state to proceed as it did by way of attachment, or the legality of the sale under such proceedings. For example, he says that:

"The property on which said taxes were said to be a lien were not described in the complaint."

Under section 5509 the property should have been described in the complaint, but if a remedy by attachment is available, it would not be necessary to describe the property upon which the tax was levied in the complaint. Other reference need not be made, as we have set out heretofore all the allegations of the complaint which plaintiff in error sets out for the purpose of showing the invalidity of the judgment which he is attacking.

The demurrer was sustained generally, and we are unable to determine the views of the trial court; hence must look to the complaint and determine from it whether facts sufficient to constitute a cause of action are stated. Certainly a showing of noncompliance with section 5509 does not invalidate a judgment rendered upon attachment proceedings, wherein, so far as we are advised by

the complaint, every requisite step may have been taken as required by law.

For the reasons stated, the judgment must be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

NICKLE v. COULTER. (No. 1806.)
(Supreme Court of New Mexico. June 27, 1916.
Rehearing Denied July 31, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1010(1)—REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

Where the findings of the trial court are supported by substantial evidence, they will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3979-3981; Dec. Dig. \S 1010(1).]

(Additional Syllabus by Editorial Staff.)

2. MECHANICS' LIENS \S 163 — AMOUNT OF LIEN—STATUTORY PROVISION.

Under the express provision of Code 1915, \S 3328, a contractor may recover on a lien filed by him only such amount as may be due him according to the terms of his contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. \S 284; Dec. Dig. \S 163.]

Error to District Court, Colfax County; Abbott, Judge.

Action by R. W. Nickle against Clara E. Coulter. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action to foreclose a mechanics' lien, which is based upon an alleged verbal contract for the construction of a roof upon a barn of the defendant's for the alleged sum of \$57. The defense to the action is that the contract price was the sum of \$31, and not the amount set out in the lien statement. The court found the facts in favor of the defendant, and gave judgment discharging the lien, from which judgment this appeal is prayed.

L. S. Wilson, of Raton, for plaintiff in error. Morrow & Alford, of Raton, and E. P. Davies, of Santa Fé, for defendant in error.

HANNA, J. The one essential question for our determination in this case is whether the finding of the trial court as to the amount of the contract is supported by the evidence. The defendant, Clara E. Coulter, testified that the plaintiff came to her as a representative of the insurance company, for the purpose of making an estimate as to the damage done by fire to the roof of the barn in question; that after an examination he told her the damage was \$15, but that other repairs were needed, and that he would put a new roof upon the barn for the additional sum of \$16 furnishing labor and materials. She and her mother were present at the time, and testified that the whole amount to cover the work in question was \$31. The plaintiff testified that he would put in a bill or claim

against the insurance company, and would put on a new roof for \$16 over and above what this claim would be; that he did not know what the claim would be at the time, and that no definite amount was mentioned at the time; that he put in a bill or claim against the insurance company for \$41, which amount was subsequently paid to the defendant, and that when the work was completed, he presented the defendant with a bill for the sum of \$57 upon his view of the understanding that he was to have the amount paid by the company, plus \$16, as compensation for his labor and the furnishing of the materials.

[1] The court found that the contract for the work, labor, and materials was \$31, and not \$57. This finding would seem to be supported by substantial evidence, and under the ruling of *Fullen v. Fullen*, 153 Pac. 294, and numerous other decisions of this and the Territorial Supreme Court, to the effect that where the findings of the trial court are supported by substantial evidence, they will not be disturbed on appeal, we must decline to sustain the attack upon the finding in question.

A novel contention is made, however, by the plaintiff in error, substantially to the effect that, even though the finding be supported by the evidence of the witnesses for the defendant in error, yet, because the plaintiff has testified that he was to receive the amount of \$16, and the amount received from the insurance company for the fire loss, which testimony is claimed to be undisputed, that the court should have held that a mistake existed as to the terms of the contract, and that, there being no deception, the court should have found for plaintiff under the rule laid down in *Mundy v. Irwin*, 20 N. M. 43, 145 Pac. 1080. In that case the court pointed out that the understanding of defendant was that he was to trade for plaintiff's tract of land, known as the "Arnold Farms," and that he knew, or could have known, its area and quantity, for which reason he could not be heard to complain when it subsequently appeared that the actual area was not what he had understood. In other words, he contracted for a specific tract of land, without definition as to quantity, and it is contended that the same situation exists in the case at bar, because the parties contracted to give and receive the amount of money to be derived from the insurance company, plus the sum of \$16. We doubt not that this was the understanding of the plaintiff, but the difficulty with the situation here is that we have in the record the positive testimony of the defendant and at least one of her witnesses that there was a definite agreement and understanding to do the work for the sum of \$31, which evidence supports the finding of the trial court that the contract be-

tween the parties was for the sum mentioned, namely, \$31.

[2] Under the provisions of section 3328, Code of 1915, a contractor is entitled to recover upon a lien filed by him only such an amount as may be due him according to the terms of his contract. And, the court having found against the contentions of plaintiff in error, as to the terms of the contract, this court, for the reasons stated, cannot disturb the finding, and must therefore affirm the judgment of the district court, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

STATE v. ORFANAKIS. (No. 1857.)

(Supreme Court of New Mexico. June 27, 1916.
On Motion for Rehearing, Aug. 9, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §422(1) — EVIDENCE — ACTS AND DECLARATIONS OF CODEFENDANTS. Where there is sufficient evidence to justify the conclusion that different persons charged with a crime are all acting with a common purpose and design, the actions and declarations of each from the commencement to the consummation of the offense are evidence against the others.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-986, 988; Dec. Dig. §422(1).]

2. CRIMINAL LAW §844(1)—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

An exception to an instruction is not specific which asserts that the instruction is contrary to law, without pointing out the grounds of legal objections.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025; Dec. Dig. §844(1).]

3. CRIMINAL LAW §763, 764(8)—TRIAL—INSTRUCTIONS—REQUESTS—WEIGHT OF EVIDENCE.

A requested instruction which is erroneous is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1735; Dec. Dig. §763, 764(8).]

4. CRIMINAL LAW §829(1) — TRIAL — INSTRUCTIONS—REQUESTS.

No error can be predicated on the refusal of the trial court to give an instruction where the instruction given by the court on its own motion fully and completely covered everything contained in the refused instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. §829(1).]

5. CRIMINAL LAW §814(6) — TRIAL — INSTRUCTIONS—APPLICABILITY TO CASE.

Where there is evidence of motive, an instruction as to the effect of the absence of motive is improper, and should be refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. §814(6).]

6. CRIMINAL LAW §1159(2)—APPEAL—QUESTIONS OF FACT—VERDICT.

Ordinarily the verdict of a jury will not be disturbed in the appellate court, where it is supported by any substantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. §1159(2).]

*(Additional Syllabus by Editorial Staff.)***7. CRIMINAL LAW** ⇨1036(1)—**APPEAL—PRESENTING QUESTIONS IN TRIAL COURT—RULINGS ON EVIDENCE.**

Where court and counsel assume that testimony would be connected up to show that a conspiracy existed, if the state failed to prove the conspiracy, it was incumbent on the defense to direct the attention of the trial court to that fact, and, having failed to do so, the point cannot be raised on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1631-1640, 2639; Dec. Dig. ⇨1036(1).]

8. WITNESSES ⇨270(2)—**CROSS-EXAMINATION—SCOPE AND EXTENT.**

Exclusion of cross-examination as to whether a certain kind of hat which witness had testified was worn by the accused on the night of the homicide was a popular hat, or one worn by other persons in the town at the time, offered as a test of the witness' memory about the hat, was not error.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 956; Dec. Dig. ⇨270(2).]

9. CRIMINAL LAW ⇨1038(3), 1056(1)—**APPEAL — PRESENTING QUESTIONS IN TRIAL COURT—EXCEPTIONS.**

An objection to an instruction that there was no evidence in the case as to involuntary manslaughter, in the absence of exception or requested instruction on the subject, will not be considered on appeal, on the theory that the statement in the instruction disclosed that the attention of the court had been called to the question, or that the court had, of its own motion, considered the question.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2646, 2663, 2670; Dec. Dig. ⇨1038(3), 1056(1).]

10. CRIMINAL LAW ⇨814(10)—**INSTRUCTIONS—DRUNKENNESS OF ACCUSED.**

Evidence in a prosecution for homicide held insufficient to require an instruction as to the effect of the drunken condition of the accused at the time of the homicide.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1821, 1979, 1981; Dec. Dig. ⇨814(10).]

11. CRIMINAL LAW ⇨517(4)—**EVIDENCE—CONFESSIONS.**

Where accused was identified by two witnesses as having been at the place of homicide, and he was shown to have been in company with the other defendants immediately before the homicide, a motion to strike out testimony as to a confession of defendant, on the ground that the corpus delicti and the connection of the defendant with the offense had not been proven, was properly denied.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1147; Dec. Dig. ⇨517(4).]

12. CRIMINAL LAW ⇨520(7)—**EVIDENCE—CONFESSIONS—VOLUNTARY CHARACTER.**

Though a witness who testified as to a confession by accused stated that he told accused that it might be easier on him to tell the truth than it would be to try and hide it, where the accused had given the substance of his confession before this statement was made, evidence of the confession was properly admitted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1180, 1181; Dec. Dig. ⇨520(7).]

13. CRIMINAL LAW ⇨877—**TRIAL—VERDICT—JOINT DEFENDANTS.**

Where three defendants were indicted for murder, but only one was tried, the verdict of conviction relates to the one on trial, though the caption of the verdict names all the de-

fendants, and the one tried is not named in the body of the verdict.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2096, 2097; Dec. Dig. ⇨877.]

On Motion for Rehearing.**14. CONSTITUTIONAL LAW** ⇨268—**DUE PROCESS OF LAW—CRIMINAL PROCEDURE.**

The admission of certain evidence in a criminal trial, even if erroneous, does not constitute a deprivation of due process of law, in violation of Const. art. 2, §§ 12, 18, and Const. U. S. Amend. 14, § 1.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 756, 757; Dec. Dig. ⇨268.]

Appeal from District Court, Colfax County; Leib, Judge.

Hristos Emmanuel Orfanakis, alias Crist Orfanus, alias Christos Emmanuel Orfanakis, was convicted of murder in the second degree, and appeals. Affirmed.

The appellant, Hristos Emmanuel Orfanakis, was jointly indicted with Elijah Perakis and Apostolakis Jivokias, charged with the murder of one Sem Tomas, alias Sam Tomas. Perakis and Jivokias were not arrested, and the case proceeded to trial with the appellant as sole defendant, who was convicted of murder in the second degree and sentenced to a term in the penitentiary of from 35 to 40 years.

J. Leahy, of Raton, for appellant. Harry S. Bowman, Asst. Atty. Gen., for the State.

HANNA, J. [7] 1. The first assignment of error is predicated upon the refusal of the trial court to strike certain portions of the testimony of the witness Thomas Walbank, who testified concerning a conversation between himself and one of the defendants jointly indicted with the appellant, which occurred on the night of the homicide, and which was not held in the presence of the appellant. After the entire conversation referred to had been detailed by the witness, a motion was made by counsel for defendant that the testimony be stricken out. Whereupon the district attorney suggested that the state had a right to prove a conspiracy between the three parties indicted. While the record is not quite clear in this respect, it would seem that the court and counsel assumed that this testimony would be connected up in order to show that a conspiracy existed. No further objection was interposed by counsel for defendant, and if the state failed to prove the conspiracy which it had suggested, it was incumbent upon the defense to direct the attention of the trial court to this fact and renew his motion to strike the objectionable testimony. We conclude, therefore, that the appellant is in no position to urge his objection in this respect.

[1] 2. It is seriously contended by the state that, even though it be admitted for the sake of argument that the question is before the court for determination, nevertheless

the testimony of the witness was not improperly admitted, because it did not prejudice the rights of the appellant and was therefore harmless error, if error at all. We do not deem it advisable to enter into any lengthy discussion of the evidence in this connection, although the state's contention in this respect may be well grounded. There is in this connection, however, the further objection to the testimony in question, as urged by the appellant, to the effect that the introduction of testimony tending to establish such a conspiracy is contrary to law and all rules of evidence. While the brief of appellant is not clear as to the character of this last objection, we cannot agree with him if we understand his contention. Generally speaking, where there is sufficient evidence to justify the conclusion that different persons charged with a crime are all acting with a common purpose and design, the actions and declarations of each from the commencement to the consummation of the offense are evidence against the others. *Kelley et al. v. People*, 55 N. Y. 505, 14 Am. Rep. 342. See, also, *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *Tarbox v. State*, 38 Ohio St. 581.

[8] 3. The next error assigned by appellant is predicated upon the action of the trial court in sustaining an objection of the district attorney to a question propounded to a state's witness, Madison, upon cross-examination, as to whether a certain kind of hat, which the witness had testified was worn by the appellant on the night of the homicide, was a popular hat, or one worn by other persons in Van Houten at the time. The theory of the defense in pursuing this line of cross-examination was based upon an alleged right to test the witness' memory about the hat. The ruling of the court was based upon the ground that the defense could show that other hats of the same kind were worn by other persons, as a matter of defense, and that the question was immaterial as a matter of cross-examination. We cannot see how the question would have been effective upon the theory of testing the recollection of the witness. He might have known that other hats of a similar kind were worn by other persons at this time, and he might not have known that fact. In either event it would have been of little value as a test of his memory in that particular. The objection, however, is without merit because, so far as the witness is concerned, the identification of the defendant did not depend upon the kind of hat worn by the defendant at the time.

[2] 4. The next contention of appellant can be grouped as including his proposition numbered from 3 to 7, inclusive, as treated in his brief, and is directed to the alleged erroneous instructions of the trial court numbered 17, 21, 22, 23, and 24. In this connection the Attorney General suggests that the exceptions are not specific, in that they do

not point out the alleged insufficiency of the instructions upon legal grounds, and we hold with the Attorney General in this contention.

In the case of *State v. Gonzales*, 19 N. M. 467, 144 Pac. 1144, in an opinion by the Chief Justice under a state of facts where the defense excepted to a certain instruction for the reason that the same did not clearly, concisely, and accurately state the law in defining reasonable doubt, and that said instruction was ambiguous, misleading, and contrary to law, this court said:

"The above exception, it will be noted, fails to point out specifically the error in the instruction. It is true it is stated that the instruction does not clearly, concisely, and accurately state the law in defining reasonable doubt, but wherein it fails in this regard is not set forth. It is also stated that the instruction is ambiguous, misleading, and contrary to law, but under the rule above stated, counsel should have pointed out specifically wherein such instruction was misleading, ambiguous, and contrary to law."

In the present case the exception was even more general than in the *Gonzales Case*, and it is only alleged that the instruction is not according to the evidence, nor the law as the same should be given. The exceptions as to the three instructions are therefore insufficient so far as they fail to point out the grounds of legal objection.

5. A different question, however, is presented as to the sufficiency of the exception upon the ground that the instructions were not according to the evidence. Instruction numbered 22 was based solely upon the matter of the testimony introduced by the defendant as to his character as a law-abiding citizen, and the duty of the jury in respect thereto. Instruction numbered 23 had to do solely with the fact that the defendant had concealed himself after the crime was committed, and the duty of the jury with respect to such evidence, if it found that he had so concealed himself. Instruction numbered 24 dealt solely with the duty of the jury in the matter of confessions. It is quite clear from the record that there was evidence of good character of the defendant as a law-abiding citizen; there was also evidence of the fact that the defendant concealed himself; there were also statements of the defendant, testified to by several witnesses, that might be regarded as of an incriminating character, tending to amount to a confession of the crime. While it is true that evidence as to the confession has a tendency to both inculcate and exculpate the defendant, yet it was for the jury to say what, if any, part of these statements were to be believed. This being the situation as to the evidence, it cannot be said that the three instructions referred to were not according to the evidence.

[3] 6. It is contended by appellant that the court should have included in its instruction numbered 23, some reference to the testimony of the defendant, to the effect that his

concealment was induced by fear of action on the part of the friends of the deceased, and by reason of advice given him by his friends, who first brought him the word that he was being charged with the crime, and that the law required that what was said on the subject of the concealment should have been qualified by some language such as, "unless such concealment is otherwise explained." The state introduced evidence in its case in chief which tended to show that after the commission of the crime charged in the indictment, the appellant concealed himself. The appellant met this evidence by admitting the concealment and showing that he had been advised by friends to conceal himself, and therefore the concealment was not prompted by a consciousness of guilt. The court of its own motion, among other things, instructed the jury as follows:

"(23) The court instructs the jury that the fact that the defendant concealed himself, if you find he so concealed himself, may be shown by the state as a circumstance tending to indicate the guilt of the accused, and may be considered by you, along with other circumstances tending to connect the defendant with the commission of the crime charged in the indictment."

Evidence of concealment and explanation thereof being admissible in the case at bar, the legal effect of such evidence became a part of the law of the case. But in this jurisdiction it has been repeatedly held that the failure of the court to instruct on a given proposition of law is waived unless an instruction containing a correct exposition of such law is tendered to the court, or the party excepts to an instruction given by the court, and in doing so specifically makes known the vice therein, so that the trial court is thereby afforded a proper opportunity to correctly instruct the jury. Instruction 23 simply was directed to the legal effect of concealment. Therefore, whether the court erred in failing to instruct the jury on the law of explanation of concealment depends upon whether the exception to instruction 23 specifically pointed out to the court the error in that instruction in failing to include therein this doctrine, or whether the appellant tendered to the court, in apt time, an instruction properly containing the law of the subject. The given instruction is made the subject of attack by appellant on various grounds, principally because it emphasized the evidence of the state on concealment, but made no mention of the evidence of explanation of concealment, but the exception was too general to call attention of the trial court to any alleged vice in the given instruction. Appellant refers but incidentally to the fact that the trial court would have given the requested instruction, tendered by him, concerning the legal effect of evidence explaining concealment. The requested instruction reads as follows:

"(2) You are instructed that if you believe from the evidence that the defendant attempted

to escape, then the court instructs you that the inference that may be drawn from any act of this kind is strong or slight according to the facts surrounding the defendant at the time."

The requested instruction constitutes a comment on the weight of the evidence, and as such is violative of section 2796, Code 1915, and the court, therefore, properly refused to give the requested instruction.

[3] 7. The instruction numbered 17 was to the effect that there was no evidence in the case as to involuntary manslaughter. Appellant argued that, even though there was no exception to this instruction, nevertheless the right to have the instruction reviewed by this court was not waived, because the giving of this instruction was assigned as error in the motion for a new trial, and the declaration of the court in the instruction to the effect that there was no evidence upon which an instruction on involuntary manslaughter could be based clearly disclosed that the attention of the court had been called to the point or question, or else the court had of its own motion duly considered this question, and an exception was therefore unnecessary because the purpose of an exception is to call the attention of the court to the point raised. We do not agree with appellant in this contention, and it is evident that the trial court was actuated by a desire to instruct upon the law as to the several degrees of murder and manslaughter, and did not feel called upon to do an idle thing in giving an instruction upon involuntary manslaughter when not involved in the case, and therefore assigned as his reason for not instructing that there was no evidence in the case calling for such instruction. Our examination of the record discloses that there was no evidence that would support or require an instruction on involuntary manslaughter, but we do not desire to be understood as disposing of this question on its merits, in the absence of any exception to the instruction whatsoever. No instruction upon the subject was tendered to the court by the defendant, and his reference to the matter in the motion for a new trial does not correct the irregularity.

[4] 8. Appellant further contends that his failure to except to instruction numbered 21, as given by the court, was not waived, because his requested instructions numbered 1 and 7, refused by the court, taken together, cover the law on the subject of alibi, and therefore sufficiently directed the attention of the trial court to the objections here urged as to the sufficiency of the instructions given. A careful examination of the requested instructions numbered 1 and 7, and instruction numbered 21, given by the court, indicates that all the matters contained in the refused instructions were substantially incorporated in the instruction given, and therefore no error in the refusal to give the requested in-

structions can properly be assigned. It was held in the case of *Territory v. Torres*, 16 N. M. 615, 121 Pac. 27, that no error can be predicated on the refusal of the trial court to give an instruction where the instruction given by the court on its own motion fully and completely covered everything contained in the refused instruction.

[10] 9. The next point urged by brief of appellant is based upon the refusal of the trial court to give a certain instruction, numbered 5, which was tendered and requested by appellant. The instruction was to the general effect that if it appeared from the evidence that defendant at the time of the commission of the crime was in a drunken condition, not voluntarily produced, such a condition might be taken into consideration as affecting his mental condition at the time of the commission of the crime, and as affecting the degree of homicide of which he might be found guilty. The Attorney General contends that the record does not disclose any evidence to show that the appellant was either involuntarily drunk, or that he was voluntarily intoxicated to the extent of rendering him incapable of harboring any criminal intent. We have carefully read the record, and there is no evidence other than that the defendant and his associates were drinking in the saloon. The sole evidence of an intoxicated condition comes from one of the witnesses for the defense, who testified that the defendant was quite drunk and could not play cards very well, but this was at a time prior to the homicide, and there is no evidence whatsoever as to his condition at the time of the commission of the crime. The instruction was properly refused, in view of the evidence disclosed by the record.

[5] 10. The next objection urged by appellant is to the court's refusal to give instruction numbered 9, requested by the defendant, which was to the effect that a failure to show motive on the part of the accused in the commission of the crime was a circumstance in favor of his innocence. We do not agree that it can be contended that there was no showing of motive, as there was some evidence tending to establish a motive. Where there is evidence of motive, an instruction as to the effect of the absence of motive is improper and should be refused. *Wharton* (3d Ed.) on Homicide, 915.

[11] 11. The next point argued is that the motion to strike out all the evidence of the witness Emerson P. McGuire, relating to the alleged confession of defendant should have been sustained, because, first, the corpus delicti had not been proven, and the defendant had not been shown to have been connected therewith. An examination of the record discloses that the defendant was, at least circumstantially, shown to have been present and participating in the homicide. He was identified by two witnesses as having been seen at the place of homicide at about the

time when it occurred. He was shown to have been in company with the other defendants who were indicted, but not tried, immediately before the homicide, and engaged in controversy with other persons at such time. His attempt at concealment on the day following the homicide is another circumstance tending to show his participation in the crime, and for these reasons we think that this contention is not well taken.

12. The second ground of the objection is that the evidence does not disclose that the defendant understood and could speak English, but it is sufficient to say in this connection that the evidence of the state was to the contrary, and therefore there was a conflict of evidence on this point, for which reason the second ground cannot be favorably considered.

[12] 13. The third ground urged is that the witness McGuire questioned the defendant, and held out some hope or promise for the purpose of getting a statement from the accused, and is based upon the fact that the witness McGuire testified under cross-examination as follows:

"I told Crist when I was talking to him that if he would come and tell me the truth, it might be easier on him than it would be to try and hide it, after I started the conversation."

The witness also further testified in the same connection as follows:

"I said it might make it easier for him if he would confess it, or something that way, or I told him if he would come through and tell it, it might be better for him, after he and I had had the conversation for some time, but not in the beginning."

So far as the record discloses, whatever might have been said to the defendant or accused by way of inducement to make a confession was stated after he had volunteered to explain his connection with the matter. It seems clear that before these statements were made by the witness to the accused, the accused had said, as testified to by the same witness:

"I asked him how many men killed Sem Tomas, and he said, 'Two,' and I asked him if it was not three, and he said, 'No; only two did it.' He said, 'Louis and I did it,' and shortly after that he said, 'No; Louis did it.'"

The last statement made by the accused, while in response to a question addressed to him, which did not assume the guilt of the accused, was apparently responded to voluntarily, and during the trial of the case he did not assert at any time that the answer, which was in reality an attempt at justification of his connection with the transaction, was elicited by reason of any promise or inducement made to him. We do not believe that the record discloses that the statement was made under such circumstances. In the case of *State v. Ascarate*, recently handed down and reported in 153 Pac. 1036, this court said:

"No hard and fast rule" could be laid down "which would serve as a test in every instance [as to the voluntary nature of the confession]."

but each case must be determined upon its own circumstances."

Tested by this rule, we conclude that the statement of the accused which is here objected to was voluntarily made, and that the objection presented by the brief of appellant under the third ground referred to is therefore not well taken.

[8] 14. The next proposition of appellant, which is only briefly referred to without argument, is that the verdict of murder in the second degree is contrary to the evidence, and also contrary to the law applicable to the issues involved, for which reason the court erred in overruling the motion for a new trial. In the case of *State v. Gonzales*, 19 N. M. 467, 144 Pac. 1144, this court said: "Ordinarily the verdict of a jury will not be disturbed in the appellate court when it is supported by any substantial evidence"

—and we conclude, after an examination of the record, that the verdict in this case is supported by substantial evidence; therefore cannot consider that the contention of appellant is meritorious.

[13] 15. Appellant assigns error in overruling the motion in arrest of judgment, contending that the appellant and two others were indicted for the murder of Tomas, and that the record discloses that the case proceeded to trial as to appellant only, and that the judgment and sentence of the court pronounced upon appellant is illegal and void, and cannot be predicated upon the verdict because of its indefiniteness as to what person was found guilty, since the names of the three defendants were placed in the caption of the verdict, and the name of the defendant tried and found guilty was not inserted in the body of the verdict. It is pointed out by the Attorney General that this objection was raised ten days after the verdict has been rendered, and there is nothing to indicate that the attention of the trial court was called to the matter at the time of the rendition of the said verdict.

It would seem to be the better practice to require the defendant to call attention to an objection of this kind more promptly than was done in the case at bar, but we prefer to dispose of the matter without basing it upon the technical grounds stated, which, however, find support in the case of *Gillum v. Commonwealth*, 121 S. W. 445, in which case the Supreme Court of Kentucky said:

"Allowing the jury to be discharged without objection, and without motion to have them correct or extend their verdict, will be deemed a waiver of formal defects in it. And it must then affirmatively appear that the substantial rights of the accused have been prejudiced by the informality."

It has, however, been held that:

"When three parties are indicted and two of them have been arrested and tried, a verdict of guilty has reference only to the two on trial. It was not necessary for the jury, when returning the verdict, to refer to the two defendants on trial as the parties to be affected by the ver-

dict." *State v. Chambers*, 45 La. Ann. 36, 11 South. 944.

To the same effect is *Hronek v. People*, 134 Ill. 139, 24 N. E. 861, 8 L. R. A. 837, 23 Am. St. Rep. 652, and *Hughes v. Comm.* (Ky.) 14 S. W. 682. In the latter case it is true that the verdict found against the "within named defendant," two persons having been jointly indicted, and appellant only, however, being on trial. See, also, *State v. Williamson*, 65 S. C. 242, 43 S. E. 671; *Archbold's Crim. Prac. & Proc.* vol. 1, p. 318.

We, therefore, conclude that where three parties are jointly indicted and one of them has been arrested and tried, a verdict of guilty has reference only to the one on trial, and it is not necessary for the jury, in returning its verdict, to refer to the defendant on trial as the party to be affected by the verdict.

For the reasons stated, we find no error in the record, and the judgment of the trial court is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

On Motion for Rehearing.

HANNA, J. The first four grounds of the motion deal with points raised by the brief of appellant, which, it is claimed, have been overlooked by this court in its decision, but a re-examination of the opinion and the record clearly shows that the contention is not well founded, as the several points in question were considered in the opinion, and we find no reason for departing from our conclusion arrived at.

[14] The fifth and sixth grounds of the motion raise a question which counsel for appellant admit they failed to call to the attention of the court in either the briefs or argument made on his behalf, the ground being that the opinion of this court is in conflict with sections 12 and 18, art. 2, of the Constitution of New Mexico, and of section 1 of the Fourteenth Amendment of the Constitution of the United States, in that due process of law has been denied appellant by permitting the testimony of the witness McGuire to stand and in the admission of the testimony of the state as a whole, and in the giving of the instructions of the court as a whole. These several grounds, which, it is asserted, amount to a denial of due process of law, upon the most favorable view of the matter, can be said to constitute nothing more than erroneous decisions of the trial court in the admission of evidence, or in the instructions as given by the court, and are to be controlled by the rule laid down in 6 R. C. L. p. 445, where it is said:

"The rule is well established that a state cannot be deemed guilty of a violation of its constitutional obligation (nor shall any state deprive any person of life, liberty, or property without due process of law) simply because one

of its courts, while acting within its jurisdiction, has made an erroneous decision."

See, also, *Arrowsmith v. Harmoning et al.*, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243.

For the reasons stated the motion is denied.

ROBERTS, C. J., and PARKER, J., concur.

ROUDEBUSH v. GANNON et al.
(No. 13420.)

(Supreme Court of Washington. Aug. 16, 1916.)

1. VENDOR AND PURCHASER \S 13—CONSIDERATION—NECESSITY OF PRESENT PASSING.

To sustain a contract conveying lands in consideration of support and care during grantor's life, it is not necessary that there be a present passing of a valuable consideration.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. \S 14; Dec. Dig. \S 13.]

2. APPEAL AND ERROR \S 1170(2)—PRESUMPTIONS—AMENDMENT OF PLEADINGS.

In cases tried by the court, where the court on appeal has before it the whole record, it will, under Rem. & Bal. Code, \S 307, requiring errors not affecting substantial rights of the parties to be disregarded, deem pleadings to be amended to conform to the proofs.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4066, 4541; Dec. Dig. \S 1170(2).]

3. CONTRACTS \S 822(3) — PERFORMANCE OF EXECUTORY CONTRACT—EVIDENCE—REPUDIATION.

Evidence held to show no substantial compliance with, but repudiation of, contract to support plaintiff during his life in consideration of conveyance of land, so that, the contract being executory, plaintiff's bringing suit to set aside the conveyance was repudiation by him, and he was entitled to decree.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 1534; Dec. Dig. \S 322(3).]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by George Tobin against Mildred Gannon and husband. Pending trial, plaintiff died, and Rex S. Roubesh, being appointed special administrator of his estate, was substituted in his stead. Judgment against defendants, and they appeal. Affirmed.

S. G. Murray and Winfield R. Smith, both of Seattle, for appellants. Rex S. Roubesh, of Tacoma, for respondent.

CHADWICK, J. George Tobin and his wife, Lorency Tobin, had lived for some time prior to July, 1914, at the soldiers' home at Orting. In June, 1914, Mrs. Tobin went to Spokane, where the family had formerly resided, for her health. She died on the 12th day of July. Mrs. Gannon, one of the appellants, a niece who had been raised by the Tobins, was summoned from Missoula, Mont., and Mrs. May Lambley, another niece, was summoned from Orting. The two women met at the Arlington Hotel in Spokane on

the morning of the 15th. Tobin had, for many years, been addicted to the inordinate use of intoxicating liquors, and had become so intoxicated that he had been put in the city jail, where he spent the night of the 14th. Shortly after the meeting of the two women, Tobin was brought by an old friend of the family to their room, where he was kept under surveillance during the day or until the funeral of Mrs. Tobin, which was held in the afternoon. When brought to the room, Mrs. Gannon greeted Tobin in an affectionate way, and immediately suggested, as she had never known a mother other than her aunt or a father other than him, that the body of her aunt be buried at Missoula, and that he make his home with her. Mrs. Gannon says she made a contract with Tobin at that time to give him a home in consideration of the money which had been accumulated by the Tobins in Mrs. Tobin's lifetime. Her version of the contract is as follows:

"The contract was that he should have his home with me when he so desired, and he was to remain sober and conduct himself properly, and in consideration of my giving him a home and furnishing him with whatever clothes and food he might need, this money was to be turned over to me and given to me. He said that his pension money would give him all the money he needed, and that probably he would want to stay at the soldiers' home or with his people back East as much or more than he did with me. * * * He wanted to live with us and make his home there, whenever it suited him, as I was the chosen one of all his relations. He said that he wanted me to have all of this \$3,500, because I was nearer and dearer to him than any one else. He also said that if I would let him live with me when he so desired and make his home there, he would not drink and become intoxicated, and that he would conduct himself as a gentleman and be a father to me. I agreed to this."

The testimony of Mrs. Lambley, the other niece, is, in substance:

"Mrs. Gannon greeted Mr. Tobin in an affectionate manner, kissed him, and took his hand and asked him to have the body shipped to Missoula, Mont., for burial. She talked to him in a persuasive manner, and told him he was the only father she knew, and that auntie was the only mother she had known, and said that he could have a home with them for the rest of his days, and she would take his dead wife's place. He said something about having the remains shipped back East for burial, and she said that that would be too much expense, and he immediately consented to have her remains buried in Missoula, Mont. She got his consent right there, and then he said to her, 'Everything I have is yours.' He was easily persuaded. He was shaky, and suffering from the effects of liquor."

Tobin and Mrs. Gannon left Spokane with the body of Mrs. Tobin on the evening of the 15th; Mr. Tobin, at the time, having the intention of making his home with Mrs. Gannon. Mrs. Gannon says: "He came of his own volition and at my request." On the 17th, Mrs. Gannon and Tobin went to a lawyer's office where a writing, of which the

following is a copy, was signed and acknowledged by Tobin:

"Know all men by these presents, that I, George Tobin, late of the state of Washington, but now of the state of Montana, and the heir and surviving husband of Lorency Tobin, late of Orting, Washington, now deceased, in consideration of the sum of one dollar and of other like and valuable considerations, do hereby and by these presents sell, assign, transfer and set over and convey unto Mildred Gannon of the city and county of Missoula and state of Montana, all of my right, title and interest of, in and to the estate of my said late wife, Lorency Tobin, whether as heir, by succession, will or otherwise, and I hereby duly appoint, nominate and constitute the said Mildred Gannon as my true and lawful attorney, irrevocable, for me and in my name, place and stead to do any and all things that may or that shall necessarily be done in and about the administration of the said estate, and the obtaining of the possession of the same and all assets thereof.

"This conveyance and transfer is absolute and irrevocable, and I hereby waive any and all right to take out letters of administration or testamentary that I may have now or hereafter.

"Dated at Missoula, Montana, this 18th day of July, 1914. George Tobin. [Seal]."

On the 20th, Tobin left Missoula and went to Orting. He was drunk when he left and drunk when he arrived at Orting. It would seem that he remained at Orting but a few days. In describing his behavior at Missoula, Mrs. Gannon says:

"He was drunk and intoxicated virtually all the time from July 27th to September 3d, 1914, except possibly the times he was confined to the city jail."

It is said that he behaved himself when sober, but when drunk he used profane and vulgar language and disturbed the peace of the neighborhood and the town; that he would "mess" up the house in "unspeakable ways," and "would become and remain in such filthy personal condition as to be nauseating and offensive to any person."

Tobin left Missoula on September 9th, and came to Tacoma where his wife's estate was being administered by R. J. McMillan, an attorney at law. Shortly thereafter he went East on a visit to relatives. After his return to Tacoma, he instituted this action to set aside the assignment. He died on September 8, 1915, and Mr. Roudebush was appointed special administrator of his estate. The complaint urges fraud in the procurement of the assignment, in that Mrs. Gannon caused Tobin to become intoxicated, and, while so intoxicated, induced him to execute the assignment, and that it was procured without his consent, and "without any consideration whatsoever." These allegations are denied, and to the merit of the case, appellants plead:

"That notwithstanding said continued condition on the part of the complainant, the defendants herein treated him with kindness, consideration and affection and gave to him the greatest care and attention; that the defendants herein have at all times been, and still are, ready, willing, and anxious that he should come and remain in the home of these defendants, have their care, protection, nurture, and attention, so that they might house, clothe, feed, and

care for him as a member of their own family, and that they have, at all times since the execution and delivery of said instrument or assignment, been ready and willing, and are still ready and willing, to receive and take care of the said complainant in accordance with the terms of said contract, and to fully, completely, and adequately perform the same upon their part, and to discharge all of the obligations due from them under said contract and agreement, and that by reason of the premises the said assignment hereinbefore described and mentioned is a valid and subsisting instrument, under which these defendants ought, and by right should, be permitted to retain whatever benefits have arisen if any, and to perform and discharge the obligations which were imposed by the said contract hereinbefore set forth and described.

* * * That the complainant herein needs and requires the care and attention of one who is interested in his remaining life, welfare, and happiness, and that the same can be bestowed by no other person and in no other way save and except by the defendant herein, through the contract hereinbefore set forth and alleged."

[1] The court refused to find fraud in the procurement of the assignment, but found that there was no present consideration for the contract, and that it had been repudiated by Mrs. Gannon. It is not to be asserted that a present passing of a valuable consideration is necessary to sustain a contract such as is set up by appellants. The contract is most frequently executory in character, but where it depends upon oral testimony as to its terms, the testimony should clearly preponderate, or be clear, cogent, and convincing.

[2, 3] The terms of the contract, as testified to by appellants, do not comport with the theory advanced by their answer. Under the pleadings, as will be seen by that which we have quoted, they profess a willingness to keep and care for Tobin, and an anxious solicitude for his welfare. Tobin was about 70 years of age. They knew him. They knew his habits and his needs. They knew, or should have known, what they were getting into. They had taken him for better or for worse. At the trial Mrs. Gannon was confronted by her own declarations and admissions contained in letters addressed to Mrs. Lambley and to Mr. McMillan. It will be remembered that Mrs. Gannon gave him money to leave on or about the 20th of July. (It was Tobin's money; the residue of \$200 after the payment of funeral expenses). Her letter of August 13, 1914, is as follows:

"Dear Cousin: As this is first opportunity I have had to drop you few lines for some time. I have certainly had my hands full with that old Tobin. He is here yet. I was surprised when he came back the last time. How in world did he get here? Did you buy his ticket? He looked as if he beat his way, filthy dirty drunk. He was drunk when he left, drunk when he came back, drunk for week after he arrived here. But he is pretty well sobered up now. Mr. Gannon had to take him in hand and tell where he stood. Mr. G. would not have him arrested so soon after funeral. But look out next time. Dan won't stand it any more; he was thoroughly disgusted as well as myself. You and Mrs. Ayer both said he had money when he left there. He didn't have any when he arrived here, not one dollar. Neither did he have any clothes. We had to buy

them for him when he left here for Orting. I gave him \$46.15, all the money left over from funeral. He raised cane, said he wanted it to live on and didn't know when he would be back—maybe never. And I hoped never. He was sober when I handed him the money and promised he would remain so, but he did not. May, has there been a administrator appointed yet? He says a McMillan of Tacoma is temporary administrator. I cannot find out anything. He had me write about his household goods. But I have quit. He don't know what he wants. He has made an ass of himself and trying to of us. I have been sick since I came home. I cannot stand him and his actions. Something disgraceful. Write soon. I will not neglect next time. Love to all and tell you more next time. From Mildred L. Gannon, 608 West Pine St., Missoula, Mont."

On August 14th, Mrs. Gannon wrote again:

"Dear Cousin: I posted your letter last night. But since then I have fired old Tobin out of my house. I expect you will see him in a few days. If you knew what talk he made about you to my husband and myself about you, your husband and children you would not harbor him either. I would not stand his insults for no money on earth. His, Tobin's talk is something awful. Love to all, Write soon. Mildred."

And on September 26th:

"Dear Cousin: I don't know whether I answered your letter or not. I have been about crazy with Tobin, and then my sister has been here. Just left Wend. Did she stop to see you?"

"Did Tobin go to see you before he left for East. Did he send his trunk to Orting. He left here Sept. 9th, and I understand left shortly for East. Don't know how long he will remain. But let us pray he will stay. He nearly drove us crazy and had me in bed half of time. No one wanted him around. I never want to see him again. He acted something awful. Turned every one against him. He has talked terrible about us, you and myself. My husband declares he can never step his foot in his house again. He had good home with us but he could not behave. I hope there will be enough left for a head stone for Aunt Lorety out of estate when settled."

"Well, May, write me. I will try and do better after this. Love to you all, from Mildred L. Gannon, 12 West Pine St., Missoula, Mont."

In answer to a request for her consent to advancing the expenses for sending Tobin back to Missoula, Mrs. Gannon wrote to Mr. McMillan on December 29, 1914:

"I cannot do anything for Mr. Tobin. It is useless. Let him go to Soldiers' Home. Heard he was there. He cannot get into home in Montana under one year according to law. It is useless to let him come. In one week he will want to return to Tacoma."

At the trial the appellants testified that the contract was that they were to furnish a home for Tobin as long as he behaved himself and kept sober.

While counsel insists that the judgment of the trial court cannot be sustained because respondent failed in his proof of fraud and undue influence, and that the issue of no consideration has no place in the case, we nevertheless feel that a proper judgment was rendered. In cases tried by the court and having the whole record before us, we follow, wherever it is possible to do so, the direction of the statute and deem the plead-

ings amended to conform to the proofs. Rem. & Bal. Code, § 307. This rule is more decisive in this case, for, upon technical consideration, appellants' present plea that their obligation was dependent upon the promise of Tobin to behave himself and keep sober would have no place in the case either.

Upon the testimony, therefore, we conclude that no present consideration passed for the contract, and that it was, hence, executory, that there was no substantial compliance on the part of appellants, measured either in time or performance and that it was repudiated by appellants and subject to repudiation on the part of Tobin, an act evidenced by the bringing of this suit. It would be a harsh doctrine, indeed, that would bind a man of 70 years to a promise to break the habit of a lifetime in consideration of a home and habitation that he had never known in place of a home and living at the soldiers' home where he had been for years and, as we must presume, remained contentedly. Granting that he did so promise, appellants knew his infirmity of habit, and should have known that in the aged, those of fixed habits, the weakness of the flesh may be—usually—most powerful to overcome the strength of the spirit.

Affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

MOWBRAY PEARSON CO. v. PERSHALL et al. (No. 13496.)

(Supreme Court of Washington. Aug. 16, 1916.)

1. EXECUTION ~~§~~242—VACATION OF EXECUTION SALE—HOMESTEAD EXEMPTION.

After default judgment for plaintiff and a certificate of a sheriff's sale to it, and the sheriff's satisfaction of judgment, but before confirmation of sale, a homestead exemption was set off to defendant on his petition in bankruptcy, the question whether the judgment was invalid may be determined on motion to confirm sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 669-672; Dec. Dig. ~~§~~242.]

2. EXECUTION ~~§~~253(1) — PROCEEDINGS — AMENDMENT—DISCRETION OF COURT.

In such case, it was not beyond a wise discretion to permit defendant to amend his motion to vacate the sale by showing that at the time suit was brought and at all times since, defendant had been insolvent, and that on its petition in bankruptcy, the realty had been listed and set off to him as exempt.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 698, 717-720; Dec. Dig. ~~§~~253(1).]

3. BANKRUPTCY ~~§~~200(4) — AVOIDANCE OF LIEN—INSOLVENCY OF DEBTOR.

Under Bankruptcy Act July 1, 1898, c. 541, § 671, 30 Stat. 564 (U. S. Comp. St. 1913, § 9651), providing that when one is adjudged insolvent all liens acquired within four months before his petition shall be void, only those liens are excepted which are established against a

debtor not insolvent at their date; but where a plaintiff sued, with an attachment of defendant's realty, obtained judgment by default and a certificate of a sheriff's sale to itself, defendant, who after the sheriff's satisfaction of judgment and before a confirmation of the sale, showed that from the time of the suit he had been insolvent, and that on his petition in bankruptcy the realty had been set off to him as exempt, was entitled to an order vacating the sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 806-816; Dec. Dig. ¶200(4).]

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Suit by the Mowbray Pearson Company against George W. Pershall and another. Judgment by default for plaintiff, certificate of sheriff's sale issued to plaintiff, and from an order vacating the sale, plaintiff appeals. Affirmed.

Robinson & McHugh, of Spokane, for appellant. Zent, Powell & Redfield, of Spokane, for respondents.

BAUSMAN, J. Appellant, suing the Pershalls in May with attachment of real estate, got judgment by default in June and a certificate of sheriff's sale to itself as purchaser in July. Just before this last the husband Pershall filed a declaration of homestead exemption, not bringing which to the appellant's attention, he moved with that as a basis, after the sheriff's satisfaction of judgment, to vacate the sale. Later he amended his motion, while confirmation of sale was still undetermined, showing that during the whole of May, and at all times since, he had been insolvent, and that in August he had filed a petition in bankruptcy in the federal court where, this property being listed, it had been set off to him as exempt. These allegations were not controverted.

[1] To consider the homestead exemption against confirmation of sale was proper. *Stark Bros. v. Royce*, 44 Wash. 287, 294, 87 Pac. 340, following *Waldron v. Kineth*, 41 Wash. 459, 84 Pac. 16, 111 Am. St. Rep. 1022.

[2] Nor was it beyond a wise discretion to permit the amendment.

[3] Under section 67f of the Bankruptcy Act, if a man be adjudged insolvent, all liens shall be void that are acquired within four months preceding his petition. Those liens only are excepted which, unlike this, are established against a debtor not insolvent at their date. *Stone-Ordean-Wells Co. v. Mark*, 227 Fed. 975, 142 C. O. A. 438.

One other exception is possible under *Clarke v. Larremore*, 188 U. S. 486, 21 Sup. Ct. 927, 45 L. Ed. 711. In that case the creditor, on a judgment recovered within the four months, had caused chattels to be sold, but had not yet received the proceeds from the sheriff. Holding that these stood for the lien, the court would not allow an exception to the statute merely because the lien had been

merged into sale, saying that the "nullity created during the four-month period related back to the time of the entry of the judgment and affected that and all subsequent proceedings." The exception that the court did consider possible, but would not announce, might have arisen, it was said, if the writ had been fully executed by the sheriff's delivering the proceeds to the execution creditor. Can appellant here bring itself within such an exception? To begin with, it is itself the purchaser, and perhaps not within the suggested exception for that reason, but, passing that, notwithstanding it has satisfied the judgment, the sale has not been confirmed, whereas in the *Larremore* Case the sale of chattels would have been complete upon mere delivery of the proceeds by the sheriff. Here the sale was ineffectual without confirmation, the satisfaction of judgment not binding on the purchasing plaintiff if that should be refused. The control of the process, in short, had not passed beyond the court. Moreover, there was the sheriff's deed yet to be given after the period of redemption. What the sheriff had thus far given the purchasing plaintiff was but a certificate, so little equal to a deed that, if the debtor should redeem, he would not need a return conveyance from the sheriff, but the mere cancellation of this, the title never having passed out of him, and the whole thing to be readjusted in the files of the same case. Until confirmation at least, this property not being the purchaser's, it was just as much subject to the bankruptcy act as the proceeds in the *Larremore* Case.

We need not discuss the effect upon this creditor of the bankruptcy court's order of exemption, for appellant on its own showing, whether the property be exempt or nonexempt, has no interest in it, nothing enforceable against the debtor.

The order vacating the sale is affirmed.

MORRIS, C. J., and HOLCOMB, MAIN, and PARKER, JJ., concur.

CITY OF ABERDEEN v. EQUITABLE SURETY CO. et al. (No. 13467.)

(Supreme Court of Washington. Aug. 14, 1916.)

1. ASSIGNMENTS ¶84 — PERSONS AGAINST WHOM ENFORCEABLE.

A surety company, which completed a defaulting contractor's work, rather than the contractor's assignee, is entitled to sums due only upon the work's completion.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 148; Dec. Dig. ¶84.]

2. ASSIGNMENTS ¶84—EFFECT—PRIORITIES.

A contractor's assignee is entitled to sums due under a completed contract in preference to a surety company which completed a second contract between the same parties upon its abandonment by the contractor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 148; Dec. Dig. ¶84.]

3. MUNICIPAL CORPORATIONS—352—PUBLIC IMPROVEMENTS—CONTRACTS—CONSTRUCTION.

Where a municipality requested separate bids for clearing and for filling certain low lands, but the same concern secured both jobs, which were covered by a single written instrument, *held* there was only one contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 883; Dec. Dig. 352.]

Department 2. Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Action to determine conflicting claims to money paid into court by the City of Aberdeen against the Equitable Surety Company and Chehalis County Bank. Judgment for defendant Chehalis County Bank and defendant Equitable Surety Company appeals. Reversed and remanded, with instructions.

Bridges & Bruener, of Aberdeen, for appellant. Stewart & Tucker and A. Emerson Cross, all of Aberdeen, for respondents.

MORRIS, C. J. Prior to October, 1912, there was in the city of Aberdeen a large district of low, wet, boggy land which the city desired to raise by suitable fill. To this end an ordinance was passed, contemplating dividing the work into four parts: (1) Clearing and removing unsuitable material; (2) filling and diking; (3) raising of sidewalks; and (4) raising catch-basins and inlets. Plans and specifications were drawn, providing that separate contracts would be let for each of the subdivisions of the work, and that separate bids must be made. The Spokane Paving & Construction Company submitted two bids; one for the clearing and removal of unsuitable material, as provided for in the first subdivision, and the second for filling and diking. These bids were accepted by the city, and the work bid upon awarded to the construction company. A contract was then drawn up between the city and the construction company, covering the two bids and requiring the construction company to give a bond for the faithful performance of the work and for the payment of labor and material. It was provided in the contract that monthly payments should be made upon monthly estimates, and that a sum not exceeding 25 per cent. should be retained by the city until the final completion and acceptance of the work. The construction company procured the appellant, Equitable Surety Company, to furnish the required bond, and commenced the work called for under its contract. The work called for under the first bid was substantially completed, and the construction company thereupon undertook the completion of the second of its undertakings, namely, the necessary filling and diking, but was compelled to abandon this portion of the work without having made any of the fill, except a very small part, having, however, completed a large portion of the

diking. After the construction company had abandoned this work the surety company, upon demand of the city, completed the work at an actual loss to it of approximately \$30,000. After the abandonment of the work by the construction company, a number of claims for labor and material were filed, as provided by law, which the surety company was compelled to pay, amounting to approximately \$3,000. Of this amount \$316.13 was on account of labor and materials going into that portion of the work calling for clearing and the removal of unsuitable materials, and the surety company was required to do additional work under this portion of the contract of the value of \$76.50, making an aggregate sum of \$392.63 paid by the surety company on that portion of the work calling for clearing and removal of unsuitable materials, the balance of the amount paid by the surety company representing labor and material performed and furnished in the filling and diking of the district. From month to month as the work progressed the city made payments upon monthly estimates, retaining the percentage provided for in the contract. When the work was abandoned by the construction company the city had in its hands bonds and cash which had been earned by the construction company in the clearing and removal of unsuitable material in the sum of \$1,343.28. While performing its contract the construction company borrowed various sums from the respondent bank, securing the payment thereof by assigning to the bank the moneys earned under the contract. Under this assignment the bonds earned by the construction were surrendered to the bank from time to time, but at the time of the commencement of this action there was still due the bank on this account a sum in excess of \$1,400. After the construction company had abandoned the work, the surety company demanded of the city the sum of \$1,343.28 remaining in its possession, which demand was refused. The respondent bank made a like demand, which was also refused. Thereafter the city commenced this action, bringing the \$1,343.28 into court and asking a determination as to who was entitled to this sum as between the bank and the surety company. The lower court found that the bank was entitled to all of the money except \$392.63, which the surety company had paid on account of claims filed with the city for labor and material entering into the clearing and removal of unsuitable material, and entered judgment accordingly.

[1-3] The judgment is based upon a conclusion of the lower court that the contract between the construction company and the city was in fact and law two contracts; one for the work of clearing and removal of unsuitable material, and the other for the filling and diking. This conclusion of law presents the only question raised on this appeal, for

If it should be held that the contract, while one in form, was in fact two, then the decision of the lower court as to the awarding of the money to the bank is correct. If, however, the contract is single then the appellant is entitled to the money. We here set forth the contract:

"This indenture made and entered into this the 18th day of October, 1912, by and between the Spokane Paving & Construction Company, a corporation, duly organized and existing under and by virtue of the laws of the state of Washington, hereinafter called the contractor, as party of the first part, and the city of Aberdeen, a municipal corporation of the second class, duly organized and existing under and by virtue of the laws of the state of Washington, hereinafter called the city, as party of the second part, witnesseth: That the said contractor for and in consideration of the stipulations and agreements herein contained agrees with the said city as follows:

"1. That the said contractor shall and will, at its own proper cost and expense, provide all the materials and perform all the work and labor necessary for the clearing of all the lands, including streets, alleys, public places and private property within the area known and described as 'Filling District No. 2,' and for filling with earth, sand, gravel or other suitable material and for grading said area, including streets, alleys, public places and private property, to the grades of such streets, and to the grades provided in the plans, specifications and details of the city engineer of the city of Aberdeen and Ordinance No. 1239 of the city of Aberdeen, and for the construction of all necessary bulkheads, dikes, gates and drains for the purpose of making such fill, not, however, to include the placing of drain pipe or the construction or building up of manholes or flush tanks, or any of the work known as draining, for which a contract has been let to other parties, said work to be done all in accordance with the plans, specifications and details prepared by the city engineer of said city, and which are hereby referred to and attached hereto, and made a part of this contract as fully and effectually as though written out herein, all under the provisions of Ordinance No. 1239 of the city of Aberdeen creating local improvement district known as 'Filling District No. 2,' the boundaries of the district so to be improved being described and designated fully in said Ordinance No. 1239 and the official map of said filling district No. 2, which are hereby referred to and made a part of this contract.

"2. It is understood and agreed that the said contractor shall commence work upon said clearing and the removing of sawdust in said district within thirty (30) days after written notice shall have been given by the said city engineer and said clearing work shall be carried on with a sufficient force of men so as to secure its completion within the period of six (6) months from and after the commencement of such work, and in case the said contractor shall fail to complete the work of such clearing within the time specified, there shall be deducted from the amount otherwise due on said clearing contract the sum of twenty-five dollars (\$25.00) per day for each and every day thereafter that such clearing work shall remain uncompleted as liquidated damages for failure to complete the said work within the time specified.

"3. It is understood and agreed that the said contractor shall commence work of filling and grading within the period of two (2) months after written notice so to do shall have been given him by the said city engineer, and said filling and grading shall be carried on regularly and with a sufficient force of men so that the same will be completed within the period of twelve (12) months from and after the service of said

notice to commence work; and in case said contractor shall fail to complete said filling and grading within the time specified, there shall be deducted from the amount otherwise due it the sum of fifty (\$50.00) dollars per day for each and every day after said time that said work shall remain uncompleted as liquidated damages for failure to complete the work within the time specified.

"4. In consideration of the full performance of said work by the said contractor, said city agrees to pay the said contractor at the following rates as measured and estimated by the city engineer of said city, to wit:

Clearing, per acre.....	\$50.00
Removing sawdust, hauling out of filling district, per cu. yd.....	.40
Filling, per cu. yd.....	.12
Dikes, per lin. ft.....	.45

Such payment to be made upon monthly estimates as the work progresses, provided, however, no payment, shall be made until after the equalization of the roll for said local improvement district and provided further, that a reasonable sum, not exceeding twenty-five (25%) per cent. shall be retained by the city upon such estimate until the final completion and acceptance of said work.

"5. Said city hereby agrees to pay said contractor the amount of this contract either in local improvement fund bonds issued by the city against said filling district No. 2, created by Ordinance No. 1239 of the ordinances of the city of Aberdeen, and said contractor agrees to accept such bonds at par, or in money realized from the negotiation and sale of bonds issued against said filling district No. 2, at the option of the said city, and the said city reserves the right at its election, either to pay the contractor in local improvement fund bonds issued against said filling district No. 2, or to negotiate and sell said bonds of said filling district No. 2, to pay the said contractor out of the proceeds thereof; that any attempt on the part of the city to sell said bonds, or any of them, shall not be construed as an election on its part to sell such bonds unless the sale of such bonds shall be actually made by the city and the proceeds received from such sale by the said city, that said bonds so issued shall be payable on or before ten (10) years from date of issuance and bear interest at the rate of eight (8) per cent. per annum until paid, such bonds to be issued and redeemed in the manner provided by the ordinances of the city of Aberdeen and the laws of the state of Washington applicable thereto.

"6. That the contractor shall have no claim against the city for any part or portion of the work, labor or materials embraced within this contract, but shall rely solely, for compensation for the work, labor and materials embraced in this contract, upon such of such bonds as may be issued to said contractor to the amount of this contract by said city of Aberdeen against said filling district No. 2, the proceeds of such bonds as may be sold by the said city to pay said contractor the amount of this contract, the assessment upon the property embraced in said filling district No. 2 and upon the fund created by such assessment upon such property within such district, and upon any reassessment of such property embraced within such district and the fund created thereby.

"7. Said contractor is required to furnish a bond to the city of Aberdeen in the penal sum of \$60,000.00 conditioned for the faithful performance of said contract and for the protection of all laborers, mechanics, subcontractors and materialmen and all persons furnishing the said contractor or any of its subcontractors, labor, provisions or supplies for the carrying on of said work, and all persons who would otherwise be entitled to liens upon said work, the amount of said bond being approximately seventy-five (75) per cent. of the contract price of said work.

"8. Said contractor further agrees to save, protect and keep said city free and harmless from all loss, damage or liability caused by any neglect or want of proper care or act or omission done or suffered to be done by the said contractor, its agents, servants, employees or subcontractors in the performance of said contract.

"9. Said contractor further agrees to observe the laws of the state of Washington with relation to the number of hours per day which men may be employed upon said work, and this contract shall be subject to cancellation and forfeiture by the officers or agents of the city authorized to contract for or supervise the execution of such work, in case men are employed upon said work for more than eight (8) hours in any calendar day or such work is not performed in accordance with the policy of the state of Washington relating to such work.

"10. Said contractor expressly agrees to pay into the city treasury the amount required to be paid to the state of Washington by chapter 74 of the Session Laws of 1911 (Workmen's Compensation Act) before payment is made to it by the city, and for the purpose of estimating such amounts, the contractor shall file with the city clerk, on or before the 1st day of each month, a certified statement of the total payroll of the preceding month, classified as required by law, and shall pay into the city treasury the amounts shown to be due to the state of Washington on account of said act. It is agreed that the city in case of the failure of the contractor to prepare and file such estimate, may require its engineer to prepare the same, and said estimate, when prepared and filed, shall be binding upon the contractor, and the said contractor hereby expressly authorizes the city of Aberdeen to pay to the state of Washington the amounts required to be paid, in accordance with said act, and the said contractor expressly releases the city of Aberdeen from all liability on account of making any and all payments to the state of Washington, and in making final payment to the contractor upon this contract, all amounts so paid by the city of Aberdeen shall be charged to the contractor and deducted from the amount due it, and final payment under this contract shall not preclude the city from thereafter making claim against the contractor for any additional payment or compensation which the said city shall be required to pay to the state of Washington in pursuance of said act, the said contractor expressly agreeing to pay to and reimburse the city of Aberdeen for any payments so made, and the bond given in pursuance of this contract, shall remain in effect for the protection of the city of Aberdeen.

"In witness whereof, the said parties have caused these presents to be executed by their respective officers duly authorized and their respective corporate seals to be affixed by their proper officers. Spokane Paving and Construction Company, a Corporation, by _____, City of Aberdeen, a Municipal Corporation, by _____, Attest: _____, Secretary. Attest: _____, City Clerk."

This contract, it seems to us, speaks for itself, and little need be said in support of our conclusion that the contract is single, not only in form, but is in effect one contract. The clear and beneficial purpose to be served in calling for separate bids was increased competition and lower bids. Bids for one or more features of the work having been submitted and accepted, the advisability of the separate contract was at an end, except in case of separate awards. These observations do not establish the nature of the contract,

but they afford ordinary and ample reason for the city pursuing the course manifest to us in calling for and accepting separate bids and then entering into a single contract which included the entire award made under the separate bids.

The judgment is reversed, and the cause remanded to the lower court, with instructions to grant appellant the relief prayed for.

HOLCOMB, MAIN, BAUSMAN, and PARKER, JJ., concur.

CODD v. VON DER AHE et ux.
(No. 13346 1/2.)

(Supreme Court of Washington. Aug. 16, 1916.)

1. APPEAL AND ERROR \S 123—DECISIONS APPEALABLE—FORMAL WRITTEN JUDGMENT.

The Supreme Court cannot entertain an appeal as from a final judgment from an oral order which was never expressed in a formal written judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 875-881; Dec. Dig. \S 123.]

2. MORTGAGES \S 559(5)—"FINAL JUDGMENT"—STATUTE.

Under Rem. & Bal. Code, \S 1119, providing that where there is an express agreement for the payment of money contained in a mortgage, etc., the court in a decree of foreclosure or order of sale shall direct that the balance remaining unsatisfied after the sale shall be satisfied from any property of the mortgage debtor, section 1120 declaring that a deficiency judgment shall be similar to other judgments for the recovery of money, section 1121 providing that a foreclosure decree may be enforced by execution, and section 1123 providing that in actions for foreclosure where there is a decree of sale and a deficiency judgment further levy and sales upon other property of the judgment debtor may be made under the same execution, a money judgment contained in a foreclosure decree is a final judgment, and there is no necessity for the entry of a decree of foreclosure and for the separate entry of a deficiency judgment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1604; Dec. Dig. \S 559(5).]

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

3. APPEAL AND ERROR \S 564(2) — FINAL JUDGMENT—STATEMENT OF FACTS—TIME FOR FILING.

In such case the time for serving and filing a statement of facts on appeal runs from the entry of the money judgment contained in the foreclosure decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2502, 2555; Dec. Dig. \S 564(2).]

4. APPEAL AND ERROR \S 564(5)—STATEMENT OF FACTS—TIME FOR FILING.

Under Laws 1915, p. 303, \S 8, providing that upon appellant's failure to serve a statement of facts, the Supreme Court, if such failure is found to be excusable, shall allow the appellant a reasonable time in which to supply such statement of facts, neither expressly or by implication repealing the former law, Rem. & Bal. Code, \S 393, requiring that a proposed statement of facts be filed within 30 days after the time for taking the appeal begins to run un-

less for cause shown the time is extended, it was no excuse that appellant made a mistake of law in assuming that an oral decision in a foreclosure proceeding never expressed in a formal written order or a judgment, was a final and appealable judgment, and the statement filed would be stricken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2504-2506, 2568, 2559; Dec. Dig. ¶ 561(5).]

5. BILLS AND NOTES ¶ 396—LIABILITY ON INDORSER—PRESENTMENT TO MAKER.

In the absence of any notice of nonpayment given to either of the indorsers of a note they could not be held as indorsers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1022-1028; Dec. Dig. ¶ 396.]

6. APPEAL AND ERROR ¶ 616(2)—RECORD—AFFIDAVITS—IDENTIFICATION.

Affidavits on motion to open the case for the reception of additional evidence, not identified by the motion itself or by the order overruling the motion, could not be considered on appeal upon the claim that a new trial must be had because of the trial court's refusal to grant the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2714, 2715; Dec. Dig. ¶ 616(2).]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Nicholas Codd against George Von Der Ahe and wife, and others. Judgment for foreclosure and order of sale, denying any deficiency judgment against defendants Von Der Ahe, and plaintiff appeals. Affirmed.

P. F. Quinn, of Spokane, for appellant. Del Cary Smith, of Spokane, for respondents.

ELLIS, J. Action on a promissory note and to foreclose a mortgage upon certain real estate securing the same. In the complaint it was alleged that the note and mortgage were executed by defendants Jacob Gundlach and Ellen Gundlach, his wife, on March 18, 1910, to defendants George Von Der Ahe and Bertha Von Der Ahe, who thereafter assigned the mortgage and indorsed the note to plaintiff who now holds them; that on March 18, 1915, plaintiff presented the note to Gundlach and wife and demanded payment, which was refused, and that on the same day he notified defendants Von Der Ahe of such presentment, demand, and nonpayment. The prayer was for personal judgment against all of the defendants for the amount due on the note and for attorney's fees and costs, for the foreclosure of the mortgage, for a sale of the mortgaged premises, for an application of the proceeds upon the judgment, and for a deficiency judgment against each of the defendants.

The Gundlachs defaulted. Defendants Von Der Ahe answered, denying, among other things, any knowledge or notice of the alleged presentment, demand, and nonpayment, and praying for their dismissal.

The cause was tried on September 10,

1915. It seems to be admitted that thereafter the trial judge orally announced his decision, denying personal judgment against defendants Von Der Ahe on the ground of insufficient notice of nonpayment to hold them as indorsers. At any rate, on October 4, 1915, before formal findings were signed, plaintiff moved on affidavits to open the case for the admission of further testimony to show such notice. On October 13, 1915, this motion was denied. On October 27, 1915, plaintiff moved for a new trial, which was denied on October 30, 1915. On November 9, 1915, the court made findings that the note was not presented to Ellen Gundlach, one of the makers, and that no demand was made upon her, and, further, that no notice of nonpayment was given to either of defendants Von Der Ahe on March 18, 1915, or at any time thereafter. On these findings and appropriate conclusions of law the court, on November 9, 1915, entered the usual decree of foreclosure and order of sale, but expressly adjudged and decreed that plaintiff is not entitled to any deficiency judgment against defendants Von Der Ahe, or either of them in any sum whatever.

At plaintiff's instance and pursuant to the decree the sheriff sold the mortgaged property on December 11, 1915, and the property was purchased by plaintiff for \$1,000, which amount was credited on the judgment, leaving a balance of \$1,592.85. On December 14, 1915, plaintiff moved for confirmation of the sale and for judgment for the deficiency against all of the defendants. There is nothing in the record to show what disposition was made of this motion, but it is admitted that an order of confirmation was entered, and that the motion was denied orally and without any formal order so far as the request for deficiency judgment against defendants Von Der Ahe was concerned.

On January 8, 1916, plaintiff served and filed his proposed statement of facts. It was certified on January 18, 1916.

On January 27, 1916, plaintiff filed his notice of appeal from that part of the decree—"dismissing the action as against George Von Der Ahe and Bertha Von Der Ahe, his wife, and granting costs against the plaintiff and from the judgment entered therein on the 11th day of December, 1915, and also from the oral order denying a deficiency judgment against George Von Der Ahe and the community consisting of George Von Der Ahe and Bertha Von Der Ahe, his wife, made on the — day of December, 1915, and from every part thereof."

Upon this record respondent has moved to strike the statement of facts on the ground that it was not filed within the time required by law. If the decree of foreclosure adjudging that appellant was not entitled to judgment for any deficiency against respondents was in that particular a final judgment the motion must be granted. The proposed statement was filed on the sixty-ninth day after the entry of order denying a new trial, and

on the sixtieth day after the date of the entry of decree.

[1-3] Appellant contends that the statute governing the foreclosure of mortgages contemplates the entry of two judgments, the first a decree of foreclosure ordering the sale, the second a deficiency judgment when the amount is determined by the return of sale, and that as to all questions touching the deficiency the last is the final judgment. He argues that therefore the time for serving and filing the statement of facts ran from the oral denial of his motion for a deficiency judgment. This position is untenable for two reasons. In the first place, assuming the soundness of the premises, the conclusion is faulty. We cannot entertain an appeal, as from a final judgment, from an oral order which was never expressed in a formal written judgment. *Robertson v. Shine*, 50 Wash. 433, 97 Pac. 497. In the second place, the premises are unsound. Our statute, reference being made to 1 Rem. & Bal. Code by section numbers, provides:

"Section 1119. When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure [or order of sale] that the balance due on the mortgage, and costs, which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor."

Section 1120 declares that judgment for any deficiency shall be similar to other judgments for the recovery of money and shall be made a lien and collected in the same manner as other judgments. Section 1121 provides that the decree of foreclosure may be enforced by execution as ordinary judgments. Section 1123 declares:

"In all actions of foreclosure where there is a decree for the sale of the mortgaged premises or property, and a judgment over for any deficiency remaining unsatisfied after applying the proceeds of the sale of mortgaged property, further levy and sales upon other property of the judgment debtor may be made under the same execution."

These provisions put it beyond question that a money judgment contained in a decree of foreclosure is a final judgment which may be enforced by a single execution, first by a sale of the mortgaged property, and second by a levy upon and sale of other property of the judgment debtor for the deficiency "under the same execution." Our statute furnishes no warrant for the entry of two judgments.

The Illinois decisions upon which appellant relies expressly rest upon a statute providing in substance that the money decree "may be rendered conditionally at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due." *Eggleston v. Morrison*, 185 Ill. 577, 57 N. E. 775; *Cotes v. Bennett*, 183 Ill. 82, 55 N. E. 661. The distinction is self-evident.

[4] But appellant contends that in any

event the service and filing of the statement of facts some 60 days after the final decree was merely a defective filing, curable under the provisions of section 8, Laws 1915, p. 303, as construed in *State ex rel. Gold Creek, etc., Co. v. Superior Court*, 155 Pac. 145. That section reads as follows:

"In case of a failure of the appellant to serve an abstract of record and statement of facts, or the one served is insufficient, the Supreme Court shall, if such failure is found to be excusable, allow the appellant a reasonable time, upon such terms as the court may impose, in which to supply such abstract of record and statement of facts."

That section does not repeal, either expressly or by any possible implication, the old law (Rem. & Bal. Code, § 893), requiring that the proposed statement of facts be filed within 30 days after the time for taking the appeal begins to run, unless for good cause shown, the time for such service and filing be extended by the trial court or judge. The act of 1915, as construed by the case cited, merely requires this court upon imposing terms to excuse the failure to file a sufficient and timely statement "if such failure is found to be excusable." In the case here no excuse is offered. Appellant merely made a mistake of law in assuming that an oral decision never expressed in a formal written order or judgment is a final and appealable judgment. This is no excuse and no other excuse is even suggested. The excuse offered and established in *State ex rel. Gold Creek, etc., Co. v. Superior Court*, supra, was of such nature as to estop the respondent there from urging that the filing was tardy. No such case is presented here. The statement of facts here was filed and certified 60 days after the entry of final judgment appealed from, and no order extending the time was entered or even asked for. The statement of facts must be stricken. *Michaelson v. Overmeyer*, 77 Wash. 110, 137 Pac. 332.

[5] Since we cannot consider the evidence it remains only to examine the court's findings. They clearly sustain the judgment. The court found that there was no presentment or demand for payment as to one of the makers of the note, and that no notice of nonpayment was given to either of the respondents as indorsers. It is elementary that in the absence of such notice they cannot be held as indorsers.

[6] We find no merit in the further claim that a new trial must be had because of the refusal of the trial court to grant appellant's motion to open the case for the reception of additional evidence as to notice of nonpayment. That motion was heard on affidavits. They are not before us. True, certain affidavits appear in the transcript, but they are not identified by the motion itself, nor, so far as the record before us shows, by the order overruling the motion. We cannot consider them. See *Mattson v. Eureka Cedar*,

etc., Co., 79 Wash. 266, 140 Pac. 377, and cases there cited.

Judgment affirmed.

MORRIS, C. J., and MOUNT and CHADWICK, JJ., concur.

MARYLAND CASUALTY CO. v. WASHINGTON NAT. BANK et al. (No. 13338.)

(Supreme Court of Washington. Aug. 16, 1916.)

1. HIGHWAYS ⇨113(3) — CONSTRUCTION — CONTRACTS—VALIDITY.

There being no prohibition in 3 Rem. & Bal. Code, § 5879—9, as to state aid roads, against the contract for construction containing a provision for retention of 20 per cent. of the contract price to satisfy liens, such condition in a contract, though not required by such statutes, is binding both on the surety and the county.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 848; Dec. Dig. ⇨113(3).]

2. SUBROGATION ⇨7(1) — CONTRACTORS' BONDS—PAYMENT OF CLAIMS.

Where road building contracts permit the county to retain 20 per cent. of the contract price to satisfy liens against the contractors, the surety on their bond is subrogated to the rights of creditors in such fund as collateral security when it pays their claims and is entitled to prevent its dissipation by the county.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 17; Dec. Dig. ⇨7(1).]

3. SUBROGATION ⇨7(2) — CONTRACTORS' BONDS—RIGHTS OF CREDITORS.

Where county retained state warrants for state aid road construction, under terms of contract, the surety on the contractors' bonds, having paid claims of creditors, had an equity in such fund even as against the bank which loaned money to the contractors, and took an assignment of all sums due them, but failed to trace the money loaned to payment of claims on the work.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 18; Dec. Dig. ⇨7(2).]

4. HIGHWAYS ⇨113(5)—CONSTRUCTION—CONTRACTORS' BONDS—SUBROGATION—LIABILITY OF COUNTY.

In such case, the county, as custodian of such warrants, was liable to the surety if it permitted the bank to secure and cash them.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 350; Dec. Dig. ⇨113(5).]

5. PRINCIPAL AND SURETY ⇨172—ACTIONS—JUDGMENT.

In surety's suit to conserve fund in hands of the indemnified party, direct judgment may be rendered against the surety in favor of any claimants against the principal brought into the case.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 495, 496; Dec. Dig. ⇨172.]

Department 2. Appeal from Superior Court, Kittitas County; Kauffman, Judge.

Action by the Maryland Casualty Company against Anderson & McKivor, the Washington National Bank, and others. From the decree, the complainant appeals, and from a part thereof the bank appeals, and Zentner & Ashman and other lien claimants join in

complainant's appeal. Judgment modified, and cause remanded, with instructions.

Short & Gleysteen, of Ellensburg, John W. Roberts, of Seattle, and Hovey & Hale, of Ellensburg, for appellants. E. E. Wager and John H. McDaniels, both of Ellensburg, for respondents.

BAUSMAN, J. [1] In 1914 the commissioners of Kittitas county entered into four road-building contracts with certain persons for whom plaintiff is surety, each contract providing that, while the contractor might have current payments to 80 per cent., the final 20 should not be paid until 30 days after the work should be accepted and the board be satisfied by receipts that all debts had been paid to laborers and materialmen. Only one road was built under a statute requiring this last provision, but there is nothing in the statutes under which the others were built (Rem. Code, § 5879—9) forbidding such salutary additions, so, as the commissioners exacted them of the principal, a surety can neither deny his part in their obligation, nor be shut out from whatever equities inhere. The county, in turn, cannot escape such liability as may follow from provisions which, not contrary, though purely supplemental, to statute, are appropriate to a public contract. State ex rel. Bartelt v. Liebes, 19 Wash. 589, 595, 54 Pac. 26, and Pacific Bridge Co. v. U. S. Fidelity Co., 33 Wash. 47, 55, 73 Pac. 772, to which may be added Rem. & Bal. Code, § 1161, amended by Laws 1915, p. 62, authorizing in these undertakings supplemental conditions not contrary to the statute. This amendment, though after the execution of this bond, was made retroactive in the same session, Laws 1915, p. 548, Rem. Code, § 1161—1. At the close of the work the contractors had received their 80 per cent., but labor and material claimants had filed demands aggregating \$15,000, while the county had received from the state warrants of \$7,293 payable and yet undelivered to the contractors. Other sums payable by the county itself brought the balance up to \$10,728, but before this was delivered the surety notified the commissioners that on account of the debts the whole should be withheld, whereupon by resolution they forbade the county auditor, ex officio their clerk, to make any delivery until they should instruct him further, which they never did. Shortly after the formal acceptance of the work, the defendant bank, having loaned the contractor during the work up to \$6,000 on assignments of all payments or warrants that might become due to him, got these warrants, indorsed by the contractor, with the consent of the county auditor and cashed them, acts found wrongful by the lower court and on this record obviously to be condemned. Then the surety brought the present suit in equity against the lien claimants and the county,

alleging that the work was completed, the whole \$10,728 in the county's hands, and 89 claims filed, which, after adjudication of them, it desired paid from the fund. The claimants by answer and cross-complaint asserted the wrongful diversion to the bank, their right to a lien on the fund and to a judgment against the county, the bank, and the surety company. The county, conceding the delivery to the bank, also asserted that to have been wrongful, but accepted no liability. The bank, brought in as a party, set up the assignment, of which it had given notice in due season. The lower court, allowing the bank a lien on what it had seized, rendered judgment in its favor for \$5,395.10, to be satisfied out of the \$7,293 in its hands, and ordered it to repay to the county only the difference. Against the surety the court gave judgment to the lien claimants for \$7,901.04. The surety appeals from the whole decree, and the bank from that part of it which made it pay back something to the county. The lien claimants joined in the surety's appeal, asserting a right to recover their demands from a fund replenished by the bank in full.

[2] In the Liebes Case, and in *First Nat. Bank v. Seattle*, 71 Wash. 122, 127 Pac. 837, we announced a trust to creditors in a contractor's reserved balance. Here, holding the surety liable for the contractor's debts by a contract supplementing statutory obligations, we have a surety's right of subrogation to that balance should he be compelled to pay the principal's creditors, and of his right to prevent the dissipation of the fund. In this portion justice must rigorously protect the surety. His expectation when he goes on the bond is plain; the principal may squander 80 per cent., leaving the surety at the mercy of the creditors, but there is at least 20 that will be applied to the creditors in spite of him. This amount, originally reserved to protect merely the creditors, is a collateral security of the principal available to the paying surety.

[3] The question first arising, whether the bank by its assignment has a priority over the surety's equity, is decisively answered by both reason and authority in *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 412, 41 L. Ed. 412, and *Henningsen v. U. S. Fidelity & G. Co.*, 208 U. S. 404, 28 Sup. Ct. 889, 52 L. Ed. 547. The lower court, to be sure, did not rest its decision on this assignment, but on a lien, under *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698; *Ann. Cas. 1916A, 767*. In that case we did allow a bank to stand as substituted lien creditor when it definitely traced loaned moneys to the payment of such of the contractor's debts as, if the bank had not paid them, the surety must have paid. The doctrines of that case, which we reserve for future discussion, need not be examined here, for the bank has utterly failed to trace its

moneys to any retired claims. In our view the bank had no right to these warrants under either assignment or lien, and the judgment must in that respect be revised.

[4] The next question is the liability of the county. By statute the relation between the county commissioners and the state officials in these road construction acts is very intimate. The former project, the latter approve, the highway. The former make the contract in their own names; the latter provide the payments. The payments in turn are to be paid only on vouchers attested by the commissioners. It was therefore natural that the state officials should transmit warrants to the county officials, even though they were made payable to the contractor. To treat this as a fund to be handled by them was a plain duty, for the commissioners, as representatives of the county, were parties to the contract on which the payments were to be made, and it is they who are the obligees in the bond. As for the surety, it was not only blameless, but vigilant, the commissioners also recognizing their duty by the resolution withholding payments to the principal. Thus the county became custodian of the fund and was liable if either its commissioners or other officers misapplied it. *Seattle v. Liberman*, 9 Wash. 276, 37 Pac. 433; *Potter v. New Whatcom*, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135; *N. Y. Security, etc., Co. v. Tacoma*, 30 Wash. 661, 71 Pac. 194; *Hemen v. Ballard*, 40 Wash. 81, 82 Pac. 277; *Quaker City Ntl. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710.

Whether such negligence as the county's should operate to release a surety ordinarily we need not decide, because this surety cannot say that this is no longer his business while he is bringing parties into court concerning a fund. Invoking judicial control or distribution of the fund, he waives release, for he seeks to protect himself in assets of the principal. The same is true as to privity of action. Having brought the creditors into court, he must submit to whatever direct adjudication against him results, even were it true that otherwise their action should be against the county, the state, or the contractor.

[5] The lower court was free, therefore, to give direct judgment against the surety in favor of any party thus brought in, but neither facts nor law warrant the judgment rendered. This fund must be replenished by the bank to the full extent of the warrants wrongfully seized, and the whole be applied to the creditors. The 20 per cent. held at the time of notification by the surety must be administered in its protection, so that, if any part has been lost by the negligence of the county, or if the bank should never be able to repay, or for any reason fail so to do, judgment must be rendered against the county in that degree as well as for any other amounts which it has suffered to be

misapplied. The bank, for its part, must repay with interest from the date of its misappropriation, nor is it to be treated as having any rights in this fund except as to surplus after full discharge of the creditors and the surety. The creditors, should the fund be not replenished by the bank, are entitled to a judgment against the county to the extent of the squandered trust and a judgment concomitantly against the surety for the whole. As for the surety, it is entitled to a judgment against the county to the extent that the diversion and nonreplenishment of the fund may increase its payments to the creditors. The county must have judgment against the bank.

The creditors claim attorney's fee under the retroactive statute of 1915, which we have already referred to, and which we deem applicable to these contracts, but it is not necessary to decide whether retroactive force can be given to that feature, for this is not a suit against a surety within its intendment. True, the surety here must respond to them in any judgment in the accounting invoked, but that is a consequence incidental. So far from being sued, the surety has brought an action to preserve their fund, a suit really to help them, and with no controversy against them.

The cause is remanded, with instructions to enter judgment and to distribute the fund in accordance with the foregoing views, and for such further proceedings not inconsistent herewith as may become necessary during the administration of the fund.

MORRIS, C. J., and MAIN, and HOLCOMB, JJ., concur.

GERBER v. HEATH et ux. (JOSEPH E. THOMAS & CO., Inc., Intervener).
(No. 13331.)

(Supreme Court of Washington. Aug. 16, 1916.)

1. MORTGAGES ¶137—INTEREST OF MORTGAGEE.

A mortgage conveys no title to real estate, but is simply a lien—a mere security for the payment of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 270-276; Dec. Dig. ¶137.]

2. MORTGAGES ¶473—FORECLOSURE—RENTS AND PROFITS—PARTY ENTITLED—SUCCESSOR OF MORTGAGOR.

The rents and profits collected by a receiver in a foreclosure proceeding pending the litigation and up to the time of the sale were payable, not to the mortgagee, but to the successor in interest of the mortgagor holding the legal title, as the mortgagor is under no obligation to apply the income of the property to either the principal or the interest of the mortgage debt, or to any other purpose than keeping up the current charges against the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1384; Dec. Dig. ¶473.]

3. MORTGAGES ¶395—GROUNDS OF FORECLOSURE—FAILURE TO PAY CURRENT CHARGES.

Should the mortgagor or his successor in interest fail to keep up current charges against the property and permit it to depreciate or become lost, the mortgagee may elect to foreclose his mortgage, especially if such contingency is provided for in the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1160; Dec. Dig. ¶395.]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by Maurice Gerber against Truman H. Heath and wife, with consent order for the appointment of a receiver, in which Joseph E. Thomas & Co., Incorporated, intervened. Decree foreclosing the mortgages of the plaintiff and the intervener with sale of property, and from an order directing the receiver to pay certain proceeds collected pending the litigation to plaintiff, the defendants appeal. Reversed and cause remanded, with instructions to direct the receiver to pay such proceeds to the defendants.

Jay C. Allen and Philip Tindall, both of Seattle, for appellants. Leopold M. Stern, of Seattle, for respondent.

MOUNT, J. In November, 1912, the Frank A. Sweeney Company, a corporation, executed to one Leonard its promissory note for \$10,000. The payment of this note was secured by a second mortgage upon real property located in Seattle. As further security for the payment of this note, the Sweeney Company executed a chattel mortgage upon the furnishings and fixtures of a hotel which was being conducted upon the real estate. At the time this second mortgage was given, Joseph E. Thomas & Co., Incorporated, was the holder of a first mortgage upon the real estate. After the execution of these mortgages the defendants, Heath and wife, by mesne conveyances became the owners of the property, both real and personal, subject to all the mortgages above mentioned. Maurice Gerber by assignments became the owner and holder of the note and mortgages executed by the Sweeney Company to Leonard. Thereafter in July, 1914, when the Leonard note was past due, the holder thereof, Maurice Gerber, brought an action to foreclose the second mortgage upon the real estate and the first mortgage upon the chattels. Thomas & Co. was not made a party to that action. An application was made for the appointment of a receiver upon the ground that taxes were due and delinquent, and no effort was being made to pay the taxes or interest; that Heath and wife were in possession and, if permitted to collect the rents during the pendency of the action, the property would be utterly lost unless a receiver were appointed. Thereafter on July 20, 1914, by consent, an order was made appointing a receiver. This order recited that the receiver was authorized—

"to take immediate possession of said mortgaged premises and personal property, and to rent the same and keep the same rented, and receive the rents, issues, and profits thereof, and to hold the same subject to the order or decree of this court, and with all the powers, duties, and responsibilities of receivers in like cases."

At the time this order appointing the receiver was made, Thomas & Co., the holder of the first mortgage upon the real estate, intervened in the action. Thereafter a decree was entered foreclosing the mortgages of the plaintiff, Gerber, and of the intervener Thomas & Co.; but no personal judgment was taken against Heath and wife. Afterwards the property was sold under a decree of foreclosure, Thomas & Co. purchasing the real property for the full amount due on the first mortgage, including the amounts due for taxes. The plaintiff, Gerber, purchased the personal property for \$500, leaving a balance of more than \$10,000 due upon the second mortgage. After the sale, which had been had under the decree, had been confirmed, the trial court upon application directed the receiver to pay \$142.67, being the net proceeds of rents and profits which he had collected pending the litigation, to the plaintiff, Maurice Gerber. From this order the defendants Heath have appealed.

[1] The only question presented upon this appeal is whether the rents and profits collected by the receiver pending the litigation should be paid to the mortgagee, or whether they should be paid to the successor in interest of the mortgagor. In *Dane v. Daniel*, 23 Wash. 379, 387, 63 Pac. 268, 270, in considering the interest which the mortgagee takes in mortgaged property, we said:

"Under the statutes of this state a mortgage of real property does not convey to the mortgagee the title to the mortgaged premises, either before or after condition broken. A mortgage is a lien simply, a mere security for the payment of money, and is satisfied and extinguished by the payment of the money for which it is given as security at any time before the sale of the mortgaged premises under a judgment or decree of foreclosure. After condition broken, the statutes confer on the mortgagee the right to have the amount due him by reason of the broken condition determined by a judgment or decree of a court, the mortgage foreclosed, and the mortgaged property sold at public auction, and the proceeds of the sale applied in satisfaction of the amount found due."

And in *Thornely v. Andrews*, 40 Wash. 580, 82 Pac. 899, 1 L. R. A. (N. S.) 1036, 111 Am. St. Rep. 983, we said:

"But in this state a mortgage conveys no title to the real estate. The property mortgaged is held merely as security for the payment of the debt."

To the same effect, see *Jump v. North British, etc., Ins. Co.*, 44 Wash. 596, 87 Pac. 923, 12 Ann. Cas. 257.

[2, 3] It is plain, therefore, that the property, and not its income, is the security for the mortgage debt. The mortgagor is under no obligation to apply the income of the property to either the principal or the interest

of the mortgage debt. Should the mortgagor, or his successor in interest, fail to keep up the current charges against the property, and permit the same to depreciate or become lost, the mortgagee may elect to foreclose his mortgage, especially if this contingency is provided for in the mortgage. A receiver is sometimes appointed to collect the income of property and apply the same to necessary charges pending the foreclosure proceedings in order to protect the property. But there is no law in this state to justify the application of the income of property to any other purpose than keeping up the current expenses, and the profits thereof not needed for that purpose clearly belong to the holder of the legal title.

In this case the original mortgagor sold the legal title; and by mesne conveyances, at the time these foreclosure proceedings were brought, it rested in Heath and wife. They were not obligated to pay the mortgage debts. They simply held the property subject to the payment of the mortgages. It seems clear to us that the net revenues from the property pending the foreclosure and up to the time of sale were the property of the holder of the legal title.

We are satisfied for these reasons that the trial court erred in awarding this money to the mortgagee. It should have been paid to Heath and wife, the holders of the legal title. All net profits received in rents from the property up to the time of the sale under the foreclosure were clearly the property of Heath and wife.

The judgment of the trial court is therefore reversed, and the cause remanded, with instructions to the trial court to direct the receiver to pay this money to the appellants Heath.

MORRIS, C. J., and FULLERTON, ELLIS, and CHADWICK, JJ., concur.

KATO v. UNION OIL CO. OF CALIFORNIA. (No. 13357.)

(Supreme Court of Washington. Aug. 14, 1916.)

1. CHATTEL MORTGAGES §138(1)—PRIORITY OF LIEN—SUBSEQUENT LEVY.

Under Rem. & Bal. Code, § 3660, declaring chattel mortgages void against creditors or subsequent purchasers unless accompanied by an affidavit of good faith, etc., an execution levy is superior to a previously recorded chattel mortgage which lacked the required affidavit.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228, 229, 231-236; Dec. Dig. §138(1).]

2. CHATTEL MORTGAGES §63—RECORDING—INSTRUMENTS TO BE RECORDED.

Rem. & Bal. Code, § 3660, declaring chattel mortgages void against creditors and subsequent purchasers unless accompanied by an affidavit of good faith, etc., applies to a bill of sale intended as a chattel mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 125-135; Dec. Dig. §63.]

3. CHATTEL MORTGAGES §149—PRIORITY—POSSESSION AS NOTICE—WHAT CONSTITUTES POSSESSION—"EQUITABLE LEVY."

An action to foreclose a chattel mortgage is not an "equitable levy" which places the mortgagee in possession so as to be notice of his rights to others.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 245; Dec. Dig. §149.

For other definitions, see Words and Phrases, First and Second Series, Equitable Levy.]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Statutory proceeding by S. Kato against the Union Oil Company of California to determine adverse claim to property levied upon under execution process. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 157 Pac. 688.

S. G. Climensson, of Seattle, for appellant.
R. D. Hamlin, of Seattle, for respondent.

PARKER, J. This is a proceeding under our statute relating to adverse claims to property levied upon, in which S. Kato claims ownership and right to the possession of two automobile trucks levied upon and taken possession of by the sheriff of King county under an execution issued upon a judgment of the superior court for that county in favor of the Union Oil Company against the Panama Auto Transfer, Incorporated. Kato obtained possession of the trucks from the sheriff upon making affidavit of ownership and his right to possession thereof and furnishing a bond for their redelivery to the sheriff as provided by section 573, Rem. & Bal. Code. Trial in the superior court without a jury resulted in findings and judgment in favor of Kato, from which the Union Oil Company has appealed to this court.

On October 26, 1914, the Panama Auto Transfer, Incorporated, executed and delivered to N. Yoshida a bill of sale, purporting to convey to him the two automobile trucks here involved. This bill of sale was recorded on the same day in the office of the auditor of King county. On December 19, 1914, Yoshida executed and delivered to S. Masui a bill of sale, purporting to convey to him the two trucks, which bill of sale was, on the following day, duly recorded in the office of the auditor of King county. The first, as well as the second, of these bills of sale was executed for the benefit of Masui, as security for the payment to him of an indebtedness then due to him from the transfer company, and also as security for future advances to be made by him to the transfer company. These bills of sale were absolute in form. Neither of them was accompanied by any affidavit of good faith, as required by section 3660, Rem. & Bal. Code, relating to the execution of chattel mortgages. The possession of the trucks remained in the transfer company. On March 20, 1915, Ma-

sui commenced an action in the superior court for King county, seeking foreclosure of these bills of sale as a chattel mortgage, alleging them to have been intended as such by all parties, concerned, to secure indebtedness to him from the transfer company, and that there was due him upon such indebtedness at the time of commencing that action the sum of \$5,872, being the aggregate of several sums loaned and advanced by him to the transfer company at different times during the period from May, 1913, to March, 1915. In his complaint in that foreclosure action in addition to his prayer for decree of foreclosure of these bills of sale as a chattel mortgage, he also prayed for the appointment of a receiver to take charge of the trucks, and also for an injunction restraining the transfer company from disposing of them. There was, however, no receiver appointed, nor was any injunction or restraining order issued in that action, nor, as we view the evidence, were the trucks ever taken possession of by Masui, or any one else in his behalf until they were taken from the sheriff by Kato (successor in interest to Masui as we shall presently see) by his making the affidavit and furnishing the redelivery bond in this proceeding. On March 26, 1915, there was duly rendered in the superior court for King county a judgment in favor of the Union Oil Company against the Panama Auto Transfer, Incorporated, for the sum of \$443.75, upon which judgment, on June 3, 1915, execution was issued under which the levy and seizure of the two trucks was made by the sheriff. This seizure of the trucks by the sheriff was, as we view the evidence, a taking of them from the possession of the transfer company. On June 10, 1915, Masui executed and delivered to respondent, S. Kato, a bill of sale purporting to convey to him the two trucks here involved. This bill of sale, it seems plain, operated only as placing Kato in the shoes of Masui, Kato thereby becoming the assignee of whatever mortgage interest in the trucks was possessed by Masui. Such was manifestly the view of this bill of sale entertained by the trial court. On June 10, 1915, the sheriff delivered the trucks to Kato upon his making the affidavit of ownership and furnishing the bond in his initiation of this proceeding to try the question of his ownership and right to the possession of the trucks as against the sheriff and the execution lien of the oil company. On October 22, 1915, decree of foreclosure was duly entered in the action of Masui against the transfer company, foreclosing the bills of sale as a chattel mortgage. The interest to which Kato succeeded by virtue of the bill of sale which Masui made to him on June 12, 1913, seems not to have been noticed in the decree of foreclosure. We may, however, assume that Kato succeeded to whatever

rights Masui acquired by virtue of that decree. The oil company was not a party to that action. On November 6, 1915, the trial of this proceeding upon the merits was commenced, and on November 17, 1915, findings of fact, conclusions of law, and judgment were duly made and rendered in this proceeding in favor of Kato and against the sheriff and the oil company, awarding to Kato a superior lien upon the two trucks by virtue of the foreclosure of the bills of sale as a chattel mortgage in the action of Masui against the transfer company, Kato having succeeded to the rights of Masui by virtue of the bill of sale executed to him by Masui pending the foreclosure action. The judgment so entered in favor of Kato and here upon review, so far as necessary for us to notice its terms, reads as follows:

"Ordered, adjudged, and decreed that this cause be, and the same is now hereby consolidated with that certain other cause No. 108,034, entitled S. Masui, Plaintiff, against Panama Auto Transfer, Inc., a corporation, Defendant.

"It is further ordered, adjudged, and decreed that the plaintiff, S. Kato, within ten days after the entry of this judgment, deliver to the defendant, Robert T. Hodge, as sheriff of King county, Wash., that certain three-ton Wilcox auto truck, license 81260, motor No. 88, serial No. 1096, and also that certain three-ton rapid auto truck, license 81006, S. V. license 249, 1914, and that the said sheriff make sale of said personal property at the same time and place as he shall sell the personal property involved in the action consolidated herewith in cause No. 108,034, and that in default of the delivery of said auto trucks to the said sheriff within said ten days, judgment be entered against the Maryland Casualty Company, a corporation, surety on the bond of said S. Kato, for the sum of \$484, with costs and disbursements herein; that upon making delivery of said personal property and trucks to the said sheriff the surety, Maryland Casualty Company, a corporation, shall be released and discharged of and from any liability herein.

"It is further ordered, adjudged, and decreed that the proceeds derived from the sale of the property herein directed to be returned to the sheriff shall be applied first upon the judgment in cause No. 108,034 [the foreclosure action of Masui v. Panama Auto Transfer, Inc.], and the balance, if any, applied upon the judgment in cause No. 107531 [Union Oil Company v. Panama Auto Transfer, Inc.], and any excess remaining shall be paid to Panama Auto Transfer, Inc., a corporation."

It seems plain to us, as it evidently did to the trial court, that respondent, Kato, as the successor in interest to Masui, never became the legal owner of the title to the trucks in question and in no event ever possessed any greater interest therein than that of a mortgagee, which is the only interest that Masui, his grantor, had or claimed to have in the trucks as against the transfer company. That this mortgage interest, as evidenced by the bills of sale, was valid as against the transfer company may, for the purpose of our discussion be conceded. The real problem is, which of these two liens is superior, that of the chattel mortgage evidenced by the bills of sale, and the foreclosure thereof, under which Kato claims, or that of the levy made by the

sheriff under the execution upon the judgment rendered against the transfer company in favor of the oil company, under which it claims? It is plain that the levy by actual seizure of the trucks under this execution by the sheriff created a valid lien in favor of the oil company so far as the regularity of that judgment and the levy is concerned, and whether or not that lien is superior to the lien of the chattel mortgage and the decree of foreclosure thereof depends upon the answer to the question, Was that a valid chattel mortgage as against the oil company, the execution creditor of the transfer company?

[1] We have seen that these bills of sale, though intended a chattel mortgage, were not accompanied by any affidavit of good faith as required by section 3660, Rem. & Bal. Code, relating to the execution of chattel mortgages, as follows:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

That the valid lien of a creditor against personal property of his debtor acquired upon a pre-existing indebtedness, whether by judicial process or otherwise, is superior to a chattel mortgage executed by a debtor, unaccompanied by the required affidavit of good faith, unacknowledged or unrecorded, is the settled law of this state. Such was our holding in *Smith v. Allen*, 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915D, 300, where the subject was reviewed at length in the light of our previous decisions. On page 144 of 78 Wash., on page 687 of 138 Pac. (Ann. Cas. 1915D, 300), of the decision we said:

"We are of the opinion that, while Smith and Allen have equal rights as mere creditors of Dodge Bros., their ultimate respective superior rights are determinable by the priority of the lien either may acquire, securing his claim, and that it is immaterial what the nature of that lien may be, so long as it is such as is recognized by law, whether statutory or contractual. It follows that the lien evidenced by Allen's mortgage is superior to that evidenced by Smith's mortgage."

In that case Allen's mortgage was executed and recorded after Smith's mortgage, but was held superior because Smith's mortgage was not acknowledged as required by section 3660, Rem. & Bal. Code, and was therefore void as against Allen's rights as a mortgagee; his mortgage having been accompanied by an affidavit of good faith, acknowledged and recorded. While in that case Smith's mortgage was unacknowledged, and in this case Masui's mortgage is unaccompanied by an affidavit of good faith, the effect is manifestly the same, by the express words of section 3660 above quoted, as we pointed out at page 141 of our decision in the *Smith Case*.

[2] We have seen that the bills of sale were duly recorded as absolute bills of sale. But

since it is plain that they were not bills of sale in fact, but were intended by all concerned as a chattel mortgage, we must now regard them as such, and test the validity of the lien they created as against the rights of the oil company by the statutory requirement above quoted, touching the execution of chattel mortgages. Viewed in this light, these bills of sale plainly did not meet this requirement, in that they were not accompanied by the required affidavit of good faith. In *Sayward v. Nunan*, 6 Wash. 87, 91, 32 Pac. 1022, 1024, Judge Scott, speaking for the court, observed:

"To hold that the affidavit and acknowledgment are not required where a bill of sale is given as security and is in effect a mortgage would be to render such provisions of the law in relation to chattel mortgages nugatory, for the same could be avoided and fictitious claims created and spread upon the records by giving a mere bill of sale—a fraudulent device—instead of a mortgage. * * * If a bill of sale is given as security and is only in fact and effect a chattel mortgage it should be held to be within the provisions of the act relating to chattel mortgages."

These observations, it may be urged with some reason, did not relate to a controlling question in that case, and are largely dictum. However, we cannot escape the conclusion that they constitute a correct statement of the law. Manifestly, if the law were otherwise, the requirement as to the affidavit of good faith accompanying the execution of a chattel mortgage could be easily avoided and its purpose wholly defeated.

[3] The trial court made no finding touching the question of the transfer company having parted with possession of the mortgaged property prior to its seizure by the sheriff under the execution. We have not merely assumed that the transfer company did not, prior to that time, part with possession of the property, but we have reached that conclusion from a careful examination of all of the evidence. It would seem to follow that Kato, as the successor in interest of Masui, was not in the position of a mortgagee in possession when the sheriff seized the property, taking it from the possession of the transfer company. Had Masui or Kato actually taken possession or had caused possession to be taken by some legal process, before the execution levy, Kato might be held to have a superior lien as a mortgagee, under our decision in *Watson v. First National Bank*, 82 Wash. 65, 143 Pac. 451, and thus have avoided the necessity of an affidavit of good faith accompanying the execution of the bills of sale as a chattel mortgage and rendered them effective as such as to creditors of the transfer company. The trial court, however, did conclude, as a matter of law, "that the interest of said Kato is that of a mortgagee in possession." This conclusion was apparently not rested upon the fact of actual possession by Masui or Kato at the time the sheriff seized the property under the execution, but seemingly is rested upon the theory that the commencement of

the foreclosure action by Masui, before the seizure of the property under execution by the sheriff to satisfy the oil company's judgment against the transfer company, operated as an "equitable levy," as counsel for Kato terms it, upon the property, and had the effect of placing Kato in the position of a mortgagee in possession. The trouble with this theory, as we view it, is that no actual taking possession by Kato, or any one in his behalf, occurred in the foreclosure proceeding, nor was any receiver appointed or any process issued in that action, authorizing the taking of possession of the property in Kato's behalf. Had there been any such taking possession of the property in the foreclosure proceeding before the levy of the execution by the sheriff, there would be good ground for arguing that Kato as the successor of Masui, thereby became in effect a mortgagee in possession, or rather that his rights should be determined upon that theory. The term "equitable levy" seems only to have reference to the bringing of property within the jurisdiction of a court of equity by a creditor's bill where equitable assets of the debtor are sought to be reached. 12 Cyc. 5; 15 Cyc. 1087. We are unable to view the foreclosure action prosecuted by Masui in any such light. It was a plain foreclosure action, seeking to subject the mortgaged property, which was a legal, and not a mere equitable, asset of the transfer company, to the payment of its debt for which the mortgage was given to secure. There was no lien upon this mortgaged property as against the oil company as long as the mortgage remained unaccompanied by an affidavit of good faith and the property remained in the possession of the transfer company, which condition continued until its actual seizure by the sheriff under the execution issued upon the judgment rendered against the transfer company in favor of the oil company. Manifestly, as between the lien rights of Kato, Masui's successor in interest, and the oil company, the lien of the latter became superior the moment the property was seized by the sheriff under the execution. We conclude that the oil company must be held to have acquired a first and superior lien as between it and Masui or Kato.

The judgment of the trial court is reversed in so far as it decrees the mortgage lien of Kato superior to that of the Union Oil Company under the levy made by the sheriff to satisfy its judgment against the transfer company. The cause is remanded to the superior court, with directions to correct its judgment and decree accordingly, and for such further proceedings as may be necessary in harmony with the views herein expressed.

Respondent's motion to dismiss the appeal was disposed of by our decision in *Kato v. Union Oil Company*, 157 Pac. 688.

MORRIS, C. J., and HOLCOMB and ELLIS, JJ., concur.

HEUSTON v. KING COUNTY et al.
(No. 13241.)

(Supreme Court of Washington. Aug. 14, 1916.)

En Banc. Appeal from Superior Court King County; John S. Jurey, Judge.

On rehearing. Judgment affirmed.

L. W. Hammond and E. R. York, both of Tacoma, for appellant. Alfred H. Lundin and Edwin C. Ewing, both of Seattle, for respondents.

PER CURIAM. Upon a rehearing en banc, a majority of the court still adhere to the opinion heretofore filed herein, as reported in 155 Pac. 773; and, for the reasons there stated, the judgment is affirmed.

FORSYTH v. WALLACE et al. (No. 13431.)
(Supreme Court of Washington. Aug. 16, 1916.)

1. DAMAGES \Leftrightarrow 169—**ADMISSIBILITY OF EVIDENCE—INDUSTRIOUS HABITS.**

In a personal injury case a plaintiff's industrious habits may be shown as bearing upon his earning power and the amount of the damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 495; Dec. Dig. \Leftrightarrow 169.]

2. TRIAL \Leftrightarrow 84(1)—**RECEPTION OF EVIDENCE—NECESSITY OF SPECIFIC OBJECTION.**

An objection that evidence of plaintiff's industrious habits was immaterial and irrelevant does not raise the point that the complaint does not allege such habits.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 211–213, 220, 221; Dec. Dig. \Leftrightarrow 84(1).]

3. APPEAL AND ERROR \Leftrightarrow 981—**DISCRETION OF LOWER COURT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

The Supreme Court will not reverse the denial of an application for new trial based upon the newly discovered fact that plaintiff had been convicted of forgery, especially where the failure to previously discover such fact is not explained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3876; Dec. Dig. \Leftrightarrow 981.]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Ora O. Forsyth against J. B. Wallace and another. Judgment for plaintiff, and defendants appeal. Affirmed.

O. C. Moore, of Spokane, and Henry S. Noon, of Seattle, for appellants. Don F. Kizer, of Spokane, for respondent.

BAUSMAN, J. Forsyth, a passenger in defendant's jitney, knocked senseless by a collision, brought suit for damages based on unconsciousness continuing several days, permanent diminution of hearing, and recurring headaches and dizziness. Defendant appeals from a judgment based upon a verdict for plaintiff.

[1, 2] A first error assigned is the court's permitting plaintiff in opening to prove industrious habits. We decline to exclude this proof under either the reasoning or the rule

in *Davis v. Kornman*, 141 Ala. 473, 37 South. 789, 791, or of *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229. Much sounder appear *Louisville & Nashville R. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 28 Ky. Law Rep. 1146, 3 L. R. A. (N. S.) 1190; *Metropolitan St. Ry. Co. v. Kennedy*, 82 Fed. 158, 27 C. C. A. 136; *Cameron Mill, etc., Co. v. Anderson*, 98 Tex. 156, 81 S. W. 282, 1 L. R. A. (N. S.) 198. There was proof here of future and permanent impairment of physical condition, and nothing is more a part of a man's earning power than industrious habits. As to their not being alleged in the pleadings, this need not be discussed, since the objection was not upon that ground, but upon a vague, "irrelevant, and immaterial." *Evergreen Farm v. Attalla Land Co.*, 157 Pac. 487. A fact perfectly relevant to a cause of action may be omitted by chance from allegations, yet this form of objection would not indicate that reason.

[3] A new trial was asked upon affidavits showing that plaintiff had been convicted of forgery some years before in another county, which fact, had it been put in evidence, would have been of force to impeach his sole narrative on sundry important details, but no good reason was shown why this was not discovered before, and, besides, it is only impeaching evidence which, even when impeaching the opposing party, we have held insufficient to justify this court in reversing the lower court's denial of new trial. *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233; *Orr v. Schwager & Nettleton*, 74 Wash. 631, 134 Pac. 501; *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817.

An instruction on future pain is complained of under circumstances similar to those discussed in *Bankson v. Latham*, 159 Pac. 369. To the authorities cited there may be added *Godley v. Gowen*, 89 Wash. 124, 154 Pac. 141.

The verdict was not excessive, nor do we find other points requiring discussion.

Judgment affirmed.

MORRIS, C. J., and MAIN, FULLERTON, and PARKER, JJ., concur.

FORREER v. JOHN DAVIS & CO. et al.
(No. 13011.)

(Supreme Court of Washington. Aug. 14, 1916.)

1. SALES \Leftrightarrow 94—**CONTRACT—SURRENDER—CONSIDERATION—REPUDIATION.**

If a party enters into a contract of sale and thereafter consents to its surrender, he cannot repudiate the consideration paid for such surrender, in the absence of fraud, if made with his full knowledge.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 260; Dec. Dig. \Leftrightarrow 94.]

2. BROKERS ~~69~~—COMPENSATION—DOUBLE COMMISSION.

Since a brokers' right to commission depends on consummation of sale, he cannot have double commission for negotiating sale, getting surrender of the contract therefor, and negotiating a new sale, without specific agreement for such compensation.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 55; Dec. Dig. ~~69~~.]

3. WITNESSES ~~316~~—CREDIBILITY.

Where a party's memory is conclusively shown to have been at fault as to part of a transaction, it raises a strong probability that he was mistaken as to other items; and a finding, though contrary to his statements, will not be set aside.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1079; Dec. Dig. ~~316~~.]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by A. E. Forrer against John Davis & Co. and others. Judgment in part for defendants, and plaintiff appeals. Affirmed.

Shorett, McLaren & Shorett, of Seattle, for appellant. Robert Booth, of Seattle, for respondents.

FULLERTON, J. In January, 1912, the appellant, Forrer, being then the owner of certain real property situated in the city of Seattle, listed the same for sale with the respondent John Davis & Co., a real estate broker doing business in the city named. The respondent sold the property before the end of January to a purchaser found by it on terms satisfactory to the appellant. The sale as consummated involved the execution of a mortgage on the property by the appellant to the respondent, a deed from appellant to the purchaser, and a mortgage from the purchaser to the appellant. Subsequently certain complications arose, not made very clear by the record, which induced the purchaser to deed the property to another person in trust, who subsequently placed another mortgage upon the property. The sale also involved money transactions between the appellant and the respondent. In February, 1914, the appellant brought this action against the respondent, the purchaser, and the other persons connected with the subsequent transactions, to set aside as fraudulent the several instruments. He also set forth the transactions with the respondent, and as an alternative prayer to his complaint asked, in case the instruments could not be set aside and canceled and the parties restored to their original position, that an accounting be had between himself and the respondent, and that he recover on such accounting the amount found to be due, averring that there was due \$540.67. At the trial after issue joined no attempt was made to prove the fraudulent nature of the instruments, and the case proceeded as for an accounting between the appellant and the respondent. The evidence introduced on this branch of the case was conflicting. The respondents'

evidence tended to show that after listing the property they sold it to one Shull for the list price and on the terms on which they had it listed, namely, for \$3,500, \$1,000 of which was to be paid in cash and the balance in monthly installments of \$25 each, the deferred payments to be secured by a mortgage upon the property; that on this sale a deposit of \$50 was made, which was forthwith turned over to the appellant; that on the next day they found another purchaser, who agreed to take the property at \$3,900, and that, with the consent of the appellant, they made a new contract with him, finally consummating the sale on terms which the appellant approved; that this sale involved the repayment to the first contractor of the \$50 advanced by him, with \$100 additional, and also the payment of certain expenses, and of certain taxes due, and that these sums, together with the agreed commissions and the sums deposited to the appellant's credit, fully accounted for all the moneys they had received out of the transactions belonging to the appellant. The appellant testified that there was but one contract of sale, the contract with the person with whom the sale was finally consummated; that he never knew Shull in transactions at all; and that the respondent had accounted only for the list price of the property, not for the amount for which the sale was actually made. The trial court allowed a recovery of \$51.22, which it found the respondent had paid as taxes for which the appellant was not liable; finding for the respondent in favor of the other items of expenditure involved.

[1] If we are to allow the items credited the respondent by the trial court, the account balances. Of these the only ones concerning which there can be any serious dispute is the item of \$100 paid to Shull for the surrender of his contract, and an item of \$175 retained as a commission because of the contract of sale with Shull. The first depends for its correctness on whether or not there was in fact a contract of sale entered into with Shull, which Shull afterwards surrendered with the appellant's knowledge and consent. While the appellant testifies with some positiveness that he knew nothing of the transaction, we think the evidence clearly shows his memory to be at fault. Not only is it contrary to the testimony of Shull himself and to the testimony of the employé of the respondent who conducted the sale, but it is contrary to the written contract of sale with Shull, which bears the appellant's signature as owner of the property. If he entered into a contract of sale with Shull, and afterward consented to its surrender, he cannot, under the circumstances shown here, repudiate the consideration paid for the surrender. We think the preponderance of the evidence is that he did enter into the contract and did consent to its surrender.

[2, 3] As to the second item the proofs are not so satisfactory. In listing the property with the respondent the appellant agreed to pay the usual commission in such cases. In such a contract the obligation to pay a commission to the broker arises only in case of a sale of the property. The broker cannot thereunder double his commission by entering into a contract of sale with one person, procuring its surrender, and then making a sale to a second person, even though the change be made with the consent of the owner. Before such additional commission can be charged there must be an agreement between the broker and the owner to that effect. Whether such an agreement was made here arises rather from evidence relating to the conduct of the parties than from any positive evidence to that effect. The court found that the appellant was "duly conversant with all of the * * * transactions, and knew each and every detail thereof," finding, in effect, that he knew of this claim on the part of the respondent and consented thereto. While the appellant testified to the contrary, we believe honestly, we again think his testimony was due to a faulty memory. It was over two years after the events before he made complaint of the account, and two years and eight months had elapsed before he was called upon to testify concerning it. His memory is conclusively shown to have been at fault concerning certain of the matters, and this raises a strong probability that he was mistaken concerning the particular item. At any rate we do not feel justified on the face of the record in setting aside the finding of the trial judge.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, CHADWICK, and ELLIS, JJ., concur.

FREELAND v. FREELAND. (No. 12989.)
(Supreme Court of Washington. Aug. 14, 1916.)

1. DIVORCE — CHILDREN — AWARD OF CUSTODY — MODIFICATION — REVIEW.

The court, on appeal from an order refusing to modify decree as to custody of a child, made by the court which gave the decree, should not disturb such order unless the evidence makes it reasonably plain that welfare of the child demands it.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 806; Dec. Dig. —312.]

2. DIVORCE — CUSTODY OF CHILD — RIGHT TO CUSTODY.

That the mother has been indiscreet with men, in the absence of proof of moral turpitude, is not sufficient to deprive her of custody of her child, awarded by the decree of divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 795; Dec. Dig. —303(2).]

3. DIVORCE — CUSTODY OF CHILD — RIGHT TO CUSTODY.

Courts will not deprive the mother of custody of her child unless it be shown clearly

that she is so unfit a person as to endanger the child's welfare.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 795; Dec. Dig. —303(2).]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action for divorce by Fred B. Freeland against Myrtle B. Freeland. Decree having been entered for plaintiff, and awarding the custody of a minor child, plaintiff petitions to modify the decree as to such custody, and defendant files a cross-petition. From an order dismissing the petition, plaintiff appeals. Affirmed.

Losey & Newton, of Spokane, for appellant. Charles P. Lund, of Spokane, for respondent.

FULLERTON, J. In an action for divorce brought by Fred B. Freeland against Myrtle B. Freeland a decree was entered in favor of plaintiff on August 4, 1914, and the custody of their minor child was awarded to each parent alternately for periods of six months, the father being given the custody for the first six months. On January 7, 1915, the plaintiff filed a petition for a modification of the decree as to the custody of the child on the ground that the defendant, by reason of misconduct occurring subsequent to the decree, was not a suitable person to have the custody of the child. The defendant filed an answer and cross-petition, asking the exclusive custody of the child. These petitions were heard before the judge who had granted the divorce and decreed the divided custody of the child. At the conclusion of the hearing the judge found that there had been no change in the condition of the parties from that which existed at the time of the entry of the decree in the divorce action, and that the defendant was a fit and proper person to have the care and custody of the child in accordance with the terms and conditions of such decree. An order was thereupon entered, dismissing the petitions of each party, and directing that the original decree remain in full force and effect. The plaintiff appeals.

[1] The appeal presents but one question, namely, Does it appear from the evidence introduced at the hearing that the trial court was guilty of an abuse of discretion in refusing to modify its original decree touching the custody of the child. It must be borne in mind that the petitions were heard by the judge who had tried and determined the divorce action; that he was conversant with the facts developed in the divorce proceedings, and that he had the witnesses before him in the present action, and was in a better position to pass upon their credibility than is this court. Under such circumstances we have heretofore held that, an appellate court should not disturb the order of the trial court unless it is made reasonably

plain by the evidence that the welfare of the child requires it. *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634; *Rogers v. Rogers*, 81 Wash. 502, 142 Pac. 1150; *Simmons v. Simmons*, 22 Cal. App. 448, 134 Pac. 791.

[2] The proofs of the appellant were to the effect that respondent had been indiscreet in her conduct with men subsequent to her divorce. Nothing, however, was established showing moral turpitude on her part. But the fact that the conduct of a mother is not what others might think the most proper is not sufficient of itself to deprive her of the right to the permanent or periodic custody of her minor child.

[3] Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's. For these reasons courts are loathe to deprive the mother of the custody of her children, and will not do so unless it be shown clearly that she is so far an unfit and improper person to be intrusted with such custody as to endanger the welfare of the children. In the present case we are satisfied that no sufficient showing has been made for a modification of the original decree.

The judgment is affirmed.

MOUNT, HOLCOMB, MAIN, and PARKER, JJ., concur.

JAMISON et ux. v. REILLY et al. (No. 13489.)

(Supreme Court of Washington. Aug. 16, 1916.)

1. LANDLORD AND TENANT §25(1) — ACKNOWLEDGMENT OF LEASE—NECESSITY.

Under the statutes an unacknowledged lease for over a year is void except as it creates a tenancy from month to month, or other rent period.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 66-68; Dec. Dig. § 25(1).]

2. LANDLORD AND TENANT §208(1)—RENT—LIABILITY OF LESSEE AFTER ASSIGNMENT.

A landlord by recognizing the assignment of the lease and accepting rent from the sublessee, surrenders his right to collect rent from the lessee.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 821, 830, 831; Dec. Dig. § 208(1).]

3. LANDLORD AND TENANT §94(1)—TENANCIES FROM MONTH TO MONTH—TERMINATION—LANDLORD'S WAIVER OF NOTICE.

A landlord, by such action, waives any notice from the lessee terminating the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 316, 361, 362; Dec. Dig. § 94(1).]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by A. C. Jamison and wife against T. J. Reilly and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. E. Gallagher, of Spokane, for appellants. Danson, Williams & Danson and George D. Lantz, all of Spokane, for respondents.

MORRIS, C. J. Action to recover rentals reserved under an unacknowledged lease. In September, 1911, appellant and respondents entered into a written lease for the occupancy of a livery stable for a term of three years at a monthly rental of \$100 per month for the first six months, and \$150 per month for the remainder of the term. This lease was signed, but not acknowledged. Thereupon the respondents entered into possession of the premises, and so remained until December 31, 1911, when they made an oral assignment of the lease to Ahrens and Simmons, who thereafter continued in possession and paid the rent up to October, 1912, when Ahrens, Simmons having died in the meantime, formally assigned the lease to Von Lehe, who continued the possession until December 31, 1912. On November 30, 1912, Mr. Jamison then being absent from home, Von Lehe served upon Mrs. Jamison written notice of his intention to surrender possession of the premises on December 31st. The sufficiency of this notice is questioned. Subsequently the Jamisons brought this action, in which they seek to recover from respondents as original lessees all of the unpaid rent for the balance of the three-year term. The lower court found against them, and they have appealed.

[1] The first question to be determined is the character of the lease. Having in mind our statutes relative to contracts creating an interest in real estate, this court has uniformly held that an unacknowledged lease for a term exceeding one year is void so far as the duration of the lease is concerned, and can be enforced only as a tenancy from month to month or from period to period in which rent is payable. *National Laundry Company v. Mayer*, 79 Wash. 212, 140 Pac. 393. Under this holding this lease, providing as it does for the payment of a monthly rental, could only be enforced as a tenancy from month to month.

[2, 3] The lower court has found, and the evidence establishes the fact, that the assignment by respondents to Ahrens and Simmons was with the full knowledge and consent of Jamison. Having accepted Ahrens and Simmons as tenants under the lease and received the rent from them during their occupancy from December 31, 1911, to October, 1912, would operate as a surrender by appellants of any right to enforce the lease as against respondents. A tenancy from month to month can be terminated by either party giving 30 days' notice, but such provision, like any other made for a party's benefit,

may be waived. We think the recognition of the subsequent tenancy and the acceptance of the rent operates as such a waiver.

These facts make it unnecessary to determine whether the notice served upon Mrs. Jamison was effective as a termination of the lease.

The judgment is affirmed.

MOUNT, CHADWICK, ELLIS, and FULLERTON, JJ., concur.

FOBES SUPPLY CO. v. KENDRICK.
(No. 12728.)

(Supreme Court of Washington. Aug. 14, 1916.)

En Banc. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

On rehearing en banc. Opinion in department (88 Wash. 284, 152 Pac. 1028) adhered to, and judgment below reversed, and cause remanded for new trial.

Miller & Lysons, of Seattle, for appellant. Peters & Powell, of Seattle, for respondent.

PER CURIAM. Upon a rehearing en banc, a majority of the court still adhere to the opinion heretofore filed herein as reported in 88 Wash. 284, 152 Pac. 1028, and for the reasons there stated, the judgment is reversed, and the cause remanded for a new trial.

STATE v. EDEN. (No. 13423.)

(Supreme Court of Washington. Aug. 19, 1916.)

INTOXICATING LIQUORS ~~§~~139—**OFFENSES—ILLEGAL POSSESSION—STATUTE.**

Initiative Measure No. 3, Laws 1915, p. 2, § 22, making it unlawful to have possession of over a certain amount of intoxicating liquor, does not render unlawful the possession of a greater amount if lawfully acquired prior to the act's effective date, and held only for personal use.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. ~~§~~139.]

Fullerton, J., dissenting.

En Banc. On petition for rehearing. Petition denied.

For former opinion, see 158 Pac. 967.

MORRIS, C. J. A petition for rehearing has been filed herein in which the prosecuting attorney of King county, joined in by the prosecuting attorneys of 15 other counties, ask the court to clarify the situation as to the effect of the opinion upon liquors obtained subsequent to January 1, 1916, either by granting a rehearing or by supplemental opinion.

It is evident from the public comment upon this decision that it has been greatly misinterpreted and misunderstood. The prominent idea in the petition seems to be that the

opinion may be construed as destroying the force of section 22, providing that it shall be unlawful for any person to have in his possession more than one-half gallon of intoxicating liquor, or more than 12 quarts or 24 pints of beer. The petition is frank in stating that a reading of the opinion would seem to indicate that the court is speaking only of liquor lawfully obtained prior to January 1, 1916, and held for lawful use prior to January 1, 1916. The petition says:

"Certain portions of the opinion show that this idea was predominant in the court's mind," and "we believe that the court intended to go no further than to hold that section 22 does not make unlawful possession of liquor acquired before January 1st. * * *"

If the prosecuting attorneys can easily gather the "predominant" idea of the opinion and the class of liquors the court had in mind, it ought not to be necessary to add to what has been said, and we would not do so except for the great public interest involved in the proper construction of this law and the manifest error into which the public has fallen in its understanding of our first opinion. The petition correctly reviews the opinion in saying the "predominant" idea written into it is the construction of the act only as to liquors lawfully acquired in this state prior to January 1st and held for personal use. That was the only question before the court, and none other was intended to be, or could be, passed upon. The information charged that Eden obtained his liquors prior to January 1st, and held them for personal use, and not for the purpose of selling or disposing of them. In other words, the information set forth a lawful possession and a permitted use. Under such a charge no question of the construction of section 22 was involved, other than to hold that it applied only to liquors acquired subsequent to January 1st, and hence was inoperative as against liquors acquired prior to that date. Such a construction, the prosecutors say, would not be "a blow to a rigid enforcement of the law." We agree with such statement, and we find nothing in the opinion, when read in connection with the agreed facts, which in any way militates against such a view.

It is unfortunate that opinions in cases of this character, involving the enforcement of a law in which the people of the state have taken such interest, should be construed other than by reference to the facts before the court and the plain intentment of the law as to those facts. When properly read in the light of the admitted facts and the language of the act, the former opinion cannot offend against the most rigid enforcement of the terms of the act. All the provisions of the law are preserved, and offenders are still subject to prosecution to the same extent and for the same causes now as at any other time since the law became effective.

The only question involved in the Eden Case subsequent to the time this law went into effect was his intent to make personal use of his liquor either by personal consumption or by gifts to guests in his own home. The law not only fails to make such a use a violation of its terms, but by exact language permits it. How, then, if he obtained his liquors lawfully and intended to put them only to a permitted use, could his act in any sense be termed a violation of the law? We again reiterate what the prosecuting attorneys are pleased to refer to as the "predominant" idea in the former opinion, that the possession of liquors lawfully obtained prior to January 1st, and held only for personal use, is not a violation of the law, and no language of the former opinion can be construed as destroying the vital force of section 22, or of other sections relating to the quantity of liquor lawfully obtainable subsequent to that date. As said in *State v. Intoxicating Liquors*, 159 Pac. 88, filed July 29th, liquors obtained prior to January 1st do not offend against the law when retained only for a personal or permitted use, but do so offend when retained for a commercial use.

These observations as to the purpose and effect of our original opinion will, we think, make our construction of the law so plain as to the question involved that no necessity now arises for a rehearing, and the same is denied.

MOUNT, ELLIS, PARKER, MAIN, CHADWICK, HOLCOMB, and BAUSMAN, JJ. concur.

FULLERTON, J. (dissenting). I think the ruling announced in the first opinion wrong even as limited in the foregoing. I, therefore, think the petition for rehearing should be granted.

HOY et ux. v. BURK et ux. (No. 13396.)
(Supreme Court of Washington. Aug. 16, 1916.)

1. LIMITATION OF ACTIONS — 100(13)—COMPUTATION OF PERIOD—FRAUD—CONSTRUCTIVE NOTICE.

Rem. & Bal. Code, § 159, providing that a fraud action must be commenced within three years after the fraud is discovered, bars such an action if plaintiff had reasonable opportunity to discover the fraud more than three years previous.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 492; Dec. Dig. 100(13).]

2. LIMITATION OF ACTIONS — 100(13)—COMPUTATION OF PERIOD—FRAUD—CONSTRUCTIVE NOTICE.

An action against the vendors of land for fraudulent misrepresentations as to soil and drainage is barred under the three-year limitation statute (Rem. & Bal. Code, § 159), by plaintiffs' constructive notice of the fraud, where

they lived on the land five years before commencing suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 492; Dec. Dig. 100(13).]

Department 2. Appeal from Superior Court, Stevens County; Bert Linn, Judge.

Action by F. C. Hoy and wife against D. J. Burk and wife. From a judgment sustaining a demurrer to the complaint, the plaintiffs appeal. Affirmed.

L. C. Jesseph, of Colville, for appellants. Rochford & Wilson, of Colville, for respondents.

BAUSMAN, J. This is an action in damages for fraudulent representations to plaintiffs, purchasers of land. The case comes here upon demurrers sustained to a complaint relating that in February, 1910, plaintiffs, of Spokane, unfamiliar with Stevens county, were induced by defendants to purchase there two tracts. Examining the larger, they found it low, wet, swampy, and of little value unless drained, but of its soil they could not then, on account of snow, make examination. Thereupon the defendant husband represented that this land lay within a drainage district, of which he was commissioner and for which there was under way a drainage system sufficient to bring this and other lands to arable condition and beyond subsequent overflow within the current year; that the soil, which was from 5 to 15 feet deep, would raise 125 bushels of oats to the acre, with freedom from frost besides. At the same time he exhibited a map of the drainage project with its plans of public record. On these things plaintiffs relied, paying \$16,000, part in cash and part by mortgage, and immediately taking possession. The land had proved entirely too shallow, raised but 25 bushels of oats to the acre, and suffers heavy frosts, while since 1911, when the drainage system was constructed, there has been an overflow of from 1 to 3 feet, lasting until June, and rendering the land so unfit for cultivation that it is worth not above \$6,000. Allegations follow of willful falsity in the representations. However, it is not denied that a system was installed, nor is it asserted that anything was done to prevent plaintiffs from making their own estimates from the public plans, or of procuring the views of engineers or others experienced in drainage. Finally the complaint conceded that when the purchase mortgage was foreclosed plaintiffs made no defense, but suffered the land to be sold. A cause of action on this showing is doubtful indeed, but the statute of limitations at all events was properly invoked.

[1, 2] This suit was not begun until April, 1915, yet plaintiffs have been living on the land since the early part of 1910. To be sure, they relate that it was not until May

or June, 1912, that they discovered the fraud, but this is an idle assertion, even if we should consider the representations more than mere estimates or opinions. Plaintiffs had a fair chance, more than three years before suit, to test the soil, and as for the drainage system they could, even as early as the autumn of 1911, view that installed. It will not do to say that they did not sooner have reasonable opportunity to discover the fraud they complain of, and if they did have reasonable opportunity, they are barred by the interpretation we have long placed upon section 159 of our Code, respecting the three-year period after discovery of a fraud. *Deering v. Holcomb*, 26 Wash. 588, 598, 67 Pac. 240, 561, followed in *Irwin v. Holbrook*, 32 Wash. 349, 357, 73 Pac. 360, and *McDonald v. McDougall*, 86 Wash. 339, 150 Pac. 625. What was said in the *Holbrook* Case may well be said here, that plaintiff was living where these things occurred, had easy access to the sources of information, and was of ordinary intelligence. He had every reason to make investigation promptly, and not a single means of finding out things for himself was withheld from him.

Judgment affirmed.

MORRIS, C. J., and HOLCOMB, MAIN, and PARKER, JJ., concur.

CLARK v. CLARK. (No. 13454.)

(Supreme Court of Washington. Aug. 14, 1916.)

1. DIVORCE \S 184(3) — APPEAL — SCOPE OF REVIEW—TRIAL DE NOVO.

Since an action for divorce is triable de novo on the whole record on appeal, it is immaterial whether findings of fact by the court below support its decree.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 570; Dec. Dig. \S 184(3).]

2. APPEAL AND ERROR \S 934(1)—PRESUMPTION—DECREE OF LOWER COURT.

The court on appeal must accept the decree of the court below as correctly speaking the judgment of such court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3777, 3780, 3781; Dec. Dig. \S 934(1).]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Suit by Ethel Clark against David A. Clark. Judgment for plaintiff, and defendant appeals. Affirmed.

H. E. Foster, of Seattle, for appellant. Milo A. Root, of Seattle, for respondent.

MORRIS, C. J. [1] Action for divorce. Appellant's chief contention seems to be that the findings of fact do not support the decree. This is immaterial, since the case is not here on the findings alone, but is to be tried de novo upon the whole record, our

statute providing that upon appeal in cases of this character this court shall be possessed of the whole case as fully as the lower court was, and shall render judgment according to the real merits of the controversy.

We are then to examine first the complaint to ascertain if cause for divorce be definitely stated, and then the proof to adjudge if such cause be established. The respondent alleged three causes of action; cruelty, non-support, and infidelity. A cross-complaint was filed, alleging desertion, gross improprieties, and cruelty. Admittedly sufficient cause was stated both in the complaint and in the cross-complaint to sever this marital relation, and it is only necessary to examine the record to ascertain which cause, if any, has been proved. We have done so, and find ample ground to sustain the decree. As was lately said in *Hawley v. Hawley*, 157 Pac. 1189, no good purpose can be served in reciting the evidence in divorce cases. It is enough to state the conclusions reached without the nauseating detail so frequently found in cases of this character.

The parties are parents of a female child of the age of five years. The custody of this child was divided between the parents of respondent and the sister of appellant until September 1, 1917, when it was decreed that the parents of respondent should have such custody during the school year and the sister of appellant during the summer vacations, the decree fixing the amount to be paid each of these parties during the periods of such custody. We are satisfied that under the circumstances such disposition of the custody of the minor child is a wise one, and for the best interests of the child.

[2] Some question is raised by respondent as to the decree incorrectly awarding the sums fixed by the lower court at the conclusion of the hearing. We must accept the decree as correctly speaking the lower court's judgment.

The decree is affirmed.

HOLCOMB, CHADWICK, and PARKER, JJ., concur.

BERGMAN v. IDAHO LIME CO.

(No. 13407.)

(Supreme Court of Washington. Aug. 14, 1916.)

PRINCIPAL AND AGENT \S 63(1)—TERMS OF AGREEMENT—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that the selling agent of plaintiff did not agree with it to pay certain freight charges on the goods sold, contrary to the usual trade custom.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. \S 105, 110-112; Dec. Dig. \S 63(1).]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by M. L. Bergman, in the name of

and for the benefit of the Bergman Clay Manufacturing Company, against the Idaho Lime Company. Judgment for defendant, and plaintiff appeals. Affirmed.

F. W. Girand, of Spokane, for appellant. Twitchell & Wentworth and Charles P. Lund, all of Spokane, for respondent.

CHADWICK, J. This action was brought by M. L. Bergman for the benefit of the Bergman Clay Manufacturing Company against the Idaho Lime Company. The Bergman Company is a corporation, the stock of which is owned by M. L. Bergman and wife, and the principal officers and stockholders of the Idaho Lime Company.

In the year 1905, the two corporations began a course of dealing whereby the Idaho Lime Company became the selling agent of the products of the Bergman Clay Company. For its services in billing the goods and collecting accounts, it was allowed a commission of 5 per cent. upon each item of sale. The record shows that the products of the Bergman Clay Company were sold under a custom prevailing in that trade, f. o. b. place of destination. The goods were billed to the customer and, on account of the uncertainty of the amount of freight, the customer paid the freight at the place of destination. The amount paid was deducted from the bill and, in turn, charged back to the Bergman Clay Company by the Idaho Lime Company.

It is the contention of the appellant that the freight charges, aggregating \$10,131.27 were improperly charged to the Bergman Clay Company, and that they should have been paid by the customer or by the lime company. Appellant relies upon an oral contract said to have been entered into in the year 1905, whereby the clay company agreed to pay the freight upon the shipments of clay products sold by it. The contract is denied by the clay company. Aside from the fact that a course of business extending over a long period of years is shown, and the further fact that the books of the clay company were experted by a bookkeeper in the year 1910, and no objection was made by appellant to these items, the court found that appellant had not sustained the allegations of his complaint, and that no such contract was entered into.

A question of fact, only, is submitted, and, although it is strenuously contended by counsel that the evidence of appellant and his wife, who testified to the contract, is to be believed, and the testimony of the witnesses who contradicted them is to be rejected, we are of opinion that appellant has not sustained the burden of proof, and that the testimony, when considered in the light of the circumstances which we have noticed, clearly preponderates in favor of the judgment. The respondent set up, by way of defense, the entire business of the two companies, the

one with the other, contending that there was a balance due and owing to it from the Bergman Clay Company. The court found, and we believe that its finding is sustained by a preponderance of the evidence, that there was, in fact, \$4,723.37 owing from the clay company to the lime company.

We find no question of law calling for inquiry or discussion. Wherefore, for the reasons assigned, the judgment is affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

HUNTER v. BYRON et ux. (No. 13215.)
(Supreme Court of Washington. Aug. 14, 1916.)

1. CONTRACTS \Leftrightarrow 35—EXECUTION—SIGNATURE OF BOTH PARTIES—NECESSITY.

A contract, signed by one party and accepted by the other, need not bear the signature of the accepting party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 171-185; Dec. Dig. \Leftrightarrow 35.]

2. CONTRACTS \Leftrightarrow 138(4)—LEGALITY OF OBJECT—ESTOPPEL TO PLEAD.

Where a contract recited a consideration, defendant could not plead that such consideration was recited for the purpose of inducing other contracts, and was not the true consideration, being estopped to plead his own fraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 689, 690; Dec. Dig. \Leftrightarrow 138(4).]

3. CONTRACTS \Leftrightarrow 138(1)—LEGALITY OF OBJECT—ESTOPPEL TO PLEAD.

In such case, where plaintiff claimed that the consideration was services performed, she was not estopped to assert full payment thereof, although she knew of defendant's fraudulent purpose, since she did not entertain any deceitful motive.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 681; Dec. Dig. \Leftrightarrow 138(1).]

4. CONTRACTS \Leftrightarrow 350(1)—BREACH—ACTIONS—EVIDENCE—SUFFICIENCY.

Where plaintiff produced a contract wherein defendant acknowledged receipt of the consideration and agreed to repay it, if plaintiff failed to secure the land for which the contract was made, and showed that she had failed through no fault of hers, she made a prima facie case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819, 1822, 1823; Dec. Dig. \Leftrightarrow 350(1).]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge. Action by Nellie Hunter against C. L. Byron and wife. Judgment for plaintiff in part, and defendants appeal. Affirmed.

P. V. Davis, of Seattle, for appellants. F. H. Brightman and Arthur E. Campbell, both of Seattle, for respondent.

ELLIS, J. Plaintiff sued on two causes of action. The cause was tried to the court without a jury.

With the second cause of action we are not concerned, since the court made no findings and entered no judgment thereon and plaintiff has not appealed.

For her first cause of action plaintiff alleged that on May 1, 1914, she entered into a written contract with the defendant O. L. Byron, acting for himself and the marital community consisting of himself and defendant Minnie Byron, whereby he, in consideration of \$1,000, agreed to secure for plaintiff title from the United States to certain described lands; that in the contract Byron acknowledged receipt of \$500 of the agreed consideration and was to receive the other \$500 when plaintiff received patent for the land; that in the contract Byron further stipulated that if through no fault of her own, plaintiff failed to secure title to the land, he would repay to her all moneys he had received under the contract. It is further alleged that through no fault of her own plaintiff is unable to obtain title to the land; that she has demanded the return of the \$500; that defendants have refused to repay any sum except \$60; and that there is due to plaintiff \$440 on this first cause of action. Defendants answered, denying any indebtedness to plaintiff, and as an affirmative defense alleging that on April 29, 1914, the parties entered into a written contract in terms the same as that set up in the complaint, save that the sum paid by plaintiff on the execution of the contract and receipt of which by defendant was therein acknowledged was \$150, the balance of \$850 to be paid when patent issued. It is further alleged that long prior to the time when patent could have been secured, plaintiff became dissatisfied and defendant, O. L. Byron repaid to her the sum of \$150 on her request. Plaintiff replied, admitting the execution of the contract set up in the affirmative defense, and alleging that it was canceled by the substituted contract of May 1, 1914, pleaded in the complaint. The court found for plaintiff on the first cause of action, and entered judgment thereon in her favor for \$350 and costs. Defendants appeal.

The several assignments of error are all directed to the claim that the evidence does not sustain the findings and judgment. The court found, in substance, that the contract of April 29th was superseded by that of May 1st, and that of the \$500 mentioned in the latter as paid, \$150 was paid in money and \$350 by services rendered by respondent in obtaining other locators for appellant C. L. Byron; that respondent had been unable to obtain title to the land, and that appellant Byron had repaid her the sum of \$150 and no more.

[1] The evidence is clear that the contract of May 1, 1914, was not signed by respondent, but it is equally clear that it was deliver-

ed to her by C. L. Byron, and that it was accepted by her. Having accepted it, her own signature was not essential. It was also clear that respondent, about the time of the transaction here involved, did considerable work for Byron in securing other locators, under an agreement with him to pay her for so doing. This was admitted by Byron in his own testimony, but he claims to have paid her for all such services. The evidence, however, is far from convincing that he ever paid her any sum in excess of the \$150, which he admits she paid to his attorney in connection with her own location.

[2, 3] Appellants' main defense was that the contract of May 1, 1914, was given respondent solely to use in inducing other locators to make cash payments of \$500 each by leading them to believe that she herself had paid that sum for securing her own location. It is true that Byron and an attorney whom he had employed in making locations in the Roseburg district in Oregon so testified. It is also true that respondent frankly admitted that Byron suggested such use of the contract at the time, and that she afterwards so used it, but she denied emphatically that such was its sole purpose. The trial court was of the opinion, and so are we, that appellant should not be permitted to defeat his own solemn written contract by saying that it was given solely for this fraudulent and deceitful use. He is estopped thus brazenly to assert his own covinous purpose. No such estoppel can be invoked against respondent. She, at least, admits no deceitful motive. If in fact she paid, either in money or services or both, the sum of \$500, her use of the contract to secure other locators contained no element of fraud or deceit.

[4] Respondent made a prime facie case when she produced the contract of May 1, 1914, in which Byron acknowledged receipt of the \$500 and agreed to repay it if she failed to secure the land, coupled with the evidence that she had so failed through no fault of hers. The very character of appellants' main defense shows a moral obliquity which weakens the credibility of his entire defensive testimony. While respondent's testimony was not entirely clear, it was not so tainted.

We find no such preponderance of evidence against the court's findings as to furnish a warrant for disturbing them.

Judgment affirmed.

MORRIS, C. J., and MOUNT, CHADWICK, and FULLERTON, JJ., concur.

In re KEITH'S ESTATE. (S. F. 7633.)

(Supreme Court of California. Aug. 10, 1916.
Rehearing Denied Sept. 7, 1916.)

WILLS \Leftrightarrow 130—OLOGRAPHIC WILLS—DEFECTIVELY EXECUTED INSTRUMENT—SEPARATE PAPER.

An unsigned writing by testator upon separate sheets of paper containing directions to his executor, not written *animo testandi*, is not admissible to probate as part of an olographic will already admitted, although found after testator's death held together with the will by a single metal clip in a sealed envelope, indorsed with testator's handwriting as his last will and testament.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 836, 338-340; Dec. Dig. \Leftrightarrow 130.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John M. Keith, deceased. Upon offer by executor of an additional writing as part of testator's will. Decree admitting the paper to probate appealed from. Reversed.

John L. McNab, Gavin McNab, Nat. Schmulowitz and R. P. Henshall, all of San Francisco, for appellants. Sidney Schlesinger, of San Francisco, for respondent.

HENSHAW, J. Deceased left an olographic will which was admitted to probate. It was duly executed and made disposition of a large estate. It named J. J. Mack of San Francisco as executor without bonds. Subsequently J. J. Mack offered for probate an unsigned writing of the testator's, in form as follows:

"March 3rd, 1913.

"Mr. J. J. Mack:

"I have made a will and have named you as executor without Bonds and giving you (10) ten year to settle up my estate and longer if you find it necessary.

"I have left Some three hundred thousand dollars to my relatives, to be divided up and given to each one as directed in my will. I have only Six Brothers and Sisters to give anything to and I think fifty thousand is all any of them will be able to handle to advantage.

"As I am giving One hundred and fifty thousand to the State University to erect a memorial to the memory of Mrs. Keith I have abandoned any idea to giving to an old Womans Home or any other home for anyone. As this will cut out a great amount of the work contemplated by me I direct or think from the present outlook that you should be paid for your Services as Administrator fifty (\$50,000) thousand dollars. If I should have anything left after making all payments and bequest, I am not sure just what I care to have done with it."

This writing was offered for probate as a part of the will of the deceased which had already been admitted to probate. It was written upon two sheets of paper. The nature of its discovery and the reason why it was not originally offered for probate as a part of the olographic will is explained in the testimony of Mr. Mack, executor, as follows:

"That the two pages now offered for probate were found in the same envelope with the three sheets which had theretofore been admitted to probate as the last will and testament of John M. Keith; that the five sheets were held together by a metal clamp or clip; that he discarded these two sheets now offered for probate, believing the same to be merely a personal letter, advising him of the wishes of the deceased; that his attorney likewise advised him that the sheets were not a part of the will, but were merely an unsigned letter; that several days later he brought the matter to the attention of his counsel, and that some months subsequently his attorney concluded that under the decision of this court in the Estate of Merryfield, 167 Cal. 729, 141 Pac. 259, it constituted a portion of the will."

And still further Mr. Mack testified that after the death of Keith he found in his apartments a sealed envelope bearing indorsement in the handwriting of Keith:

"My last will and testament. John M. Keith, Bakersfield, March 3, 1913, John M. Keith."

Within the envelope were paper writings of the testator, held together by a single metal clamp or clip. The first of these in order was the unsigned letter to Mr. Mack, consisting of two pages. Next in order were three pages, each page signed by the testator, and the three constituting the olographic will as originally admitted to probate. The court admitted the unsigned letter to probate "as a part of the will already admitted," and from its decree so doing this appeal is taken.

Standing alone, it is not disputed but that the two pages admitted as a part of the will of Keith were not executed with the formalities required by law. It was not signed by the testator. Nevertheless the argument was advanced and adopted by the judge in probate that although the letter to Mr. Mack was written last, still—

"in contemplation of law the entire document was a literary unit and an indivisible legal entity. * * * It was virtually a single act."

If these two writings are to be judged from their contents, *ex visceribus suis*, no one would doubt but that the executor's first conviction that the unsigned letter addressed to him formed no part of the will, and was merely a note of personal advice, was perfectly sound. It is manifest that the testator knew of the requirements governing the execution of an olographic will, and was careful to see that no doubt could be raised as to the due execution of his own will. This is shown by his care in affixing his signature to each page thereof. His failure or refusal to perform a similar act of signing the personal letter might well be viewed as a precaution, to prevent the taking place of exactly that which here has taken place—the admission of this letter to probate as a part of his will. Still further, upon the face of the letter it nowhere discloses an intent that it should be read and construed as a part of his will. Thus, there is no reference to it in the will itself, and the letter uses no

language to indicate that the writer contemplated that it should be construed as part of his will. First, there is an absence of signature. Next, there is express reference, not to the making of a will, but to a will already completely made—"I have made a will." The only language which by any stretch of imagination can be said to indicate even a testamentary intent is found in that sentence where the writer says:

"As this will cut out a great amount of the work contemplated by me, I direct or think, from the present outlook, that you should be paid for your services as administrator \$50,000."

But apparently this language is designedly guarded, to forbid the possibility of its being construed as testamentary in character. He does not direct—he directs or thinks. He does not think that the administrator should receive \$50,000, but thinks "from the present outlook" he should receive that sum. The internal evidence of the two documents, then, we repeat, standing alone, is well-nigh conclusive to the effect that the testator believed that he had, in the three pages of writing originally admitted to probate, executed a full and complete will, and that in the personal letter to his friend Mack he clearly expressed this belief; for that letter makes explicit declaration of the fact that the testator had made a will, and contains nothing bearing the inference that he assumed that his personal communication to his friend was to be considered as a part of that will. Cases are numerous—they do not require specific reference—where courts have gone to lengths in upholding as valid written dispositions of property which those courts could clearly see were designed to be testamentary in character. But here the court in probate has reversed this canon of construction, and has forced upon the estate of the testator a writing which it has decreed to be testamentary, but which manifestly the testator himself did not design to be or think was testamentary in character. The reversal of this decree which must follow could securely be rested upon this ground alone, namely, that this writing, incomplete as a will, bears overwhelming evidence that it was not written by the deceased *animo testandi*, but, to the contrary, that it was written, as the executor most naturally and properly concluded upon his first reading of it, as a letter of private information and advice to the man whom he had named as executor in his formal will.

But it appears from the brief of respondent, wherein is embodied, as a part of respondent's argument, the opinion of the learned judge in probate, that direct and conclusive support for the adjudication upholding the admission of this letter in probate as a part of the will, is found in the decision of this court in *Estate of Merryfield*, 167 Cal. 729, 141 Pac. 259. In that case Mrs. Merryfield, an aged lady, left an olographic will.

It was written on three sheets of paper of the same size and character, and apparently torn from the same writing pad. On each of the three sheets was writing exclusively of the testatrix, and the writing of the three sheets formed a complete olographic will, the last sheet of the three being signed. The three sheets were folded together in sequence, and were kept in a locked drawer, where they were found. There was no contention but that the third sheet which was signed was in itself a good and complete olographic will. The contention was that the two preceding and unsigned sheets were not a part of this will. The court in probate found from the evidence that the three sheets did constitute the will of the deceased. This court declared that the evidence was sufficient to sustain the court's finding, pointing out that the sheets themselves were arranged and folded together in proper sequence (in the case at bar the letter to J. J. Mack is the first paper held by the clip); next that it is not likely that the testatrix would have folded these pages in order and carefully preserved them with her will if she had not intended and believed that they were a corporate part of her will; finally that the fact that the will was written upon more than one sheet of paper was immaterial, and herein it is said:

"Nor is it necessary to support the finding that the several detached pieces of paper constituted one instrument that these sheets should be fastened together by mechanical or other device" (citing cases).

This last declaration says this, and only this: That it is not necessary that several detached pieces of paper, together forming one written instrument, must necessarily be connected together by some mechanical or other device before it can be held, as a matter of fact or law, that they do constitute together a single instrument. We are at pains thus to define the full meaning of this language, since it appears from his decision, based upon this case, that the learned judge in probate construed it to mean that where papers were bound together by a mechanical device, necessarily and without regard to anything else, they did form a part of a single instrument, in this case a will.

Certain cases, principally from Pennsylvania, are relied on as affording additional support to the court's ruling. But, to begin with, it may be said, in the language of one of them, "In such cases as this, precedents rarely afford aid." *Gaston's Estate*, 183 Pa. 374, 41 Atl. 529, 68 Am. St. Rep. 874. Of the cases which are most relied on, one is *In re Harrison's Estate*, 196 Pa. 576, 46 Atl. 883. In that case the testatrix had left a will. She also executed a writing upon the face of a sealed envelope, as follows:

"Six bonds for my brother John's daughters; also, one for my nephew J.; to be sold after my death."

No question whatsoever arose over the testamentary character of this writing, and it

was admitted to probate as a part of the will. The question which did arise was whether the bonds spoken of in this codicil could be sufficiently identified, and the holding was that as the codicil was written upon an envelope containing bonds, it was a fair inference that the codicil had reference to the bonds within the envelope. But in that case Chief Justice Green is at pains to point out the extraordinary length to which the court of Pennsylvania has gone in upholding all kinds of irregular, incomplete, and insufficient writings as constituting wills, and proceeds to review what he calls "some of the remarkable cases in which papers were sustained as wills." Manifestly the determination of the Pennsylvania court in that case has not the slightest bearing upon the question before this court. The other case is that of *Fosselman v. Elder*, 98 Pa. 159. There the testatrix left a will, and among her papers was found a sealed envelope, indorsed in her handwriting thus:

"Dear Bella, this is for you to open."

Within the envelope was a promissory note for \$2,000, and a paper written and signed in the handwriting of the testatrix as follows:

"Lewistown, October 2, 1879. My wish is for you to draw this \$2000 for your use should I die sudden. Elizabeth Fosselman."

Here again no question arose over the due execution of this writing as a codicil to the will, nor over its admissibility to probate as a codicil. The contention was that testamentary effect could not be given to it because it failed to describe with sufficient certainty the legatee, and the decision of the court, which its Chief Justice described as being one of its "remarkable cases," was that reference could be had to the language, "Dear Bella, this is for you to open," found upon the outside of the envelope, as serving to identify this Bella as the person to whom the codicil gave the legacy. This case also, it must be apparent, is equally inapplicable. In neither of the Pennsylvania cases was the question of the due execution of the paper writing as a will in controversy. Here it is the sole question in controversy. In each of the Pennsylvania cases the testatrix duly executed an instrument of testamentary character in accordance with the law of wills. In the first of the cases the question was whether the property bequeathed could be sufficiently identified. In the second, the question was whether the beneficiary had been described with sufficient certainty to enable the court to give effect to the bequest. It certainly cannot require more than this statement to establish the radical difference between those cases and this, where the very gist of the controversy is not over the meaning of a duly executed testamentary writing, but whether the writing itself is testamentary, and, if testamentary, whether it has been

executed with the formalities required by law. For the reasons already given it is to our minds clear that the writing addressed to J. J. Mack was not written by the deceased animo testandi, nor was it executed with the formalities required to justify its admission to probate, even if it were so written.

To the end that respondent on this appeal may have the full time allowed by law after the filing of this opinion and decision in which to petition the court for a rehearing of the matter, the judgment heretofore given is set aside, and the decree appealed from is reversed on this date.

We concur: LORIGAN, J.; MELVIN, J.

FARRAR v. STEENBERGH et al. (two cases).
(Sac. 2284, 2295.)

(Supreme Court of California. July 22, 1916.
Rehearing Denied Aug. 22, 1916.)

1. JUDGMENT \S 120—DEFAULT—ENTRY BY CLERK—POWERS.

In entering default judgment as provided by Code Civ. Proc. \S 585, the clerk acts ministerially and without judicial functions, and must conform strictly to the statute, or his proceedings are void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 210; Dec. Dig. \S 120.]

2. JUDGMENT \S 94—DEFAULT—ENTRY BY CLERK—POWERS—CROSS-COMPLAINT.

A so-called cross-complaint, seeking rescission of sale contract for fraud and return of money paid, is not an action arising on contract for money or damages only within Code Civ. Proc. \S 585, and the clerk's entry of default thereon is void, and may be disregarded or set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 153; Dec. Dig. \S 94.]

3. JUDGMENT \S 143(17)—VACATING DEFAULT—EXCUSABLE NEGLECT.

Vacating default entered on cross-complaint is justified where the cross-complaint was entitled "answer" and was long and involved, and the only indication of its character was allegation of matter appropriate to a counterclaim as constituting a cross-complaint, especially in view of supposed friendly relations of the attorneys and stipulations for trial at a later date filed before default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 290; Dec. Dig. \S 143(17).]

4. JUDGMENT \S 143(17)—RELATIONS WITH ADVERSE PARTY—SHARP PRACTICES.

Courts should not encourage practices of attorneys in securing defaults by misleading the adverse attorneys by labeling a cross-complaint an "answer" and by violating stipulations for trial on a certain date.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 290; Dec. Dig. \S 143(17).]

5. JUDGMENT \S 159—VACATING DEFAULT—AFFIDAVIT—SUFFICIENCY.

That an affidavit for vacation of default did not specifically allege that the attorney had no knowledge that a pleading entitled "answer" was in fact a cross-complaint in time to answer does not render it insufficient, where the facts alleged justified a clear inference to that effect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 310, 312, 313; Dec. Dig. \S 159.]

Department 1. Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by Walter T. Farrar against C. H. Steenbergh and another. From a judgment for defendants on their cross-complaint, entered by default, plaintiff appeals. From an order vacating and setting aside such judgment, defendants appeal. Appeal of plaintiff dismissed, and order of vacation affirmed.

Hoefler & Morris, of San Francisco, for plaintiff. Edward J. Linforth, of San Francisco, for defendants.

SHAW, J. The above-entitled appeals arise out of the same case. No. 2284 is an appeal by the defendants from an order of the superior court made on July 16, 1914, setting aside a default and judgment theretofore entered in the case in favor of the defendants against the plaintiff. No. 2293 is an appeal by the plaintiff from the judgment which was vacated by the order involved in the other appeal. It will make for convenience and brevity to consider the two appeals together.

The complaint stated a cause of action to foreclose a mortgage for the sum of \$4,000. The defendants filed an answer, containing allegations "by way of cross-complaint," to the effect that the plaintiff sold and conveyed to C. H. Steenbergh the tract of land mortgaged, for the price of \$6,000, that Steenbergh paid \$2,000 thereon and gave said mortgage as security for the remainder, that plaintiff induced Steenbergh to buy the land by false and fraudulent representations as to its quality and character; that on discovering the fraud Steenbergh offered to reconvey the property and rescind the sale, and demanded the return of the \$2,000 paid. The prayer was that the plaintiff take nothing; that the note and mortgage sued on be declared void and canceled; that the sale be rescinded; and that Steenbergh recover of plaintiff \$2,000. This document was served on the plaintiff on December 1, 1913, and was filed on December 2, 1913. The default of the plaintiff for not answering the cross-complaint included therein was entered by the clerk on January 12, 1914. On June 1, 1914, the clerk, on motion of the defendants, entered judgment against the plaintiff for the relief asked in the cross-complaint, as above specified. Plaintiff moved to vacate this default and judgment, upon the grounds: First, that the clerk was without jurisdiction to enter the default, and that the court was without jurisdiction to enter the judgment; second, that the default was entered through the mistake, inadvertence, surprise, and excusable neglect of the plaintiff and his attorneys. The court, as above stated, granted the motion and set aside the default and judgment.

[1-3] The authority of the clerk to enter judgments on default of a party is derived

from the first subdivision of section 585 of the Code of Civil Procedure. So far as material it reads as follows:

"1. In an action arising upon contract for the recovery of money or damages only, if * * * no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint, including the costs, against the defendant."

In the performance of the functions devolved upon him by that subdivision the clerk acts ministerially. He exercises no judicial functions, but is only an agent by whom the judgment is written out and placed upon the record. Consequently, he must conform strictly to the provisions of the statute, or his proceedings will be void. *Stearns v. Aguirre*, 7 Cal. 449; *Kelly v. Van Austin*, 17 Cal. 564; *Wharton v. Harlan*, 68 Cal. 425, 9 Pac. 727; *Glidden v. Packard*, 28 Cal. 651; *Wallace v. Eldredge*, 27 Cal. 497. It follows that he has no authority, under this subdivision, to enter a judgment, except in cases of the kind mentioned therein. He has no such authority in an action not of the character therein described. *Shay v. Chicago Clock Co.*, 111 Cal. 551, 44 Pac. 237; *Crossman v. Vivienda W. Co.*, 136 Cal. 574, 69 Pac. 220; *Lacoste v. Eastland*, 117 Cal. 679, 49 Pac. 1046. The subdivision gives him no authority except in "actions arising upon contract for the recovery of money or damages only." There may be reason to doubt whether a cross-complaint comes within the scope of the subdivision. It limits the authority of the clerk to cases where no answer has been filed "within the time specified in the summons or such further time as may have been granted." Service of a cross-complaint upon a plaintiff who appears by an attorney is not made by a summons to the plaintiff, but by delivery of a copy of the cross-complaint to the attorney. Code Civ. Proc. §§ 442, 1015. As there is no summons upon plaintiff, and no "time specified in the summons," to look to, it is questionable whether the section authorizes a clerk to enter a judgment against the plaintiff upon a cross-complaint in any case. This doubt is emphasized by the fact that a claim for the recovery of money only, on a contract, express or implied, when made by a defendant against the plaintiff, constitutes a counterclaim under section 438 of the Code, rather than a cross-complaint under section 442, and is deemed controverted without answer. Code Civ. Proc. § 462. But, however this may be, it is clear that the cause of action set forth in the cross-complaint is not of the character described in the subdivision quoted, and that the clerk has no authority to enter judgment upon such cause of action. It is distinctly a cause of action in equity to rescind a contract of sale, cancel a note and mortgage, and recover

the consideration paid by the cross-complainant. Upon no theory can it be considered as an action upon contract for the recovery of money only. The judgment entered by the clerk was therefore void, and, "being void, the court below might disregard the entry, or set it aside." *Stearns v. Aguirre*, supra.

[4] The question of vacating the default requires further consideration. See *Wharton v. Harlan*, supra. The failure of the plaintiff's attorney to examine the document served on him on December 1, 1913, with sufficient care to perceive that it purported to contain a cross-complaint was, of course, negligence on his part, but that document was in itself deceptive. It was labeled an answer. The acknowledgment of service prepared by defendant's attorney, indorsed thereon and signed at his request by the plaintiff's attorney, described it as "the within answer." It opened with several pages of prolix qualified denials, in effect admitting all the allegations of the complaint. There followed this passage:

"And for a further, separate and distinct cause of defense to said action, and by way of cross-complaint said defendants allege and each of them alleges, as follows, to wit:"

The matter thereafter set forth, if sufficient for any purpose, would have supported a counterclaim for the \$2,000 paid on the price of the land as fully as it would a cross-complaint for specific equitable relief. A counterclaim requires no answer. The only things whereby to distinguish this pleading from a counterclaim were the words "and by way of cross-complaint" in the foregoing introduction, and a part of the prayer at the close of the paper. The plaintiff's attorney had previously favored the defendants' attorney by extensions of time to answer. He had good cause to believe that the relations between them were friendly and kindly, and no cause to suspect treachery or deceit. Attorneys do not usually take defaults against opposing attorneys with whom they are on friendly terms, without giving information thereof. The attorneys had their offices in San Francisco, and the case was in the superior court of Shasta county. Prior to the entry of the default they had, apparently with mutual confidence and trust, signed and filed a stipulation that the case might be set for trial at the convenience of the judge at any time between January 20 and January 30, 1914. It had been set for January 20th by the judge, and defendants' attorney had been informed of that fact by his opponent. Under all these circumstances we cannot say that the trial court abused its discretion in holding that it was excusable negligence. Courts should not encourage the practices here followed by the defendants' attorney.

[5] The only other objection to the sufficiency of the showing is that the affidavit of plaintiff's attorney does not expressly declare

that he did not discover the fact that it included a cross-complaint, or that he would have filed an answer thereto if he had known the fact, or that he was surprised by the default. While it is true that these statements are not expressly made, the facts stand forth by inference from nearly every act of the parties, as related in the affidavit, between the 1st of December, 1913, and the 1st of June, 1914, when the judgment was entered by the clerk. We shall not give them in detail. The court was amply justified in inferring from the facts stated and not denied that the plaintiff's attorney had failed to discover the character of the paper filed as an answer, and that his failure to answer the same, or to proceed earlier to attack the entry of the default, was due solely to inadvertence, due to his ignorance of the character of the paper and of the entry of the default. There was no abuse of discretion in setting aside both the default and the judgment.

The judgment which is the subject of the appeal in No. 2295 was vacated by the court below, and, as we have concluded that the order vacating it should be sustained, the proper course for the disposition of the appeal is to dismiss it, since the judgment from which it was taken is no longer in force. The appeal therefrom was taken after the defendants had appealed from the order vacating the judgment, and was made necessary, as a matter of prudence, by the contingency that the defendants might possibly be successful in their appeal from the order. Under such circumstances defendants should not be allowed costs on the dismissal of the appeal.

The order vacating the default and judgment is affirmed, and the appeal from said judgment is dismissed. The plaintiff will recover his costs on both appeals.

We concur: SLOSS, J.; LAWLOB, J.

TANFORAN v. TANFORAN. (S. F. 6663.)
(Supreme Court of California. Aug. 8, 1916.)

1. PLEADING \S 53(2)—INCONSISTENCY.

If the pleader thinks it desirable so to do, as where the exact legal nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, his pleading may set forth the same cause of action in varied and inconsistent counts with strict legal propriety, as a cause for fraud and misrepresentation and for duress.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 114-117; Dec. Dig. \S 53(2).]

2. PLEADING \S 369(1)—ELECTION OF COUNTS—WHEN NECESSARY.

Since inconsistent causes may be pleaded, it is error for the judge to require plaintiff to elect upon which he will rely, but plaintiff has the right to produce evidence on all causes set forth, whereupon it is for the jury to say which has been sustained, although defendant may move

for nonsuit on any cause not sustained by the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199, 1200; Dec. Dig. ¶369(1).]

3. APPEAL AND ERROR ¶1039(9)—HARMLESS ERROR.

Erroneous requirement that plaintiff elect upon which of two inconsistent causes she will rely is harmless where made after all of plaintiff's evidence is in and there is absolutely no evidence to support the count then discarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4084; Dec. Dig. ¶1039(9).]

4. DEEDS ¶190—PLEADING.

Where a wife, after separation, seeks to set aside a deed for fraud and duress, the issue of undue influence, not being pleaded, is not raised.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 561; Dec. Dig. ¶190.]

5. APPEAL AND ERROR ¶172(1) — SCOPE OF REVIEW—WAIVER OF OBJECTIONS.

In a suit by plaintiff to set aside a deed to her former husband at their separation, where it was stipulated that they were unfriendly at time of its execution, statement by court that there was no issue of undue influence in the case cannot be objected to on appeal, where no objection to it was raised when it was made, or offer to amend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070-1073, 1076-1078; Dec. Dig. ¶172(1).]

6. CANCELLATION OF INSTRUMENTS ¶4—UNDUE INFLUENCE—ACTIONS.

A cause of action to set aside a deed for undue influence, and particularly for that form of undue influence which is presumed to have been exerted because of the confidential relationship of the parties, is a cause of action wholly separate from that which would seek the cancellation of an instrument either for fraud or for duress.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. ¶4.]

In Bank. Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Suit by Stella Tanforan against Frank Tanforan. From a judgment for defendant and order denying new trial, plaintiff appeals. Affirmed.

W. W. Sanderson, of San Francisco, for appellant. Joseph K. Hawkins, of San Rafael (Edward C. Harrison and Maurice E. Harrison, both of San Francisco, of counsel), for respondent.

HENSHAW, J. Plaintiff sued, seeking a judgment canceling a deed which she had made to her former husband, and compelling a reconveyance to herself of the property so deeded. Her complaint charged in two counts. In both it is declared that the property so conveyed was her separate property, owned by her in fee, subject to a life estate in her mother. This by the pleadings is admitted. In the first count she charged that, differences having arisen between herself and her husband, they had agreed to a separation, and had further agreed that the defendant would pay to the plaintiff upon such separation the sum of \$1,000, and for this

sum the plaintiff would execute to her husband her deed, conveying to him all of her right, title, and interest in and to the community property. The husband, the defendant herein, caused the articles of separation and the deed to be drawn, and they were presented to her in a notary's office for execution. Plaintiff said to the defendant that she was too sick to read the documents, and asked the defendant to state what the deed contained. The defendant then falsely and fraudulently represented to her that the deed was a deed to the community property which she was to execute in accordance with the understanding of the parties. Believing this, she did so execute the deed, and thereafter discovered that the deed was not a deed to the community property, but was a deed to all her separate property. These false representations she relates were made upon the 18th of February, 1909, the date of her execution of the deed. In her second count she sets up that the husband compelled her to execute this deed of her separate property under duress, on that day and for several days prior thereto threatening "to kill and murder plaintiff unless plaintiff would execute and deliver to defendant a deed granting and conveying to the defendant all her right, title, interest, and estate in and to" her separate property, and she alleges that she was impelled to execute, and did execute, this deed under her fears caused by these threats of her husband.

All these matters were denied by the husband, whose answer and whose evidence were that shortly prior to the 18th of February he discovered that his wife was unfaithful. They had one child, a daughter. They agreed to separate. The wife's estate in her separate property was not an estate in enjoyment, and consequently the wife was receiving no immediate benefit from it; that his wife said that she must have money and was going to sell her interest; that he said if she was going to do this he would give her \$1,000 for it and hold the property so that their daughter might, in time, have and enjoy it; that under these circumstances, and with full knowledge of the deed and of its contents, his wife executed the deed and received the thousand dollars. Subsequently, as the husband and wife had contemplated, he brought his action of divorce, and then gave to her \$500 for her interest in the community property.

Having thus outlined the husband's defense, we may in similar manner set forth the testimony of the wife. She states that shortly before the execution of the deed domestic trouble had arisen, and she and her husband had agreed to separate. Her husband told her that she—

"would have to give him a deed to our little girl of what was coming to me out of my mother's estate. I looked at him and said, 'What did you

say?" He said, 'Before we do any business in settling up our estate, you have got to deed to me what is coming in your mother's estate.' I said: 'You certainly have got your nerve. What has what is coming to me got to do with ourselves?' And he said, 'It don't make any difference; you have got to deed to our little girl what is coming to you from your mother's estate.' I did not consent to it. He told me he wouldn't give me anything of the community property, and I said, 'You are not to take from me what don't belong to me (referring to my interest in my mother's estate), and you are not entitled to that in any way, shape, or form.' When he found I wouldn't agree with him to do anything on this deed, I said, 'You can keep everything you have, and I will take everything in the house that my mother gave to me, which will cover most everything in the house, and I will go home to her,' and later on, I think the day after, he came to me and said, 'Have you decided to do what I want about that property?' and I said: 'No; that property is not mine to give to anybody. Wouldn't that be a nice thing for my mother to know that I did such a thing with her property?' And he said, 'She will never know anything about it.' I answered, 'How can I deed the property over to Loretta without my mother knowing it?' He answered, 'She will never know it.' When I told him my decision, he said, 'I will give you \$1,000 for your share of the community property and \$30 a month towards your board.' This community property consisted of a little home in town, a little money loaned out, horses and buggies. He said, 'I will have the separation papers drawn.' I said, 'You can have the separation papers drawn and bring them home, and we will read the papers and talk them over together,' and he told me he would. But he did not bring any papers over to Novato. He made several trips to San Rafael or the city, but stated they were not ready, as his lawyer was very busy. He never mentioned the deed to me again."

Her version of the happenings at the notary's office is that her husband there gave her two papers—one the articles of separation, the other the deed. She familiarized herself with the contents of the former. She looked at the deed and said, "I can't stay here long enough to read it; I am too sick." Her husband told her it was a deed to the community property, and she took his word for it, and so signed the paper.

[1] At the commencement of the trial the court declared that the two causes of action were necessarily inconsistent, and that the plaintiff would ultimately be required to elect upon which one she stood before the defendant put in his case. Further the court stated that he would not compel this election until plaintiff had introduced all of her testimony. When this was done and plaintiff had rested her case, defendant's attorney moved that plaintiff be required to elect upon which of the causes of action she would stand. The court granted the motion, and plaintiff's attorney declared his election to stand upon the first cause of action, that of fraud. Complaint is made of this, and much discussion is indulged in over the question whether or not the counts are inconsistent, and whether or not, if inconsistent, the court had the legal right to compel an election. Little, however, need be said upon the matter. Our simplified method of pleading, which requires merely the statement of ultimate facts,

will not often render it necessary for a complaint to charge in inconsistent counts. But when for any reason the pleader thinks it desirable so to do, as where the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, his pleading may set forth the same cause of action in varied and inconsistent counts with strict legal propriety. Pom. Code Rem. § 467; *Remy v. Olds*, 4 Cal. Unrep. 240, 84 Pac. 216, 21 L. R. A. 645; *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213; *Rucker v. Hall*, 106 Cal. 425, 38 Pac. 962; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, 153 Pac. 712.

[2, 3] Since, then, inconsistent causes of action may be pleaded, it is not proper for the judge to force upon the plaintiff an election between those causes which he has a right to plead. Plaintiff is entitled to introduce his evidence upon each and all of these causes of action, and the election, or in other words the decision as to which of them is sustained, is, after the taking of all the evidence, a matter for the judge or the jury. There is, of course, a corresponding right in the defendant to move for a nonsuit upon any of these causes which may not have been adequately supported by the evidence. Therefore it must be said that the court's ruling in forcing an election was erroneous, but nevertheless it was absolutely without injury. All of plaintiff's testimony had been received. Not one word of it substantiated the count charging duress. Plaintiff could not have been injured by the election to abandon a cause of action wholly unsupported by evidence. The court, in short, would have been justified in granting a nonsuit as to this cause of action, and the election insisted on in effect did no more than this. There was left, then, to the consideration of the court the single question: Was plaintiff induced to execute the deed through the fraud and deceit of her husband? The court by its findings answered this question in the negative, and from the judgment which followed this appeal is taken.

[4-6] Upon the appeal appellant's attorney does not argue with much conviction against the decision of the court in the matter of fraud and of duress. Indeed, he cannot well do so, since the latter cause of action was wholly unsupported by the evidence, and the first was decided against plaintiff under conflicting evidence. He therefore shifts his ground and advances with great earnestness the contention that the evidence clearly establishes a breach of trust, an abuse upon the part of the husband of the confidential relation existing between himself and wife—a gross advantage taken by the husband in his dealings with his wife, as evidenced by the disparity between the price the husband paid for the property, \$1,000, and its value,

which is asserted to have been \$15,000. Wherefore it is said that by virtue of section 2235 of the Civil Code the deed of the wife should be canceled because of the undue influence exercised upon her by her husband. That familiar Code section declares that:

"All transactions between the trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence."

In this connection appellant's attorney complains grievously of a declaration made by the court. The record discloses the following: The court asked the attorney for plaintiff if he would stipulate that the parties were unfriendly on the 18th day of February, the day of the execution of the deed. It was so stipulated. Then said the court:

"The confidential relation ordinarily presumed to exist between husband and wife is not at issue in this action. There is no presumption here of undue influence on the part of the husband in taking the deed from his wife."

To this declaration no response whatever was made by plaintiff's attorney. It is quite apparent that the court by this statement meant to declare what it conceived to be the nature of the issues joined by the parties. It is entirely unjustifiable to say that the court meant that it would listen to nothing touching the abuse of such a confidential relation if such abuse were fairly within the issues. If the court's declaration concerning the scope of the pleadings and the issues did not meet the views of plaintiff's attorney, then was the time for him to have spoken and, if necessary, to have amended his complaint and to have charged by a third count the procurement of the deed by undue influence. He did not do so. It certainly can require no citation of authority to the effect that a cause of action for undue influence as such, and particularly for that form of undue influence which is presumed to have been exerted because of the confidential relationship of the parties, is a cause of action wholly separate from that which would seek the cancellation of an instrument either for fraud or for duress. True, the execution of an instrument under such circumstances of undue influence is a species of fraud, but it is no part of the fraud, and partakes in no degree of the character of fraud which was specifically pleaded. As we have said, it was open to plaintiff to have amended her complaint after the court had expressed its views defining what it conceived to be the questions at issue between the parties. Plaintiff did not do so, nor make any effort to do so. The court's definition of the issues under the pleadings before it was strictly accurate, and the effort upon this appeal is to have this court treat the pleadings as sufficient to charge an abuse of confidential relations

amounting to undue influence. But for the reasons given, this cannot be done. It is equivalent to asking this court to decide the litigation upon the ground that the defendant exercised undue influence in procuring the making of the deed, a charge which is not found in the pleadings, upon which, of course, issue was not joined, and upon which necessarily the trial court made no findings.

The judgment and the order denying plaintiff's motion for a new trial are therefore affirmed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

HIRSCH v. ALL PERSONS, ETC.

(S. F. 7985.)

(Supreme Court of California. Aug. 7, 1916.)

APPEAL AND ERROR § 2 — DECISIONS APPEALABLE — STATUTES — APPLICATION TO PENDING PROCEEDING.

Code Civ. Proc. § 963, abolishing appeals from orders granting new trials, with certain exceptions, applies where the order was made after its effective date, regardless of when the new trial proceedings were instituted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3-7, 1882, 2421; Dec. Dig. § 2.]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by one Hirsch against All Persons, etc. From an order granting a new trial, certain defendants appeal. Appeal dismissed.

Chas. F. Hanlon and Percy V. Long, both of San Francisco, for appellants. Henry Ach, of San Francisco, for respondent.

HENSHAW, J. This is a motion to dismiss an appeal taken from the order of the court granting a new trial, which order was made and given after the amendment of the Code of Civil Procedure abolishing the right of appeal from an order granting a new trial, saving "in an action or proceeding tried by a jury, or where such trial by jury is a matter of right," etc. (Code Civ. Proc. § 963), and further providing that upon appeal from a judgment the court may review "any order on motion for a new trial" (Code Civ. Proc. § 956). Respondent on this motion relies upon the case of *San Francisco v. Superior Court of Alameda County*, 157 Pac. 604. But in that case it is declared, touching the right of an appeal from such an order, in the following language:

"It has been held that as to the right of appeal from such an order [granting or refusing to grant a new trial] it is the condition of the law at the time of the denial of the motion for a new trial that controls, regardless of whether the proceeding for a new trial was initiated prior to or subsequent to the change in the law."

To the support of this language is cited *Woodruff v. Colyear*, 156 Pac. 475, where it

is declared that the statute denying a right of appeal from an order denying a new trial is necessarily applicable in every case where such order was made subsequent to the date of the taking effect of the amendment. "It is the condition of the law at the time of the making the order that controls" the right of appeal.

The motion to dismiss is therefore granted.

We concur: SLOSS, J.; SHAW, J.; LO-RIGAN, J.; MELVIN, J.; LAWLOR, J.

CLEMMONS v. RAILROAD COMMISSION OF STATE OF CALIFORNIA.

(L. A. 4425.)

(Supreme Court of California. Aug. 4, 1916.)

1. PUBLIC SERVICE COMMISSIONS \S 35—CERTIORARI TO REVIEW ORDERS—OBJECTIONS TO JURISDICTION—WAIVER.

Where order was issued for the Railroad Commission to show cause why certiorari should not issue to review an order of the Commission, and the Commission objected to the order for want of jurisdiction, but the writ was ordered without passing on the merits, the Commission was not precluded from insisting on their objection raised on reply to order to show cause.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. \S 35.]

2. PUBLIC SERVICE COMMISSIONS \S 29—ORDERS—APPEALS—TIME.

By specific provision of Public Utilities Act, \S 66 (Laws 1911 [Ex. Sess.] p. 54), an aggrieved party, who fails to apply for rehearing of an order of the Public Utilities Commission before its effective date, loses his right to have such order reviewed in the courts.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. \S 29.]

3. PUBLIC SERVICE COMMISSIONS \S 19(1) — ORDERS—APPEALS—TIME.

Public Utilities Act, \S 61a, providing the effective date of certain orders of the Commission, applies only to proceedings instituted by persons or corporations against public utilities, and not to proceedings instituted by the public utility itself.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. \S 19(1).]

4. PUBLIC SERVICE COMMISSIONS \S 19(1) — ORDERS—APPEALS—TIME.

In the absence of any statutory provision to the contrary the Public Utilities Commission may provide in its discretion the time when its orders shall take effect.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. \S 19(1).]

5. PUBLIC SERVICE COMMISSIONS \S 27—ORDERS—APPEALS—TIME.

Since the Legislature might have withheld from the courts of the state any power reviewing the acts of the Public Utilities Commission, the power of review which is given must be exercised within the limits and upon the conditions fixed by the Legislature.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. \S 27.]

In Bank. Application for writ of review by Dan Clemmons and William Clemmons against the Railroad Commission of the State

of California and the members thereof. Proceeding dismissed.

James Donovan and F. E. Davis, both of Los Angeles, for petitioners. Douglas Brookman, of San Francisco, for respondents.

SLOSS, J. This is a proceeding brought to review an order of the Railroad Commission. Tujunga Water & Power Company, a corporation engaged in supplying water in certain territory in the county of Los Angeles, applied to the Commission for an increase of rates. Certain consumers, including the petitioners above named, appeared and resisted the application. After a hearing the Commission, on July 8, 1915, made and filed its order establishing a schedule of rates greater than those theretofore in force. The order contained a provision that the authorized schedule be put into effect on and after July 15, 1915. On August 13, 1915, Dan and William Clemmons, petitioners herein, filed with the Commission their application for a rehearing. The rehearing was denied on various grounds, one of them being that the application had not been presented within the time allowed by law. The applicants petitioned this court for a writ of certiorari.

In the first instance, we issued an order to show cause why a writ of certiorari should not issue. In response to this order, the Commission raised the objection that its order could not be reviewed here because timely application had not been made to the Commission itself for rehearing. Public Utilities Act, \S 66. On the return day of the order to show cause, the court directed the issuance of a writ of certiorari, and return to this writ has been duly made.

[1] Notwithstanding our order that a writ issue, the respondents are not precluded from continuing to insist, as they do, upon their preliminary objection raised in response to the order to show cause. In ordering the issuance of the writ of certiorari we did not finally pass upon the merits of this objection. In any event, the point goes to the jurisdiction of the court, and it may, therefore be raised at any stage of the proceedings.

The Public Utilities Act (section 67) provides that:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, * * * within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined."

The same section, after defining the scope of such writ of review, declares that:

"No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its offi-

cial duties; provided, that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases."

[2] The validity of these limitations upon the control of the courts of this state over the acts of the Railroad Commission was definitely settled in *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. All of the justices who took part in the decision of that case agreed that the conclusion just stated was the necessary consequence of the constitutional grant to the Legislature of authority to confer powers upon the Railroad Commission, such authority being "expressly declared to be plenary and unlimited by any provision of this Constitution." Const. art. 12, § 22. Section 66 of the Public Utilities Act provides that:

"No cause of action arising out of any order or decision of the Commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, an application to the commission for a rehearing."

Since in the case at bar "the effective date" of the order complained of was, by the order itself, declared to be July 15, 1915, and since application for rehearing was not made until 29 days after that date, it follows that the petitioners have lost their right to apply to this court, or to any court of this state, for a review of the action of the commission.

[3] The petitioners seek to escape the effect of this reasoning by the contention that, under section 61a of the act, orders of the Commission do not take effect until 20 days after service of such orders. It is claimed, and the evidence seems to support the claim, that there was no service of the order in this case upon these petitioners or their attorney until within 20 days prior to the filing of the application for rehearing. We are satisfied, however, that the provision of section 61a thus relied upon by the petitioners has no application to the present case. Section 60 provides for the making of complaint, by the Commission of its own motion, or by any person interested, against any public utility. Such complaint is to be served by copy upon the corporation or person complained of, and time is to be set for the hearing. Section 61a, which immediately follows, begins by providing for a hearing at the time so fixed. It then goes on to provide for the order of the Commission, and states that:

A "copy of such order, certified under the seal of the Commission, shall be served upon the corporation or person complained of, or his or its attorney. Said order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided. * * *"

These provisions in section 61a have reference to an order made after the hearing contemplated in that section, and such hearing clearly is one following a complaint pre-

sented under section 60. Sections 60 and 61a both deal with a proceeding initiated by complaint against a corporation or person conducting a public utility. Neither section has any reference to a proceeding like the present, where the public utility itself has instituted a proceeding before the Commission, and is seeking relief which may affect all of its numerous patrons. The soundness of this distinction is made quite apparent by a consideration of the next succeeding section (62), which deals specifically with proceedings initiated by public utilities for the purpose of getting some affirmative relief. This section provides for complaints by public utilities, and authorizes the Commission to hear such complaints *ex parte* or after service upon such parties as may be designated by the Commission. In such proceedings, the many consumers or other members of the public who may be affected are not included in the term "the corporation or person complained of," as used in section 61a, and that section has no application. Where, as in this case, a public utility seeks to have its rates raised, every consumer is as much a person complained of as is any other. If the petitioners' contention be sound, an order authorizing an increase of rates would not be effective until 20 days after service of the order upon every consumer. We do not think this is the intent of the statute, or within a fair interpretation of its terms.

[4, 5] In the absence of any provision to the contrary in the statute, we see no reason to doubt that the Commission may provide in its discretion for the time when its orders shall take effect. It is urged by the petitioners that the Commission might fix so short a time that it would be impossible to petition for a rehearing, and might thereby deprive a party aggrieved of any right to resort to the courts for redress. But the answer to this is that the Legislature might have withheld from the courts of the state any power of reviewing the acts of the Commission. *Pac. T. & T. Co. v. Eshleman*, *supra*. The power of review which is given must be exercised within the limits and upon the conditions which the Legislature has seen fit to fix.

The necessary result of the foregoing discussion is that the failure of the petitioners to ask the Commission for a rehearing within the time allowed by the statute bars them of any right to ask this court to review the order complained of. There is therefore no occasion, and it would be improper to inquire into the merits of the attack made upon the order of the Commission. That order has become final, so far as the power of this court to review it in certiorari is concerned.

The proceeding is dismissed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

DONLON BROS. et al. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA. (L. A. 4511.)

(Supreme Court of California. Aug. 2, 1916.)

1. MASTER AND SERVANT — 367—WORKMEN'S COMPENSATION ACT—INDEPENDENT CONTRACTOR.

Where one was killed while cutting firewood at a certain price per cord under employment by the agent of a contractor with the landowner to have the wood cut from trees on the land, deceased furnishing his own working tools, determining his own hours of labor and his compensation depending on inspection and measurement of his work, the relation of master and servant did not exist.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 367.]

2. MASTER AND SERVANT — 417(7)—WORKMEN'S COMPENSATION ACT—PROCEEDING BEFORE INDUSTRIAL BOARD—REVIEW—RELATION OF APPLICANT.

Upon review of an award of the Industrial Accident Commission, the existence of the relationship of master and servant is jurisdictional.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 417(7).]

3. MASTER AND SERVANT — 417(7)—WORKMEN'S COMPENSATION ACT—PROCEEDING BEFORE INDUSTRIAL BOARD—REVIEW—RELATION OF APPLICANT.

The determination of the board as to the existence of such relationship is reviewable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 417(7).]

In Bank. Application for writ of review by Donlon Bros. and another against the Industrial Accident Commission of the State of California. Award annulled.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. [1] Review of an award of the Industrial Accident Commission. The admitted facts disclose that petitioners, Donlon Bros., a copartnership, contracted with K. Kataoka, agreeing to pay him \$4.50 a cord for firewood which he was to cut from a row of eucalyptus trees growing on the tract of land owned by the Donlon Bros. Kataoka, a Japanese, contemplated having the contract performed by Japanese labor. Unable to procure it, he contracted with Angel Garcia for the doing of the same work, agreeing to pay Angel Garcia at the rate of \$4.25 a cord. Thereafter Angel Garcia in turn contracted with Lachuga to pay him \$4 a cord for the doing of the same work. Lachuga entered into the performance of this contract, and employed one Antonia Hernandez to assist him, with the understanding that they were to divide the \$4 per cord received. Lachuga furnished his own tools and implements and labored at his pleasure. He was not under the authority or direction of the petitioner, nor was Garcia, who employed him. While Lachuga and Hernandez were so working together Lachuga was killed by

a falling tree. The opinion of the majority of the Commission, upon which the award is based, is as follows:

"The evidence in this case makes out the case of a piece worker, cutting firewood upon property owned by Donlon Bros., who had undertaken to have the work done on their premises by letting a contract to one Kataoka, who, through his agent, employed the deceased to cut wood at \$4 a cord. The principal question to be determined was whether the status of the deceased was that of an employé or an independent contractor. The deceased furnished his own working tools; he was a free agent as to his hours of labor, but he could be discharged at any time. His work was inspected and measured to determine whether or not it was satisfactory and to arrive at the amount of his earnings. His earnings are proved to have been less than the minimum of \$333.33 fixed by the statute."

[2, 3] Commissioner Weinstock filed his dissent, holding that the relation of employer and employé necessarily involves the element of personal service, which is not delegable, and that the facts clearly established that such relationship did not exist; that Kataoka, the only one with whom petitioner had dealings, was an independent contractor, and that this relationship extended to the subcontractor. In this we think the dissenting commissioner was clearly right. We consider the case too plain to demand the citation of authority, which, however, is most abundant. As the question of the relationship is jurisdictional (*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398), it follows that the award must be annulled, even upon the findings of the Commission; and it is so ordered. *Cars- tens v. Pillsbury et al.*, 158 Pac. 218.

We concur: **ANGELLOTTI, C. J.**; **LORIGAN, J.**; **SHAW, J.**; **SLOSS, J.**; **MELVIN, J.**

TRIST & CO. et al. v. GOLDSTONE et al. (S. F. 6739.)

(Supreme Court of California. Aug. 1, 1916.)

1. LANDLORD AND TENANT — 194(1) — SURRENDER OF PREMISES—LIABILITY FOR RENT—EVIDENCE—SUFFICIENCY.

Where the tenant corporation was dissolved and new partnerships formed among the members, each partnership using half of the premises and paying the rent therefor to the landlord in the next building, who was familiar with the dissolution and consulted in regard to it, there was a surrender of the premises to the landlord, after which the corporation tenant was released from any liability for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. — 194(1).]

2. LANDLORD AND TENANT — 109(1) — "SURRENDER"—OPERATION OF LAW.

A "surrender" is the yielding up of an estate for life or years to the remainderman or reversioner, and is created by law when parties to a lease do some act so inconsistent with the relation of landlord and tenant as to imply con-

sent to termination thereof and estop the parties to dispute the fact of surrender.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350, 352, 353; Dec. Dig. § 109(1).]

For other definitions, see Words and Phrases, First and Second Series, Surrender.]

3. LANDLORD AND TENANT § 194(1) — SURRENDER OF PREMISES—ASSIGNMENT OF LEASE.

The rule that where a tenant by lease specifically agrees to pay rent, he is not absolved from such obligation by assignment of his lease rights does not apply, where the transaction is not an assignment, but a surrender of the premises by operation of law.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. § 194(1).]

4. LANDLORD AND TENANT § 233(2) — SURRENDER OF PREMISES—QUESTIONS FOR TRIAL COURT.

Whether there has been a surrender of the premises is a question of fact, to be determined in the first instance by the trial court.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 941; Dec. Dig. § 233(2).]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Triest & Co. and another against Leo W. Goldstone and others. Transferred to the Supreme Court after judgment of the District Court of Appeal, affirming on appeal judgment for defendants, other than Jacob Goldstone, who was defaulted. Affirmed.

D. Freidenrich and Henry G. W. Dinkelspiel, both of San Francisco, for appellants. Joseph E. Rien and Milton B. Babb, both of San Francisco, for respondents.

SLOSS, J. The case comes to this court by virtue of an order of transfer, after judgment by the District Court of Appeal for the First Appellate District. The Court of Appeal, speaking through Mr. Justice Kerrigan, delivered an opinion which reads as follows:

"This is an appeal from a judgment in an action to recover rent alleged to be due according to the terms of a certain lease. Judgment went for the defendants, and plaintiffs appeal."

[1, 2] "On July 8, 1907, a lease was entered into between plaintiffs as lessors, and Goldstone Bros., a corporation, as lessee, of the basement, ground floor, and first floor of a building then under construction on Mission street in San Francisco, for the term of ten years from the time of the completion of the building, at a total rental of \$48,000, payable in equal monthly installments of \$400 in advance, on the 1st day of each month.

"The building was completed July 31, 1907, and the corporation went into possession under the lease. At the time of the execution of the lease and continuously thereafter up to the time that the corporation forfeited its charter, defendants were its directors, and they also constituted all of its stockholders. The corporation was engaged in the wholesale men's furnishing goods business. On December 1, 1909, the defendants divided among themselves the stock of merchandise belonging to the corporation. The value thereof was about \$40,000. They divided among themselves the book accounts as collected, and by the end of the year 1910 there were no assets of any consequence remaining which had not

been distributed. At the time the division was made the corporation had no debts and no obligations other than the obligations under the lease. The corporation failed to pay its license tax for the year 1910, and forfeited its charter on November 30, 1910. At the time the merchandise was divided, four of the defendants organized two partnerships. Leo W. and Joseph Goldstone became partners under the firm name of Goldstone Manufacturing Company, and Moses A. and Henry Goldstone became partners under the firm name of Goldstone Bros., and the two partnerships divided between themselves the leased premises, each taking one-half thereof. Commencing with the month of August, 1910, and up to and including the month of March, 1912, each partnership paid to the lessors \$200 per month for the one-half of the premises which each occupied, plaintiffs giving to each a receipt for \$200 rent of one-half of premises, 732 Mission street. During the month of March, 1912, one of the partnerships, Goldstone Manufacturing Company, removed from the premises. The installment of rent which was payable on the 1st of April, 1912, was not paid, and no rent has been paid since that time.

"This action was commenced after the installment of rent for the month of April, 1912, had accrued, to have it adjudged that the withdrawal and division by the defendants among themselves of the capital stock of Goldstone Bros., a corporation, in violation of the provisions of section 309, Civil Code, was unlawful, and that the defendants be required to account for the capital stock of the corporation so withdrawn and divided and its avails, and that plaintiffs have and recover from the defendants jointly and severally, to the full amount of the capital stock so withdrawn and divided, the unpaid rent for the month of April, 1912, and all additional installments of rent which shall accrue and become payable up to the time of the entry of judgment herein. The complaint also contains a prayer for general relief.

"Defendant Jacob Goldstone was served, but failed to answer, and his default was duly entered. The other defendants answered. The cause came on for trial, and resulted, as above stated, in a decision in favor of the defendants. A judgment having been entered in accordance therewith, this appeal was taken within 60 days after the entry based upon the judgment roll, and also a bill of exceptions containing the substance of all of the evidence which was offered and admitted.

"The court found and decided that on the 30th day of November, 1910, the plaintiffs resumed possession of the demised premises, and other persons became tenants of said plaintiffs of said premises. That the other persons who became tenants were the partnership of Goldstone Bros., consisting of Moses A. and Henry Goldstone, of one-half of the premises, and the partnership of Goldstone Manufacturing Company, consisting of Leo W. and Joseph Goldstone, of the other half.

"In addition to what has been said, it appears from the record that the plaintiffs were fully aware of the manner in which the Goldstone Bros. corporation was being dissolved. The place of business of one of the plaintiffs, Triest & Co., was next door on Mission street to the premises occupied by the corporation, and one of the officers of Triest & Co. was not only familiar with the manner in which the defunct corporation gave up its business, but he was very intimate with the members of the corporation, was frequently consulted by them concerning the dissolution, and, there being the possibility of an arbitration proceeding in connection with said dissolution, agreed to act as arbitrator. The plaintiffs were aware that the premises had been subdivided, each partnership taking a certain part of them, and each paying to the plaintiffs \$200 a month for the portion occupied by it.

"It is not disputed that the defendants, under the provisions of section 309 of the Civil Code, are liable for the rent reserved in the lease unless there was a surrender by operation of law of the demised premises. We are of the opinion that the evidence is sufficient to sustain the finding of the court that there was such a surrender.

"A surrender is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender made. In this state it has been said that the surrender operates by way of estoppel independently of the intention of the parties. 24 Cyc. 1367; Ladd v. Smith, 6 Or. 316.

"A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds it can be done by express consent of the parties in writing, or by operation of law when the parties do something which implies that the parties have consented. These acts are such as would estop the parties from disputing the fact of surrender, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant, or the resumption of possession by the landlord, if the tenant acquiesces, or the giving of a lease to another; and any act which will amount to an eviction will estop the landlord and make a formal surrender unnecessary; and, while it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is independent of the intention of the parties that their acts shall have that effect." Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

"The Goldstone Bros. Company disposed of its entire stock and retired from business, and four of the five persons who were perhaps liable under the provisions of section 309, Civil Code, to the plaintiffs for the rent reserved in the lease formed two copartnerships, constituting two distinct entities separate from the corporation, and each of these copartnerships, as we have seen, took a portion of the demised premises and paid rent therefor. This all was without objection, and with the knowledge and acquiescence of the plaintiffs, and we therefore entertain no doubt, and accordingly hold, that the evidence is sufficient to sustain the finding of the trial court that the plaintiffs consented to the substitution of the new tenants, whereby the Goldstone Bros. corporation was released or discharged from any further obligation under the lease. 24 Cyc. 1142, 1370; Ettlinger v. Kruger (Sup.) 125 N. Y. Supp. 445; Fry v. Patridge, 73 Ill. 51; Page v. Ellsworth, 44 Barb. (N. Y.) 636; Colton v. Gorham, 72 Iowa, 324, 33 N. W. 76.

"In the case of Brayton v. Boomer, 131 Iowa, 28, 107 N. W. 1099, a tenant of a business building sold out his business on an agreement of the purchaser to pay the rent thereafter, and the arrangement was made known to the landlord, who made no objection and tacitly consented thereto. It was held that the original tenant became relieved from liability for rent accruing after that time, the court saying: 'No one will question that the parties to a tenancy, whatever the character, may, by mutual consent, terminate the same at pleasure, and consent in form of words is not necessary. If the lessor, with knowledge of the assignment, so deal with the parties that his consent to the assignment may fairly be implied—in other words, that he tacitly consented thereto—it is sufficient.'

"The judgment is affirmed."

[3.4] We are satisfied, upon further study of the record and the arguments of counsel, that the foregoing opinion contains an accurate statement of the facts and a clear and

correct disposition of the questions of law arising on these facts. In granting the application for transfer we were influenced by the thought that the decision of the Court of Appeal might be in conflict with the doctrine declared in *Samuels v. Ottinger*, 169 Cal. 209, 146 Pac. 638, and similar cases. *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Brosnan v. Kramer*, 135 Cal. 36, 66 Pac. 979. The rule laid down in these cases is well settled. It is that where a lessee has, by his lease, expressly agreed to pay rent, he is not absolved from this obligation by an assignment of his rights under the lease, even though the lessor may have accepted payment of rent from the assignee. But we have here no question of assignment. The defense, sustained by the findings of the trial court, was that the plaintiffs had resumed possession of the premises and accepted persons other than the original lessee, as tenants of different portions of the demised premises. In other words, the defendants relied upon a surrender of the lease, and such surrender, as is shown by the authorities cited by Mr. Justice Kerrigan, may be accomplished by operation of law without any written agreement to that end. Whether in any given case there has been such surrender is a question of fact to be determined in the first instance by the trial court. We entertain no doubt that the conduct of the parties, as set forth in the opinion of the District Court of Appeal, together with inferences fairly deducible from that conduct, fully justified the finding that was made. If there was a surrender of the lease by the original tenant, and a letting of the premises to other tenants who held thereafter under an oral agreement rather than under the original writing, there was, of course, no assignment of the lease, and the decisions on the effect of acceptance of rent from the assignee have no bearing.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

SAN BERNARDINO COUNTY v. STEWART. (L. A. 3766.)

(Supreme Court of California. Aug. 1, 1916.)

1. AGRICULTURE Ⓒ11—FUMIGATION—LIEN—NOTICE.

Pol. Code, §§ 2322, 2322a-2322c, creating a lien for the cost of fumigating orchards, etc., where the owner refuses to fumigate after written notice to do so, must be at least substantially followed to create a valid lien.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15-30; Dec. Dig. Ⓒ11.]

2. AGRICULTURE Ⓒ11—FUMIGATION—LIEN—NOTICE.

Under Pol. Code, §§ 2322, 2322a-2322c, creating a lien for expenses incurred after written notice by the horticultural commissioner to fumigate has been served upon an orchard's

owner, the party in possession, or their agents, no lien is created where an inspector, apparently without authority, signed and handed a notice to the owner's brother, who merely lived on the property.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 15-30; Dec. Dig. ¶¶ 11.]

Department 2. Appeal from Superior Court, San Bernardino County; Z. B. West, Judge.

Action to foreclose a statutory lien by the County of San Bernardino against Frances Stewart. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

E. C. Campbell, of Long Beach, for appellant. R. B. Goodcell and Frank T. Bates, both of San Bernardino, for respondent.

PER CURIAM. The defendant has appealed from the judgment and from an order denying her motion for a new trial.

The county of San Bernardino began this action to foreclose an alleged lien upon the farm of the defendant for the amount of certain expenses incurred and paid by the county in fumigating the orchard of the defendant situated on said farm, done to free said orchard of noxious insects with which it was infested. The work was done and the proceeding instituted under the authority of sections 2322, 2322a, 2322b, and 2322c of the Political Code.

Section 2322 authorizes the board of supervisors of a county, upon the conditions therein stated, to appoint a horticulture commissioner for such county. Section 2322a makes it the duty of the horticulture commissioner of the county to cause inspection to be made of orchards within the county, and if any are found infested with pests or disease injurious to fruit—

"he shall in writing notify the owner or owners, or person or persons in charge, or in possession of the said places or orchards, * * * that the same are infested with said * * * pests * * * and require such person or persons, to eradicate or destroy the said insects, or other pests, or their eggs or larvae, * * * within a certain time to be therein specified."

It also provides that:

"Said notices may be served upon the person or persons, or either of them, owning or having charge, or having possession of such infested place or orchard, * * * or upon the agents of either, by any commissioner, or by any person deputed by the said commissioner for that purpose in the same manner as a summons in a civil action."

Also that any places so infested with pests or noxious insects—

"are hereby adjudged and declared to be a public nuisance; and whenever any such nuisance shall exist at any place within his county, and the proper notice * * * shall have been served, as herein provided, and such nuisance shall not have been abated within the time specified in such notice, it shall be the duty of the county horticultural commissioner to cause said nuisance to be at once abated, by eradicating or destroying said diseases, insects, or other pests, or their eggs, or larvae. * * * The expense thereof shall be a county charge, and the board

of supervisors shall allow and pay the same out of the general fund of the county. Any and all * * * sums so paid shall be and become a lien on the property and premises from which said nuisance has been removed or abated in pursuance of this chapter."

It further provides that a notice of such lien shall be recorded in the recorder's office within 30 days after the right has accrued, and that "an action to foreclose the same shall be commenced within ninety days" thereafter by the district attorney of the county in the name of the county. This suit was begun upon the authority of this section.

[1,2] The effect of this statute is to impose upon the property owner, without his consent, the burden of the expense of fumigating his orchard. It is a proceeding in invitum for the public benefit. It requires no citation of authority to establish the proposition that the statutory method of procedure must be at least substantially followed in order to create a valid lien against the private property of an individual, for such expense, or to compel him to pay the expenses incurred by the county in that behalf. In this case the statutory procedure was not followed. The statute provides that the horticulture commissioner shall give the notice to the owner to destroy the pests in his orchard. The notice given in the present case was not signed by the horticulture commissioner, and does not purport to be given by him. It was signed by C. A. Nelson, a local inspector, and purports to be given upon his authority alone. The statute requires that the notice shall be served on the owner of the property, or on the person in charge thereof, by the horticulture commissioner or by any person deputed by said commissioner for that purpose. The notice was served by Nelson, the inspector, who signed the same, not by the horticulture commissioner. It does not appear that Nelson was deputed by the horticulture commissioner or authorized by him to serve said notice, or that he had any authority from the horticulture commissioner, or under the law, to serve the notice. The statute requires that it shall be served in the same manner as a summons in a civil action. The service of the notice in question was accomplished, so far as there was any service, by delivering it to one J. H. Stewart, who was at that time upon the premises. He was not the owner thereof, and he was not in charge or control thereof for the owner. The owner was at that time on the premises in question, and could readily have been served personally, if the necessary pains had been taken to that end. J. H. Stewart was her brother, and lived on the premises in the same house with his sister. He owned lands in the vicinity and cultivated them, and also at times assisted his sister in the cultivation of her land, and sometimes advised with her concerning the same, but he was in no legal sense her agent in charge of

the property and had no control thereof. For these reasons we are of the opinion that no valid lien was acquired upon the property by the proceedings in question. This conclusion renders it unnecessary to determine whether or not the property owner may, in such a case, prove, as a partial defense, that the amount paid by the county for the expense of fumigating was in excess of the reasonable cost thereof.

The judgment and order are reversed.

**SAN BERNARDINO COUNTY v.
STEWART. (L. A. 8767.)**

(Supreme Court of California. Aug. 3, 1916.)

AGRICULTURE §11—FUMIGATING ORCHARD—LIEN—NOTICE.

Under Pol. Code, §§ 2322, 2322a-2322c, creating a lien for expenses incurred after written notice by the horticultural commissioner to fumigate has been served upon an orchard's owner, no lien is created where an inspector, apparently without authority, signed and handed a notice to the owner.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15-80; Dec. Dig. §11.]

Department 2. Appeal from Superior Court, San Bernardino County; Z. B. West, Judge.

Action to foreclose a statutory lien by the County of San Bernardino against J. H. Stewart. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

E. C. Campbell, of Long Beach, for appellant. R. B. Goodcell and Frank T. Bates, both of San Bernardino, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was one by the county of San Bernardino to foreclose an alleged lien upon defendant's land for expenses incurred and paid by the county in fumigating defendant's orchard and freeing the trees of noxious insects. In some particulars the cause resembles County of San Bernardino v. Stewart, L. A. No. 3766, 159 Pac. 717, in which an opinion was filed on August 1, 1916. There are certain differences in this case. For example, it appears that service of notice was made upon defendant personally. He waived the five days within which he might have done the work, under the terms of the notice, and permitted the premises to be entered and the fumigating of the trees to proceed. In all other particulars this case is just like the one cited. In this, as in that, the notice was issued and signed by the local inspector, and not by the county horticultural commissioner. It does not appear that the commissioner either directed or was cognizant of the service of the notice to fumigate the trees. As the inspector's authority to give the notice does not appear, and as, this be-

ing a proceeding in invitum, it must be shown that the statutory method of procedure was followed in order that the lien should attach, we must hold on the authority of County of San Bernardino v. Stewart, supra, that the jurisdiction of the lower court was not shown, and that the judgment does not find full support in the record.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

VORE v. EPHRAIM et al. (Sac. 2261.)

(Supreme Court of California. Aug. 2, 1916.)

1. EXCEPTIONS, BILL OF §28—AVAILABILITY IN DIFFERENT PROCEEDING.

A bill of exceptions settled for use on motion for new trial may be used in support of an appeal from the judgment, although it was not regularly used on the motion for new trial.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. §28; Appeal and Error, Cent. Dig. § 2330.]

2. APPEAL AND ERROR §864—SCOPE OF REVIEW—TIME OF PERFECTION OF APPEAL.

Where appeal from judgment is taken within 60 days, sufficiency of the evidence may be considered as well as alleged errors of law occurring at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. §864.]

3. MINES AND MINERALS §38(2)—QUIETING TITLE—EFFECT OF PATENT—EXCEPTIONS.

Where plaintiff originally located mineral lands and mined ore thereon, but while he was in possession patent issued to another covering the land, but under a statute excepting from grants and a clause in the patent excepting all mineral lands, and plaintiff thereafter removed from the land, but before the patentees took possession relocated it, his title would not support an action to quiet title, for although the statute and patent excepted mineral lands, a determination whether the land was actually mineral land was required to be made by the land department, and its issuance of patent excepting mineral lands was void as to the exception.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87½; Dec. Dig. § 38(2).]

4. JUDGMENT §585(4)—RES ADJUDICATA—MATTERS CONCLUDED.

Where defendants had brought a prior action to quiet title to the land, which plaintiff held under alleged right of location, defendants having a patent from the government, and such action resulted in defendants' favor, it was res adjudicata as against the plaintiff's action to quiet title to the same land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1084; Dec. Dig. §585(4).]

In Bank. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Edmund Vore against Ferdinand Ephraim and others. From a judgment for plaintiff, and order in effect denying new trial, defendants appeal. Reversed.

I. B. L. Brandt, of San Francisco, for appellants. John M. Fulweller, of Auburn, for respondent.

SHAW, J. The defendants have appealed from the judgment.

The court below made an order that plaintiff's motion to dismiss defendants' motion for a new trial be granted. The defendants filed two notices of appeal from this order, one designating it as an order denying defendants' motion of a new trial, and the other designating it as an order dismissing defendants' motion for a new trial.

[1, 2] The appeal from the judgment was taken within 60 days after its entry. A bill of exceptions for use on the motion for new trial was duly proposed and settled and is set forth in the transcript. A bill of exceptions so settled for use on motion for new trial may be used in support of an appeal from the judgment, although it was not regularly used on the motion for a new trial. *Wall v. Mines*, 128 Cal. 138, 60 Pac. 682; *Vinson v. Los Angeles, etc., Co.*, 141 Cal. 154, 74 Pac. 757; *Gay v. Gay*, 146 Cal. 240, 79 Pac. 885; Code Civ. Proc. § 950. As the appeal from the judgment was taken within 60 days, the sufficiency of the evidence may be considered, as well as the alleged errors of law occurring at the trial. Code Civ. Proc. § 939; *Brown v. Tolles*, 7 Cal. 398; *Walls v. Preston*, 25 Cal. 59; *Harper v. Minor*, 27 Cal. 107; *Haviland v. Southern C. E. Co.*, 158 Pac. 328, decided May 25, 1916. From these principles it appears that the questions presented may be as well reviewed on appeal from the judgment as upon an appeal from an order denying a motion for new trial. Hence the elaborate discussions in the briefs regarding the action of the court below upon the motion for new trial and its effect upon our authority to review the errors of law presented are unimportant and require no consideration at our hands.

[3] The complaint stated a cause of action to quiet the plaintiff's alleged title to about 20 acres of land included within the boundaries of the east half of section 3, township 13, range 9 east, in Placer county. Therein the plaintiff claimed title to the land described under a mining location regularly made by him on September 11, 1911, under the mining laws of the United States, and on his allegation that at that time the said lands were unoccupied public mineral lands of the United States. The defendants claim title derived from the Central Pacific Railroad Company, under a patent from the United States executed on June 23, 1883, in pursuance of the grant of the United States to the Central Pacific Railroad Company by the act of Congress of July 1, 1862, c. 120, 12 U. S. Stats. 492, and the amendment of July 2, 1864, c. 216, 13 U. S. Stats. 356. The defendants are the successors in interest, by deeds regularly executed by the Central Pacific Railroad Company, to the title which it acquired by said patent. At the time said patent was issued in 1883, the particular land here involved was in the posses-

sion of the plaintiff and was worked by him as a mining claim. Gold had been discovered therein and was being taken therefrom by him in large quantities. In 1887 the plaintiff left said claim and abandoned it. So far as appears it was never again worked as a mining claim and there was no further assertion that it constituted mineral land until the plaintiff again located the parcel in 1911, as aforesaid. The patent under which the defendants claim contained an exception, which at that time was inserted in all patents issued by the United States, reading as follows:

"Excepting all mineral land, should any such be found in the tracts aforesaid."

The act of 1862, granting the land, contained this clause:

"Provided, that all mineral lands shall be excepted from the operation of this act."

The contention of the respondent is that by reason of this proviso in the granting act and the exception in the patent, coupled with the fact that at the time the patent was issued the land was known to be mineral in character and was worked as a mine, the railroad company and its successors obtained no title to that part of the land purporting to be conveyed by the patent which was covered by the mining location.

Every question upon which the respondent relies in support of this claim is decided against him in the recent decision of the Supreme Court of the United States in *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527. It is but fair to add that this decision was made after the rendition of the judgment herein. The decision in that case involved the construction of the grant to the Southern Pacific Railroad Company by the act of July 27, 1866, c. 278, 14 U. S. Stats. 292. That act also, as do the acts of 1862 and 1864, excluded from its operation all mineral lands other than coal and iron lands. In that case, as in this, mining locations had been made on the land in controversy and discovery made thereon prior to the issuance of the patent. At the time the patent was issued in 1894, the locators were in possession of the mining locations, but afterwards they abandoned the same and the plaintiff and his associates relocated the same under the mining laws of the United States. The patent in that case contained a clause excepting mineral lands, should any be found in the tracts, substantially the same as that contained in the patent here under consideration. After elaborate consideration the court there decided the following propositions: (1) That although mineral lands, known to be such at and before the issuance of patent, were excluded from the grant, yet that the act cast upon the land department of the United States the duty of determining the character of the land before issuing patents therefor; (2) that the land department was the legally

constituted tribunal to determine the question whether or not the land to be patented was or was not mineral land within the meaning of the act, and that its determination was not void, but that a patent issued in due form passed the title, subject only to the right of the United States to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued; (3) that the clause in the patent purporting to except mineral land found to be in the tract is void, because the officers of the United States who prepare and issue the patent have no authority to insert such exception; (4) that a patent so issued constitutes "a conclusive and official declaration that the land is agricultural and that all the requirements have been complied with," except upon a direct attack by the United States, or some person acting in privity with it, to set aside the patent for fraud or mistake, or to declare a trust under it; (5) that one claiming under a mining location, made after the issuance of the patent and after the previous location was abandoned, is not in privity with the United States so as to be able to invoke the right to annul such patent; (6) that the fact that the claimant of the mining location was not in privity with the government when the patent was issued prevents him from attacking the patent on the ground of fraud or mistake.

These propositions cover the case made by the respondent and show beyond controversy that the court below erred in its findings and judgment in favor of the plaintiff.

[4] The defendants also pleaded in defense a former adjudication. The defendants here, other than Ephraim and his wife, are the heirs of one Michael Phillips, a former co-owner with Ephraim. In 1893, the defendants Ferdinand Ephraim and the executrix of the estate of Michael Phillips began an action against the plaintiff Vore to quiet their title to certain lands, including that here in controversy, alleging that Vore claimed some interest or estate therein adverse to the plaintiff which was without right. Vore appeared and demurred to the complaint, the demurrer was overruled, he failed to answer, and thereupon judgment was entered against him in favor of the plaintiffs in that action, defendants here, declaring that all claims of Vore to the land were invalid and that the plaintiffs were the true and lawful owners thereof and of every part and parcel thereof. The court below was of the opinion that this judgment was not a bar, its theory being that at that time the land was public land of the United States, and that the present claim of the plaintiff Vore is based upon a mining claim made after that judgment was given and is an after-acquired title on which he may prevail. As we have seen, the court was in error in the premise that the land was then public

land of the United States. This is fatal to its conclusion. The land at that time belonged to the defendants and has ever since belonged to them. That judgment was a conclusive determination in their favor against the plaintiff in this case. There was no after-acquired title. No other points are discussed which require notice.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

WESTERN INDEMNITY CO. v. PILLSBURY et al., Industrial Accident Commission. (S. F. 7422.)

(Supreme Court of California. June 29, 1916.)

1. MASTER AND SERVANT ~~§~~417(7)—WORKMEN'S COMPENSATION ACT—AWARD OF INDUSTRIAL COMMISSION—REVIEW.

The finding of the Industrial Accident Commission awarding compensation will not be disturbed, where there is a substantial conflict of testimony regarding the status of the person claiming compensation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ~~§~~417(7).]

2. MASTER AND SERVANT ~~§~~367 — WORKMEN'S COMPENSATION ACT—AUTHORITY OF INDUSTRIAL ACCIDENT COMMISSION.

The authority of the Industrial Accident Commission to award compensation is limited to injured employes, and cannot include independent contractors.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ~~§~~367.]

3. MASTER AND SERVANT ~~§~~361—WORKMEN'S COMPENSATION ACT—EMPLOYEES—"CONTRACT FOR HIRE."

Under Compensation Act (St. 1913, p. 284) § 14, providing that the term "employee" as used in sections 12 to 85, shall mean every person in the service of an employer, as defined by section 13, under any appointment or contract of hire or apprenticeship, *held*, a "contract of hire" means a contract for personal services.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ~~§~~361.]

4. MASTER AND SERVANT ~~§~~361—WORKMEN'S COMPENSATION ACT—"SERVANT"—"EMPLOYÉ."

Under Civ. Code, § 2009, defining a "servant" as one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who, in such service, remains entirely under the direction and control of the master, the word "servant" is generally synonymous with the word "employee" (citing Words and Phrases, Employé; Servant).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ~~§~~361.]

5. MASTER AND SERVANT ~~§~~367—WORKMEN'S COMPENSATION ACT—INDEPENDENT CONTRACTOR.

One who furnished teams and drivers to a contractor, and who received a certain sum per day for the work of each team and driver, and who himself drove one of such teams, *held* not a servant of such contractor, entitled to compensation for injuries, notwithstanding that control

was exercised by the contractor in directing the drivers as to the materials to be hauled.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §367.]

In Bank. Certiorari, on the relation of the Western Indemnity Company, a corporation, against A. J. Pillsbury and others, as members of and constituting the Industrial Accident Commission, to review proceedings leading to an award to H. H. Stevens. Award annulled.

Eugene F. Conlin, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari directed to the Industrial Accident Commission to review the proceedings leading to an award made to H. H. Stevens against the Western Indemnity Company. H. S. Tittle was a defendant before the Industrial Accident Commission, but the Western Indemnity Company, his insurance carrier, assumed all liability which might exist against its codefendant.

H. S. Tittle was a contractor engaged in performing work for the city and county of San Francisco in connection with the municipal railway line on Van Ness avenue. Mr. Stevens called upon Mr. Tittle and, presenting his card, which announced him as one engaged in "teaming and grading," offered to furnish teams and drivers for the work, if any should be required, at \$6 a day for team, wagon, and driver. No contract was made at that time, but about a week later Mr. Tittle notified Mr. Stevens that he required a team. One was furnished; Mr. Stevens driving it himself. About a week later, Stevens was notified that another team was needed. He agreed to furnish and did furnish a second driver, team, and wagon at \$6 a day, employing the driver himself and paying him \$3 a day.

The Industrial Accident Commission found that Mr. Stevens was an employé, in that he had "agreed to provide a team and wagon and drive it himself." He was injured and demanded compensation. It is contended by petitioner here that the finding of the commission to the effect that Stevens agreed to drive the team himself is entirely without support in the evidence, and that under the facts as shown without conflict he was an independent contractor.

[1,2] It is the rule that, where there is a substantial conflict of testimony regarding the status of a person claiming compensation, the finding of the commission will not be disturbed. We must examine the record carefully, therefore, and if we find any evidence to support the finding that Stevens was an employé we should not annul the award. If he was not an "employé," unquestionably the commission had not authority to award compensation because the power of the Legislature only extends to the creation and enforcement of a liability on the

part of employers to compensate their employes. *Carstens v. Pillsbury*, 158 Pac. 218.

There is no substantial conflict in the testimony. It is undisputed that the contract between Stevens and Tittle did not cover any definite period. It is also undisputed that the latter's foreman directed Stevens and his driver in the matter of the materials to be hauled. There was no agreement regarding the bulk of matter or the number of loads per day, but each wagon was to be used for the period of eight hours a day both in removing the rubbish and surplus sand that accumulated from Tittle's work as a general contractor constructing the railway tracks and also in hauling lumber and rock for the use of Tittle. But there is no word of evidence that Stevens was employed personally to drive either of his teams. He was to furnish the means of accomplishing certain results—namely, drivers, teams, and wagons—and there was no element of personal service in the contract. It is true that he did drive one of his own wagons; but, if he had desired to devote a day to other occupations, his contract with Tittle would have been fully performed if he had put any competent man in charge of the horses he had been driving, because he had been required to furnish "teams" (which included wagons and drivers). Neither Mr. Stevens nor the driver of his second team was listed as an employé on the books of Mr. Tittle (who did business under the name of "Tittle Company"); the account being carried as "H. H. Stevens Teams." At the end of each week an envelope was given to Stevens containing pay at the rate of \$6 per day for each team; neither he nor his driver receiving any segregated sum from Tittle as wages. It is clear that the contract was not one between employer and employé in the sense of section 14 of the Compensation Act, but one by which Mr. Stevens agreed to furnish facilities for doing a certain sort of work. There was no stipulation between the contractor who was performing the work for the municipality and Stevens regarding wages. A lump sum was paid for each team, and Mr. Tittle knew nothing, so far as the testimony reveals, regarding the amount of wages paid Stevens' driver. Neither did he pay Mr. Stevens a certain sum for use of the teams and another sum for personal services. The amount paid was \$12 a day for two drivers, two teams, and two wagons. After the accident another driver was substituted for the injured man. He continued to perform the work just as his employer had done it, and his name was never given to the Tittle Company, nor entered upon the books, but the money due for the two teams was paid to the wife of the injured man.

[3] Section 14 of the Compensation Act provides that:

"The term 'employé' as used in sections 12 to 35, inclusive, of this act shall be construed

to mean: Every person in the service of an employer as defined by section 13 hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written." St. 1913, p. 284.

A "contract of hire" means a contract for personal services, and this is emphasized by the fact that the basis of compensation provided by the act is the amount of wages earned. Doubtless there could be a contract of service without stipulated wages, but there could be no employé unless his personal services were rendered to the employer, and since wages are generally paid for personal services, wages or salary are made the criteria of compensations given to injured employés.

[4] The word "servant" is generally synonymous with the word "employé" (35 Cyc. 1431; 3 Words and Phrases, 2369 and 2376; 7 Words and Phrases, 6426; *Hand v. Cole*, 88 Tenn. 400, 12 S. W. 922, 7 L. R. A. 96), and section 2009 of our Civil Code defines a servant as follows:

"A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

[5] Thus reasoning from the definition furnished by the act itself it seems clear that the man who received an award of compensation was not an "employé" of the railroad contractor.

But it is urged with much force that since the foreman for Tittle Company directed Stevens in the matters of the materials to be hauled the latter was not an independent contractor—that the test of what constitutes independent service lies in the control exercised and that the driver being under the supervision of the foreman was therefore an employé of Tittle. It is true that many authorities specify "control" of the person performing work as the means of differentiating service from independent employment. The test of "control," however, means "complete control." For example, the citizen who hires a taxicab to take him to a certain place exercises that amount of control over the driver but he does not thereby become the man's employer. *Labatt*, in his work on *Master and Servant* (2d Ed., § 25), says:

"It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled."

In *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, the court said (Mr. Chief Justice Holmes delivering the opinion):

"In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains

subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street. *Huff v. Ford*, 126 Mass. 24 [30 Am. Rep. 645]; *Reagan v. Casey*, 160 Mass. 374, 379 [38 N. E. 58]; *Jones v. Liverpool*, 14 Q. B. D. 890; *Waldock v. Winfield* [1901] 2 K. B. 596; *Quarman v. Burnett*, 6 M. & W. 499; *Laugher v. Pointer*, 5 B. & C. 547, 558; *Murray v. Dwight*, 161 N. Y. 801 [55 N. E. 901, 48 L. R. A. 873]; *Lewis v. Long Island Railroad*, 162 N. Y. 52, 66 [56 N. E. 548]; *New York, Lake Erie & Western Railroad v. Steinbrenner*, 47 N. J. Law, 161 [54 Am. Rep. 126]; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516 [15 N. W. 887, 45 Am. Rep. 54]; *Little v. Hackett*, 116 U. S. 366 [6 Sup. Ct. 891, 29 L. Ed. 652]."

That was a case in which it was sought successfully to hold responsible a person engaged in a general teaming business for injuries inflicted by the carelessness of his driver, who at the time was, and for some time theretofore had been, carrying property for an electric light company. The case of *Reagan v. Casey*, cited supra, was also one in which the injury was inflicted by the negligence of a driver of a team furnished by the owner for a specified sum per day to the city and subject to the orders of the city's foreman. The driver was paid by the owner of the team and wagon and not by the city. It was held that the employer of the driver and not the city was responsible. The same rule is announced in *Hedge v. Williams*, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366, in which it was held that a firm of plumbers engaged by the defendant to repair a tank on his property were independent contractors and that defendant was not liable for an injury inflicted upon his servant by reason of the carelessness of the servant of the subcontractor. In that case confusion arose in the minds of some of the counsel in the case from the fact that defendant's foreman was also a member of the firm of plumbers. As foreman he directed the repairer to do the work on the tank, but this court held that there was no contractual relation between defendant and Fontaine, who was sent to mend the tank, and that the latter could not be considered the servant of the former.

In the case at bar confusion arose out of the fact that Stevens drove his own team, but we see nothing in that fact which made him a servant and not a contractor. The commission found that Tittle had the right and power of discharging the applicant (Stevens) "and ruling his team off the work" if the services rendered were unsatisfactory but the conjunctive is very significant. Tittle could not, under the contract, discharge Stevens or dispense with the services of the team. The agreement was not thus divisible, and clearly Stevens was not the employé of Tittle. The same distinction between a servant and an independent contractor is observed in *Bennett v. Truebody*, 66 Cal. 510, 6 Pac. 829, 56 Am. Rep. 117. If Mr. Stevens' driver who had charge of the other wagon

had met with an accident his employer would have been liable and the assumption by Stevens of a dual role of contractor and driver did not shift the liability.

It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results but not in the means used. 1 *Shearman & Redfield on Negligence* (8th Ed.) 396. But in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking. *Standard Oil Co. v. Anderson*, 212 U. S. 221, 222, 29 Sup. Ct. 252, 53 L. Ed. 480. The same principles are announced in *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376. In *Chisholm v. Walker & Co.*, 2 B. W. C. C. 261, a case very much like the one at bar, arising under a workmen's compensation statute, it was held that the man who received a certain sum per day for the work of himself and his horse was not engaged in a "contract of service." A similar ruling was made in *Ryan v. County Council of Tipperary*, 5 B. W. C. C. 578. *Spiers v. Elderslie S. S. Co.*, 2 B. W. C. C. 205, was a case in which a workman engaged by one Williamson, a subcontractor, to work in removing scales from boilers on a ship was injured. It was held that the shipowner was not liable.

It is suggested that, inasmuch as the statute enjoins upon the court liberal construction, we should ignore common-law and other definitions, and should, in determining who are and who are not employes, regard only decisions under compensation acts. In *re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598, is cited as authority for this position, although counsel for respondents frankly admits that the New York Supreme Court has taken very advanced ground in that decision. With all due respect to the ability and learning of the majority of the Appellate Division of the Supreme Court of New York, we must say that we can find no satisfactory answer to the dissenting opinion of Mr. Justice Lyon, in which Mr. Justice Howard concurred, arguing that under the undisputed facts *Rheinwald* was an independent contractor, as held by the compensation commission.

This court has always endeavored to construe the Workmen's Compensation Act liberally and with a view to carrying out its benevolent purposes, but we cannot see why we should discard the wisdom and learning of the past in our efforts to decide what the Legislature intended by the language used. Especially should we avoid all temptation to stretch the law to cover individual cases where those demanding compensation arouse our sympathy. This man to whom compensation was given was badly injured, but we should not for that reason shut our eyes to

the fact that he was an independent contractor, and not an employe. The very strength and propriety of compensation statutes rest in the fact that where a business is charged with the care of injured employes, the hirers in that business of men and women whose daily tasks place them in jeopardy, may insure against the liability imposed by the law. It would be unfair to the employers, unfair to the insurers, and unfair to the legitimate beneficiaries of the statute for us to try by every devious twist of interpretation to uphold every award made, merely because the person seeking it might be unfortunate.

For the reasons set forth above the award is annulled.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

GONSALVES et al. v. PETALUMA & S. R. RY. CO. (S. F. 7669.)

(Supreme Court of California. Aug. 5, 1916.)

1. DEATH \S 32—WHO MAY SUE—DEPENDENCY ON DECEASED.

Civ. Code, \S 1970, as to recovery of damages against employer for death of employe by employe's personal representative for his "widow, children, dependent parents and dependent brothers and sisters," must be construed with Code Civ. Proc. \S 377, giving an action for wrongful death to heirs or personal representatives of decedent not a minor against the person causing the death or his employer if responsible for an employe's conduct, so that, in action for employe's death, proof that the action is prosecuted for the benefit of the class of dependents limited in section 1970 is necessary only in actions based upon that section, and not in actions based upon section 377.

[Ed. Note.—For other cases, see Death, Cent. Dig. \S 47, 48; Dec. Dig. \S 32.]

2. DEATH \S 32—WHO MAY SUE—UNSAFE PLACE TO WORK.

A cause of action for death founded upon employer's negligence in furnishing employe an unsafe place in which to work may be brought under Code Civ. Proc. \S 377, giving an action for wrongful death to heirs or personal representatives of decedent, and need not be brought under Civ. Code, \S 1970, limiting recovery to dependents, which section does not supersede rights given by section 377.

[Ed. Note.—For other cases, see Death, Cent. Dig. \S 47, 48; Dec. Dig. \S 32.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John Gonsalves and another, administrators of the estate of Manuel Gonsalves, deceased, against the Petaluma & Santa Rosa Railway Company. From judgment for plaintiffs and order denying new trial, defendant appeals. Affirmed.

Edwin T. McMurray, of San Francisco, for appellant. Ornbaum & Fraser and Preston & Preston, all of San Francisco, and W. B. Rinehart, of Oakland, for respondents.

HENSHAW, J. Plaintiffs, suing as administrators of the estate of Manuel Gon-

salves, deceased, brought their action against defendant for having negligently occasioned his death by putting him to work in an unsafe place. So far as concerns this appeal, the negligence is conceded, it being stated in the transcript that "evidence was introduced by plaintiffs which, for the purpose of any appeal from the judgment herein, defendant admits tended to prove and was sufficient to prove that the death of Manuel Gonsalves was caused by the negligence of defendant." The complaint charged that the deceased at the time of his death was unmarried; that he died intestate, and left surviving him as his sole heirs at law and next of kin Antonio Gonsalves, his father, and Isabell Gonsalves, his mother, "both of whom at the said time of his death were dependent upon him for their support and maintenance." Further, the complaint alleged that the action was brought for and on behalf of the deceased's heirs to recover the damage occasioned to them by his death. The jury rendered a verdict for plaintiffs in the sum of \$1,000, and they submitted to a reduction and remission of this verdict in the sum of \$400, upon the suggestion of the court that if this were not done a new trial would be granted. Thereafter defendant appealed.

[1] Section 377 of the Code of Civil Procedure is as follows:

"When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Section 1970 of the Civil Code formerly read as follows:

"An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé."

Subsequently this section was amended in important particulars, and as amended was in force at the time Gonsalves met his death and this action was brought. It is not necessary here to do more than to point out that these amendments greatly modified the earlier rules touching the assumptions of risks and nonliability for injuries occasioned by the negligence of a fellow servant. The section as a whole deals with the question of the indemnification by an employer of an injured employé and of the right of action to the personal representative of an employé who may be killed. Touching this latter matter, the section provides as follows:

"When death, whether instantaneous or otherwise, results from an injury to an employé,

* * * the personal representative of such employé shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated. * * *"

The Court of Appeal, which first heard the appeal in this case, held that the dependency of the parents—the heirs at law of the deceased—was not proved, and held further that touching the right of action of an injured employé, or of his representatives in case of his death, the general provisions of section 377 of the Code of Civil Procedure had been superseded by the provisions of section 1970 of the Civil Code, and that as a result, in the case of any and every employé who is killed, a recovery could be had only where dependency was proved.

It was for the consideration of this important question that a hearing before this court was ordered. Heretofore this court has not been called upon to determine the matter. Thus in *Rulz v. Santa Barbara Gas Co.*, 164 Cal. 188, 128 Pac. 830, we declared that in that case it was immaterial whether it be considered that the action was brought by virtue of section 377 of the Code of Civil Procedure or by section 1970 of the Civil Code. Again in *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989, the only pronouncement of the court upon this subject is that:

"So far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action."

This, of course, is a perfectly sound declaration, but it is giving it an unwarranted meaning to say that by it this court even intimated that the general provisions of section 377 of the Code of Civil Procedure were abrogated in every case of actions by the representatives of deceased employés. Indeed, it would call for very direct and positive language to lead a court to say that the law-makers in giving the general right of action provided for by section 377 of the Code of Civil Procedure to everybody else, and therein declaring that in every such action such damages may be given "as under all the circumstances may be just," meant to deny that right of action and forbid that measure of recovery in the case of representatives of deceased employés, and to declare that as to them there could be no recovery at all unless the heirs of such employés were actual dependents upon them. But there is no language in our law which prompts, much less which forces, the view that the Legislature thus designed to restrict this right of action in cases where the death of an employé had been negligently caused. Section 377 of the Code of Civil Procedure still remains in full force and gives the right of action and fixes the measure of recovery in all cases. Section 1970 of the Civil Code is to be construed with section 377, not as superseding it, and so con-

strued it means, as declared in *Pritchard v. Whitney Estate Co.*, supra, that where section 1970 has created rights of action growing out of the relationship of employer and employé, which rights of action did not formerly exist, such rights of action by the representative of an employé who has lost his life may be prosecuted for the benefit of the class limited and designated in the section itself. So construed there is no conflict between the two sections. This construction, we repeat, is not only reasonable, but uniformly it is the construction which other courts have put upon their laws in cases where the provisions of those laws are similar to or identical with our own. We need not be at pains to review these authorities at length. It will be sufficient to refer to *St. Germain v. Potlatch*, 76 Wash. 102, 135 Pac. 804; *Chiara v. Stewart Mining Co.*, 24 Idaho, 473, 135 Pac. 245; *Payne v. N. Y. & Susquehanna R. R. Co.*, 201 N. Y. 436, 95 N. E. 19; *Behringer v. Inspiration Con. Copper Co. (Ariz.)* 149 Pac. 1065; *Statts v. Twohy Bros. Co.*, 61 Or. 602, 123 Pac. 909; *Colorado Milling Co. v. Mitchell*, 26 Colo. 284, 58 Pac. 28.

[2] The only question remaining is whether this cause of action, founded upon the employer's neglect in furnishing the employé an unsafe place in which to do his work, is one created by section 1970. But this question readily answers itself. It is not a cause of action created and given by section 1970, but one that has always existed under the statutory provision of the earlier section 377, Code of Civil Procedure. *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163; *Sneed v. Marysville Gas Co.*, 149 Cal. 704, 87 Pac. 376; *Clark v. Tulare Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

HAY v. CASEY et al. (Civ. 1511.)

(District Court of Appeal, Third District, California. May 25, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. VENDOR AND PURCHASER ⇨87—REMEDY OF PURCHASER—RECOVERY OF MONEY PAID.

Where a vendor, after the purchaser's breach of his contract, agreed to a mutual abandonment and rescission, and promised to repay the purchaser the amount paid under the contract as soon as the land was sold, the purchaser was entitled to a repayment of the purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 147; Dec. Dig. ⇨87.]

2. VENDOR AND PURCHASER ⇨341(3)—RECOVERY OF PURCHASE MONEY—EVIDENCE.

In a purchaser's action, brought after his breach of his contract, to recover the amount

paid thereunder, evidence held to sustain a finding that the vendor had promised to repay all money paid by the purchaser under the contract as soon as the premises were sold by him, and had not declared a forfeiture of any of the purchaser's contracts.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1012-1014; Dec. Dig. ⇨341(3).]

3. LIMITATION OF ACTIONS ⇨46(2)—SALE OF LAND—RECOVERY OF PRICE.

In such case, where the sale to be made by the vendor was made April 21, 1911, the statute of limitations did not begin to run against the purchaser until that date.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 241; Dec. Dig. ⇨46(2).]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Joe Hay against Martin E. Casey and another. Judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

Richard Belcher and W. H. Carlin, both of Marysville, for appellants. Brittan & Raish and Wetmore & Davies, all of Marysville, for respondent.

HART, J. On February 13, 1909, a written agreement was entered into between the parties to this action, by the terms of which appellants agreed to sell and respondent agreed to buy, for the sum of \$7,500, certain real property in the city of Marysville. \$900 was paid by respondent at the time of the execution of the agreement, the balance being payable in monthly installments. In addition to the first payment of \$900, plaintiff claims to have paid \$900 and defendants admit receiving \$800, but whether during the life of said contract or under a succeeding one does not clearly appear. On the 4th of March, 1910, a second contract was entered into for the sale of the property, at a consideration of \$5,893, payable in installments. Default being made by plaintiff in all or some of these payments, on May 23, 1910, a third contract was executed, the purchase price being specified as \$5,916. On this contract also default was made by plaintiff. On October 22, 1910, appellant Martin E. Casey, as party of the first part, J. Ross Traynor, as party of the second part, and respondent, Joe Hay, as party of the third part, entered into a written agreement by which said Traynor was given a 30-day option to sell said property for the sum of \$8,000, and appellant Martin E. Casey and respondent therein agreed that the contract of May 23, 1910, "shall be and hereby is canceled and declared null and void. * * * In consideration of which said party of the first part agrees to pay said party of the third part," out of said \$8,000, the sum of \$1,850, less certain bills for lighting, water, taxes, etc. "In the event said eight thousand dollars be not paid in accordance with this agreement said party of the third part shall receive nothing and shall have

no further right, title, claim, or interest in or to any part of said land, premises or personal property." In each of the above-mentioned contracts time was made of the essence. On January 25, 1911, appellants entered into an agreement with one T. J. Tyrell for the sale of said property for the sum of \$8,000, and, on April 21, 1911, pursuant to said contract, the property was deeded to one Barney Van Buskirk. In the complaint it is alleged:

"On or about the 9th day of February, 1911, and while said plaintiff was in possession of said real property under said contract as aforesaid (the contract of February 13, 1909), said plaintiff and defendants entered into an agreement whereby plaintiff agreed to cancel and rescind the said contract hereinabove referred to in consideration of the payment to plaintiff by defendants of all the sums of money paid by plaintiff to defendants, together with the sums of money expended by said plaintiff in repairing and improving said real property amounting in all to the sum of \$2,870"

—and the complaint prays judgment in that amount. In their answer defendants denied that they entered into the agreement, above quoted, to pay plaintiff the sum of \$2,870, or that plaintiff rescinded the contract of February 13, 1909; but they allege that the payments provided for in the contract of October 22, 1910, to be made by said Traynor, were never made by him, "and at the expiration of the time in said agreement provided, defendant Casey exercised his right, and declared the same forfeited and null and void." The court found that, under the contract of February 13, 1909, plaintiff entered into possession of the property and remained therein continuously until January 25, 1911, and that "defendants had and received of the plaintiff, under said contract, the sum of \$1,700." Finding No. 5 is:

"That on or about the 4th day of March, 1910, the said plaintiff and defendants mutually agreed to rescind the contract of February 13, 1909."

There are similar findings as to the contracts of March 4, 1910, and May 23, 1910. Respecting the Traynor contract, of October 22, 1910, the court found:

"That there was no consideration for the waiver of the rights of plaintiff contained in said contract," and "at no time did the defendants, or either of them, declare a forfeiture of any of the contracts referred to."

"(11) That in the month of December, 1910, the plaintiff delivered the keys of said premises unto said defendants at their request, and upon their promise to repay to plaintiff the said sum of \$1,700 when the said premises were sold by said defendants, and that the plaintiff was permitted to remain in possession thereafter until on or about the 25th day of January, 1913 (1911)."

"(12) That said defendant, Martin Casey, repeatedly promised to repay to plaintiff all moneys paid by plaintiff under said contract, as soon as the said premises were sold by said defendant."

The court also found that the cause of action was not barred by the provisions of either section 339, subdivision 1, or section 1668 of the Code of Civil Procedure. Judgment

was entered in favor of plaintiff for the sum of \$1,700, and defendants appeal from an order denying their motion for a new trial.

[1, 2] Appellants claim that, on November 22, 1910, 30 days after the execution of the tripartite agreement between Traynor and the parties to this suit, "plaintiff's right to the property terminated by his own agreement," and that whatever he paid on the purchase price defendants properly retained as liquidated damages.

Respondent cites *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 794, 22 Am. St. Rep. 257, where the Supreme Court declared, as stated in the syllabus:

"The stipulation in the contract that the purchase money paid should be taken as liquidated damages for the breach of the contract by the purchaser is void under sections 1670 and 1671 of the Civil Code, it not being impracticable or at all difficult to fix the actual damage to the vendors, the measure of which is definitely fixed by section 3307 of the Civil Code as the excess of the agreed price, if any, over the value of the property to the vendors."

This is answered by appellants by citing *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, where the case of *Drew v. Pedlar* is distinguished and it is said:

"Where time is expressly made of the essence of the contract, equity will not ignore the provision, for equity follows the law, and will neither make a new contract for the parties, nor violate that which they have freely and advisedly entered into."

But the court also said in that case:

"It has been said that after the vendee's breach the vendor may agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of his money."

It is the claim of respondent that this quotation is exactly applicable to the case at bar.

The transcript of the testimony is far from satisfactory, though probably defendants are free from blame in the matter. The plaintiff is a Chinese, and testified without an interpreter. His testimony, in some respects, seems confused, but he testified that after the sale of the property to Van Buskirk, appellant Martin E. Casey many times promised to pay him as soon as he received the purchase money from Van Buskirk. The witness Traynor said that on several occasions Casey told him "he would do right with Joe Hay," and "he would return Joe what money he had paid."

Appellant Martin E. Casey, testified on direct examination that he agreed to pay Joe Hay \$1,800 if the property was sold for \$8,000 and "outside of that I know of no promise I have made to Joe Hay to repay any money at all." On cross-examination he said:

"I don't remember making any direct promise at all. I don't remember whether I made a promise to Joe Hay in the month of February or the month of March."

We think the trial court was justified in finding "that said defendant Martin Casey repeatedly promised to repay to plaintiff all moneys paid by plaintiff under said contract, as soon as the said premises were sold by said defendant," and also in finding that "at no time did the defendants, or either of them, declare a forfeiture of any of the contracts referred to."

Appellants claim that the testimony of plaintiff and of Traynor shows that any promise by appellant Martin E. Casey to repay plaintiff was made in November, 1910, but it is clear that such promises were made at a later time. Plaintiff testified:

"Mr. Casey promised to pay me, but he never paid me any. I asked him several times, but he said the man didn't pay him yet. I had reference to Barney Van Buskirk."

And Traynor testified:

"I believe I talked with Mr. Casey about 3 days before the property was actually sold. That was why I asked him if he sold this property would he do right by Joe Hay, and he said he would."

[3] The complaint in this action was filed February 6, 1913. As the sale to Van Buskirk was made on the 21st day of April, 1911, the statute of limitations did not begin to run against plaintiff until that date.

The order appealed from is affirmed.

We concur: CHIPMAN, P. J.; ELLISON, J., pro tem.

HAY v. CASEY et al. (Sac. 2254.)

(Supreme Court of California. July 24, 1916.)

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Application to the Supreme Court for a rehearing. Rehearing denied.

Richard Belcher and W. H. Carlin, both of Marysville, for appellants. Brittan & Raish and Wetmore & Davies, all of Marysville, for respondent.

PER CURIAM. Rehearing denied.

SHAW, J. I dissent from the order denying a rehearing in the Supreme Court. There is no support in the evidence for the finding of the trial court "that there was no consideration for the waiver of the rights of plaintiff contained in said contract," meaning the contract of October 22, 1910, between Martin E. Casey, J. Ross Traynor, and the plaintiff, Joe Hay. The contract itself shows a valuable consideration in the mutual agreements of the respective parties. *Gallagher v. Equitable G. L. Co.*, 141 Cal. 707, 75 Pac. 329; *Siddall v. Clark*, 89 Cal. 321, 28 Pac. 829. It was a complete novation and a settlement of all previous transactions and obligations between Hay and Casey. The condition therein stated upon which the money was to be paid to Hay never happened, and

never can happen. The obligation is at an end. Unless it has suddenly become the law that contracts made freely and for a valuable consideration do not fix the rights of the parties under it, the decisions of the trial court, of the District Court of Appeal in affirming that judgment, and of this court in denying a rehearing, are erroneous.

BRUSCHI v. COOPER et al. (Civ. 1425.)
(District Court of Appeal, Third District, California. June 7, 1916. Rehearing Denied by Supreme Court, Aug. 4, 1916.)

1. NAMES \S 16(2) — IDEM SONANS — NAME WITHOUT RULE.

Under Code Civ. Proc. \S 1963, subd. 25, providing that the identity of a person from the identity of name is to be presumed unless controverted by other evidence, and the rule idem sonans, the name "Dimetra" may be said to mean the name "Demetra."

[Ed. Note.—For other cases, see Names, Cent. Dig. \S 18; Dec. Dig. \S 16(2).]

2. ESTOPPEL \S 70(1)—GROUNDS—FAILURE TO ASSESS TITLE.

The fact that a certificate of sale and tax title deeds were issued "without any objection on the part of the owner of the property" is not, in itself, sufficient to establish estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 183, 185, 187; Dec. Dig. \S 70(1).]

3. ADVERSE POSSESSION \S 16(1)—OCCUPANCY — SUFFICIENCY.

Use of an undefined part of uninclosed lots as a dumping ground for sand and storage of loose personal property did not constitute occupancy within Code Civ. Proc. \S 322, providing that continued occupation and possession of land for five years under a written instrument or judgment is deemed to have been held adversely, except that possession of one lot in a tract is not possession of other lots.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 82, 83, 87, 88; Dec. Dig. \S 16(1).]

4. ADVERSE POSSESSION \S 79(1)—EXTENT OF POSSESSION—COLOR OF TITLE.

A certificate of purchase issued at a tax sale does not constitute color of title, since there must be an apparent transfer of title, a tax sale certificate being an admission that the property is held subject to the owner's right of redemption.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 459; Dec. Dig. \S 79(1).]

5. WATERS AND WATER COURSES \S 231—IRRIGATION TAX DEEDS—NOTICE OF SALE—SUFFICIENCY.

Under Irrigation Act (St. 1897, p. 254), \S 45, providing that the collector must make out a certificate in duplicate dated on the day of sale, and specifying the time when the purchaser will be entitled to a deed, a certificate, incorrectly dated, but stating the correct date of the sale in the body of the instrument, and that the property might be redeemed within 12 months, sufficiently complied with the statute.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 320; Dec. Dig. \S 231.]

6. WATERS AND WATER COURSES \S 231—IRRIGATION TAX DEEDS—RECITALS—STATUTE.

Under Irrigation Act, \S 35, requiring the assessor to assess all real property and prepare an assessment book, in which must be listed

all such property, specifying the name of the person to whom the property is assessed, if known, section 45, requiring the assessor, in his certificate of sale for delinquency, to state the name of the person assessed, and section 48, requiring the matter recited in the certificate of sale to be recited in the deed, although section 50 provides that, when property is sold for taxes correctly imposed, no misnomer of the owner shall affect the sale, a certificate of sale and deed, reciting the name of such person as "D. Bruscia," were void, where the assessment was to "D. Bruschie," since the listing of land for assessment necessarily means that the name of the owner, if known, must be correctly stated.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ¶ 231.]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Suit by Demetra Bruschi against Ida B. Cooper and others. From a judgment quieting title in defendant O. H. Williams, plaintiff appeals. Reversed.

Rehearing denied by Supreme Court, 159 Pac. 734.

J. R. Webb and George Cosgrave, both of Fresno, for appellant. Hatton & Scott, of Modesto, for respondents.

CHIPMAN, P. J. This case was before the court and decided January 29, 1916, reversing the judgment of the lower court. A rehearing was granted and further light on the case invited, particularly upon the validity of the assessment, certificate of tax sale, and the tax deeds involved in the action. In discussing the question presented we found what seemed to us a very close analogy between the general code provisions for assessments and delinquent tax sales and the provisions of the Irrigation Act. Following the decisions of the Supreme Court as we understood them, we were constrained, with some reluctance, to hold the title asserted by defendants to be invalid. In reviewing the opinion heretofore filed in the case, respondents contend:

First. That section 35 of the irrigation act (Stats. 1897, p. 254) does not require that "the property must be assessed to the owner." The section does provide that:

The assessor "must prepare an assessment book with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head: (a) the name of the person to whom the property is assessed (if the name is not known to the assessor, the property shall be assessed to 'unknown owners')." * * *

The assessment was made not "to unknown owners," but to a person named, viz., D. Bruschie. How far a mistake in the name may affect the validity of the assessment need not now be considered. The fact is that the owner's name was given.

Second. It is urged:

"That section 45 of that act does not absolutely require that the certificate of sale must state the name of the person assessed. Said section 45 requires the collector to make out in duplicate a certificate dated on the day of sale,

stating (when known) the name of the person assessed," etc.

We have seen that the assessment was not to "unknown owners," but to a person named D. Bruschie, presumably believed by the assessor to be the owner. In making out his certificate the collector gave the name of the person to whom the property was assessed as D. Bruscia. It is claimed that the statute expressly makes the naming of the person assessed "subject to the condition that the assessor knows the name of the persons assessed." This may be so where the assessment is to "unknown owners," but where an owner is named in the assessment and is named in the certificate, it cannot be said that it was the case where the person was unknown.

Third. It is contended that, "the irrigation act does not require that an irrigation tax deed issued thereunder 'shall correctly recite the name of the person to whom the property was assessed, as a condition of its validity,'" as held in the former decision. Section 47 provides:

"If the property is not redeemed within the time herein provided, the collector, or his successor in office, must make to the purchaser, or his assignee, a deed of the property, reciting in the deed substantially the matters contained in the certificate," etc.

It is true that the statute does not in terms require that the name of the person assessed must be recited in the deed, neither does it require a description of the property to be given, but we held at the former hearing that, in requiring the deed to recite "substantially the matters contained in the certificate" the name of the person assessed should be regarded as among the substantial matters to be recited if the name in fact did appear in the certificate.

We fail to discover, upon a re-examination of the statutory provisions relating to the subject, any satisfactory grounds on which to reach a conclusion different from that expressed in our former opinion. And we therefore adopt that opinion, which is as follows:

"This is an action, as set forth in plaintiff's second amended complaint, to quiet the title of plaintiff to lots 28, 29, 30, 31, and 32 in block 33 of the city of Modesto, Stanislaus county. An amendment was, by leave of court, made to the amended complaint stating that 'should the court find that defendants, or either of them, had expended money in payment or taxes or assessments on said property, and are justly entitled to reimbursement of the same, then plaintiff is ready, willing, and able to pay * * * such sum as the court may find that they are entitled to and offer to pay the same and to do equity in the premises.'"

"Defendant Williams answered: Denied generally and specifically the averments of the said complaint; alleged that the cause of action is barred by sections 318, 319, and 322 of the Code of Civil Procedure; and as a separate defense alleged that prior to the commencement of the action defendant was, and he still is, the owner in fee of the said lots; that, on February 20, 1906, said lots 30 and 31 were sold to satisfy the tax levied on said property last referred to by Modesto irrigation

district for the year 1905, which said tax had become delinquent; that at said sale M. L. Cooper became the purchaser, and, no redemption having been made, a deed of conveyance to said two lots was, on March 4, 1907, made to said Cooper, 'conveying to said M. L. Cooper absolute title to said real property'; that, on May 6, 1910, said M. L. Cooper conveyed said two lots to his wife, Ida B. Cooper, and, on December 26, 1911, said Ida conveyed the same to defendant Williams, and ever since said date he has been the owner of said real property. Similar averments in said answer are set forth as to lots 28, 29, and 30; defendant Williams thus deraining title thereto. As a further defense it is set forth that 'plaintiff is precluded or estopped from instituting or maintaining this action for the following reasons: That, on December 26, 1911, said property was conveyed to defendant by good and sufficient deed for a good and valuable consideration; that since said date "said defendant, at great cost and expense, to wit, about \$9,000, has erected and built upon said premises a large and expensive building," and has made other improvements on said real property amounting to \$1,000; that plaintiff "was fully cognizant of the erection of said building on said premises at the time said building was in course of erection, and until and long after the said building was erected and completed plaintiff made no claim to the ownership of said property, or any part thereof." Like averments are made as to said improvements other than said building; that had defendant known or had he been informed that plaintiff made any claim to or interest in said property, defendant would not have made said improvements; that, by reason of the foregoing, plaintiff "intentionally endeavored to perpetrate, and by instituting this action is now willfully, knowingly, and intentionally endeavoring to perpetrate, a fraud upon said defendant, to his loss in the sum of not less than \$15,000." For a further defense: That plaintiff is estopped from maintaining the action for the following reasons: That plaintiff is guilty of laches, in that he 'abandoned said real property, * * * and for many years prior to the commencement of the action, failed and refused to pay any taxes or assessments whatever levied upon or assessed against said property, * * * and that said real property and the whole thereof has frequently been sold for taxes,' and that plaintiff purposely refrained from paying said taxes for the purpose of attempting to defraud the purchaser at any sale of said property for delinquent taxes; that plaintiff was well aware of all said assessments and sales of said property; that following said sales certificates of purchase were duly issued with plaintiff's full knowledge, and conveyance made without protest or objection by plaintiff. By way of cross-complaint, defendant sets up the facts first above stated as to the sale and purchase of said property for delinquent taxes, and also pleads adverse possession by himself and predecessors in estate.

"Defendants Ida B. Cooper, Z. E. Drake, and F. E. Johnston answered: Denied plaintiff's alleged ownership; alleged ownership in defendant Williams on December 26, 1911, at which time he, said Williams, conveyed the south 60 feet of said property by deed of trust, in which said Williams was party of the first part, the said Drake and Johnston parties of the second part, and defendant Ida Cooper party of the third part, to secure to said Cooper the payment of \$2,000 and other sums, no part of which has been paid, and said deed of trust is a lien on said property, and is in full force and effect.

"Defendant the Modesto Savings Bank denied plaintiff's ownership, and alleged ownership in defendant Williams. It also set up a deed of trust by Williams, on the east 80 feet of the property, to secure a loan of \$2,000.

"Plaintiff answered the cross-complaint of defendant Williams: Denied the alleged adverse possession, and denied that defendant Williams or his grantors or predecessors in interest have paid all, or any, taxes or assessments levied on said property; denied that plaintiff has no right, title, or interest in said property, or that plaintiff's claim is without right.

"The court made findings in favor of defendants: That at the commencement of the action plaintiff was not, and is not now, the owner of said property, or any part thereof, or any interest therein, and is not entitled to the possession thereof; that the alleged cause of action in plaintiff's second amended complaint is not barred by either section 318, 319, or 322 of the Code of Civil Procedure; that, prior to the commencement of the action, defendant Williams was, and now is, the owner in fee simple of said property. The court found further: That, on February 20, 1906, the whole of said property 'was by the collector of Modesto irrigating district sold to satisfy the assessment or tax levied and imposed on said real property by Modesto irrigating district for the year 1905, which said assessment or tax had become and was delinquent at the time of said sale, said lots Nos. 30 and 31 of said block No. 33 in said city of Modesto being assessed and sold as one parcel to M. L. Cooper, and lots Nos. 28, 29, and 32 in said block No. 33 in said city of Modesto being assessed and sold as a separate parcel to said M. L. Cooper,' and said Cooper became the purchaser of all said lots; that thereafter, on March 3, 1906, the said collector made out in duplicate a certificate, stating name of the person to whom said property, to wit, lots 30 and 33, were assessed, a description of the land sold for assessment, giving the amount and year of assessment, and specifying the time when the purchaser, said Cooper, would be entitled to a deed; that said certificate was signed by said collector and a copy delivered to said purchaser and a copy filed in the office of the county recorder of Stanislaus county. Similar finding was made as to lots 28, 29, and 32; that, immediately after the delivery by said collector of said certificates to said purchaser, he, the said purchaser, entered into the actual possession of the whole of said real property, and took actual possession thereof, and claimed the same, and thereafter and up to March 4, 1907, 'continuously and actually occupied, possessed, and publicly claimed said real property, and the whole thereof, as his property'; that said claim and possession was under said certificate of sale during the period from March 3, 1906, to March 4, 1907, 'and prior to the erection of the building hereinafter mentioned the whole of said premises was entirely uninclosed.' It is also found that said Cooper had like possession of said land, claiming the same openly and notoriously from March 6, 1906, to May 6, 1910, and, during all said period, paid all the taxes and assessments levied or assessed against said property, and that no part of said property was redeemed from said sales, and that, on March 4, 1907, a deed of conveyance was made by said collector to said Cooper, conveying said lots 30 and 31, and on said day a deed was also made to said Cooper by said collector, covering said lots 28, 29, and 32, conveying to said Cooper absolute title to all said lots; that said certificates of sale were duly issued, delivered and recorded, as were also the said deeds of conveyance, 'without any objection on the part of plaintiff'; that, on May 6, 1910, said M. L. Cooper conveyed all said property to his wife, Ida B. Cooper, who thereupon entered into actual possession of said property, and, ever since said date, and up to December 26, 1911, continued to occupy and possess said property openly and notoriously, and adversely during said period collected the rents, issues, and profits of said property and paid all taxes levied or assessed against the same; that, on Decem-

ber 26, 1911, said Ida B. Cooper conveyed all said real property to defendant O. H. Williams for a good and valuable consideration, and ever since said date Williams has been, and now is, the owner in fee of all said property; that said Williams, on said date, entered into possession of said property, and ever since said date has been in open and notorious possession thereof under claim of right, and has paid all taxes levied and assessed against said property; that neither plaintiff nor any other person except said L. M. Cooper, Ida B. Cooper, and said Williams 'was or were in the possession of said real property, or any portion thereof, within more than five years before the commencement of this action'; that said occupation and possession 'was, under claim of title by said O. H. Williams, M. L. Cooper, and Ida B. Cooper, based upon said certificates and said deeds of conveyance, and exclusive of any other right and hostile to any right, title, or claim or right of possession of plaintiff, his grantors or ancestors'; that said Williams purchased said property in good faith, and paid therefor the sum of \$4,000; that, since December 26, 1911, said Williams has erected on said premises a building which cost about \$9,000 and has made other improvements there-to amounting to \$1,000; that plaintiff has made no attempt to pay any of said taxes, 'but has at all times been able, ready, and willing to pay the same.' The court finds the averments of the answer respecting said loans, secured as alleged, to be true.

"Judgment was accordingly entered, quieting defendant Williams' title to the property. Plaintiff appealed from the judgment under the alternative method.

[1] "That the government title to the lots in question vested in Francisco Bruschi, father of plaintiff, by deed of Charles Crocker, November 8, 1882, seems not to be controverted. On January 1, 1883, Francisco conveyed lots 28, 29, and 32 to Dimetra Bruschi. The name 'Dimetra' may be said to mean the name 'Demetra,' and would, in our opinion, fall within the rule *idem sonans*. The identity of name carries with it the identity of person. Code Civ. Proc. § 1963, subd. 25.

"As to lots 30 and 31, plaintiff claims as heir and as a distributee under the will of Rosa Bruschi, his mother. By the decree of May 27, 1905, in the estate of Francisco Bruschi, lots 30 and 31 were distributed to Rosa. The decree of distribution in her estate recites that 'the residue of the estate, consisting of the property hereinafter particularly described, is now ready for distribution,' names certain nine heirs, among them a son, Demetrio M. Bruschi, and devises in equal shares 'the residue of said estate of Rosa Bruschi, deceased, hereinafter particularly described and now remaining in the hands of said administratrix, and any other property not now known or discovered which may belong to the said estate.' The property particularly described is \$112.20 in money and a promissory note of \$547.06. Plaintiff was shown to be the son and hence an heir at law of Rosa. We think it sufficiently appeared that he had a one-ninth interest in lots 30 and 31 which were devised to Rosa, and of which the decree of distribution in her estate made no disposition except under the clause 'any other property not now known.'

[2] "Upon the question of estoppel pleaded, no fact is found except that said certificate of sale and said tax title deeds were issued 'without any objection on the part of plaintiff' which is not in itself sufficient to establish an estoppel. Plaintiff offers in his complaint 'to pay to defendants, or either of them, such sum as the court may find that they are justly entitled to, and offers to pay the same and to do equity in the premises.' There is no finding as to what payment plaintiff should make to defendants in the event of plaintiffs succeeding in the action or what the court would deem equitable—wheth-

er such payment should include all taxes and cost or the improvements made upon the lots, or both. The court found for the defendant Williams, and it was not necessary to deal with this feature of the case.

[3, 4] "If the findings may be construed as showing title in defendant Williams by adverse possession, they are not supported by the evidence. The period of five years after the execution and delivery of the tax deed had not elapsed before the action was commenced, although it had elapsed if the date of the certificate of sale may be considered. However, the lots were not inclosed until about the time the building was erected on them by Williams in 1911. They had been used as a dumping ground for sand and storage of some loose personal property by a man who paid Williams a rental for such use, but otherwise there was no occupancy of the lots. There was no evidence showing what portion of the lots was thus used, even if such use could be regarded as occupancy, which we do not think would be so regarded. Code Civ. Proc. § 322; *Cohen v. Anderson*, 22 Cal. App. 634, 185 Pac. 1096. Defendant's claim that he held under color of title by virtue of the certificate of sale cannot be sustained, for a certificate of purchase issued at a tax sale does not constitute color of title. 1 Cyc. 860, 1099. There must be an apparent transfer of title. 1 Am. & Eng. Ency. of Law, 859, 973; *Packard v. Moss*, 68 Cal. 123, 8 Pac. 818; *Investment Co. v. Fox*, 32 Utah, 301, 90 Pac. 564, 13 L. R. A. (N. S.) 627, 125 Am. St. Rep. 865, where the court said: 'The fact that Moon went into possession under and by virtue of the tax sale certificate was, in effect, an admission on his part that he held the property subject to the owner's right of redemption.' The court found against defendants on their plea of the statute of limitation.

"It seems to us that the judgment must stand or fall upon the strength of the title of defendant Williams derived through the tax proceedings which were taken under the act of March 31, 1897 (Stats. 1897, p. 254).

"Appellant relies upon the following points for reversal: (1) Insufficiency of the assessment; (2) invalidity of the certificate of sale; (3) insufficiency of the deed made pursuant to the sale.

"The assessment is attacked on the grounds: (a) That the assessment levied to pay the general expenses of the district is not segregated from the assessment to pay annual interest on outstanding bonds; (b) that noncontiguous lots are not separately assessed.

"The assessment was made pursuant to the authority of the above-mentioned act. Lots 28, 29, and 32 were assessed to D. Bruschie, and lots 30 and 31 to F. Bruschie, and in each case the assessment was of the group of lots, and not separately; also, the valuation was made on each group as a whole, and not separately. As we have reached the conclusion that the certificate of sale and the deed of the collector of the district to defendant Williams are invalid, we refrain from passing upon the objections raised to the assessment.

"Section 48 of the act is relied upon by defendants as validating any and all the tax proceedings under which they claim. The construction given this section by the Supreme Court may as well be shown here as elsewhere. After stating that certain matters recited in the certificate of sale 'must be recited in the deed,' and that 'such deed duly acknowledged or proved is prima facie evidence of such matters, the section reads: 'Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free of all incumbrances, except when the land is owned by the United States, or this state, in which case it is prima facie evidence of the right of possession.' This conclusive evi-

dence clause is the same as is found in section 3787 of the Political Code, except that the word 'other,' just before the word 'proceedings,' is omitted in section 48 of the Irrigation Act. The Supreme Court, in *Escondido High School District v. Escondido Seminary*, 130 Cal. 128, 62 Pac. 401, said: 'If it were necessary to pass upon the question in this case, it might, consistently with recognized rules of construction, be held that the language used in the act of 1887 (the language is the same in the act of 1897) means all the proceedings other than those as to which the deed is made prima facie evidence and the act would thus be relieved from the constitutional objection in support of which appellants cite copious authorities.' The court did not find it necessary to decide the question, but we do not hesitate to hold that the section means what is thus, at least inferentially, said it does mean. Otherwise, construed literally, the deed is made prima facie evidence of certain seven enumerated things, and conclusive evidence of the same things, as well as all others. The deed is made prima facie evidence that: (a) The property was assessed as required by law; (b) that the property was equalized as required by law; (c) that the assessments were levied in accordance with law; (d) the assessments were not paid; (e) at a proper time and place the property was sold as required by law; and by the proper officers; (f) the property was not redeemed; (g) the person who executed the deed was the proper officer.'

"In *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 239, 240, 90 Pac. 936, 938, the scope of the conclusive evidence clause is defined. Section 3680 of the Political Code provides that upon all bills or statements there must be stamped the words 'sold for taxes' and the date of sale. In the case before the court this memorandum was not made, and it was urged that this provision was intended as notice required to be given the owner, and a failure to give it deprived him of his property without due process of law. The court said: 'Of course it is true that the Legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of the listing, valuation, apportionment, or notice (Cooley on Taxation, pp. 355, 356; 1 Blackwell on Tax Titles, § 640), but it can make the certificate or deed conclusive as to matters or things which in the first instance the Legislature might not have required to be done, and which are in their nature, therefore, nonessentials. * * * But there is nothing in the law which makes the giving of such a notice essential—no rights of the taxpayer would be violated if such a provision for notice were not required at all. * * * It is quite within its power to do away with this provision, or, as here, to hold that the tax deed shall be conclusive evidence that it was given.' See *Smith v. Furlong*, 160 Cal. 522, 527, 117 Pac. 527.

"The invalidity of the certificate of sale is urged: (a) Because it is not dated on the day of the sale; (b) it does not specify when the purchaser will be entitled to a deed; (c) it does not give the name of the person assessed. The certificates are identical in substance. Taking the certificate of the sale on the assessment to D. Bruschie, it states that the property, describing it, was duly assessed as required by law, by the proper officers of said district and for the purposes thereof, in the year 1905; that the name of the person so assessed was D. Bruscia; that said property was equalized as required by law; that the assessments were levied in accordance with law, and the amount of the assessment is the sum of \$3.16 and the year of the assessment 1905; that 'the assessments were not paid; that at the proper time and place, after all due and legal proceedings heretofore had, I did, on this 20th day of February, 1906, offer the said real estate (describing it, being lots 28 and 29) for sale for said assessments'; that M. L. Cooper became the purchaser. 'Said property may be redeemed within twelve months from the date of

said purchase, viz.: this 20th day of February, 1906, by the person and in the manner as provided by law and if the property is not so redeemed, said purchaser will, on or after said expiration of twelve months from the date of sale and purchase and after having complied with the provisions of the law relating to his right thereto be entitled to a deed.' The certificate then states that a description of the land as in the certificate has been entered in a book kept, as a record by said district, known as 'Vol. 1, Certificate of Sale,' which description is numbered 809 on the margin and is put on this certificate as the number thereof.

"In witness whereof I have signed this certificate, and filed a duplicate thereof in the office of the county recorder of the said county of Stanislaus, in which said land sold is situated, this 8d day of March, 1906. G. R. Stoddard, Collector of Modesto Irrigation District.'

[5] "Section 45 of the act of 1897, among other things, provides that 'the collector must make out in duplicate a certificate, dated on the day of sale stating (when known) the name of the person assessed * * * and specifying the time when the purchaser will be entitled to a deed.' The certificate was made out in duplicate, but was dated March 3, 1906, instead of February 20, 1906, the day of the sale. But it clearly appears in the certificate that the sale was made on February 20, for it is twice stated, and it as clearly therein appears, that the 'property may be redeemed within twelve months from the date of said purchase, viz., this 20th day of February, 1906,' and if not so redeemed, 'said purchaser will, on or after the expiration of twelve months from the date of sale and purchase, and after having complied with the provisions of the law relating to the right thereto be entitled to a deed.' The certificate gives the name of the owner of the assessed property as D. Bruscia. The name of the owner in the assessment roll is D. Bruschie. One of the objects of the certificate doubtless, is to give notice to the owner of the date of the sale, and to inform him when the purchaser will be entitled to a deed; i. e., inform him of the period of redemption. We think the purpose of the statute in this regard is fully met by the statement found in the body of the certificate. *Best v. Wohlford*, 153 Cal. 20, 21, 94 Pac. 98. The Idaho Revised Codes, § 1759, provides that after receiving the amount of the taxes, and costs from the purchaser at tax sale, the collector must make out in duplicate a certificate dated on the day of sale. In *McGowan v. Elder*, 19 Idaho, 163, 113 Pac. 103, the tax sale was on July 8, 1904, and the certificate was dated July 9, 1904. The Idaho Supreme Court held it good, and that the provision of the statute is directory and not mandatory. The decision of this point does not, as appellant contends, rest upon the provision of the statute that no assessment is illegal on account of informality.

"[6] The objection to the deed is the same as one of the objections to the certificate of sale—that the party assessed is 'D. Bruschie,' whereas the name of the person assessed as given in the certificate and deed is 'D. Bruscia.' Section 35 of the Irrigation Act requires the assessor of the district to assess all the real property of the district to the persons who own the same. 'He must prepare an assessment book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, * * * under the appropriate head: (a) The name of the person to whom the property is assessed; * * *.' Section 45 requires the assessor, in his certificate of sale, to state the name of the person assessed. Section 48, among other things, states that: 'The matter recited in the certificate of sale must be recited in the deed.' Just how much of the matter and what particular matter 'must be recited in the deed' the statute does not inform us. It does not in terms require that the deed shall contain the name

of the person assessed. But the statute requires that the name of the person assessed should appear on the assessment roll and also in the certificate of sale. It would seem reasonable to hold that 'the matter' referred to in section 48 includes the name of the person assessed. The point now before us being raised on both the certificate of sale and the deed, it may be considered in connection with both.

"Appellant relies upon *Henderson v. De Turk*, 164 Cal. 296, 128 Pac. 747. In that case defendant claimed solely upon a deed from the state, based on a sale and alleged deed to the state on account of delinquent taxes. The deed to the state recited the name of the person assessed as 'E. W. Davis,' while the assessment was to 'E. W. Davies.' Section 3785 of the Political Code provided that the deed must recite, among other things, 'the name of the person assessed.' It was held that 'this means, of course, the name of the person assessed as it appears on the assessment roll,' and that a deed which 'misrecites, or fails to recite, any one of the facts required by statute to be recited therein is void.' It was also held, on the authority of *Emerle v. Alvarado*, 90 Cal. 444, 465, 27 Pac. 356, that the rule of *idem sonans* does not apply 'to assessments and other cases of description, where the written name is material.' It was further held, in the *Henderson v. De Turk* Case, that the failure of the deed to recite correctly the name of the party assessed is not remedied or cured by either the section 3807 or 3628 of the Political Code, because section 3628 refers only to the assessment, which is not rendered invalid by reason of a mistake in the name of the owner. Section 3807 provides: 'When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable.' Of this section the court said: 'It does not purport to apply to the deed made in pursuance of the sale, * * * and cannot be held to dispense with the requirement that the deed shall correctly recite the name of the person to whom the property was assessed, as a condition to its validity.' Finally, it was held that section 3787 of the Political Code 'makes such a tax deed evidence of regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law.' The deed relied upon was held to be invalid.

"Turning to the Irrigation Act, we find, as already pointed out, that section 35 makes it the duty of the assessor to assess all real property at time stated. 'He must prepare an assessment book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head: (a) The name of the person to whom the property is assessed (if the name is not known, * * * to 'unknown owners'); (b) land (describing it) * * *. On the last day of December of each year, 'all unpaid assessments are delinquent,' etc. Section 41. Sections 42 and 43 provide how the delinquent tax sale is to be conducted, and who may purchase, etc. Section 45 provides for issuing a certificate of sale to the purchaser: 'After receiving the amount of assessments and costs, the collector must make out in duplicate a certificate dated on the day of sale, stating (when known) the name of the person assessed,' etc., and section 46 provides that, before delivering any certificate, the collector 'must in a book enter a description of the land sold, corresponding with the description in the certificate, the date of sale, purchasers' names, and amount paid,' etc., but does not require to be entered in this book the name of the person assessed, as does the certificate. Section 47 provides how and when redemption may be made, and section 48 provides that if the property is not redeemed the

collector 'must make to the purchaser, or his assignee, a deed of the property,' and 'such deed duly acknowledged or proved is prima facie evidence that'—then follow the seven several facts thus made prima facie evidence, and the conclusive evidence clause already quoted. Section 50 is the same as section 3807 of the Political Code mentioned in *Henderson v. De Turk*, supra. We thus find a very close parallel between the general code provisions for assessments and delinquent tax sales and the provisions of the Irrigation Act. The property must be assessed to the owner (section 35); the certificate of sale must state 'the name of the person assessed.' Section 45. 'The matter recited in the certificate of sale must be recited in the deed.' Section 48.

"As to section 50, which is the same as section 3807 of the Political Code, the case cited holds that it 'cannot be held to dispense with the requirement that the deed shall correctly recite the name of the person to whom the property was assessed, as a condition of its validity.' As to the conclusive evidence provision, holding it to mean, as we do, the same as the like provision in the Political Code (section 3787), the court said, in the case cited, that said section 'makes such tax deed evidence of regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law'; that is to say, in the case then before the court, conforming to the requirement that the deed must correctly recite the name of the person to whom the land was assessed.

"We are brought to the single consideration, Is the requirement in the certificate of sale and in the deed that there must appear therein 'the name of the person assessed' such an essential in the proceedings as could not be dispensed with by the Legislature, or may it be classed as a nonessential and subject to the rule laid down in *Bank of Lemoore v. Fulgham*, supra, where it was held that the Legislature can make the certificate or deed conclusive as to matters or things which, in the first instance, the Legislature might not have required to be done, and which, in their nature, therefore, are non-essentials? It was said, in the case cited, that the Legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of listing, valuation, apportionment, or notice. *Cooley on Taxation*, pp. 355, 363; *Blackwell on Tax Titles*, § 640. What is meant by 'listing' the land? Mr. Cooley says: 'An assessment consists of two processes of listing the persons, property, etc., to be taxed, and of extending the sums which are to be the guide in an apportionment of the tax between them.' 1 *Cooley on Taxes*, p. 596. Mr. Black says: 'Statutes generally require that real property shall be listed and assessed to the owner or to the occupant; and it is generally admitted that this requirement is imperative and a compliance with it essential to jurisdiction.' *Black on Tax Titles*, § 106, citing *State v. Vanderbilt*, 33 N. J. Law, 38, where it was held that real estate must be assessed in the name of some person or persons or corporation, as the owner thereof. "It seems to us that the 'listing' of land for assessment necessarily means that the name of the owner, if known, and a description of the property assessed must be stated, and, as was held in the *De Turk* Case, 'correctly stated.' In the present case, the assessment was to 'D. Bruschie.' The certificate of sale and the deed recited the name as 'D. Bruscia.'

"We confess to some regret at not being able to find some way to escape from following the rule laid down in *Henderson v. De Turk*, supra. The record shows that the state and county tax on these lots was delinquent for several years prior to 1905, and they were sold to the state and were redeemed by Cooper after he purchased the land at tax sale in 1906. The owners seem to have paid no heed to their duty to the state, and not until valuable and expensive im-

provements were in good faith put upon the lots did they assert any claim to them. The law, however, we conceive to be the same, under the facts appearing, as if no improvements had been made on the lots, and we are constrained to follow the law as our Supreme Court has established it.

"We have vainly tried to convince ourselves that the name of the owner cannot be deemed an essential in the assessment, on the theory that section 3628 of the Political Code and section 50 of the Irrigation Act expressly provide that no misnomer of the owner 'affects the sale,' and on the theory that if the name is not known to the assessor, the assessment may be made to 'unknown owners.' It might be said that the owner of the land is presumed to know its description, and that the recorded duplicate certificate is notice to him, if it correctly describes the land, whether or not his name appears as the owner, and hence 'the name of the person assessed' might be dispensed with by the Legislature as a nonessential. We cannot accept such reasoning as sound, for we are always brought back to the proposition that the essential requirement of 'listing' land for assessment necessarily involves the coupling of the owner's name, if known, with the description of the land, and, if not known, a statement of that fact."

The judgment is reversed.

We concur: HART, J.; ELLISON, Judge pro tem.

BRUSCHI v. COOPER et al. (Sac. 2223.)
(Supreme Court of California. Aug. 4, 1916.)

WATERS AND WATER COURSES \S 231—IRRIGATION — TAX DEEDS — EFFECT AS EVIDENCE.

Irrigation Act (St. 1897, p. 254) \S 48, providing that a deed of property sold for assessments duly acknowledged or proved is, except as against actual fraud, conclusive evidence of the regularity of all proceedings from assessment by the assessor, inclusive, up to the execution of the deed, etc., does not extend to defects in the deed itself.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 320; Dec. Dig. \S 231.]

In Bank. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

On petition for rehearing in the Supreme Court. Petition denied. For former opinion, see 159 Pac. 728.

J. R. Webb and George Cosgrave, both of Fresno, for appellant. Hatton & Scott, of Modesto, for respondents.

SHAW, J. The petition for a rehearing of this cause in the Supreme Court is denied.

Nothing in the opinion should be deemed to hold that the correct name of the owner is so essential to a tax assessment or a certificate of tax sale that an error therein as to the name of the owner cannot be cured by the section making the deed conclusive evidence of the regularity of the assessment and certificate. The decision can be supported on the ground that the conclusive evidence clause does not extend to defects

in the deed itself, as was held in *Henderson v. De Turk*, 164 Cal. 296, 128 Pac. 747.

We concur: MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

LONG v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al. (Civ. 2070.)

(District Court of Appeal, Second District, California. July 5, 1916. Rehearing Denied by Supreme Court Aug. 31, 1916.)

COURTS \S 190(9)—APPEAL—DELAY IN PROSECUTING DISMISSAL.

Code Civ. Proc. \S 588, providing that an action shall be dismissed by the court in which the same shall have been commenced, or to which it may be transferred, on motion of the defendant, unless brought to trial within five years after the defendant has filed his answer, does not apply to an action transferred to the superior court from a recorder's court by appeal on questions of both law and fact, after a trial upon the issues, joined by defendant's answer filed in the recorder's court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \S 190(9).]

Petition for writ of review by S. O. Long against the Superior Court of the State of California, in and for the County of San Diego, and W. A. Sloane, Judge thereof, to review the action of the Superior Court, denying a motion to dismiss an appeal from a recorder's court, and rendering judgment for plaintiff in the case of *T. P. Banta v. S. O. Long*. Proceedings of the superior court. Affirmed.

W. A. Martin and F. J. Trude, both of Los Angeles, for petitioner. W. P. Cary, of San Diego, for respondents.

SHAW, J. Pursuant to a writ of review issued out of this court, the superior court of San Diego county through its clerk has made a return of the transcript and record of the proceedings had and taken by respondents in a certain case, entitled "*T. P. Banta v. S. O. Long*," from which it appears that on November 6, 1905, a judgment was rendered in favor of the plaintiff therein by the recorder's court of Imperial township (then a part of San Diego county), from which the defendant, who is petitioner here, on November 7, 1905, perfected an appeal upon questions of both law and fact to the superior court of San Diego county. No further proceeding was taken by either party to said action until June 7, 1915, at which time defendant therein, pursuant to notice given, moved the court to dismiss the same upon the grounds: First, that the action had not been prosecuted with diligence; second, that it had not been brought to trial by plaintiff within five years after defendant had filed his answer therein, as required by section 583, Code of Civil Procedure. The court denied the motion, and proceeded to a trial of

the case, as a result of which, judgment went for plaintiff.

The contention of petitioner is that upon the facts stated, the court had no jurisdiction other than to make an order granting his motion to dismiss the action.

The sole point involved is whether the provision of section 583, Code of Civil Procedure, providing that an action shall be dismissed by the court in which the same shall have been commenced, or to which it may be transferred on motion of the defendant, unless brought to trial within five years after the defendant has filed his answer, applies to actions transferred to the superior court on appeal from a recorder's or justice's court. This question was involved in the case of *Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104. There the petitioner applied for a writ of mandate to compel the superior court to dismiss the action upon facts identical with those here presented. The court held that section 583 of the Code of Civil Procedure did not apply to actions pending in the superior court on appeal thereto from a justice's court, and that, while the court possessed inherent power in its discretion to make an order of dismissal, it could not be compelled to do so. To what is said in the opinion in that case, we may add that the case is not brought strictly within the provisions of the statute, since it appears that defendant filed his answer in the justice's court, and upon the issues so joined a trial was had. We regard the case above cited as determinative of the question presented, and upon the authority thereof the proceedings of the superior court in the action of *T. P. Banta v. S. O. Long*, made the subject of this review, are affirmed.

We concur: CONREY, P. J.; JAMES, J.

CLARK v. HOTLE. (Civ. 1590.)

(District Court of Appeal, First District, California. June 30, 1916.)

APPEAL AND ERROR §1011(1)—REVIEW—QUESTION OF FACT—FINDING.

In an action on a note, wherein defendant set up a counterclaim, where there was a substantial conflict in the evidence on such counterclaim, the finding of the trial court against it must be sustained on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. § 1011(1).]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Georgiana E. Clark against Q. E. Hotle, with counterclaim by defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

Ezra W. Decoto, of Oakland, for appellant. Carleton Gray, of Oroville, A. F. St. Sure, of Alameda, and St. Sure, Callaghan & Rose, of Oakland, for respondent.

PER CURIAM. This is an appeal from the judgment in favor of plaintiff and against defendant in an action on a promissory note. The defendant does not deny that he executed and delivered the note to plaintiff's assignor, one S. J. Norris, as alleged in the complaint, but he sets forth in his answer a counterclaim for a certain amount. The court found against this defense; and the sole question presented by the record is as to whether or not the evidence supports that finding.

After the making of the note and before its maturity Norris, the payee thereof, and the defendant borrowed from the First National Bank of Oroville \$1,000, giving the bank their joint note for that sum, the proceeds by agreement being placed to the personal account of Norris. At the time of this transaction defendant and Norris had entered into a tentative agreement concerning some development work of the Feather River Canal Company's property, under the terms of which Hotle was to make certain monthly advances. This agreement was subsequently reduced to writing and signed by the parties. According to the testimony of Hotle the money borrowed from the bank was for the personal account of Norris, and when the note became due Norris refused to pay it; that Hotle thereupon took it up, and that Norris refused to allow him credit therefor upon the amount to be advanced under their Feather River Canal Company contract. Norris, on the other hand, testified that the \$1,000 borrowed from the bank and placed to his personal account, was used and paid out, as intended by both parties, for the account of the Feather River Canal Company, and that the defendant was given credit therefor. The surrounding circumstances tend strongly to support the testimony of Norris; but, in any event, there is a substantial conflict in the evidence, in view of which the settled law is that the finding of the trial court must stand.

Judgment affirmed.

CASTERA v. SUPERIOR COURT IN AND FOR COUNTY OF LOS ANGELES et al. (Civ. 1950.)

(District Court of Appeal, Second District, California. Feb. 15, 1916.)

CONVICTS §6—ACTIONS—STATUTE—EFFECT OF CONVICT'S DISABILITY ON OTHER PARTY. Under Pen. Code, § 673, providing that a sentence in a state prison for any term less than for life suspends all civil rights of the person sentenced and forfeits all public offices, private trusts, authority, or power during such imprisonment, a defendant is not obliged to submit to the pendency of a civil action against him, while the plaintiff is undergoing a sentence pursuant to a conviction of felony, but is entitled to have the case heard and determined.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 5-10; Dec. Dig. § 6.]

Petition for mandamus by John Castera against the Superior Court of the State of California in and for the County of Los Angeles and Frank G. Finlayson, Judge thereof. Peremptory writ issued.

Slosson & Mitchell, of Los Angeles, for petitioner. Henry W. Nisbet, of Los Angeles, for respondents.

CONREY, P. J. Mandamus. There is now pending in the superior court of the county of Los Angeles and in the department thereof presided over by the respondent judge, an action in which one J. E. Youtz is plaintiff and the petitioner is one of the defendants. Petitioner and other defendants in that action, having been duly served with summons, filed a demurrer to the complaint. After the filing of his complaint, the plaintiff Youtz was imprisoned in the state penitentiary pursuant to his conviction of a felony and is now undergoing a three-years' term of imprisonment. On account of such imprisonment of the plaintiff, the respondent judge has ordered said demurrer stricken from the calendar and refuses to hear and determine the same or proceed further in said cause. The petitioner seeks a peremptory writ of mandamus, commanding that said cause be restored to the calendar of said court, and that the court proceed to hear and determine the same. To this petition a general demurrer is filed, alleging that the petition does not state facts sufficient to entitle the plaintiff to the relief sought by him. It is understood by the parties that our determination of this demurrer is to dispose of the case without further hearing. Permission was granted respondents' counsel to file a brief in support of the demurrer, but no brief has been presented.

"A sentence of imprisonment in a state prison for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment." Pen. Code, § 673.

We are not aware of any decision covering the precise question involved in this matter. It is stated that, even where conviction of a felony results in civil death (as it does in this state upon a sentence of imprisonment for life), the weight of authority is apparently in harmony with the English doctrine to the effect that the convict still remains subject to be sued. 8 Ruling Case Law, p. 707, and citations there found. This doctrine is specifically recognized in this state in the statutory provisions allowing a divorce to be granted upon proof that defendant has been convicted of a felony.

To say that a defendant in a civil action is obliged to submit to the continued pendency of an action against him under these circumstances, because the plaintiff is undergoing a sentence of the kind herein described,

would be to impose upon the defendant a punishment for the plaintiff's crime. The sentence might be for a long term of years, and all of defendant's property might be subject to an attachment in the action, and yet the defendant would be without relief, no matter how groundless in fact the action might be. This cannot be the law. The interests of the plaintiff in such an action will ordinarily be sufficiently protected by the vigilance of the attorneys who have charge of his case; but, if in any case he is not so protected, the loss should fall upon him rather than upon those unconnected with his offense.

Let the peremptory writ issue as demanded.

We concur: JAMES, J.; SHAW, J.

MCCARTY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 1935.)

(District Court of Appeal, Second District, California. Feb. 15, 1916.)

JUSTICES OF THE PEACE §159(5)—**SURETIES ON APPEAL BOND—FILING OF NOTICE OF EXCEPTION—STATUTE.**

Under Code Civ. Proc. § 978a, providing that the adverse party in an appeal from a justice may except to the sufficiency of the sureties on the appeal bond and that the appeal shall be unavailing if the sureties do not justify before the justice within five days thereafter, the notice of such exception, to be effectual, must be filed with the justice, and it is not essential that it be served upon the party or his attorney.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 554; Dec. Dig. § 159(5).]

Application by Charles R. McCarty for a writ of prohibition to restrain the Superior Court of the State of California in and for the County of Los Angeles and Hon. Fred H. Taft, Judge thereof, from proceeding with the trial of a certain action pending in such court on appeal. Application denied.

Niles Chapin Folsom, of Los Angeles, for petitioner. Pendell & Gleason, of Los Angeles, for respondents.

JAMES, J. Application has been made on the part of the petitioner for a writ of prohibition to restrain the superior court from proceeding with the trial of a certain action pending on appeal from the justice's court of Los Angeles township to said superior court, and in which this petitioner is the plaintiff. The action was commenced in the justice's court on the 23d day of February, 1915, and judgment was thereafter rendered against one Leuschner, the defendant. The defendant gave notice of appeal and undertaking on appeal in the amount required by law. As ground for the writ here sought it is alleged that the sureties on the undertak-

ing on appeal failed to justify after exception had been taken to their sufficiency, and that therefore, under the provisions of section 978a, Code of Civil Procedure, the appeal should have been dismissed by the superior court. A motion was made in the superior court, asking for an order dismissing the appeal for want of jurisdiction in the court to hear the matter because of the failure of the sureties to justify. Upon the alternative writ issuing, an answer was filed on behalf of respondents herein. One of the disputed questions between the parties was as to whether in fact service of notice of exception to the sureties was made. The petitioner here contends that he made such service by delivering the notice of exception to the defendant in the justice court action, and the defendant contends that, as attorneys had appeared for him at the trial of the action in the justice's court, they were entitled to have the notice of exception to the sureties served upon them; that otherwise such service would be ineffectual. The defendant in the justice court action further contends that, even though it might be lawful to serve a notice of exception to sureties on an undertaking on appeal on a defendant in person, in fact such service was not made. However, we are of the opinion, as this court has heretofore decided, that a notice of exception to the sufficiency of sureties on an undertaking on appeal from a judgment of a justice's court, in order to be effectual, must be filed with the justice. *Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628. Nowhere in the petition filed herein is it set forth that the notice of exception to the sureties was ever filed with the justice, and, referring to the certified copy of the justice's transcript which is attached to the answer of respondents, we find no record showing that any notice of exception was filed in the justice's court, or any papers at all referring to the sufficiency of the undertaking on appeal. In the case above cited this court has intimated that it is not essential that such a notice of exception shall be served upon the party or his attorney, but that it must be filed with the justice. The reasons upon which that holding is based are quite fully set forth in the opinion.

The application for a peremptory writ is denied.

We concur: CONREY, P. J.; SHAW, J.

KETCHUM COAL CO. v. DISTRICT COURT
OF CARBON COUNTY et al. (No. 2964.)
(Supreme Court of Utah. Aug. 22, 1916.)

1. MANDAMUS \S 10—RIGHT TO RELIEF.

Where mandamus is sought to compel action on the part of a court, the legal right to such particular action must be clear, and the

legal duty to do the act or thing demanded on the part of the court must be equally clear.¹

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 87; Dec. Dig. \S 10.]

2. MANDAMUS \S 4(1)—RIGHT TO RELIEF—REMEDY BY APPEAL.

Where mandamus is sought to compel action on the part of a court, there must be a lack of an adequate remedy by appeal.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 9, 11, 17-19; Dec. Dig. \S 4(1).]

3. MANDAMUS \S 31—RIGHT TO RELIEF—ENTERTAINING AND PROCEEDING WITH CAUSE.

Mandamus may issue to compel a court to take jurisdiction of a cause and to proceed to hear and determine it, where the court without legal authority therefor refuses jurisdiction.²

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 74, 75; Dec. Dig. \S 31.]

4. MANDAMUS \S 51—RIGHT TO RELIEF—ENTRY OF JUDGMENT.

Where a court has heard a case and has made its findings, mandamus will lie to compel it to enter final judgment.³

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 98-100; Dec. Dig. \S 51.]

5. MANDAMUS \S 54—RIGHT TO RELIEF—ENFORCEMENT OF JUDGMENT.

Mandamus will lie to compel courts to enforce their own judgments.⁴

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 108; Dec. Dig. \S 54.]

6. MANDAMUS \S 31—RIGHT TO RELIEF—HEARING AND DETERMINING CASE.

Mandamus will issue to compel a court to proceed when through mere mistake of law it declines to take jurisdiction and for that reason refuses to proceed to try a case or to hear and determine the issues therein, and where there is no adequate remedy by appeal.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 74, 75; Dec. Dig. \S 31.]

7. EMINENT DOMAIN \S 243(2)—ORDER OF CONDEMNATION—EFFECT.

That plaintiff in a proceeding to condemn a strip of land had the legal right to condemn and that condemnation was for a public use was settled by the lower court's order of condemnation authorizing plaintiff to take possession of and improve the strip.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. \S 627, 700; Dec. Dig. \S 243(2).]

8. EMINENT DOMAIN \S 198(1)—DETERMINATION OF TITLE—LEGAL OR EQUITABLE REMEDIES.

Under Const. art. 8, \S 19, providing that there shall be but one form of civil action, and that law and equity may be administered in the same action, and Comp. Laws 1907, \S 3596, providing that the court shall have power to determine all adverse and conflicting claims to the property sought to be condemned, and to the damages therefor, and to determine the respective rights of different parties seeking condemnation of the same property, in a condemnation action where it was alleged that a defendant company claimed to own part of the property sought to be condemned, and such company in its answer claimed title to such land,

¹ *Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167; *Carbon County v. School District*, 45 Utah, 147, 143 Pac. 220; *State v. Morehouse*, 38 Utah, 234, 113 Pac. 169; *Kyrimes v. Kyrimes*, 45 Utah, 188, 143 Pac. 232.

² *Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167.

³ *Benson v. Ritchie*, 44 Utah, 59, 128 Pac. 126.

⁴ *Ketchum Coal Co. v. A. H. Christensen*, Judge, et al., 159 Pac. 541.

and the plaintiff in its reply alleged that since the commencement of the action it had acquired title to the land in question, and denied the defendant company's title, the district court, without requiring the issue of title or the damages to other lands resulting from the severance to be determined in a separate action, was authorized to determine those issues in the same action.⁵

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 525; Dec. Dig. ¶198(1).]

9. JURY ¶19(11)—JURY TRIAL—DEPRIVATION—EMINENT DOMAIN.

Such action would not necessarily deprive a party of a jury trial, since, if the question respecting title was equitable, no party would be as a matter of right entitled to a jury trial, and, if the question was purely legal, then all questions whether with regard to the title or the damages might be submitted at the same time to the jury impaneled in the case, and the court might by proper instruction tell the jury that the damages must be apportioned in accordance with their findings respecting the title.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 116-119; Dec. Dig. ¶19(11).]

10. EMINENT DOMAIN ¶166—CONDEMNATION PROCEEDING—NATURE.

Condemnation proceedings were created so that the title or ownership of real property which is claimed and needed for some public use may be transferred from one person to another against the will of the owner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 448-450, 456; Dec. Dig. ¶163.]

11. EMINENT DOMAIN ¶195—PLEADING AND ISSUES—TITLE OF PLAINTIFF.

In an action by a coal company against another coal company to condemn a strip of ground for a tramway, wherein the complaint alleged that the defendant claimed to own part of the strip of land sought to be condemned, and the answer claimed title to the land and damages for lands affected, etc., and plaintiff's reply alleged that since the commencement of the action it had acquired title to the land in question and set forth the source of its title and denied the defendant's title, defendant was not entitled on the pleadings and issues to a dismissal of the action on the ground that plaintiff was asserting paramount title in itself, and that there was nothing to condemn.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 524; Dec. Dig. ¶195.]

12. EMINENT DOMAIN ¶191(8)—PROCEEDINGS—ALLEGATION AND PROOF OF TITLE.

In a condemnation action, the plaintiff may acquire the title subsequent to the institution thereof, and, if he does, may plead such fact.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 515; Dec. Dig. ¶191(8).]

13. ESTOPPEL ¶68(5)—EMINENT DOMAIN—PROCEEDINGS—DISPUTING TITLE OF DEFENDANT.

Ordinarily, where a condemnor commences his proceeding and does not assert title in the land sought to be condemned, he may not, except under certain conditions, dispute the title of condemnee; and the condemnor cannot dispute the title of the party in possession against whom proceedings have been instituted, unless such party has acquired a paramount title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 165; Dec. Dig. ¶68(5).]

14. MANDAMUS ¶4(1)—JUDICIAL ACTS—DISMISSAL OF ACTION—REMEDY BY APPEAL.

Ordinarily, the court acts judicially in dismissing an action or complaint, and its error

therein may be reviewed on appeal if the action has passed to final judgment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9, 11, 17-19; Dec. Dig. ¶4(1).]

15. MANDAMUS ¶48—JUDICIAL ACTS—HEARING CAUSE.

Where the district court in a condemnation action, having jurisdiction to determine both the issue of title and of damages, dismissed the action on the ground that the issue of title should be determined in another action, the dismissal amounted to a refusal to hear and determine issues presented in the action, and mandamus would lie to compel the court to proceed to trial and determine the case upon the issues, and to enter final judgment thereon.⁶

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 95; Dec. Dig. ¶48.]

16. APPEAL AND ERROR ¶337(2)—DECISIONS APPEALABLE—FINAL JUDGMENT.

A cause cannot be appealed until final judgment is entered therein between all the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1877; Dec. Dig. ¶337(2).]

17. MANDAMUS ¶4(1)—RIGHT TO RELIEF—ADEQUATE REMEDY BY APPEAL.

In a coal company's action to condemn a strip of land for a tramway, etc., brought against another coal company and other defendants, where the court, though having jurisdiction to determine both the issues of title and damages erroneously dismissed the action as against defendant coal company on the ground that the issue of title should be determined in a separate action, plaintiff had no adequate remedy by appeal, as notwithstanding the order of condemnation and its possession, it would be required to await final judgment as to the other defendants before it could appeal, and to submit to have its action tried in parts, and might be required to pay costs and expenses incident to two jury trials, so that the only adequate remedy would be a writ of mandate directing the district court to reinstate the case as against the defendant company, to determine the issues, and to enter judgment thereon.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9, 11, 17-19; Dec. Dig. ¶4(1).]

18. DISCOVERY ¶30—POWER OF COURT—STATUTE.

Under the statute the district court in a condemnation proceeding has ample power to make an order on plaintiff's motion requiring all the corporation defendants to permit plaintiff to obtain a full discovery and development of all relevant and material facts, under the supervision and control of the court.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 44; Dec. Dig. ¶30.]

19. DISCOVERY ¶51—NATURE—SCOPE.

In a condemnation proceeding, plaintiff's motion for an order requiring all the corporation defendants to permit it to inspect and take copies of all of their contracts, resolutions, mortgages, books, documents, papers, memoranda, correspondence, bonds, etc., in the possession or under the control of any of the defendants was too sweeping and indefinite.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 65; Dec. Dig. ¶51.]

20. MANDAMUS ¶4(3)—JUDICIAL ACTS—DENIAL OF MOTION FOR DISCOVERY—REMEDY BY APPEAL.

Plaintiff in a condemnation action aggrieved by error in granting or refusing its motion for the inspection of the defendants' contracts, correspondence, etc., may preserve an exception to the ruling and present it to the Supreme Court

⁵ Morgan v. Child, Cole Co., 41 Utah, 563, 128 Pac. 521; Park v. Wilkinson, 21 Utah, 285, 69 Pac. 945.

⁶ Hoffman v. Lewis, 21 Utah, 179, 87 Pac. 187; Benson v. Ritchie, 44 Utah, 59, 138 Pac. 138.

on appeal after final judgment, and hence mandamus will not issue to compel the district court to vacate its order denying the motion on the ground that it had no power to grant it, and to require it to consider the motion upon its merits and to pass upon it.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 10-15, 18; Dec. Dig. § 4(3).]

Original application by the Ketchum Coal Company for a peremptory writ of mandate to require Hon. A. H. Christensen, Judge of the District Court of Carbon County, Utah, to vacate an order or judgment dismissing the defendant Pleasant Valley Coal Company from a condemnation action brought by plaintiff against it, and other defendants, and to reinstate it as a defendant in such action, and to proceed to try it against all of the defendants. Peremptory writ of mandate issued requiring the district court to vacate its order for judgment, reinstate the company as a party defendant, and to proceed to try and determine all the issues with regard to title presented by the pleadings of the respective parties, whether legal or equitable, and to make such final disposition upon the merits of such issues and to enter such judgment as to it may seem just and proper.

See, also, 159 Pac. 541.

Boyd, DeVine & Eccles, of Ogden, and Walton & Walton, of Salt Lake City, for plaintiff. Dickson, Ellis, Ellis & Schulder and Van Cott, Allison & Riter, all of Salt Lake City, for defendants.

FRICK, J. This is an original application to this court for a peremptory writ of mandate to require Hon. A. H. Christensen, Judge of the district court of Carbon county, Utah, to vacate an order or judgment dismissing the defendant Pleasant Valley Coal Company, hereinafter called company, as defendant from a certain action pending in said court wherein the plaintiff in this proceeding is plaintiff, and all of the other defendants above named, including said company, are defendants, and reinstate said company as a defendant in said action, and to proceed to try the same against all of the defendants, including said company. The application was made upon notice duly served upon all of the defendants. All except the Utah Fuel Company have appeared by their respective counsel and have joined in a demurrer to the application, and have also filed an answer to certain portions thereof. For the purposes of this decision it is not necessary to consider anything except the general demurrer which has been argued by respective counsel and the cause duly submitted. Neither is it necessary to make any further reference to the defendant Utah Fuel Company, nor to the answer of the defendants, since it presents no issues which affect the result reached by us.

The application is based upon substantially the following facts: Some time in the year 1913, the plaintiff, under the name of Ketch-

um Coal Company, a corporation, owning a coal mine in Carbon county, Utah, and the applicant in this proceeding, hereinafter styled plaintiff, commenced an action in the district court of Carbon county against the defendants above named and other defendants to condemn a certain strip of ground to be used for tramway, tunnel, and other purposes in connection with the operation of its coal mine. In July, 1913, an order condemning a certain strip of ground was duly entered by said district court and the plaintiff was given, and took, possession of the strip condemned as aforesaid. During the first half of this year, however, some of the defendants interfered with plaintiff in its right of possession of said strip, and upon applying to the district court of Carbon county for relief from said interference said court refused to grant the relief demanded and dismissed plaintiff's application. The plaintiff thereupon made an application to this court to require the district court to enforce its order of possession and use of such strip, which application was duly granted. Ketchum Coal Company v. A. H. Christensen, Judge, et al. (Utah) 159 Pac. 541. In plaintiff's complaint filed in the condemnation proceeding it was alleged that the defendants claimed to own the property sought to be condemned, and it was further alleged that the company claimed to be the owner of certain portions of section 1, township 13 south, range 9 west, particularly describing the subdivisions affected and over a large portion of which lands the strip in question, which is 60 feet wide and 1,300 feet in length, extended. The company answered plaintiff's complaint and in its answer set up various defenses to plaintiff's right to condemn the property, and in connection therewith also claimed title to the strip of ground and to the land over which said strip extended. It also claimed a large amount of damages, both for lands affected and otherwise. It is not necessary to refer to the answers of the other defendants. The plaintiff in due time filed its reply to the company's answer. In the reply the plaintiff sought to meet the defense set up by the company and also explained and denied its claim for damages. The plaintiff also alleged in the reply that since the commencement of the action it had acquired title to the strip of ground in question, setting forth in great detail the source of title, and denied the company's title; and in that connection it also set forth with much particularity the facts assailing the company's title and the reasons why the company did not have title to the strip of ground in question and to the other lands for which it claimed damages. No attack was made upon the reply, and the company proceeded to take the deposition of a certain witness for the purpose of controverting at least some of the facts pleaded in the reply. The case, it seems, was set for trial, but before that time arrived the company filed a motion in

which it asked the court to dismiss the condemnation proceedings as against it for the reasons: (1) That the plaintiff was seeking to condemn property to which it had "set up paramount title in itself by virtue of a conveyance" from one who claimed title in fee, and that it claimed that it had acquired all rights to said property by virtue of said conveyance; and (2) for the reason that plaintiff was merely maintaining the action as against the company "for the purpose of attempting to quiet its title to the property sought to be condemned, alleging and claiming that it has paramount title to said property sought to be condemned, and that the defendant Pleasant Valley Coal Company has no title therein or thereto." The district court granted the motion and dismissed the action as against the company, except as to a very small area of ground which was a part of said strip. The dismissal thus excluded from the condemnation proceedings practically the whole strip of ground which had been condemned and of which plaintiff had taken possession pursuant to the order of July, 1913, and upon which it alleges in this application it had expended about \$40,000 in carrying out the purposes for which it had sought to condemn the same. By excluding the company and the strip of ground from the condemnation proceedings a large portion of the area of ground involved in that action has been eliminated therefrom.

The parties do not agree upon what ground the district court granted the company's motion. The plaintiff has, however, made the court's oral opinion a part of the record in this case. The company disputes that what plaintiff has presented to us correctly reflects what the district court said in passing on the motion, and contends that it does not contain all that was said. We need not concern ourselves with all that the court may have said. Its reasons for dismissing the action against the company are not controlling. The controlling question is whether the dismissal can be sustained in law.

As already pointed out the motion to dismiss was based upon two and two grounds only. All that the court said, as appears from the stenographer's report, is directed to those grounds. From what the court said we are well satisfied that in passing on the motion it based its decision entirely upon the fact that the plaintiff in its reply had set forth that since the action was commenced it had acquired the title to the lands which the company claimed to own, and therefore, as the court said, the "controversy between plaintiff and defendant (company) * * * is purely and simply a question of quieting the title." The court then goes on to enlarge upon its reasons for dismissing the action, and finally concludes that the question concerning the title "should be determined outside of the condemnation suit, and the court so holds." In other portions of the court's oral opinion the same grounds are

stated. There cannot be any doubt that the court granted the motion upon the sole ground that the plaintiff had set up in its reply that it had acquired the title to the strip of ground to which the company also claimed title, and that therefore the title to the lands in question was involved. The court then held that all questions affecting title should be determined in another action, and for that reason declined to proceed further in that action except as to those lands to which the plaintiff did not claim title; and as to all lands to which both it and the company claim title the proceeding was dismissed.

The company resists this application upon substantially the following grounds: (1) That mandamus is not the proper remedy; and (2) that the court properly dismissed the action as against the company for the reason that the plaintiff claims title to the strip of ground in question, and therefore the action as between it and the company could proceed only as one to quiet the title to the lands claimed by both, and that a condemnation proceeding may not be converted into an action to quiet title.

[1-6] Many reasons are urged by counsel why mandamus is not the proper remedy, the principle ones being: (1) That the court acted judicially in dismissing the action against the company; and (2) because plaintiff has an adequate remedy by appeal. We have frequently stated the rule governing mandamus proceedings and under what circumstances the writ will be granted or denied. The rule and the reasons therefor are discussed in *Hoffman v. Lewis*, 81 Utah, 179, 87 Pac. 167, *Carbon County v. School District*, 45 Utah, 147, 148 Pac. 226, *State v. Morehouse*, 38 Utah, 234, 112 Pac. 169, and *Kyrimes v. Kyrimes*, 45 Utah, 168, 143 Pac. 232. We shall not pause to again discuss the rules or the reasons which ordinarily govern the courts in such proceedings except to state that where the writ is sought to compel action on the part of the court the legal right to the particular action which is sought to be compelled by the writ must be clear and the legal duty to do the act or thing demanded on the part of the court must be equally clear. In addition to the foregoing there must be a lack of adequate remedy by appeal. Mandamus may, however, issue to compel a court to take jurisdiction of a cause and proceed to hear and determine it where the court, without legal authority therefor, refuses jurisdiction. *Hoffman v. Lewis*, supra. So, where a court has heard a case and has made its findings, mandamus will lie to compel it to enter final judgment. *Benson v. Ritchie*, 44 Utah, 59, 138 Pac. 186. And, as we have recently decided, the writ will also lie to compel courts to enforce their own judgments. *Ketchum Coal Co. v. A. H. Christensen*, Judge, et al., supra. The writ will likewise issue to compel a court to proceed when it, through mere mistake of law, declines to take jurisdiction, and for that reason refuses

to proceed to try the case or refuses to hear and determine the issues therein and there is not an adequate remedy by appeal. The doctrine just attempted to be stated is laid down in 26 Cyc. 190, in the following words:

"Where a court declines jurisdiction by mistake of law, erroneously deciding as a matter of law and not as a decision upon the facts that it has no jurisdiction, and either declines to proceed or disposes of the case, the general rule is that a mandamus to proceed will lie from any higher court having supervisory jurisdiction, unless there is a specific and adequate remedy by appeal or writ of error. Mandamus will not, however, issue to review the decision of a lower court which has refused jurisdiction after determination of fact."

From an examination of the cases, and by keeping in mind the underlying principles which govern courts in granting or denying the writ of mandate, it goes without saying that unless great care is exercised the writ in some instances may be improperly granted, while in others it may as improperly be denied. That can occur only, however, when the higher court, without reflection or without a careful examination of the authorities or close scrutiny of the facts, fails to fully grasp and appreciate the character or nature of the act or thing which is sought to be coerced, and the circumstances under which the court's refusal to act occurs. Some attention must also be given to the difference in the procedure or practice in the jurisdiction where the writ is applied for as compared with other jurisdictions from which cases are cited.

[7] With the foregoing conditions in mind let us now proceed to a brief review of the case in hand. As we have seen, the original action was instituted to condemn a certain strip of ground. That the plaintiff had the legal right to condemn, and that condemnation was for a public use, were settled by the lower court when it entered the order of condemnation and by which it authorized the plaintiff to take possession of and improve the strip of ground to which now both the plaintiff and the company claim title.

[8] No legal objection seems to have been made to that order, and no objections were urged to plaintiff's complaint, and none was made to the company's answer in which it affirmatively set up its title to the strip. The plaintiff had, however, made one O. N. Sweet and one T. A. Ketchum parties to the original complaint, and had therein alleged that they also claimed title to much of the land which the company claimed. While the action was pending, however, it seems that T. A. Ketchum obtained Sweet's title, or supposed title, to the lands claimed by the company and that plaintiff thereupon acquired whatever title T. A. Ketchum had from him. The facts regarding the acquisition of the title were thus set forth in plaintiff's reply, and in that way, and for that reason the issue respecting the title to the strip in question and the particular subdivisions from which the strip is taken arose between the

plaintiff and the company. While no objection was interposed to the reply as a pleading, yet, after the cause had been set for trial, the company interposed a motion to dismiss as against it for the reasons we have before stated. Are the reasons urged by the company in support of the court's action sound?

Counsel for the company have referred us to cases from other jurisdictions where it is held that when the title to the ground sought to be condemned is claimed by both the condemnor and the condemnee the question of title as between them may not be litigated or determined in a condemnation proceeding, but that the question of title must be settled in an independent action and that the condemnation proceeding cannot proceed until the question of title is settled. The cases of *City of Geneva v. Henson*, 195 N. Y. 447, 88 N. E. 1104, and *In re City of Yonkers*, 117 N. Y. 564, 23 N. E. 661, clearly reflect the holdings of the courts upon that subject, and hence it is not necessary to refer to other cases. Conceding, however, that the cases from New York, and from other states, that are referred to by counsel, in view of the statutory provisions and the nature of condemnation proceedings in those jurisdictions, are entirely sound, the question here is whether, in view of our constitutional and statutory provisions relating to the nature and character of actions in this jurisdiction, we are justified in following those decisions.

In New York, as well as in many other jurisdictions, condemnation proceedings are special and the proceeding comes before courts of general jurisdiction only in cases when there is an appeal from the damages awarded to the landowner. In the first instance, therefore, the proceedings are not instituted in courts of general jurisdiction and the amount allowed either for land taken or for damages to adjoining lands is not determined by a jury in the ordinary way as it would be in a court, but it is usually determined by special commissioners or by a special tribunal. Under such circumstances every lawyer readily understands and appreciates why condemnation proceedings are not deemed proper to try questions of title, and therefore such questions must be tried in a court of general jurisdiction, and in case the dispute respecting the title arises between the condemnor and the condemnee the question of title must be determined in a proper action and in a proper court before the damages can be adjusted as between them. Such is, however, not the case in this jurisdiction. Our Constitution (article 8, § 19) provides:

"There shall be but one form of civil action, and law and equity may be administered in the same action."

Matters purely legal and purely equitable may thus not only be determined in the same

forum, but they may be tried and determined in the same proceeding or action. Moreover, there is but one form of civil action known to our practice. In passing upon the foregoing provision of our Constitution this court, in *Morgan v. Child*, 41 Utah, 562, 128 Pac. 521, held that when it is necessary to settle equitable issues before legal rights are to be determined and adjusted, a separate action to determine the equitable questions is not necessary, and that a party to any action or proceeding cannot be required to adjudicate his equitable rights in a separate action, but he may have all issues, whether equitable or legal, heard and determined in the same action or proceeding. This court in that case, therefore, reversed the lower court's ruling by which it refused to proceed to determine the legal rights of the plaintiff until he had settled his equitable rights in a proper action in a court of equity.

This court has also held that when in a case both equitable and legal issues arise and it becomes necessary to determine the equitable issues before proceeding to an adjustment of the legal rights of the parties, or some of them, in such event the court must determine the equitable issues first. *Park v. Wilkinson*, 21 Utah, 285, 60 Pac. 945, and cases there cited.

In view of the constitutional provision aforesaid, and the foregoing decisions, the district court of Carbon county was clearly mistaken respecting its duty to hear and determine all the issues arising in the original action, whether legal or equitable, and in holding that the issues respecting the title to the strip in question and with regard to the other land which is claimed to be damaged by the severance of the strip therefrom or by the construction of the contemplated improvements could not be tried and determined in the original action.

In some jurisdictions it is held that the title may be quieted in condemnation proceedings both as between the condemnor and the condemnee and as between several condemnees. It is, however, also held that in case the dispute respecting the title arises only between or among the condemnees so that it is only a question of the distribution of the condemnation money or the damages that are awarded, the question of title may be determined as well after as before the condemnation action is tried. Among other cases in which it is held that disputes regarding the title to the condemned property may be determined in the condemnation proceeding we refer to the following: *Chicago & M. El. Ry. Co. v. Diver*, 213 Ill. 26, 72 N. E. 758; *Illinois Cent. R. Co. v. Roskemmer*, 264 Ill. 103, 105 N. E. 695; *Chicago & N. W. Ry. Co. v. Miller*, 251 Ill. 58, 95 N. E. 1027; *Wilcox v. St. P. & N. P. Ry. Co.*, 35 Minn. 439, 29 N. W. 148; *Gerrard v. Omaha, N. & B. H. R. Co.*, 14 Neb. 270, 15 N. W. 231; *Diet-*

richs v. Lincoln & N. W. R. Co., 14 Neb. 355, 15 N. W. 728; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

In *Chicago & M. El. R. Co. v. Diver*, supra, the Supreme Court of Illinois squarely holds that the issue of title should be determined in the condemnation action, and with regard to the method of procedure the court states the rule thus:

"In a condemnation proceeding, the issue of ownership, if any, is preliminary to the submission of the question of damages to the jury, and is to be litigated and determined before the jury is impaneled to assess the amount to be paid the owner."

That case is approved and followed in *Illinois Cent. R. Co. v. Roskemmer*, supra. It is, however, said in the latter case that:

"It may be impossible to have a final adjudication before the trial as to the various titles involved."

Chicago & N. W. Ry. Co. v. Miller, supra, is a case in point. That condition may arise when the dispute regarding the title arises only between or among the condemnees. Where such is the case the condemnor takes the property and improves it, and the damages are assessed against him, which he pays into court to await the final determination of the title.

Where, however, as in this case, the dispute regarding the title arises between the condemnor and one or more of the condemnees the question of title must be settled and determined before the damages are assessed. In the case cited from Minnesota, as well as in those cited from Nebraska, it is held that disputes concerning the title may be determined in a condemnation proceeding, and it is so held notwithstanding the fact that under both the Minnesota and Nebraska statutes condemnation proceedings are not instituted in courts of general jurisdiction, but come there only on appeal in case either party is dissatisfied with the award of damages made by the commissioners appointed for that purpose. As a matter of course it is held in both states that the issues respecting title must be raised by the pleadings or they cannot be considered.

In *City of Los Angeles v. Pomeroy*, supra, Mr. Chief Justice Beatty, under a statute like ours, in his usual clear and vigorous style, points out that all questions relating to the title of the property that is condemned or is affected by the condemnation proceeding that may arise should be tried and determined in the condemnation action. And why may that not be done? It seems clear that our statute, which is like the one in California, contemplates that it should be done. Comp. Laws 1907, § 3596, so far as material here, provides:

"The court or judge thereof shall have power: * * * To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor," and "to determine the respective rights of different

parties seeking condemnation of the same property."

Again, under our statute an action to condemn lands is commenced, conducted, and tried in the same courts and in the same manner as all other actions affecting real property are tried. In view of the provisions of our statute it is not easy to understand why all issues arising in condemnation actions are not to be tried and determined in that action the same as is done in all other actions affecting real property.

[9] Counsel for the company, however, suggests that if that be done a party may be deprived of a jury trial. That does not necessarily follow. If the question respecting title is equitable no party is, as a matter of right, entitled to a jury trial, and if the question is purely legal then all questions, whether with regard to the title or the damages, may be tried and submitted at the same time to the jury that is impaneled in the case, and the court may, by proper instructions, tell the jury that the damages must be apportioned in accordance with their findings respecting the title. The same questions may arise in much the same way where a party sues for damages to his real property and his title is disputed.

[10, 11] Counsel for the company, however, also vigorously contend that where, as here, a plaintiff in a condemnation proceeding asserts paramount title in himself there is nothing to condemn, and therefore his action must fail. They insist that the plaintiff in its reply claims title to practically all the land that is claimed by the company, and in view of that fact there is nothing to condemn as against it. It is quite true that condemnation proceedings were conceived and created so that the title or ownership of real property which is claimed and needed for some public use or purpose may be transferred from one person, natural or artificial, to another against the will of the owner. As a general rule, therefore, the condemnor seeks to acquire the property of another. The cases therefore are not numerous where the owner seeks to condemn property in which he has an interest, and are much rarer still where he claims the title to the property sought to be condemned. Such cases may, however, arise. For example: There may be a title emanating from two sources. The condemnor may thus claim through one source while the condemnee may claim through the other. Again, the condemnor may claim the legal title in fee while the condemnee claims an equitable title; or the one may claim that he has acquired a tax title from the state the validity of which the other having the fee title disputes. Now it is palpable that in any one of the foregoing instances the conditions may be such that the condemnor may desire possession of the property sought to be condemned at once for the purpose of devoting it to some

public use. He may thus commence an action to condemn, set forth his title, and further allege that the condemnee claims ownership thereof, or some interest therein, pleading the facts in that regard. True it is, if the condemnor claims ownership the condemnee may, either by general demurrer or otherwise, admit his claim, and where that is the case the condemnor is entitled to judgment upon the merits, and the condemnee is entitled to go hence with his costs. That, however, is not the question we are confronted with. Here the company as condemnee concedes nothing and yet claims a strategic advantage over plaintiff by reason of its plea of ownership in its reply. The company, however, still insists on its plea of ownership in its answer as well as upon its denial of plaintiff's ownership in the same answer, and notwithstanding the fact that it concedes nothing and claims title in itself and disputes the title of plaintiff it nevertheless insists that there is nothing to condemn and nothing to try. To so hold would result in sacrificing substance to mere empty form. As a matter of course one may not invoke the aid of a court of justice to obtain that which is already his own and to which others lay no claim. We, however, have no such case to deal with here. Here both the plaintiff and the company claim title to the property sought to be condemned. The company was in possession of the strip condemned until the order of condemnation was entered, when plaintiff took possession thereof, and has since then placed certain improvements thereon. If the company desires to concede plaintiff's claim of title all it has to do is to withdraw its answer and surrender its claim of title. The plaintiff may then have judgment on the merits against it, and the case should of course be dismissed, at least as against the company. So long, however, as it claims the title to the condemned strip and demands damages therefor, how can it demand to be dismissed from the case? It would seem that the mere statement of the proposition is its best answer.

[12] It should, however, also be remembered that in this court the plaintiff alleges that it acquired the title subsequent to the institution of the condemnation action. Why may a condemnor not do that? And if he does, why may he not plead the fact? Indeed, if he did not plead it he could not avail himself of it in the action. The same presumptions should therefore not prevail where one pleads that since the commencement of the action he has acquired an outstanding title as though he had claimed the paramount title in his original complaint, and especially not where, as here, the condemnee persists not only in denying the plaintiff's title, but continues to claim the title in itself.

[13] Ordinarily, where a condemnor commences his proceeding and does not assert ti-

title or ownership in the land sought to be condemned he may not, except under certain conditions, dispute the title or ownership of the condemnee. Mr. Mills, in his work on Eminent Domain (2d Ed.) § 161, states the rule in that regard thus:

"The condemning party cannot dispute the title of the party in possession, against whom proceedings have been instituted, unless such party has acquired a paramount title."

Counsel for the company contend that the last clause is not supported by authority and hence cannot be considered. But why not? It certainly is good sense and we think must commend itself to every disinterested lawyer. Moreover, to permit the dismissal to stand would place the plaintiff in a most anomalous if not deplorable condition. In that event what becomes of the order of condemnation? What are plaintiff's rights in and to the strip of which it took possession under that order and in the improvements placed thereon pursuant thereto? Is or is not the plaintiff a trespasser? And, if so, is it such from the time it took possession under the court's order or only from the date of the dismissal of the action as against the company? We confess our entire inability to grasp plaintiff's legal status in case the dismissal stands.

[14, 15] Counsel for the company, however, insist: (1) That although it was conceded that the court was mistaken regarding the law and may have misconceived its duty in the premises in dismissing the company from the action, yet that it acted judicially; (2) that the plaintiff has an adequate remedy by appeal and hence mandamus will not lie. Ordinarily, no doubt, the court acts judicially in dismissing an action or complaint, and in case it errs such error may be reviewed on appeal after the action has passed to final judgment. Does the court's action in this case, however, merely constitute an erroneous dismissal? True, generally speaking, it may be said the court erred in dismissing the action. The error, however, falls within the principle we have quoted from Cyc. and the one discussed in the case of *Hoffman v. Lewis*, supra. In fact and in law the dismissal in this case clearly amounts to a refusal on the part of the lower court to hear and determine the issues that are presented in the condemnation action. If any court in any case should arbitrarily or capriciously refuse to hear and determine such case and should dismiss it, would any one question the aggrieved party's right to a writ of mandate to compel such court to proceed to try and determine the case on its merits and to enter final judgment thereon? Of course, as was stated in *Benson v. Ritchie*, supra, the Supreme Court could not direct what the judgment should be, nor would such tribunal say that the action should not finally be dismissed upon its merits. It would, however, be proper to compel the court to hear the case and to enter a final judgment therein. If, there-

fore, it is proper to do that, why is it not also proper to compel the court to hear the case upon its merits and to enter a final judgment therein either by dismissing it upon the merits or by granting such relief as to the court under all the facts and circumstances, may seem just and right?

Now let it be conceded, for no doubt such is the fact, that the lower court did not intend to act either arbitrarily or capriciously in refusing to hear and determine the issues respecting the title to the lands in question and in dismissing the action as against the company, yet how does that affect either plaintiff's rights or the duty of this court in the premises? Moreover, does such an admission change the character or nature of the act of the court? We think not. As before stated, the court's action clearly comes within the principle stated in Cyc., and in law also amounts to an arbitrary refusal of the court to proceed to try and determine certain issues between certain parties in a pending action.

[16, 17] The further question, however, is: Has the plaintiff an adequate remedy by appeal? Clearly not. The dismissal does not dispose of the case as between the plaintiff and the other defendants. The case, under our procedure, therefore, cannot be appealed until final judgment is entered therein between all the parties. When that is done all parties to the action may, however, be satisfied with the judgment and hence there may be no cause for appeal except on the act of the court in dismissing the case against the company. In the meantime the question of damages as to the other defendants may be tried to a jury. If the plaintiff then must await final judgment as to the other defendants before it can appeal, what are its rights to the strip and its improvements thereon pending the action on appeal? It must thus stand bound hand and foot notwithstanding its order of condemnation and possession until the action is finally determined, and thus it will be held helpless until this court has passed upon the questions presented by the appeal. That may not occur for several years. The provisions of our statute, which, under certain restrictions that have been complied with by the plaintiff in this case, give the condemnor immediate possession of the land sought to be condemned and the right to improve it and to put it to the contemplated public use pending the action regardless of the time it may be pending could thus be entirely frustrated. Moreover, the plaintiff must thus submit to have its action tried in parts and unless, in case of an appeal, the judgment in favor of the other defendants for damages should be reversed by this court the plaintiff may be required to pay costs and defray the expenses incident to two jury trials. In view of all this, we are of the opinion that the only adequate remedy plaintiff has under the circumstances is a writ of

mandate requiring the district court to reinstate the case as against the company and to hear and determine the issues as in any other case and to enter such a judgment upon all the issues as to the court may seem just and right.

[18-20] This brings us to the second branch of the application. Early in June of this year plaintiff's counsel filed a motion in which they asked the court for an order requiring all of the corporation defendants to permit the plaintiff to inspect and take copies, if so desired, of "all books, contracts and resolutions, * * * all mortgages or deeds of trust, * * * all books, documents, papers, memoranda, and data, * * * all correspondence, telegraphic or otherwise, originals or carbons, or letter press copies thereof, * * * all bonds, papers, documents, memoranda, data in the possession or under the control of any of said corporations," etc. The motion merely limited the things sought to be inspected or copied to such as might be material or relevant, or might shed some light upon the issues tendered by the pleadings and such as concerned the dealings of the corporations among themselves. The court refused to make the order upon the ground that it did not have the power to do so. Plaintiff now asks that we compel the court to vacate that order, and that it be required to consider the motion upon its merits and to pass upon it. Here again all the corporate defendants insist that mandamus is not the proper remedy, and that the motion is too sweeping and indefinite regarding the things of which inspection is asked, etc. While we are of the opinion that the court gave the wrong reason for its refusal to require the corporate defendants to permit inspection and that the court, under our statute, has ample power to make such an order, and that courts in furtherance of justice should exercise the powers vested in them so that a full disclosure and development of all relevant and material facts, under the supervision and control of the court, may be secured, yet we are also of the opinion that the motion is too sweeping and indefinite. We are also further of the opinion that although the defects of the motion just stated were removed, yet the writ should not issue for the reason that mandamus is not the proper remedy. The matter of obtaining evidence by inspection or otherwise is a matter that may arise in any case and thus may be a matter incident to the ordinary course of procedure therein. If the court errs in granting or refusing inspection the party aggrieved may preserve his exception to the court's ruling and may present it to this court on appeal after final judgment. It may be, however, that the party who feels aggrieved at the time the ruling is made may, nevertheless, be well satisfied with the result ultimately reached by the court. In such mat-

ters, while the ruling of the court may in some instances cause a retrial of the case and thus cause delay in the ultimate determination of the litigation, it is not like the other branch of this application, a refusal to proceed to try and determine the issues presented by the pleadings, and produces no more delay or inconvenience than occurs in actual practice almost daily. If writs of mandate could be obtained every time a court refuses to order the production of some evidence deemed material and relevant by one of the parties to an action, or every time a court refuses to grant inspection of certain documentary or other evidence, we would hardly have time to meet the legitimate and ever increasing appellate work of this court. In connection with this question plaintiff's counsel have argued various propositions, which, if the questions were properly before us, would require attention. In view, however, of the conclusion reached that mandamus is not the proper remedy we refrain from discussing and passing upon these propositions. We are clearly of the opinion that upon the second branch of the application stated above mandamus is not the proper remedy.

It is therefore ordered that a peremptory writ of mandate issue requiring the district court of Carbon county to vacate its order or judgment dismissing the action against the company, and to reinstate the company as a party defendant in the action to the same extent as though no order of dismissal had been entered, and to proceed to try and determine all the issues with regard to title presented by the pleadings of the respective parties whether legal or equitable, and to make such final disposition upon the merits of such issues, and to enter such judgment or judgments as to the court may seem just and proper. Plaintiff to recover costs of this proceeding.

STRAUP, C. J., and MCCARTY, J., concur.

SINGER v. SWARTZ. (No. 1808.)

(Supreme Court of New Mexico. May 1, 1916.
On Motion for Rehearing, Aug. 10, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §101, 102(8)—INJURIES TO SERVANT—APPLIANCES AND PLACE TO WORK.

The master owes the duty to the servant to exercise reasonable care and diligence to furnish him a safe place to work, as well as safe instrumentalities with which to do the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 135; Dec. Dig. §101, 102(8).]

2. MASTER AND SERVANT §106—INJURIES TO SERVANT—APPLIANCES.

Under the circumstances of this case, held, that it was the duty of the master to adjust the safety roller on the laundry mangle so as

to minimize the danger of injury to the operators thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 203, 212, 255; Dec. Dig. § 203(3).]

3. MASTER AND SERVANT § 203(3)—INJURIES TO SERVANT—ASSUMED RISKS.

The servant assumes all the ordinary risks incident to employment, but not the extraordinary risks, unless he knew and appreciated the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 543; Dec. Dig. § 203(3).]

4. MASTER AND SERVANT § 288(1)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY—ASSUMPTION OF RISK.

Where the evidence is of such a character that the proper inference to be drawn from it, as to the assumption of risk by the servant, is a question with respect to which different opinions may not unreasonably be formed, whether the servant assumed the risk or not is a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1063, 1069, 1087, 1088; Dec. Dig. § 288(1).]

5. MASTER AND SERVANT § 288(11) — INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY—ASSUMPTION OF RISK.

Where the servant is a person of immature years, the cases in which the court may instruct the jury as a matter of law that the servant assumed the risk is much more limited than in cases where the servant is a person of mature years.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1079–1082; Dec. Dig. § 288(11).]

Appeal from District Court, Curry County; John T. McClure, Judge.

Action by Lena Singer, a minor, by J. H. Singer, her father and next friend, against W. F. Swartz. From a judgment for plaintiff, defendant appeals. Affirmed.

H. D. Terrell, of Silver City, for appellant. Harry L. Patton and A. W. Hockenhuil, both of Clovis, for appellee.

PARKER, J. This is an action brought in the district court of Curry county by Lena Singer, a minor, by her father as next friend, against W. F. Swartz, to recover compensation for injuries alleged to have been received by her while operating a power driven steam mangle in the laundry of appellant.

[1] 1. Thirteen errors are assigned by appellant, the first and most important of which involves the law of assumption of risk. Appellant contends that at the time of the accident the appellee was a bright and intelligent girl; that she had previously been employed in the laundry business; that she was sui juris, and knew and appreciated that in the event her hands or fingers passed into the mechanism of the mangle she would sustain severe injuries, and therefore she assumed the risk attendant upon the operation of said machine. A motion for a directed verdict on this ground was made by appellant at the close of appellee's case in chief, which was denied by the court.

As a general rule, it may be stated that among the primary duties of the master is the duty to exercise reasonable care and diligence to furnish the servant with a safe place to work, as well as with safe instrumentalities with which to do the work. 1 Bailey, Personal Injuries (2d Ed.) § 66 et seq.; 2 Cooley on Torts, p. 1102. In 3 Latt's Master & Servant, § 808, it is said that the duties of the master arise out of the contract of employment, and are limited to the implications arising therefrom, viz., to see that suitable instrumentalities are provided, which includes servants, machinery, apparatus, premises, etc., and to see that those instrumentalities are safely used. At section 902 of the same work and volume it is said that there is no exception to the said rule, and that when a case is made showing the existence of the master's culpability with respect to those duties, which duties are cast upon the master by virtue of the policy of the law, a prima facie right to indemnity exists in favor of the servant. Therefore the first question to be determined is whether or not the master has committed an act amounting to negligence with regard to these primary duties. Dressler, Employer's Liability, §§ 82, 83.

[2] The complaint alleges negligence on the part of the appellant: First in failing to provide a cut-off switch at a place where it might be used by one actually operating the mangle; and, second, in failing to adjust the safety roller on the machine. The first charge of negligence has been disposed of by the jury, which found that appellant was not culpable in that respect. The machine referred to is a large power driven machine, used and built principally for the purpose of ironing clothing. It consists of four metal revolving rollers, attached to either side of a metal frame. The rollers are padded with fabric, and they revolve over a metal ironing table of concave shape, which is heated by means of steam pipes. The machine was equipped with a wooden roller, called a safety roller, placed in front of the first metal revolving roller, which was adjustable and was intended to minimize the danger of injury in the actual operation of said machine. On the day of this accident the safety roller was so adjusted that it hung about an inch and a half above the ironing table. While appellee was feeding a thin dresser scarf into the machine, her fingers passed beneath this safety roller, and her hand was drawn into the mechanism of the machine and severely injured. Her injuries are permanent. At this time she was between 13 and 14 years of age, and had worked for appellant in his laundry in 1911 irregularly for about a month, and regularly thereafter for about six weeks prior to the day the accident befell her. She had operated the mangle at different times, but was not a mangle girl, as

appellant characterizes her, but a general employe of the plant. She testified that she knew she would be injured should her hands or fingers pass into the mechanism of the machine, but that she never realized the exceptional danger in operating the machine, nor had she ever been instructed concerning its operation or the exceptional dangers attendant thereon. She admitted that the wife of appellant had told her to be careful when operating the machine, but that this was the extent of warning she had received. The conclusion reached from the evidence of the appellee's case is that, had the safety roller been properly adjusted on this occasion, appellee would not have sustained injury. The appellee testified that she had never adjusted the safety roller, nor had she ever seen it adjusted by any one else, and that, while she never particularly noticed its location, she believed that it was in the same condition at the time of the accident that it had been since she had worked for appellant. While it does not affirmatively appear in the case made by appellee that the duty of adjusting the safety roller was upon appellant, it is a fact, appearing in the case made by appellant, that he considered it his duty to keep this roller in proper condition. However, it makes but little difference as to this, because the law required appellant to keep this roller adjusted as long as it remained a part of the machine. Thus, in *Stager v. Troy Laundry Co.*, 38 Or. 480, 63 Pac. 645, 53 L. R. A. 450, the court said that, the appellant having furnished an appliance on a mangle for the protection of the operator (a guard plate), it was the duty of the master to see that it was properly adjusted, citing *Woods v. Railroad Co.*, 11 App. Div. 16, 42 N. Y. Supp. 140. See, also, *Quinn v. Electric Laundry Co.*, 155 Cal. 500, 101 Pac. 794, 796, 17 Ann. Cas. 1100. Under the facts of this case failure to adjust the safety roller constituted actionable negligence on the part of the appellant.

[3] The next question is, Did appellee assume the risk of operating this machine when the safety roller was improperly adjusted? Every risk which the employment still involves after the master has done everything he is bound to do is assumed by the servant if the latter knew and appreciated the same. 3 *Labatt's Master and Servant* (2d Ed.) § 895. The section last referred to, together with sections 894 and 1169, indicates that wherever the risk is caused by the negligence of the master, the same is not an ordinary one, but an extraordinary one, and as a general rule such risk is not assumed by the servant, because the assumption of such risks was not contemplated by the contract of employment; the contract of employment impliedly providing that only those risks which naturally attend the employment after the master has fulfilled his implied duties should be assumed by the servant. See, also, 2 *Bailey, Per. Inj.* § 373; 2 *Cooley on Torts*,

p. 1102; *Dressler, Employer's Liability*, § 88. But the doctrine of assumption of risk has been referred to in cases decided by this court. In *Van Kirk v. Butler*, 19 N. M. 597, 145 Pac. 129, this court, speaking through Mr. Justice Hanna, said:

"An 'extraordinary risk,' in the sense in which we use this term, is not one which is uncommon or unusual, in the sense that it is rare, but is one that arises out of unusual conditions, not resulting in the ordinary course of the business, as, by reason of the master's negligence."

Tested by the rule last quoted and what is contained in the text hereinabove referred to, the risk involved in this case occasioned by the negligence of the master in failing to properly adjust the safety roller, was an extraordinary one, and, in the absence of certain other facts, such risk was not assumed. The general rule being that extraordinary risks are not assumed by the servant for the reasons stated, the qualification or exception thereto should be noted, viz., that such risks are assumed if the servant knew and comprehended the same. In *Thayer v. D. & R. G. R. Co.*, 154 Pac. 691, this court held that the servant assumes all the ordinary risks incident to the service, but not the extraordinary risks, save in those cases where such risks were known to and comprehended by the servant. Appellant argues that the danger of operating this mangle machine was actually known to and appreciated by the servant, the appellee, and that she admits as much. All that she admits, or all that may be inferred from her testimony, is what any truthful person of any understanding would readily admit, that she knew she would sustain serious injury, in the event her hands or fingers passed into the mechanism of the machine, which manifestly a child of even tender years might well know and understand. She does not admit that she knew of the master's negligence, or that the danger in operating the machine was greater because of the negligence of appellant than it otherwise would be. As a matter of fact, it appears that she did not even know the function performed by the safety roller, nor had she any knowledge whatever of mechanics. She had seen the safety roller, but had not particularly noticed its location on the machine. We are satisfied that she cannot be held to have had actual knowledge, as a matter of fact, of this added or increased danger, but if such knowledge should be imputed to her as a matter of law, it amounts to the same thing in the end. There is no presumption that a servant knows and appreciates the extraordinary risks of the service (3 *Labatt's Master & Servant*, § 1201), unless, perchance, the circumstances are such as to charge her with full knowledge thereof, in which event the question becomes one of law, rather than fact. 2 *Bailey, Per. Inj.* § 388. In the first instance the burden of showing that the servant assumed the risk is upon the master. See *Thayer v. D. & R. G. R. Co.*, supra.

[4, 5] Are the facts of this case of such a character that the court as a matter of law ought to charge appellee with constructive knowledge and comprehension of this risk? 3 Labatt's Master & Servant, § 1182. In the work and volume last mentioned, at section 1179, it is said:

"It follows that assumption of an extraordinary risk cannot be predicated, as a matter of law, where there is no evidence going to show that the servant understood, or ought to have understood, that risk, or where the evidence actually produced is fairly susceptible of the construction that he did not understand it."

In the case of *Crawford v. Western Clay Co.*, 20 N. M. 555-559, 151 Pac. 238, this court held that where the evidence is of such a character that the proper inference to be drawn from it, as to the assumption of risk by the servant, is a question with respect to which different opinions may not unreasonably be formed, it must be submitted to the jury, and not determined as a question of law by the court. But where the servant is a minor, or, as some of the cases say, a person of immature years, the cases in which the court may instruct the jury that the servant assumed the risk, as a matter of law, is much more limited than where the servant was of mature years. In 4 Labatt's Master & Servant, § 1317, the doctrine is thus summarized:

"Speaking more generally and without reference to the particular class of risks, it may be said that the fact of minority increases, to a greater or less extent, the probability that his faculties of observation and comprehension are more limited than those of the typical person of ordinary intelligence, whose supposed capacity for appreciating dangers furnishes the juridical standard by which the existence or absence of obligatory knowledge is tested. The obvious effect of this consideration, when viewed in relation to the common-law system of jury trials, is that the range of circumstances under which obligatory knowledge can be imputed, as a matter of law, is more restricted in cases where the injured person was a minor than in those where he was of full age, at the time when the cause of action arose. In this respect the element of minority operates in precisely the same manner as that of inexperience. The hypothesis is that a minor is inferior to an adult as respects both the ability to obtain material information and the ability to draw deductions from such information as may be obtained. But an examination of the decisions collated in the next section shows very clearly that it is the latter description of inferiority which is most frequently the real differentiating factors in the case. That is to say, the inference that the danger created by certain conditions, as well as the conditions themselves, was known to the servant is less readily drawn where he is a minor than where he is an adult."

In *Stager v. Troy Laundry Co.*, 38 Or. 480, 63 Pac. 645, 53 L. R. A. 459, the plaintiff was injured by a mangle. The guard plate installed on the machine was out of adjustment. It was shown that the rules of the defendant company prohibited employees from adjusting the plate. On account of the improper adjustment plaintiff was injured, and defendant asserted that the risk was obvious, and that the plaintiff assumed the

same. In effect the court held that if the servant knows that proper precautions for his safety have been neglected by the master and knowingly consents to expose himself to those dangers, his assent dispenses with the duty of the master to take such precautions, and he assumes all risk, and this because of negligence on his part which proximately contributes to the injury. But it was held in that case that one does not assume the risk because he knows there is some danger connected with the employment. The court then remarked that the different adjustments of the guard plate created different degrees of danger, and that under the circumstances of that case, which are much like those in the case at bar, it could not say, as a matter of law, that plaintiff assumed the risk, and the question was properly for the jury.

In *Larsen v. Bloemer*, 156 Cal. 752, 106 Pac. 62, the plaintiff was injured in a laundry. She had never been instructed with reference to the dangers of the mangle, and the court held that whether she assumed the risk or not was a question of fact for the jury.

In *Bromberg v. Evans Laundry Co.*, 134 Iowa, 38, 111 N. W. 417, plaintiff's hand was caught in a mangle and injured. Being but 18 years of age, the court held that such person is presumptively incapable of appreciating the danger of the employment, and did not assume the risk thereof unless the employer affirmatively showed that she had sufficient capacity to appreciate the risk.

These cases are cited for the purpose of showing how several of the courts have treated this question, and not because we regard them as strictly in point. The law concerning the assumption of risks is well settled. Its application to a given state of facts is the difficult task. See 2 Bailey, Per. Inj. p. 1015. Whether as a matter of law the risk was assumed depends entirely on the facts of each case, and therefore precedent is of little avail. In the case at bar we cannot say that this 13 year old girl should have comprehended the extraordinary risk caused by the negligence of the master in failing to properly adjust the safety roller. We cannot say that the evidence shows that she was more intelligent than any other girl or boy of the same age. Certainly it appears that she did not possess the understanding of an ordinarily prudent adult person. But in view of the fact that the evidence is in such a state that different opinions may not unreasonably be drawn from it as to whether the servant knew and comprehended the extraordinary risk, we believe the court committed no error in submitting the case to the jury. Much might be said with respect to the duty of the master to warn and instruct servants of immature years, but the application of the principles hereinabove announced makes such discussion unnecessary.

2. The case made by appellant was to the general effect that appellee had been properly instructed with reference to the mechanical working of the machine; that she had been properly and fully warned concerning the danger in operating it; that appellee was a capable worker; that appellee admitted that the cause of the accident was her own carelessness; that the safety roll adjustment at the time of the injury was reasonably safe; and that the duty of adjusting the safety roller was upon the master or the foreman, but sometimes the girls would adjust it. The motion for a directed verdict, made at the close of appellee's case, was renewed by appellant at the close of the rebuttal by appellee, which was denied by the court. Appellant's second point, and the only other one we need notice in this case, is that the motion for a verdict non obstante veredicto should have been granted. The argument is based upon the findings of the jury in the form of answers to interrogatories propounded to it. The answers to the special interrogatories were to the general effect that appellee was possessed of the same degree of intelligence and brightness ordinarily possessed by girls of her age; that she knew that the cylinders revolved over a heated iron surface; that she well knew that if her hand was caught in the mechanism of the machine, she would be injured, and that she ought to have known such fact; that the plaintiff was instructed how to operate the mangle; that she was indirectly warned that if her hand was caught in the mechanism of the mangle, she would be injured. The answers to the special interrogatories submitted by appellee were to the general effect that the appellee did not know and fully appreciate the dangers incident to her employment, and that appellant was negligent in failing to properly adjust the guard roll. The answers are not contrary to the verdict, and a discussion of the reasons, therefore, is unnecessary, in view of the fact that appellant's main argument is based upon the fact that appellee knew her hands would be injured in the event they passed into the mechanism of the machine, which question, so far as it concerns the doctrine of assumption of risk, we have disposed of in the first point herein. The judgment of the trial court is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

On Motion for Rehearing.

PARKER, J. The court in this case held, among other things, that under the facts and circumstances the master was negligent in failing to see to it that the safety roller on the mangle was in proper adjustment at the time the appellee was injured. The appellant's principal objection to this holding is

that, as the safety roller had to be adjusted in the course of the use of the mangle, the duty of adjusting it rested upon the servant, and not upon the master; hence the master cannot be held to have been negligent in this regard. The doctrine of law for which appellant contends, cited in 4 Labatt's Master & Servant, § 1544, is well established, but whether it is applicable or not depends upon the facts of this case. The controlling consideration in the solution of the question must be the method in which the business of the appellant was conducted. If it were a part of the duties of the servant to adjust the safety roller as the occasion arose, then, undoubtedly, the omission to properly adjust the roll would constitute negligence on his part, whereas, if the business was so conducted that the duty of adjusting the roller rested upon the master, its omission would constitute negligence on the latter's part. The facts presented in the case made by the appellant affirmatively show that the duty of adjusting this safety roller rested entirely upon the master or his foreman, the vice principal, except in occasional instances when the older employes assumed the duty of adjusting it. Such being the case, the omission to adjust the roller in this instance constituted negligence on the part of the master, the appellant, and the doctrine for which he contends has no application. Supporting this view are the three cases cited by us in the former opinion, viz.: Woods v. Long Island R. Co., 11 App. Div. 16, 42 N. Y. Supp. 140, 142; Stager v. Troy Laundry Co., 88 Or. 490, 63 Pac. 645, 53 L. R. A. 459, 461; Quinn v. Electric Laundry Co., 155 Cal. 500, 101 Pac. 704, 795, 17 Ann. Cas. 1100.

The motion for rehearing will therefore be denied; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

ALLEN v. DILLARD. (No. 6382.)
(Supreme Court of Oklahoma. May 18, 1916.
Rehearing Denied June 6, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶568—RECORD—SETTLEMENT—NOTICE.

A notice to settle case-made, served but 21 hours before the time specified therein for such settlement, is void, and a case-made settled upon such notice is a nullity, unless the cause be one falling within the recognized exceptions to the rule requiring notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. ¶568.]

2. APPEAL AND ERROR ¶568—RECORD—SETTLEMENT—NOTICE.

Such exceptions are: First, that the defendant has waived the notice or appeared in person or by counsel at the time and place of settling the case-made; second, that the defendant suggested amendments, all of which were allowed; third, that the defendant suggested

amendments, all of which were allowed except those that were immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.]

Commissioners' Opinion, Division No. 2. Appeal from Superior Court, Tulsa County; M. A. Breckenridge, Judge.

Action by J. C. Allen, guardian, against F. B. Dillard. Judgment for defendant, and plaintiff appeals. Dismissed.

A. T. Lewellen, of Tulsa, and J. T. Smith, of Sapulpa, for appellant. F. B. Dillard, of Tulsa, pro se.

BURFORD, C. [1] This case comes before us on a motion to dismiss. The essential facts are that after various extensions granted by the trial court, in which to make and serve a case-made, the plaintiff's time was so limited that after the service of the case-made and the three days given by the statute to suggest amendments there was approximately two days left within which to file the case in the Supreme Court within the limit prescribed by statute. It does not seem to have occurred to the plaintiff in error that he could have served his notice to settle the case-made during the time allowed for suggesting amendments. Frey v. McCune, 153 Pac. 109. He, therefore, procured an order of court that the case should be settled upon 21 hours' notice, and it appears that said case-made was settled upon a notice served 21 hours before the time fixed in such notice for settling the case. Rev. Laws 1910, § 5242, provides, in part:

"The case and amendments shall, upon three days' notice, be submitted to the judge," etc.

[2] In State v. Coyle, 150 Pac. 80, not yet officially reported, and Reed v. Wolcott, 40 Okl. 451, 139 Pac. 318, this court held that the 3 days' notice to suggest amendments must be given to the defendant, and that, if the case-made were served so late that the 3 days' notice could not be given prior to the time that said case must be filed in the Supreme Court, and the defendant refused to waive his right to suggest amendments, the plaintiff in error must fail. We see no reason why the same doctrine in principle would not be applicable to the 3 days' notice required by the statute for settling the case-made. If this time may be shortened to 21 hours by the trial judge, it might be shortened to 1 hour, and the place of settling the case-made fixed at some distant point, where it would be impossible for the counsel for defendant in error to attend. We think, therefore, that it must be held that the notice given in this case was a nullity. However, this court has held that in certain cases an entire failure to give notice of time and place of settlement of the case-made will not work a dismissal upon the principle that in such excepted cases the rights of the defendant in error are not prejudiced by such

failure to give notice. These recognized exceptions are laid down in the leading case of First National Bank v. Daniels, 26 Okl. 338, 108 Pac. 748, as follows:

"First, that defendant has waived such notice or appeared in person or by counsel at the time and place of settling same; second, that defendant suggested amendments all of which were allowed; third, that defendant suggested amendments, all of which were allowed, except those that were immaterial."

See, also, School District v. Griffith, 33 Okl. 625, 127 Pac. 258; Gordon et ux. v. Allen, 153 Pac. 1176; Globe Surety Co. v. First State Bank of Hewett, No. 6717, 157 Pac. 316, not yet officially reported.

Unless, therefore, the plaintiff can bring himself within one of these recognized exceptions the case must be dismissed.

The certificate of the trial judge to the case-made shows that the defendant in error did not appear at the settlement of the case-made. The first exception is thus eliminated. It is contended, however, that the judge's certificate brings the case within the second exception above quoted. This certificate recites:

"And all suggestions as to amendments to the said case-made was ordered by the court to be incorporated and made a part thereof."

A careful examination of the case-made, however, shows that it does not include any suggestion of amendments by the defendant in error. It does show that there were numerous motions filed and orders made after the case was served on the defendant in error, and that these appear in the case-made.

In view of the state of the record we are unable to say from the certificate of the trial judge that the amendments incorporated were suggested by the defendant in error, as they may have been suggested by the plaintiff in error, or by the trial judge himself. This especially in view of the fact that the case-made does not contain any suggestions of amendments by the defendant in error. Inasmuch as it is certified to be a true and correct case-made, we must assume that if such suggestions had been made by the defendant in error, they would have been incorporated in the case-made.

Since the case is not brought within any of the recognized exceptions to the rule, it seems that the motion to dismiss must be sustained.

The conclusion we have reached is not in conflict with the decision of Tulsa Ice Co. v. Wilkes, 153 Pac. 1169, since, in that case, it appeared from the certificate of the judge that the case-made was submitted to him "by the parties to said cause," thus showing that there was an appearance by both parties at the settlement, which brought that case within the first exception to the rule.

For the reasons given, the appeal is dismissed.

PER CURIAM. Adopted in whole.

In re FOLSOM'S ESTATE. (No. 6614.)
(Supreme Court of Oklahoma. March 14, 1916.
Rehearing Denied April 5, 1916.)

(Syllabus by the Court.)

1. COURTS §202(5) — APPELLATE JURISDICTION—DISMISSAL OF APPEAL.

Where notice is given and bond executed and approved for an appeal, in a probate matter, from the county court to the district court, the district court is without jurisdiction to dismiss the appeal until after the transcript provided by section 6518, Rev. Laws of 1910, has been transmitted to the clerk of the district court to be filed in his office.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 486; Dec. Dig. §202(5); Appeal and Error, Cent. Dig. §§ 104, 3378, 3379.]

2. COURTS §202(5) — APPELLATE JURISDICTION—TRANSMISSION OF TRANSCRIPT.

When the appellant in an appeal, in a probate matter, from the county court to the district court, has neglected to have the transcript provided by section 6518, Rev. Laws 1910, timely transmitted to the clerk of the district court, the appellee may invoke the remedy provided by section 6518, Rev. Laws 1910, to have such transcript transmitted to the clerk of the district court, and thereby confer jurisdiction on the district court of such appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 486; Dec. Dig. §202(5); Appeal and Error, Cent. Dig. §§ 104, 3378, 3379.]

Commissioners' Opinion, Division No. 1.
Error from District Court, Haskell County;
W. H. Brown, Judge.

In the matter of the estate of Cornelia Folsom, deceased. From a judgment dismissing an appeal from an order of the county court denying revocation of probate of a will, Saul J. Folsom brings error. Reversed and remanded.

Linebaugh Bros. & Pinson, of Atoka, for appellant. Malcolm E. Rosser, of Muskogee, G. A. Holley, of Stigler, Geo. S. Ramsey and Edgar A. de Meules, both of Muskogee, for appellee.

COLLIER, C. The will of Cornelia Folsom was admitted to probate on the 28d day of December, 1911, in the county court of Haskell county, Okl. Letters testamentary were issued thereupon to G. A. Holley, and thereafter Saul J. Folsom, appellant herein, filed a contest of said will, which was duly heard and denied. From this order denying the revocation of said will Saul J. Folsom took an appeal by filing in the county court of Haskell county a notice of appeal, stating his grounds of appeal to be both upon questions of law and of fact. On the 21st day of November, 1912, said Saul J. Folsom filed an appeal bond which was duly approved by the county judge on said day, which said bond was made payable to estate of Cornelia Folsom, deceased. The county judge failed to send up a transcript of said cause appealed, and about 18 months thereafter G. A. Holley, as executor of the will of Cornelia Folsom, deceased, together with others interested in

said estate, served upon E. O. Clark a notice of hearing motion to dismiss appeal, which notice was served at 1:30 p. m. on the said 24th day of February, 1914, and was directed to the appellant, E. O. Clark, and Linebaugh Bros., attorneys of record, and was to the effect that at 4:30 p. m. of the same day a motion to dismiss appeal, taken as above set out, would be presented to the district judge for the county of Haskell. Thereupon appellant, by his attorney, moved the court to make an order upon the county judge to make and transmit certified copies of the notice of appeal, bond, judgment, decree, orders, minutes, records, papers, and proceedings had in the county court of Haskell county, to the clerk of the district court, to be filed as soon as reasonably possible, which request or motion was denied, the court announcing as his reason that the court had pending before it a motion to dismiss the appeal, to which denial of the court contestant excepted. On the same day the appellee moved the court to dismiss the appeal herein, upon the grounds: That said contestant, Saul J. Folsom, did attempt to appeal from said order by filing in said cause a notice of appeal and a bond for the same, but that said notice is not in due form as provided by the statutes of the state of Oklahoma, and that the pretended appeal bond filed therein is void and insufficient, for the reason that the said bond does not run to the proper obligee, and does not run to and in favor of the person contemplated by the laws of the state of Oklahoma, and the statutes in such case made and provided, in that said bond runs in favor of the estate of Cornelia Folsom, deceased, and not in favor of the contestees therein. That no effort had been made upon the part of the appellant, Saul J. Folsom, to perfect his appeal, and that a period of almost 18 months has elapsed since the filing of said notice of appeal, and that for said reason the said appellant has not prosecuted his appeal with diligence as provided by the statutes of this state, and movants allege and state the fact to be that said appeal was not taken in good faith, but for the purpose of delay, and further say that if said appeal was taken in good faith, appellant wholly failed to prosecute the same, and for the above reasons this court should hold that said appeal has been abandoned. The said Saul J. Folsom moved to strike the said motion to dismiss the appeal, for the reason that the transcript of the record of the county court had never been filed in the district court, nor had the case been properly docketed upon the dockets of the district court, as required by law, and for the further reason that the case had not been properly set for hearing, as required by law. It was thereupon agreed in open court that the transcript of the record from the county court had never been filed in the district court, and

that the same had not been docketed upon the dockets of the district court prior to the filing of this motion, and that the same had not been set for trial 12 days before the beginning of the December, 1913, term. The motion to strike was denied and duly excepted to. Thereupon the said Saul J. Folsom filed a response to the motion to dismiss, upon the ground that the transcript had not been filed in the office of the clerk of the district court. The said G. A. Holley then offered in evidence the last will and testament of Cornelia Folsom, deceased, the order admitting the will to probate, the certificate of proof of will, the letters testamentary, the contest of the will filed by the contestant, the order denying petition to set aside the former order admitting the will to probate, and the appeal bond. To the admission of said evidence the said Saul J. Folsom objected, which objections were overruled and duly excepted to. The court then rendered judgment, dismissing the appeal of said Saul J. Folsom, to which he duly excepted, and brings the case here for review.

Section 6513, Rev. Laws 1910, provides:

"The judge of the county court must, within ten days from the filing of the notice of appeal and the giving of the required bond, cause a certified copy thereof and of the judgment, decrees or order, or specific part thereof appealed from, and of the minutes, records, papers and proceedings in the case, to be transmitted to the clerk of the district court of the county, to be filed in his office; and the appeal may be heard and determined at any day thereafter by said court, at any general, special or adjourned term; and if the appellant make no appearance when the case is called for trial, or otherwise fail to prosecute his appeal, the respondent may, on motion, have the appeal dismissed, or may open the record and move for an affirmance."

Section 6516, Rev. Laws 1910, provides:

"If the judge of the county court neglect or refuse to make or transmit such certified copies as are hereinbefore required to be transmitted to the clerk of the district court in cases of appeal, he may be compelled by the district court by an order entered, upon motion, to do so; and he may be fined, as for contempt, for any such neglect or refusal. A certified copy of such order may be served upon the county judge by the party or his attorney."

[1] We are of the opinion that until the transcript of the proceedings in the county court in the matter appealed from is filed with the clerk of the district court, the district court does not acquire jurisdiction of the appeal from the county court, and consequently, it being admitted that the transcript of appeal in the instant case had not been filed with the clerk of the said district court, the trial court committed reversible error in assuming jurisdiction of and dismissing the appeal.

[2] Section 6516 gives to appellee an efficient procedure of having said transcript of the proceedings in the county court filed in the district court, and the proper procedure, to have secured jurisdiction by the district court of said appeal, would have been for

the appellee, upon the neglect of the appellant, to have had the transcript so filed, to have had the transcript filed under authority given by said section 6516, as said section can be invoked by either party to the appeal. We think the court was in error in overruling motion of plaintiff for an order requiring the judge of the county court to transmit to the clerk of the district court, now officially known as "court clerk," the transcript of the case, as authorized by said section 6516.

Under the view we take of the case we deem it unnecessary to review any of the other errors assigned.

This case should be reversed and remanded.

PER CURIAM. Adopted in whole.

FROST et al. v. AKIN, Sheriff, et al.
(No. 7241.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 8, 1916.)

(Syllabus by the Court.)

JUDGMENT \S 407(2) — VACATION — EQUITY — ADEQUATE REMEDY AT LAW.

Where the enforcement of an alleged void judgment is sought to be enjoined, and it appears from the petition that the plaintiff had an adequate and complete remedy at law by proceeding to vacate such judgment, and that he had not availed himself of such remedy at law, and had not been unavoidably deprived of such remedy, it is not error for the court to sustain a demurrer to the petition and deny the injunction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 769; Dec. Dig. \S 407(2).]

Commissioners' Opinion, Division No. 1. Error from District Court, Blaine County; James R. Tolbert, Judge.

Action by E. M. Frost and others against Lee A. Akin and another. Judgment for defendants. Plaintiffs bring error. Affirmed.

Hainer, Burns & Toney, of Oklahoma City, for plaintiffs in error. Seymour Foose and R. O. Brown, both of Watonga, for defendants in error.

RUMMONS, C. Plaintiffs in error, plaintiffs below, commenced this action in the district court of Blaine county, to enjoin the collection of a judgment rendered against plaintiffs, E. M. Frost, as administrator of the estate of Wm. A. Frost, deceased, and Myrtle Rogers, then Myrtle Frost, and others, in an action by school district No. 71 of Blaine county, upon the official bond of one J. O. Frost, as treasurer of said school district. The school district was joined with the sheriff as a defendant. The defendants demurred to the petition of plaintiffs, which demurrer was sustained by the court, and the temporary injunction theretofore granted vacated and dissolved. Plaintiffs, electing to stand upon their petition, bring this proceeding in

error to reverse the judgment of the trial court.

It is contended by plaintiffs that the judgment, the execution of which they sought to restrain by injunction in this action, was void as to them, and that therefore they were entitled to invoke the aid of a court of equity to restrain its enforcement. On the other hand, it is contended by the defendants that the plaintiffs had a plain, adequate remedy at law, and therefore that action for injunction would not lie. We feel convinced that the plaintiff had a complete and adequate remedy at law against this judgment, even if it were void, by proceeding under sections 5267, 5268, 5269, 5270, 5272, 5275, Revised Laws 1910, in the original action to set aside and vacate said judgment. An apparently unbroken line of decisions in this state is to the effect that a party against whom a void judgment has been rendered has a complete adequate remedy at law against the same under the provisions of the Code empowering the district court to vacate and modify its judgments at or after the term at which said judgments were entered. *Hockaday v. Jones*, 8 Okl. 156, 56 Pac. 1054; *Bilby v. Stuart*, 39 Okl. 451, 135 Pac. 931; *Harris v. Smiley*, 36 Okl. 89, 128 Pac. 276; *Choi v. Turk*, 154 Pac. 1000. In *Orist v. Cosby*, 11 Okl. 635, 69 Pac. 885, the territorial Supreme Court held:

"If property is wrongfully levied upon, the party interested must proceed in the court from which the execution issued to have the levy discharged, and cannot obtain the desired relief by injunction in a separate action. * * * A party claiming an interest in property levied upon under an execution has an adequate remedy at law, by way of motion, to have the property released from the levy."

Under these authorities it is clear that the plaintiffs had a complete and adequate remedy at law against the judgment complained of, and against the execution sought to be enjoined, by giving bond provided for in section 5272, Revised Laws 1910, and proceeding in the original case to make application to vacate the judgment in the district court. As the petition does not show that plaintiffs had no complete and adequate remedy at law, the trial court did not err in sustaining the demurrer of defendants, and its judgment should be affirmed.

PER CURIAM. Adopted in whole.

STATE v. WICKSTROM. (No. 13308.)
(Supreme Court of Washington. Aug. 16, 1916.)

CRIMINAL LAW §178—DISMISSAL OF PROSECUTION—BAR—STATUTES.

Rem. & Bal. Code, § 2314, permits the court, upon its own motion or upon application of the prosecuting attorney and in furtherance of justice, to order any criminal prosecution to be dismissed, setting forth the reason of the dismissal to be entered of record. Section 2315 provides that an order, dismissing a prosecution

for a misdemeanor or gross misdemeanor, shall bar another prosecution for the same misdemeanor or gross misdemeanor, and section 2316 provides that whenever a defendant is convicted upon an information charging a crime, consisting of different degrees, he cannot be tried for the same crime in another degree. Defendant was charged in justice court with the crime of assault in the third degree, which by section 2415 is a gross misdemeanor, which charge was dismissed on motion of the state because an information had been filed in the superior court, charging him with assault in the second degree, declared by section 2414 to be a felony. *Held*, that as the docket entry showed no intention to abandon the prosecution, and as the subsequent information did not charge the same crime with which defendant was charged in the justice court the dismissal was no bar to the prosecution in the superior court, and that the provision as to conviction upon information charging crime consisting of different degrees applies only to a conviction after trial upon the merits.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 826-829; Dec. Dig. § 178.]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Jack Wickstrom was convicted of assault in the third degree, his motion for a new trial was overruled, and he appeals. Affirmed.

Frank G. Riley, of Tacoma, for appellant. Fred G. Remann and James Selden, both of Tacoma, for the State.

MAIN, J. The defendant was charged by information with the crime of assault in the second degree. The trial resulted in a verdict of guilty of assault in the third degree. Motion for a new trial being made and overruled, a judgment was entered upon the verdict, and the defendant was given a jail sentence. From this judgment and sentence the appeal is prosecuted.

The facts are these: On June 30, 1915, the appellant was charged in the justice court with an assault in the third degree. On the same day a warrant was issued and the arrest made. The date set for the hearing was July 8, 1915. For his appearance on July 8th, the defendant deposited \$10 cash bail. On July 6, 1915, an information, charging the defendant with assault in the second degree, was filed in the superior court. After this information had been filed, the appellant was arrested and gave bond for his appearance in the superior court. When the case in the justice court was called on July 8th, as appears from the docket entry, the cause was dismissed on motion of the state because an information had been filed in the superior court. In response to that information the appellant pleaded not guilty, and that the dismissal of the action in the justice court was a bar to any further prosecution.

The sole question here for determination is whether the dismissal of the action in the justice court operates as a bar. Section 2314, Rem. & Bal. Code, provides that the court

may, either upon its own motion, or upon application of the prosecuting attorney—

"and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record."

This section further provides that the prosecuting attorney cannot discontinue or abandon a prosecution except as provided therein.

In *State v. Hansen*, 10 Wash. 235, 38 Pac. 1023, construing a statute in like language with that just quoted, it was held that the purpose of the statute applies to those cases where the action is dismissed in the furtherance of justice, as the statute expresses it, without any intention to renew it in some other form. It was there said:

"* * * Where, as in this case, by the motion made, which was to quash, dismiss, or withdraw the information (whichever it may be called), with leave to file another information, the request showed upon its face that there was no intention to abandon the prosecution, the reason for the application of this statute fails."

In the present case the docket entry of the justice of the peace shows that there was no intention to abandon the prosecution, for it recites that the action was dismissed because an information had been filed in the superior court. There being no intention by the dismissal to abandon the prosecution, the question then arises whether a dismissal under section 2314, Rem. & Bal. Code, operates as a bar to a further prosecution. Section 2315 of the statute provides that an order dismissing a prosecution under section 2314—"shall bar another prosecution for a misdemeanor or gross misdemeanor where the prosecution dismissed charged the same misdemeanor or gross misdemeanor, but in no other case shall such order of dismissal bar another prosecution."

By the terms of this statute if a person is charged with a misdemeanor, and the same is dismissed, it bars another prosecution for the same misdemeanor; or if one is charged with a gross misdemeanor and the case is dismissed, it bars another prosecution for the same gross misdemeanor; but in no other case, as the statute says, shall such order of dismissal bar another prosecution. Under the facts in this case the appellant was charged in the justice court with the crime of assault in the third degree, which, by the statute, is a gross misdemeanor. Rem. & Bal. Code, § 2415. By the information in the superior court he was charged with assault in the second degree, which, by the statute (Rem. & Bal. Code, § 2414) is a felony. The statute, as already indicated, bars a prosecution when the second prosecution is for the same misdemeanor or gross misdemeanor with which a defendant had been previously charged and

the action dismissed. This statute is not applicable to the facts in this case. The information filed in the superior court charges a felony, and therefore does not charge the same gross misdemeanor with which the defendant had been charged in the justice court.

The case of *State v. Durbin*, 32 Wash. 289, 73 Pac. 373, is cited as sustaining the contention that the dismissal of the action in the justice court bars further prosecution, because it was there held that, where a defendant had been charged with a minor offense which was included within a greater, and the action dismissed, a subsequent prosecution for the greater offense upon the trial of which the defendant might be convicted of the minor with which he had been previously charged could not be maintained. It must be admitted that the case supports this contention if the statute there being construed was the same as the present statute, and if that decision has not been subsequently modified. The statute upon which that case was based is general in its terms, while the present statute is specific and definite, and provides in express language when a dismissal will work a bar and when it will not. The difference in language in the two statutes is such that the holding in that case would not now be controlling.

In *State v. Campbell*, 40 Wash. 480, 82 Pac. 752, while the *Durbin* Case is not expressly overruled a doctrine is announced which is out of harmony with the holding in that case. It was there said:

"But it will not do to lay down a rule to the effect that, in a case where, through inadvertence or misinformation of a prosecuting officer, a defendant has been charged with a misdemeanor—for instance, an assault and battery—and it afterwards eventuates that the actual crime committed was that of an assault with intent to commit murder, or even murder, the law must be content with punishing the defendant for the crime of assault and battery or allow him to escape punishment altogether, by reason of the inability of the state to dismiss the action for assault and battery and indict for the greater offense. Such a determination by a court would surely be the clogging, instead of the lubricating, of the wheels of justice."

Our attention has been called to section 2316, Rem. & Bal. Code, where it is provided that whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree. This obviously applies to an acquittal or conviction after a trial upon the merits, and does not apply to a case which has been dismissed prior to trial.

The judgment will be affirmed.

MORRIS, C. J., and HOLCOMB, BAUSMAN, and PARKER, JJ., concur.

MARTIN v. EWING. (No. 13381.)
(Supreme Court of Washington. Aug. 16, 1916.)

1. ACTION ¶64 — **PERSONAL SERVICE BEFORE PREPARATION OF COMPLAINT.**

Under Rem. & Bal. Code, §§ 220-224, requiring a copy of the complaint to be served with the summons or filed with the clerk within five days after service of the summons, jurisdiction is acquired by service of a summons before preparation of the complaint and two days before filing it.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 725-734; Dec. Dig. ¶64.]

2. PROCESS ¶63—**VALIDITY—TIME OF ISSUANCE.**

The Legislature may provide for the commencement of an action by service of a summons before the complaint is prepared.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 71-75; Dec. Dig. ¶63.]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by Harrison B. Martin against Levi E. Ewing. From a judgment quashing the attempted service of a summons, plaintiff appeals. Reversed and remanded.

Harrison B. Martin and Howard H. Startzman, both of Seattle, for appellant. Hughes, McMicken, Dovell & Ramsey, of Seattle, for respondent.

MOUNT, J. On November 10, 1915, Levi E. Ewing, a resident of the city of Cleveland, Ohio, was temporarily in the city of Seattle. On that day he was served with a summons, which, omitting the formal parts, is as follows:

"You are hereby summoned to appear within twenty days after service of this summons upon you, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and answer the complaint of the plaintiff and serve a copy of your answer or other pleadings upon the undersigned attorney for plaintiff at his address below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the clerk of said court."

Then follows the signature and address of the attorney for the plaintiff.

On the next day a representative of Mr. Ewing called upon the attorney for the plaintiff and requested information as to the nature of the action on account of which the summons was served, and asked for an inspection of the plaintiff's complaint. In answer to these inquiries it was stated that no complaint had been prepared. On the 12th day of November, 1915, a complaint was verified by the plaintiff and filed in the superior court. The defendant afterwards, appearing specially, moved to quash the summons and the service thereof, on the ground that at the time of the issuance and service of the summons on November 10th, no complaint had been prepared or was in existence. Upon a showing of the facts above stated the superior court granted the defendant's motion to quash, and entered an order to

that effect. The plaintiff has appealed from that judgment.

The statute (Rem. & Bal. Code, § 220) provides:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint."

Section 221 provides:

"The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified in which there is a post office, within twenty days after the service of the summons, exclusive of the day of service."

Section 222 provides for the contents of the summons as follows:

"The summons shall also contain,—

"(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant.

"(2) A direction to the defendants summoning them to appear within twenty days after service of the summons, exclusive of the day of service, and defend the action.

"(3) A notice that, in case of failure so to do, judgment will be rendered against them, according to the demand of the complaint. It shall be subscribed by the plaintiff, or his attorney, with the addition of his post office address, at which the papers in the action may be served on him by mail. There may, at the option of the plaintiff, be added at the foot, when the complaint is not served with the summons, and the only relief sought is the recovery of the money, whether upon tort or contract, a brief notice specifying the sum to be demanded by the complaint."

Section 223 provides the form of the summons.

Section 224 provides as follows:

"A copy of the complaint must be served upon the defendant with the summons unless the complaint itself be filed in the office of the clerk of the superior court of the county in which the action is commenced within five days after service of such summons, in which case the service of the copy may be omitted; but the summons in such case must notify the defendant that the complaint will be filed with the clerk of said court; and if the defendant appear within ten days after the service of the summons, the plaintiff must serve a copy of the complaint on the defendant or his attorney within ten days after the notice of such appearance, and the defendant shall have at least ten days thereafter to answer the same; and no judgment shall be entered against him for want of an answer in such case till the expiration of the time."

[1] It is the contention of the respondent that before a summons can be issued there must be a complaint in existence. The statute does not so provide. It provides for the service of a summons, and that a complaint must be filed within five days thereafter.

Valid service depends upon the statute, and not upon a cause of action stated in writing and filed. There may be a good service and no cause of action, or a good cause of action and no service. Both must exist to give the court jurisdiction to render a judgment against the defendant. Jurisdiction of the person of a defendant is obtained from the notice and service thereof upon him. Jurisdiction of the subject-matter is obtained from the facts stated in the complaint when filed as required by statute. The service of the notice in the case complied with the statute and, if the complaint when filed states facts sufficient, the court has jurisdiction both of the person and of the subject-matter. No question is made as to the sufficiency of the allegations of the complaint, which was filed within the time required. It is simply contended that a written verified complaint was not in existence at the time service of the summons was made. The statute does not require that the complaint shall be written or verified or filed before service of the summons. It requires that a formal complaint be filed within five days after service of the summons.

In this case the summons was served upon the defendant on the 10th day of November, 1915. On November 12th, and within five days, the complaint was verified and filed. It seems too plain for argument, therefore, that the court had jurisdiction both of the subject-matter and of the person of the defendant when the motion to quash was made.

[2] An instructive argument is made by the respondent upon the history of pleadings under the common law and under former statutes of this and other states. While this argument is engaging, no contention is made that the Legislature is not authorized to pass a law providing that actions may be begun by the service of a summons without the complaint being verified or filed. We are satisfied the Legislature has power to provide for the commencement of an action by notice or summons, and to provide for the filing of the complaint thereafter. For these reasons we are convinced that the trial court erred in quashing the summons.

The judgment is therefore reversed, and the cause remanded for further proceedings.

MORRIS, C. J., and FULLERTON and ELLIS, JJ., concur.

SHASER et ux. v. CITY OF OLYMPIA et al.
(No. 13386.)

(Supreme Court of Washington. Aug. 14, 1916.)

MUNICIPAL CORPORATIONS \S 488, 489(5) —
PUBLIC IMPROVEMENTS—ASSESSMENT ROLL
—OBJECTION—STATUTE.
Local Improvement Code (Laws 1911, p. 455, \S 23), providing that whenever any assess-

ment roll for local improvements shall have been confirmed the regularity and validity of the proceedings relating to such improvement and to the assessment therefor, including the confirmation thereof, shall be conclusive upon all parties, and cannot be contested by one not filing written objections to the roll, and not appealing from the confirmation, applies to an assessment roll made and confirmed subsequent to the time when it took effect, though in a proceeding initiated before its passage, so that an owner who filed no objection to the roll could not thereafter, by an independent action in equity, have the roll adjudged void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1151, 1152; Dec. Dig. \S 488, 489(5).]

Department 2. Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Suit by Scott Shaser and wife against the City of Olympia and others to have an assessment roll for a local improvement adjudged to be null and void. Judgment for defendants, dismissing the action, and plaintiffs appeal. Affirmed.

Chas. D. King, of Olympia, for appellants. Thos. M. Vance, Troy & Sturdevant, and Geo. R. Bigelow, all of Olympia, for respondents.

MAIN, J. By this action it was sought to have an assessment roll for a local improvement adjudged to be null and void. To the amended complaint a demurrer was interposed and by the trial court sustained. The plaintiffs declined to plead further and elected to stand upon the amended complaint. A judgment was entered dismissing the action. From this judgment the plaintiffs appeal.

The amended complaint is long and contains a somewhat comprehensive history of the improvement from its initiation to the time the present action was instituted. It will be unnecessary here to set forth in detail all the facts as they appear in the amended complaint. It therein appears that the improvement, which was that of the construction of a trunk sewer, was initiated during the year 1910. The assessment roll for this improvement was prepared subsequent to the 4th day of March, 1915, and was confirmed by the city council on the 19th day of May, 1915. No objections to the roll were filed with the city council prior to its confirmation, although notice was published to the effect that the city council would consider objections to the roll on the 19th day of May, 1915.

It should be observed that this is an independent action in equity seeking the annulment of the assessment roll, and is not a case where a property owner or owners had filed objections to the roll with the city council, and from the confirmation of the same appeal to the superior court, and in turn if the superior court should enter a judgment confirming the roll, appeal to this court.

Section 23 of the Local Improvement Code (Laws 1911, c. 98) is as follows:

"Whenever any assessment roll for local improvements shall have been confirmed by the council or other legislative body of such city or town as herein provided, the regularity, validity and correctness of the proceedings relating to such improvement, and to the assessment thereof, including the action of the council upon such assessment roll and the confirmation thereof, shall be conclusive in all things upon all parties, and cannot in any manner be contested or questioned in any proceedings whatsoever by any person not filing written objections to such roll in the manner and within the time provided in this act, and not appealing from the action of the council in confirming such assessment roll in the manner and within the time in this act provided. No proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment, or any certificate of delinquency issued therefor, or the foreclosure of any lien issued therefor: Provided that this section shall not be construed as prohibiting the bringing of injunction proceedings to prevent the sale of any real estate upon the grounds (1) that the property about to be sold does not appear upon the assessment roll, or (2) that said assessment has been paid."

It is not claimed that the facts in this case bring it within either of the clauses specified in the proviso which authorize an independent proceeding. Even though the improvement was initiated prior to the passage of this law, the assessment roll being made and confirmed subsequent to the time when the law took effect, is governed by its provisions. This is distinctly held in the case of *In re Local Improvement Sewer District No. 1*, 84 Wash. 505, 147 Pac. 199. In that case a local improvement, the construction of sewers upon certain streets in the city of Chehalis, was initiated and the contract let for the same prior to the time when the Local Improvement Code went into effect. The assessment roll for that improvement was prepared and confirmed subsequent to the time when the law became operative. Relative to the right of property owners whose property had been included in the assessment to appeal from the decision of the city council confirming the roll and the necessity for procedure, it was said:

"We conclude that Summersett and others not only had the right of appeal from the decision of the city council confirming this assessment roll, but that they were by law required to so appeal or abide the decision of the council as final against them."

We think the remedy available to the appellants was to file objections to the assessment roll, and in the event of an adverse decision of the city council, to follow the procedure provided for in the Local Improvement Code. Not having followed this remedy, they cannot now be heard to complain by an independent action in equity.

Whether an independent action in equity would lie if the city had proceeded without power, or if there were fraud inhering in the

roll, it is not necessary here to determine. There is no claim of lack of power; and the facts stated in the amended complaint do not show fraud.

The judgment will be affirmed.

MORRIS, C. J., and HOLCOMB, BAUSMAN, and PARKER, JJ., concur.

WOODWORTH v. SCHOOL DIST. NO. 2, STEVENS COUNTY, et al. (No. 13023.)

(Supreme Court of Washington. Aug. 14, 1916.)

1. PRINCIPAL AND AGENT \S 124(3)—SCOPE OF AUTHORITY—QUESTION FOR JURY.

A school district having purchased a clock from the seller's agent, held, that the court could not say as a matter of law that the agent had no apparent authority to receive warrants in payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 724; Dec. Dig. \S 124(3).]

2. PRINCIPAL AND AGENT \S 105(9)—AUTHORITY OF AGENT—POWER TO COLLECT.

While as a general rule the collecting power of an agent is limited to receiving legal tender, he may in collecting from a school district accept warrants of such district.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 302-305; Dec. Dig. \S 105(9).]

3. PRINCIPAL AND AGENT \S 22(3), 122(1)—PROOF OF AUTHORITY—STATEMENTS OF AGENT—ADMISSIBILITY.

Neither the fact of agency nor the scope of authority can be established by declarations of the agent in the absence of the principal, nor does the fact that the agency is admitted for one purpose make the agent's admissions not known to or acquiesced in by the principal admissible to show scope of agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 40, 416, 418; Dec. Dig. \S 22(3), 122(1).]

4. EVIDENCE \S 242(1)—ADMISSIONS OF AGENT—ADMISSIBILITY.

Declarations of an agent not authorized to bind the principal, as to the scope of another agent's authority, are not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 893; Dec. Dig. \S 242(1).]

5. PRINCIPAL AND AGENT \S 194(2)—ACTIONS—INSTRUCTION.

Where the alleged agent did not have possession of the property at the time the sale was made and when it was shipped it was billed to the purchaser and not to the agent, it is improper to instruct that where an agent has exclusive possession of property with authority to sell, a purchaser from him could rely on his having authority to receive payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 728, 729; Dec. Dig. \S 194(2).]

6. PRINCIPAL AND AGENT \S 173(3)—CONTRACTS WITH THIRD PERSONS—ACTIONS—EVIDENCE.

Evidence held insufficient to show acquiescence in or ratification of the agent's acts in accepting payment for goods sold by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 661; Dec. Dig. \S 173(3).]

7. PRINCIPAL AND AGENT \S 137(1), 175(3)—"RATIFICATION"—"ESTOPPEL".

Ratification and estoppel are not equivalent terms, the first being retroactive and validating

all of the act involved, and the second extending only to so much of the act as is affected by the conduct working the estoppel.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 492, 494, 667; Dec. Dig. ¶137(1), 175(3).]

For other definitions, see *Words and Phrases*, First and Second Series, *Estoppel*; *Ratification*.]

8. PRINCIPAL AND AGENT ¶147(2)—SCOPE OF AUTHORITY—STATEMENTS OF AGENTS.

Persons who deal with an agent cannot rely on his representations as to the extent of his authority nor assume the existence of authority but whether the agency is general or special they must make inquiry and use all proper diligence to learn the scope of authority, and if they fail so to do they deal with the agent at their peril.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 529, 531, 533; Dec. Dig. ¶147(2).]

9. PRINCIPAL AND AGENT ¶119(1)—SCOPE OF AUTHORITY—BURDEN OF PROOF.

The burden of proving the scope of the agent's apparent authority is upon persons dealing with him.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 391, 393, 398, 399, 401; Dec. Dig. ¶119(1).]

10. PRINCIPAL AND AGENT ¶105(4)—SCOPE OF AUTHORITY—POWER TO COLLECT.

An agent employed to make sales on credit is not authorized subsequently to collect the price in the name of the principal, nor will payment to him discharge the purchaser in the absence of showing of authority in the agent other than that necessarily implied in mere power to make sales.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 301, 374; Dec. Dig. ¶105(4).]

11. PRINCIPAL AND AGENT ¶105(4)—SALES AGENTS—SCOPE OF AUTHORITY—POWER TO COLLECT.

The fact that an agent by whom property is sold has possession of the bill or account for such goods, does not authorize the purchaser to make payment to him.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 301, 374; Dec. Dig. ¶105(4).]

Holcomb and Chadwick, JJ., dissenting.

Department 2. Appeal from Superior Court, Stevens County; W. H. Jackson, Judge.

Separate actions by R. P. Woodworth against School District No. 2, Stevens County, and against Union High School District No. 8. Consolidated for trial. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

O. C. Moore, of Spokane, for appellant. Howard W. Stull, John B. Slater, J. A. Rochford, and F. Leo Grinstead, all of Colville, for respondents.

MAIN, J. The plaintiff, as assignee for collection of the Self-Winding Clock Company, brought two actions in the superior court for Stevens county, one against school district No. 2, and the other against Union high school district No. 3. The purpose of these actions was to recover the purchase price of certain clocks, and the necessary

equipment, which had been furnished to the districts by the Self-Winding Clock Company. After the issues were framed the two actions were consolidated and tried in the superior court as one action. The jury's verdict was in favor of the school districts. From the judgment entered upon this verdict the appeal is prosecuted.

The facts, so far as necessary to an understanding of the questions here presented, may be summarized as follows: The Self-Winding Clock Company was engaged in the manufacture of clocks intended for use in school buildings, and for other similar purposes. The factory and head office of this company was located in Brooklyn, N. Y. On or about April 5, 1910, one J. A. Jansson opened an office in San Francisco, Cal., as the Pacific Coast representative of the clock company. The scope of the power and authority to be exercised by Jansson as such representative was set forth in a typewritten memorandum, delivered to him by the company. In this memorandum he was authorized to have suitable letter head stationery prepared, with his name in the margin as "Sales Representative of This Company." It was expressly provided in the memorandum that Jansson should not make any collection of past-due accounts, except upon special written or telegraphic request of the clock company.

In pursuance of the authority given him by this memorandum, Jansson caused letter head stationery to be printed upon which his name appeared as "Pacific Coast Representative."

On March 27, 1911, Jansson sold to the school districts above mentioned the clocks and equipment for the purchase price of which this action was brought. The sales were reported to the home office in Brooklyn, N. Y. An acknowledgment from that office was sent direct to the school districts. Some time during the summer of the year 1911, Jansson installed the clocks in the buildings for which they had been purchased. In making the installation, he was authorized to employ labor, and make such local purchases of material as was necessary, and pay for the same. The money thus disbursed was to be reported by Jansson in his semi-monthly expense account to the company, and thereupon he would be repaid the money so expended.

On December 9, 1911, school district warrants were issued, payable to Jansson for the cost of the clocks and the installation. On December 11, 1911, these warrants were presented to the county treasurer, and payment was refused for want of funds. Thereafter, the exact date of which does not appear, Jansson sold the warrants to the bank of Colville. The money received upon the warrants was not remitted to the clock company, but was wrongfully converted by Jansson to his own use.

On May 27, 1912, the clock company wrote

a letter, addressed to the clerk of one of the school boards, inquiring why the material and labor furnished in connection with the clocks and program system had not been paid for. This was the first communication from the home office to the district, other than the acknowledgment of the receipt of the orders shortly after the contract was made. No answer being received to this letter, on August 28, 1912, another letter was addressed to the district. After this letter had been received, the clock company was informed that the warrants had been issued and delivered to Jansson. The warrants were paid on April 25, 1914. Two months or more prior to this date the actions against the school district had been instituted. Some further mention of the facts will be made in connection with the consideration of the particular points to which they may be pertinent.

There are three general questions for determination: First, did Jansson have apparent authority as agent of the clock company to receive the warrants? second, was there error in the admission of testimony during the trial? and, third, did the trial court err in the instructions given or the requests refused?

[1] I. So far as the school districts were concerned, they were justified in dealing with Jansson within what was the scope of his apparent authority. They had no knowledge of the limitation placed upon his authority by the clock company when he became its Pacific Coast representative. The letter head stationery which Jansson used in corresponding with the districts had his name printed thereon as Pacific Coast representative. Jansson not only had the power to sell clocks and equipment, but the installation was under his direction and supervision. In installing the clocks he was authorized to purchase material and employ labor and pay for the same, which in turn was to be charged to the clock company in his expense account. In the letter written by the clock company on August 28, 1912, fault was found with the district because it had not answered the previous letter, and in this connection it was said:

"Even though you have been in communication with our Mr. Jansson at San Francisco in regard to terms of settlement we think you should in fairness to us, make response direct to this office advising us of your reasons for your long delay in making settlements."

This letter, even though written after the sales, recognizes the right of the districts to negotiate terms of settlement with Jansson. We think it cannot be held as a matter of law that the school districts were going beyond the scope of Jansson's apparent authority when the warrants were issued and delivered to him. Under the facts stated, the jury had a right to find that Jansson had apparent authority to receive the warrants.

[2] Our attention has been called to the general rule that the collecting power of an

agent is limited to his receiving for the debt of his principal that which the law declares to be a legal tender, or which by common consent is considered and treated as money. But in this case the company is in no sense harmed by reason of the fact that the warrants were issued to Jansson, and by him subsequently cashed at the bank. Had he been paid cash instead of being given warrants, he would have had an equal opportunity to embezzle the funds. In addition to this the legal and recognized way of school districts in making payments is by the issuing of warrants. The clock company, in its letter under date of February 5, 1913, which authorized one Mitchell to make collection of the account, requested the district to arrange "to give Mr. Mitchell a warrant in settlement of this account."

[3] II. During the trial, one member of the school board, while testifying in behalf of the districts, was permitted, over objection, to testify to certain declarations of Jansson to the effect that he was authorized to receive and receipt for moneys on behalf of his principal, the clock company. In other words, the declarations of Jansson as to the scope of his power and authority were received. This was error. Neither the fact of agency, nor the scope of the agent's authority, can be established by declarations of the alleged agent in the absence of the principal. The fact that the agency may be admitted for one purpose does not make the admissions and declarations of the agent, which are not known to or acquiesced in by the principal, admissible for the purpose of establishing the scope or extent of his authority. *Western Security Co. v. Douglass*, 14 Wash. 215, 44 Pac. 257; *Gregory v. Looose*, 19 Wash. 599, 54 Pac. 33; *Allen v. Farmers' & Merchants' Bank*, 76 Wash. 51, 135 Pac. 621; *Bacon v. Johnson*, 56 Mich. 182, 22 N. W. 276; *Chicago, R. I. & P. Ry. Co. v. Chickasha Nat. Bank*, 174 Fed. 923, 98 C. C. A. 535; 1 Clark & Skyles, Agency, § 465.

In the authority last cited, the rule is stated thus:

"Nothing is better settled than the rule that the admissions and declarations of an alleged agent or of an agent, not known to and acquiesced in by the principal or alleged principal, are not admissible for the purpose, either of proving the fact of agency, or of establishing the nature or extent of his authority. To hold otherwise would be to allow a person to establish an agency for another, merely by holding himself out as agent, or to allow one who is the agent of another for a certain purpose to extend his authority by his own declarations or acts, irrespective of the acts of the principal."

In the case of *Lemcke v. Funk & Co.*, 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915D, 570, the general rule is recognized. It was there held, however, that the fact of agency having been established, the acts and declarations of the agent were admissible on the issue as to whether in fact he so held himself out and did make the contract there in con-

troversy as the contract of his principal. The holding of the court upon the question presented in that case does not authorize the admission in evidence of the declarations of Jansson for the purpose of establishing the scope and extent of his authority.

[4] It is also claimed that another witness was permitted to testify, over objection, that Mitchell, who came to Colville in September, 1913, for the purpose of collecting from the school districts on behalf of the clock company, made statements relative to the authority of Jansson, and his embezzlement of the money belonging to the clock company. Mitchell, after Jansson had absconded, had been placed temporarily in charge of the San Francisco office. From the record in this case it does not appear that Mitchell had any authority to bind the home office by statements relative to the authority or conduct of Jansson, and, consequently, such declarations were not properly admissible.

[5] III. The trial court instructed the jury that where an agent has exclusive possession of property of his principal, with authority and for the express purpose of selling it, a purchaser from such agent would have a right to rely upon the agent having authority to receive payment therefor. This instruction should not have been given. Jansson did not have possession of the property at the time the sale was made; and when it was shipped from the factory it was billed, not to him, but direct to the school district. The instruction is not applicable to the facts in this case.

[6] The court also instructed the jury that if they should find from the evidence that Jansson had no authority to receive payment at the time payment was made, yet if they found that subsequent to such payment to Jansson, the Self-Winding Clock Company acquiesced in or ratified or did not repudiate such payment after having knowledge thereof, then the clock company was estopped to deny the authority of Jansson to receive such payment. There is no evidence in the case upon which an estoppel can be predicated. While the clock company did not immediately bring actions after learning that the warrants had been delivered to Jansson, and by him cashed and the money embezzled, the school districts were put in no different position than they would have been had the actions been immediately begun. The actions were begun some two months prior to the time when the warrants were actually paid by the districts. The clock company did not, either by affirmative or negative action, induce the district to act or refrain from acting in the matter, and, therefore, there could be no estoppel. *Daniel v. Gold Hill Mining Co.*, 28 Wash. 411, 426, 68 Pac. 884; *Hughes v. N. Y. Life Ins. Co.*, 32 Wash. 1, 5, 72 Pac. 452; *Murray v. Briggs*, 29 Wash. 245, 259, 69 Pac. 763.

[7] The instruction as given fails to recog-

nize the distinction between ratification and estoppel. While both may be present in a given case, and there may be cases in which one will be estopped to deny that he has ratified, yet they are not the same. In 1 *Mechem, Agency* (2d Ed.) § 349, the distinction is clearly pointed out as follows:

"Ratification, moreover, differs from estoppel, though they are often very closely associated. Estoppel requires that the party alleging it shall have done something or omitted to do something in reliance upon the other party's conduct, by which he will now be prejudiced if the facts are shown to be different from those upon which he relied. Ratification requires no such change of condition or prejudice; if the principal ratifies, the other party may simply avail himself of it. As soon as ratification takes place, the act stands as an authorized one, and not merely as one whose effect the principal may be estopped to deny. If there be ratification, there is no occasion to resort to estoppel. There may, however, be cases in which one may be estopped to deny that he has ratified.

"The difference in effect may be striking; ratification is retroactive, estoppel operates upon that done after the act and in reliance upon it; ratification makes the whole act good from the beginning, while estoppel may only extend to so much as can be shown to be affected by the estopping conduct."

[8] The trial court was requested to instruct the jury that persons who deal with an agent cannot rely upon the agent's representations as to what the authority is, nor can they assume that such authority exists, but it is their duty, whether the agency be general or special, to make inquiry, and use all proper diligence to ascertain the nature and extent of such authority; and if they do not do so, they deal with the agent at their peril; and if the authority of the agent is disputed, the burden of proof is upon them to prove it. This instruction should have been given.

[9] Under the authorities above cited, the declarations of the agent as to the scope of the authority were inadmissible, and the jury when request was made should have been told that it was the duty of those who dealt with the agent to ascertain the nature and extent of his authority. The burden of proving the scope of the agent's apparent authority was upon the school districts. *Mott Iron Works v. Metropolitan Bank*, 78 Wash. 294, 136 Pac. 36; 1 *Mechem, Agency* (2d Ed.) § 743; *Clark & Skyles, Agency*, § 210.

[10] The court was also requested to instruct the jury that an agent employed to make sales, and selling on credit, is not authorized to subsequently collect the price in the name of the principal; and payment to him will not discharge the purchaser unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales. This instruction also should have been given in order that the jury might be advised that if they found that Jansson had no apparent authority other than to make sales, payment to him would not discharge the debt.

[11] Another instruction requested and re-

fused was to the effect that the fact that an agent by whom property is sold has possession of the bill or account for such goods does not authorize the purchaser to make payment to him. This instruction embodied a correct statement of the law. 1 Mechem, Agency (2d Ed.) § 864. It was a proper instruction to give in this case.

The judgment is reversed and the cause remanded for a new trial.

MOUNT and PARKER, JJ., concur.

HOLCOMB, J. I concur in the reasoning and conclusion reached in paragraph 1 of the majority opinion. That, it seems to me, determines the entire matter and renders most of the reasoning and all of the conclusions reached in the subsequent paragraphs of the opinion inconsistent and the matters therein discussed errors without prejudice. Under the express provisions and the spirit of our Code (section 1752, Rem. & Bal. Code), requiring us to render judgment upon the merits, disregarding all technicalities, to my mind the merits are entirely on the side of respondents here, no substantial rights of appellant were so violated as to justify a reversal of the judgment, and the judgment should stand affirmed. I therefore dissent.

CHADWICK, J. (dissenting). There being proof of agency the error complained of was without prejudice.

STATE ex rel. PROSECUTING ATTORNEY OF SPOKANE COUNTY v. UNION SAV. BANK OF SPOKANE. (No. 12817.)

(Supreme Court of Washington. Aug. 16, 1916.)

1. MANDAMUS —73(1) — PROCEEDINGS BY PROSECUTING ATTORNEY—DISCRETION—STATUTE—"MAY."

Under Rem. & Bal. Code, § 1035, providing that an information in the nature of quo warranto may be filed by the prosecuting attorney in the superior court of the proper county upon his own relation whenever he deems it his duty to do so, or shall be directed by the court, or by any other competent authority, or by any other person on his own relation whenever he claims an interest in the franchise or corporation which is the subject of the information, which is a remedial statute which must be liberally construed, it is not a matter within the final discretion of the prosecuting attorney whether he will institute a quo warranto proceeding to inquire by what authority a state savings bank is executing, or about to execute, the functions of a banking corporation, as the word "may" is used, not in the permissive, but in the alternative, sense, so that the ultimate discretion is vested in the courts, regardless of the duty or motive of the prosecuting attorney, who may be compelled by mandamus to institute such proceeding.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 115, 135, 144-146, 149; Dec. Dig. —73(1).]

For other definitions, see Words and Phrases, First and Second Series, May.]

2. MANDAMUS —22—PROCEEDING—INTEREST OF RELATOR—COMPETITOR.

Under such provision, the court may proceed either sua sponte, or upon the application of any citizen and taxpayer, whether he claims a special interest or not, and without a showing of any peculiar personal interest by one invoking the power of the court to direct the prosecuting attorney to file such information in the nature of quo warranto, the question being whether the case presented is extrinsically meritorious and not what parties its maintenance will specially benefit, so that the fact that the petitioner was an attorney for certain other banks, of which the defendant bank proposing to resume banking operations after it had ceased to transact a banking business was a potential competitor, was no ground for a denial of the petition.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 54; Dec. Dig. —22.]

3. MANDAMUS —172—PROCEEDING BY PROSECUTING ATTORNEY—PRIMA FACIE SHOWING—STATUTE.

Rem. & Bal. Code, § 1034, provides that an information may be filed against any corporation doing acts amounting to a surrender or forfeiture of its rights as a corporation, or exercising powers not conferred by law, and section 8 of the statute governing banking corporations, effective July 12, 1907, as amended by section 5 of Act March 19, 1909 (Rem. & Bal. Code, § 3317), provides that in order for any bank with a capital stock less than \$100,000 in cities of over 50,000 population to avail itself of privileges conferred by the law, it must have been transacting business in the state on March 19, 1909. A petition of a citizen and taxpayer for an order to compel the prosecuting attorney to institute a proceeding in the nature of quo warranto to inquire by what authority a state savings bank was about to exercise the functions of a banking corporation alleged that the bank had disposed of its assets, liquidated his liabilities, and ceased to do a banking business in 1908; that stockholders then surrendered their stock, and that the bank was seeking to reissue the stock to others, intending to replace its capital of \$25,000 and recommence business in a state of over 50,000 population. Held, that whether the bank was transacting business within the intent of the act could not be tried in the mandamus proceeding; the only question being whether the petition made a prima facie showing thereof.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 381-385; Dec. Dig. —172.]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Petition by W. S. Gilbert, a citizen and taxpayer of Spokane County, for an order directing the prosecuting attorney thereof to institute proceedings in quo warranto against the Union Savings Bank of Spokane. From an order directing him to institute such proceeding, the prosecuting attorney appeals. Order affirmed.

See, also, 86 Wash. 48, 149 Pac. 327.

Danson, Williams & Danson, Clyde H. Belknap, and Geo. D. Lantz, all of Spokane, for appellant. Smith & Mack and Hamblen & Gilbert, all of Spokane, for respondent.

ELLIS, J. W. S. Gilbert, a citizen and taxpayer of Spokane county, filed a petition in the superior court of that county, praying

for an order against the prosecuting attorney of that county, directing that officer to institute in his official capacity the necessary proceedings to inquire by what authority the Union Savings Bank, a corporation organized under the laws of this state, was exercising or about to exercise, the functions of a banking corporation. Accompanying the petition and made a part of it was a proposed information in the nature of quo warranto, which, omitting formal parts, was as follows:

"(1) That on or about the 31st day of August, 1906, the defendant, Union Savings Bank of Spokane, was organized and incorporated under the laws of the state of Washington, with a capital stock of \$25,000 for the purpose of carrying on and conducting a general commercial banking business in the city and county of Spokane, state of Washington.

"(2) That after the organization of said Union Savings Bank of Spokane as aforesaid, it proceeded to do business as a bank in the said city and county of Spokane, state of Washington, until some time during the year 1908, at which time the said defendant disposed of its entire business and assets, together with its entire capital and good will, to another bank, the stock of which it purchased for its own stockholders with defendant's capital, liquidated and discharged all of its obligations and liabilities, and entirely ceased to transact any further business as a bank or at all; and the stockholders therein at said time surrendered to said bank, their stock certificates.

"(3) That since the year 1908, the said bank has ceased to do business as a bank, has wholly and entirely abandoned the banking business and any other business, and its stockholders, ever since the year 1908, have had no intention of carrying out the purposes for which said bank was organized and established.

"(4) That the said defendant has wholly failed, neglected, and refused at all times from and after it ceased to do business as above alleged, to put in its capital stock in full, in cash as required by law, and has likewise failed and neglected and refused to pay the penalty of \$100 per day required and stipulated by law to be paid by reason of its failure to comply with the laws of the state of Washington, relative to the payment of its capital stock in full in cash.

"(5) That at all the times herein mentioned, the city of Spokane has had, and now has, more than 50,000 inhabitants.

"(6) That said defendant is now about to resume business, and is about to carry on a banking business in the city and county of Spokane, state of Washington, and is about to reissue its old stock and proceed to do business as a bank, in the city and county of Spokane, state of Washington, with a capital and capital stock not exceeding \$25,000, and without payment of any of the penalty due from it to the state of Washington, on account of its failure to comply with the laws of the state of Washington, relating to banks.

"(7) That said defendant has surrendered and forfeited its rights and privileges as a corporation, and its right to do business as a bank in the city and county of Spokane, state of Washington, and is exercising, or about to exercise, powers as a bank, not conferred by law.

"Wherefore plaintiff prays that the court enter a decree forfeiting all the rights and privileges of the defendant herein as a corporation, adjudging that said defendant has no right or authority to conduct a banking business in the city and county of Spokane, state of Washington, or at all, and granting such other and further relief to plaintiff as may be appropriate in the premises."

The petitioner, after setting out, but at much greater length, all of the facts alleged in this proposed information, alleges in substance, that on March 2, 1915, acting on behalf of several bankers of Spokane, he laid before the prosecuting attorney all of those facts, offered to furnish the evidence to establish such facts, and requested the prosecuting attorney to file an information in the nature of quo warranto against the bank for the purpose of contesting its right to do business as a bank in the city and county of Spokane, but the prosecuting attorney, without exercising any discretion, refused to proceed unless first directed to do so by the state bank examiner or by the court; that on March 3, 1915, petitioner requested the state bank examiner to direct the prosecuting attorney to proceed in the premises, but the bank examiner, without investigation, arbitrarily refused, and still refuses, to so direct, taking the position that the matter is one of such public importance that it should be determined by the courts; that on March 11, 1915, petitioner presented to the prosecuting attorney the proposed information above set out, requesting him to sign, verify, and file the same and on behalf of the state of Washington to inquire into the right of the bank to do business as a bank in the city and county of Spokane, and again offered to produce the necessary evidence to substantiate the things alleged in the information, but the prosecuting attorney, without inquiry into the merits of the information, arbitrarily refused to sign, verify, and file the information, and again refused, and still refuses, to proceed in any manner against the bank.

On the filing of the petition the court made a show cause order, a copy of which, with a copy of the petition, was served upon the prosecuting attorney, who answered, admitting the allegations of the petition as to the organization of the Union Savings Bank of Spokane in 1906 with a capital stock of only \$25,000; that it continued in business until November, 1908, when it liquidated its obligations and ceased to transact a banking business until about February 1, 1915; admitting that the city of Spokane has more than 50,000 inhabitants; admitting that the bank is about to carry on a banking business in that city with a capital stock of \$25,000 fully paid; admitting that petitioner requested the prosecuting attorney to file an information in the nature of quo warranto against the bank as alleged in the petition; denying that the prosecuting attorney refused, without consideration or investigation, to proceed in the premises; and alleging that, after carefully investigating the matter and ascertaining that the Attorney General of the state had given an opinion that the Union Savings Bank had not forfeited its charter and has a right to transact a banking business, and that the state

bank examiner had given permission to the bank to transact a banking business, the prosecuting attorney, being of the opinion that no legal reason exists for the filing of the information requested, refused, and still refuses, to sign such information or to prosecute the proposed proceeding in quo warranto.

The matter was heard by the court on the admissions in the pleadings and on affidavits. The affidavits of W. S. Gilbert and M. E. Mack in support of the petition were to the effect that the prosecuting attorney did not, in any manner, investigate the facts alleged in the petition, and that he stated that he did not care to investigate the facts or go into the law of the case unless ordered to proceed either by the state bank examiner or by the court; that he did not wish to file an information on his own motion at the instance of attorneys for other banks, because he desired to remain neutral, but that if ordered to do so, either by the bank examiner or by the court, he would be glad to file the information and prosecute it vigorously, and finally refused to proceed in any manner unless directed to do so by the court.

On behalf of defendant two affidavits were filed. That of R. J. Danson, one of the original incorporators of the bank, states that at the time the bank ceased business in 1908 it intended, and has at all times since intended, to resume a banking business, and has at all times paid its corporate license fees to the state of Washington. The affidavit of E. W. Edgington, cashier of the Security State Bank of Spokane, successor to Union Savings Bank by change of name, states that affiant first became a stockholder in the Union Savings Bank about the 1st of March, 1915; that prior thereto he furnished the state bank examiner with the records of the bank, and represented to the examiner that the bank was incorporated in 1906 and continued in business until 1908, when it ceased to conduct a banking business; that it had paid its annual license fees up to date; that affiant, with others, desired to take over the stock of the corporation, replace the capital, change its name, and commence business under a new name, with new stockholders in the city of Spokane; that the bank examiner thereafter sent affiant an opinion of the Attorney General, containing the information that the corporation had the right to do business in the city of Spokane; that, relying upon such opinion and the permission of the state bank examiner, affiant and various others purchased the stock of the corporation from its then owners, amended its articles of incorporation with the consent of the secretary of state, purchased fixtures, and prepared to open business, and were ready to begin business with the entire capital stock of \$25,000 intact, and that if affiant and his associates are not now permitted to continue business, irreparable injury

will result; that the petitioner Gilbert is not a stockholder, nor interested in the corporation in any manner, other than the general public; that he is not a creditor of the corporation, but is one of the attorneys for certain other banks of which this bank, if permitted to continue in business, will be a competitor; and that the object of the petitioner in this proceeding is to suppress competition.

Upon the pleadings and these affidavits the court entered an order, directing the prosecuting attorney to institute proceedings in quo warranto against defendant bank substantially as prayed for in the petition. From this order the prosecuting attorney and Union Savings Bank have appealed. The petitioner, as respondent, moved to dismiss the appeal on the ground that the order was not a final order. This court on the hearing of that motion held that the order was a final order, in that the proceeding was in the nature of mandamus against the prosecuting attorney to compel him to perform a duty resulting from his office, and that this proceeding is in no sense a proceeding against the bank. State ex rel. Prosecuting Attorney Spokane County v. Union Savings Bank, 86 Wash. 48, 149 Pac. 327. Our decision on the motion to dismiss settles the law of the case as to who are proper parties. We shall therefore treat this appeal as an appeal by the prosecuting attorney alone.

[1] 1. Appellant first contends that it is a matter within the discretion of the prosecuting attorney whether or not he shall institute quo warranto proceedings, and that the court has no power to compel him to act against his will. The governing statute (Rem. & Bal. Code, § 1035), reads as follows:

"The information may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information."

It is clear that the Legislature conceived that cases might arise in which the prosecuting attorney might not "deem it his duty" to file the information, yet in which the rights involved might be of such public moment as to make it essential that they be determined by the court after a full trial on the law and the facts. Hence the Legislature provided that the information may be filed by the prosecuting attorney, not only whenever he deems it his duty to file it, but also whenever he "shall be directed by the court or other competent authority." Appellant argues that the use of the word "may" in the opening line of the statute has a permissive significance, and vests a final discretion in the prosecuting attorney. But this cannot be so unless we strike from the statute the clause last quoted. On the contrary, when that clause is considered, it is

clear that the word "may" is used, not in the permissive, but in the alternative sense. That is to say, the information *may* be filed *either* at the instance of the prosecuting attorney *or* of the court. Clearer terms than those of the statute could hardly be framed to deny a final discretion to the prosecuting attorney and vest an ultimate discretion in the courts. The statute neither says nor implies that the court may direct the prosecuting attorney to act only when that officer has fraudulently or corruptly refused to act. It distinctly reposes the final discretion in the court, regardless of the attitude or motives of the prosecuting attorney.

The question is no longer an open one in this state. In *State ex rel. White v. Point Roberts Reef Fish Co.*, 42 Wash. 409, 412, 85 Pac. 22, 23, a private person, having no interest in the corporations involved sought on his own relation by quo warranto proceedings to enjoin their corporate acts and declare void their charters. It was there held in substance that under the statute the relator had no standing to proceed on his own relation because of his lack of the personal interest required by the last clause of the statute. But this court said:

"It must not be understood that it is within the power of the prosecuting attorney of any county to capriciously or fraudulently prevent the state or its citizens from compelling corporations to obey the laws, or to deprive the state or its citizens of a judicial investigation of alleged violations of the law on the part of the corporations. But instead of proceeding upon their own relation, as the appellants did in this case, they had a right to ask the court to direct the prosecuting attorney to proceed with the case upon the showing made in their complaint, and if the court refused to do this, an appeal would lie to this court and the question of the sufficiency of the complaint would be determined on such appeal."

Appellant says that this is mere dictum. It is dictum in a sense. We are therefore not bound by its implication that it is only on a showing of fraud or caprice on the part of the prosecutor that the court can act. The terms of the statute are too clear to the contrary. But in so far as the above-quoted language shows that the relator there had mistaken his remedy by pointing out his true remedy, it is not in any just sense dictum. In any event, in the recent case of *State ex rel. Prosecuting Attorney of Okanogan County v. Blackwell*, 157 Pac. 223, decided since the present case was argued, the exact question here presented was decided adversely to appellant's contention. That was an action in mandamus to compel the prosecutor to file an information in quo warranto against a municipal corporation. The trial court ordered the prosecutor to investigate the facts and determine whether he would or would not file the information. We said:

"It seems plain from the order quoted that the order, in effect, requires an answer to the petition after the prosecuting attorney has investigated the facts. When the answer is filed

if issues are made, the trial court will determine the controversy and enter a final order."

Obviously if, as contended by appellant here, the court has no power to compel the prosecutor to act against his will, this court did an idle and vain thing when it there, in substance, directed the trial court, when the issues should be made up, to try the controversy and enter a final order.

The case of *State ex rel. Rosbach v. Pratt*, 68 Wash. 157, 122 Pac. 987, mainly relied upon by appellant, is not apposite. In that case the powers of the Industrial Insurance Commission and the Attorney General under the Industrial Insurance Act were involved. We held that *under that act* the commencement of actions to enforce payment of delinquent assessments was a matter "resting wholly within the discretion of the Commission and the Attorney General." The statute governing quo warranto was neither involved nor mentioned. As we have pointed out, the quo warranto statute expressly vests the ultimate discretion in the court. The distinction is plain. The same distinction exists, so far as the controlling statutes are divulged in the opinions, in every case cited by appellant from other jurisdictions. We shall not review them, since we are clear that under our statute the superior court has the ultimate discretion to order the prosecuting attorney to file the information. The same distinction exists as to cases involving quo warranto at common law. As pointed out in *Mills v. State ex rel. Smith*, 2 Wash. 566, 27 Pac. 590, "the common law on that subject has been supplanted by the statute," and again:

"The Legislature has looked out for the interests of the public by providing that the information shall be filed by the prosecuting attorney, either on his own relation, or when directed by the court or other competent authority; and private interests are provided for in the latter part of the section by the words 'or by any other person on his own relation.'"

Moreover, "this statute is remedial, and must be liberally construed." *State ex rel. Attorney General v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 493, 68 Pac. 946; 70 Pac. 114.

[2] 2. It is next urged that the petition should be denied because it was filed at the instigation of other banks of which the Union Savings Bank is a potential competitor. Our statute, as we have seen, vests the ultimate discretion in the court as to whether or not the information shall be filed. The statute does not declare, either expressly or by implication, that the court in directing the prosecuting attorney to file the information shall only proceed upon its own motion. Obviously the statute intends that the court may proceed either sua sponte or upon the application of any citizen taxpayer, whether he claim a special interest or not. This is plain since under the last clause of the statute a person who claims a personal interest in the office, franchise, or corporation may

proceed "on his own relation" without regard to the attitude of the prosecuting attorney in the premises. No peculiar personal interest need be shown where the petitioner invokes the power of the court to direct the prosecuting attorney to file the information. It follows that the fact that such petitioner may be a potential competitor is not material one way or another. The question is whether the case presented is intrinsically meritorious, not, who will its maintenance specially benefit? The question is one of merits not motives.

[3] 8. But it is contended that in any event the showing made by the petitioner was not sufficient to invoke the power of the court to direct the filing of the information. The statute (Rem. & Bal. Code, § 1034) declares:

"An information may be filed against any person or corporation in the following cases: * * * 5. Or where any corporation do or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law."

The question, therefore, is, Has the petitioner made a prima facie showing that the corporation here in question has done or omitted acts which amount to a surrender or forfeiture of its right to do business as a bank, or is it seeking to exercise powers not conferred by law? The statute governing banking corporations, so far as here material, reads as follows:

"It shall be unlawful for any corporation to transact a banking business unless at the time of organization and commencement of such banking business, such corporation has property of cash value as follows: * * * in cities having a population of more than 50,000 inhabitants, \$100,000. Such property shall be in lawful money as provided in section 8321. Provided, that the provisions of this section as to the amount of capital shall not apply to any bank or trust company organized and doing business at the time of the passage of this act: *But provided further, that the capital stock of any bank or trust company transacting business in this state, organized prior to the twelfth day of June, 1907, shall be paid in full in cash within five months from the date upon which this act shall take effect. And a failure to comply with the provisions of this section shall subject any such bank or trust company to a penalty of one hundred dollars per day for each day of such failure, and such penalty may be collected by suit against such bank or trust company on the relation of the state examiner, or attorney general.*" Rem. & Bal. Code, § 8317.

This section, save the part which we have italicized, was section 8 of an act which went into effect July 12, 1907. The italicized provisions were added by section 5 of an act, which went into effect March 19, 1909. It is unnecessary at this time to construe this law further than to say that it seems to imply that, in order for any bank with a capital stock less than \$100,000 in cities of over 50,000 population to avail itself of the privileges conferred by this law, such bank must have been transacting business in this state

on March 19, 1909, when this act in its present form went into effect. Whether or not the bank here in question was transacting business within the intent of that act at that time is a question which cannot be tried out in this mandamus proceeding. We are only called upon to determine whether the petition made a prima facie showing that it was not. It is alleged, in substance, that the bank disposed of its assets, liquidated its liabilities, and ceased to do a banking business in 1908. This is admitted. It is alleged that the stockholders then surrendered their stock, and that the bank is now seeking to reissue the stock to others, who intend to replace the capital of \$25,000 and recommence business as a bank in a city of over 50,000 population. This also is admitted, except that the prosecuting attorney denies on information and belief that the original stock was ever surrendered. Neither of the affidavits filed in support of the answer distinctly denies such a surrender. We have set out the full substance of the facts presented on both sides in our statement of the case. It is unnecessary to repeat them here. We are satisfied that they present a prima facie case calling for a defense on the part of the bank. It has no standing to make that defense in this proceeding which, as we stated on the motion to dismiss the appeal, is in no sense a proceeding against the bank. The answer of the prosecuting attorney indicates that in refusing to file the information he acted upon the opinion of the Attorney General in whom the statute vests no discretion in the premises. As we have seen, the primary discretion is vested in the prosecuting attorney, the ultimate discretion in the court. That officer having refused to proceed, we fail to find that the court exceeded its discretionary powers in ordering him to file the information on the showing made.

It would be obviously unfair to further discuss or prejudice the questions of law and fact in this proceeding to which the bank is in no sense a proper party. There are things which must first be heard and determined by the trial court in the quo warranto proceeding.

The order appealed from is affirmed.

MORRIS, C. J., and MOUNT, CHADWICK, and FULLERTON, JJ., concur.

STATE ex rel. WRIGHT v. CITY OF TACOMA et al. (No. 13534.)

(Supreme Court of Washington. Aug. 25, 1916.)

MUNICIPAL CORPORATIONS § 871 — PUBLIC IMPROVEMENTS—WATER SUPPLY—PAYMENT OF CONTRACTOR—FUNDS.

Rem. & Bal. Code, §§ 8005-8010, forbids a city from proceeding in a public improvement matter without clearly apprising the taxpayers of the probable cost. An ordinance, providing for the construction of a gravity water system,

including a pipe line 41 miles long, to be laid in part through a rough and mountainous country, provided that the estimated cost of the system, with the water rights and appurtenances, was to be the sum of \$2,000,000, and further provided that whenever any contract for work not prescribed in the plans should be ordered by the city council, it should be done by the contractor at actual cost, with 10 per cent. added, and, as authorized by section 8008, created a "special water warrant fund No. 2," to defray the additional costs and expenses, which should be paid out of the earnings of the system to a certain sum annually if the whole number of warrants authorized to be issued amounted to \$2,000,000. Held, that the ordinance created two funds, and that where the contract was made within the estimate, a contractor, who performed work in addition to that contemplated by the original plan and to make practicable, was entitled to mandamus to compel the city to issue special water fund warrants in denominations of \$1,000, with interest, unless the city, within 60 days after remittitur, pay the contractor the full amount in lawful money, notwithstanding the city had denied all liability and did not raise the objection that it had an option to pay the claim in cash.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 904; Dec. Dig. § 371.]

En Banc. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Mandamus by State of Washington, on relation of George P. Wright, against the City of Tacoma and others and John F. Meads, as Controller of the City of Tacoma. Judgment for relator, directing that defendant city's warrants be issued to him, and the city and others appeal. Remanded, with direction to enter a modified judgment.

T. L. Stiles and Frank M. Carnahan, both of Tacoma, for appellants. Fletcher & Evans and Sullivan & Christian, all of Tacoma, for respondent.

CHADWICK, J. This case was before the court and opinion rendered in 87 Wash. 334, 151 Pac. 337, to which reference should be made. Counsel for both sides accept that opinion in so far as it establishes the claim of respondent. Beyond that, there is a positive disagreement as to its meaning and legal effect. The case was remanded, and a judgment entered as follows:

"Now therefore it is by the court considered, ordered, and adjudged that plaintiff George P. Wright do have and recover of and from the defendant city of Tacoma, a municipal corporation, the sum of \$97,095.91 with 6 per cent. per annum interest thereon from October 9, 1914, until paid, the same to be payable out of any warrants, bonds, or revenues created, or to be created, or authorized to be created, under the provisions of ordinance No. 3982 of defendant city, and out of the gross revenues, earnings, and credits of the water system now belonging, or which may hereafter belong, to said defendant city, together with plaintiff's costs and disbursements taxed in the Supreme Court, amounting to the sum of \$115.55."

After demand upon the city and its officers, and a satisfaction of the judgment as required by section 953 of the Code, respondent relator began this action, praying for a writ of mandamus to compel the city officers to issue special water fund warrants, each in

the sum of \$500, payable out of the gross revenues, earnings, and credits of the water system, and that each warrant be made to draw interest at the rate of 6 per cent. per annum, payable semiannually, or, in the alternative, if such relief could not be granted, that the city, its officers and agents, be directed to sell a sufficient amount of warrants or bonds, payable out of the gross revenues, earnings, and credits of the water system to obtain the necessary funds to pay the amount due respondent in cash. The court made findings and entered a judgment in favor of respondent, directing that warrants be issued direct to respondent, in denominations, and bearing interest at the rate prayed for.

Briefly stated, the contention of counsel for appellant is that there is no legal obligation on the part of the city to pay the judgment, for the following reasons: (a) By the ordinance, the cost of the water system was limited to the fund to be realized from the sale of bonds, and warrants, not exceeding the sum of \$2,000,000; (b) that the whole of the fund, so realized, has been paid out upon valid contracts, so that none remains to meet the demands of respondent's judgment; (c) that respondent, by the terms of his contract, limited his recovery to the proceeds of the sale of such bonds and warrants, and cannot now, under well-established principles, compel the payment of his judgment from other sources of revenue, whether such revenues be raised for general or special purposes. To meet these material contentions, respondent insists that the former opinion is the law of the case, and forecloses all inquiry as to the legality of the claim, as well as the sources from which it is to be paid. Counsel for the city insist that the question of exhaustion of the fund was not only not inquired into in our former opinion, but was expressly reserved upon the objection of respondent until such future time as he might seek satisfaction of his judgment. It will thus be seen that the controlling question for us to consider is whether the \$2,000,000 to be raised by the sale of the warrants and bonds was a limitation upon the cost of the water plant. Because counsel charges that the expression in the former opinion of the court:

"The \$2,000,000 referred to in section 3 [ordinance] is not a limitation of the amount which the system was to cost, but is only an approximate estimate."

—is inapt and inadvertent, and cannot be harmonized with another expression that, the contract being a binding and legal obligation, "the fact that the fund has been exhausted, if it be a fact, is not a sufficient reason to deny to the contractor a right to have the liability of the city under the contract determined by a judgment of a court of record," and, appreciating counsel's insistence that in *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, we have settled the law governing this case, we have decided to

treat the question as one of original inquiry.

If appellants' theory be sound that the judgment cannot be satisfied if the original fund has been exhausted—and we are not disposed to take issue with it, or the conclusions of counsel if their premise be sound—we are met by the first and controlling question in the case: What is the fund? Obviously, the answer must be found in a construction of the ordinance. Section 3 provides:

"That the estimated cost of said gravity water system with the lands, waters, water rights, easements, privileges and appurtenances therefor as aforesaid, as near as may be, is the sum of two million dollars."

If this were all, the reasoning of the Uhler Case would be controlling. But it is not all. Seemingly, in anticipation of conditions that might arise in the construction of a water system, including a pipe line approximately 41 miles long, to be laid, in part, through a country rough and mountainous, the council endeavored to obviate the rule that would hold it to, or within, the estimate, and made further provision. It fixed the possible limit of a bond issue, but provided that such additional costs and expenses as might occur should not go unpaid, but should be paid out of the earnings of the plant. It created not one, but two funds. Section 2 provides:

"That whenever during the progress of the work under any contract, any work or material not prescribed in the plans and specifications for said work shall be ordered by resolution of the city council, the same shall be done or furnished by the contractor at actual cost and 10 per cent. added."

Section 13 provides that there is created and established in the treasury of the city of Tacoma, a fund to be called—

"city of Tacoma special water warrant fund No. 2, which fund is created and is to be drawn upon for the sole purpose of defraying the cost and expense of the said addition of the said gravity water system as specified and adopted by sections 1 and 2 of this ordinance, together with such interest as shall accrue from the warrant obligation issued in payment therefor. Whenever the city of Tacoma shall have sold any warrants upon the said city of Tacoma special water warrant fund No. 2, or shall have contracted with any person or corporation for the construction of said gravity water system, or any part thereof, and agreed to pay therefor with warrants, on said fund, or with money derived from the sale of such warrants, thereafter as long as any obligations are outstanding against said fund, the city treasurer shall set aside into said fund from the gross revenues, earnings and credits derived from the water system now belonging to or which may hereafter belong to said city, the sum of \$100,000 each year, if the whole number of warrants authorized to be issued hereunder is the sum of \$1,500,000 and the sum of \$125,000 each year if the whole number of warrants authorized to be issued hereunder is the sum of \$2,000,000."

The work done by respondent, for which judgment was allowed in the former action, was done in addition to the work contemplated under the original plans of the city, and, in large part, to meet changes demanded by the city to make the system possible, feasible, and practicable.

The reason why a city may not proceed under the statute (Rem. & Bal. Code, tit. 60, ch. 33) without clearly apprising the taxpayer of the probable cost is, as held in the Uhler Case, to protect the citizen from impositions and careless administrations. The Legislature was careful to provide that a city council could not proceed willy nilly. It made the taxpayer a party to the contract. The clear intent of the statute is that he shall not be misled. But no taxpayer could be misled into the belief that the \$2,000,000, fixed as an estimate "as near as may be" in section 3, was a limitation upon the cost of the system. He was clearly apprised of the intent of the council to proceed, with his sanction, of course, to build a system for which obligations in the way of general negotiable bonds to the extent of \$500,000 and special fund warrants (bonds) payable out of the revenues of the system, to the extent of \$1,500,000 were authorized, and for any excess of cost, special warrants to be drawn on "city of Tacoma special water warrant fund No. 2, out of which the cost of the addition to the water system was to be paid," *Wright v. Tacoma*, supra. We were of that opinion when the other opinion was written, and are of that opinion now.

If the ordinance, considered in all of its parts, has not this meaning, the section creating "special water warrant fund No. 2" has no function to perform, for the statute provides for the payment of the original bond issue out of the earnings of the system. Rem. & Bal. Code, § 8008. There was no such saving provision in the Olympia ordinance. The taxpayer was called upon to reject or approve a plan to purchase an existing plant, the cost of which should have been reasonably ascertained. It will be answered that the Olympia ordinance did, in effect, and in fact, make provision for an added cost, and that, its procedure being rejected, we cannot consistently hold that obligations in excess of the estimated cost can be issued in this case. The clause of the Olympia ordinance, which is relied on, is as follows:

"The issuance of bonds as provided for herein is based upon the estimated cost of \$90,000 as near as may be, and in the event that a larger sum is necessary to carry out the purposes of this ordinance, the issuance of bonds in the total amount necessary shall be provided for by supplemental ordinance to be enacted after the actual amount of bonds necessary to carry out the purpose of this ordinance is ascertained."

Construing this section, we said in *Uhler v. Olympia*, supra:

"It will be seen that this section of the ordinance violates the spirit and intent of the act giving the council power to pass an ordinance providing for the submission of such questions. The council had fixed, as the estimated sum necessary to purchase the waterworks, \$90,000. It could not therefore, make its own act indefinite by providing, in the event a larger sum became necessary after the condemnation to carry out the purpose intended, that it might provide by supplemental ordinance for the issuance of bonds

in the total amount necessary, whatever that sum might be. If the council could do this, it could make out of the statute a mere form, and leave the citizen as uninformed as to the probable amount of the bond issue as if no sum had been fixed as an estimate at all. It could fix an estimate at say \$25,000 without reference to probable values, and issue bonds at will and to any amount. In other words, under the authorities cited in our former opinion, holding that the payment and the manner of payment are just as much a part of the plan as the declaration of intent, and under the statute which provides that there shall be reasonable certainty in declaring the amount of the estimate, it follows that the council cannot, by resort to supplemental ordinance, substantially increase the burden as it is fixed by the estimate."

The difference between that case and this is easily apparent. The Olympia ordinance, when taken as a whole, left the whole cost subject to another ordinance which may have been passed by the council, thus destroying the element of reasonable certainty which the statute seems to require. The power to fix the amount to be expended was, in reality, reserved by the council. It gave the voter the form of power, but reserved the substance. In the instant case the ordinance was more skillfully drawn. Extra work and changes made necessary in the course of construction, things inevitable in all building operations, were anticipated, and the cost, if in excess of the \$2,000,000, was provided for by a plan for payment, an essential thing which was entirely omitted in the Olympia ordinance. The one plan was rendered wholly indefinite; the other was made as definite as the circumstances of the case would permit.

The provision in the Tacoma case for added cost was a wise one. Unlike the undertaking in the Olympia case, which was to acquire by condemnation an existing water plant, the cost of which could be approximated within reasonable bounds and which could be abandoned if a jury fixed a price that the city was unwilling to pay, the plan was to build a water system with the water supply some 41 miles away and which, from the nature of things, could not well be abandoned, although the whole of the estimated sum had been expended before the plant was constructed. As we have said, the difference between the two projects is such that some rational method of anticipating extra cost was the part of wisdom in the one, while a difference between the estimated cost and the verdict of the jury in the other, if material, could be, and in fact should be, approved by the electorate.

It must be born in mind that the contracts were let for sums within the estimate, and the changes, for the cost of which the judgment in this case was rendered, were ordered by the city authorities under the ordinance. We are not holding that, the estimate being \$2,000,000, and the bids aggregating \$2,500,000, or any considerable sum in excess of the estimate, the council should

proceed under any form of ordinance without another vote of the people.

While it is not now material, we feel it is not out of place to discuss briefly an expression in our former opinion which counsel has called to the aid of their cause:

"The question raised by the ruling upon the demurrer to this affirmative defense is, Will the exhaustion of the special fund, out of which the contractor was to be paid under the ordinance and by the terms of his contract, deny him the right to a judgment against the specified fund for the amount which may still be due? It is not claimed that the contract between the city and the respondent was other than a valid one. The contract being a binding and legal obligation, it would seem that, if there was a balance due under such contract, the contractor would have a right to have such valid claim established by a judgment against the city, provided the judgment limited the collection thereof to the fund referred to in the ordinance and the contract."

The effect of counsel's argument is that our opinion did no more than to establish the claim, leaving the question as to the exhaustion of the fund open; that proof of the state of the fund was denied in the former case; and, the fact that the whole \$2,000,000 was expended prior to the time the judgment in this case was rendered being now shown, respondent cannot recover. Confusion seems to have crept into the case by the use of the words "exhaustion of the special fund" and "the fact that the fund has been exhausted, if it be a fact," etc. We did not intend, nor do we think our language, when considered in the light of our holding, implies, that no recovery could be had after the \$2,000,000 fund was exhausted. As heretofore pointed out, that is only a part of the fund. The word "fund," as used in the ordinance, means the \$2,000,000 and such warrants as may be issued under section 13, and which, from the nature of the enterprise, cannot be exhausted so long as the council follows the direction of the ordinance by creating and maintaining "special water warrant fund No. 2." Our thought was that the special water warrant fund was a variable fund; that sometimes it would be greater and sometimes it would be less, or even exhausted, but, even if it were so, a judgment establishing the claim could not be denied because of the diminished or depleted state of the fund. A judgment being rendered, or, as we said, the claim being established, it could "only be collected out of the" special water warrant fund No. 2 as funds became available from the earnings of the system. Our opinion could not be sustained, in reason, if this were not so. To enter a judgment that could not be satisfied would be an idle thing to do. The fact that we ordered a judgment to be entered is a sufficient argument that we did not intend to hold that it could not be eventually satisfied.

Counsel for the city complains that the court has proceeded in violation of the terms of the contract and ordinance, in that it

has ordered the warrants to be delivered direct to respondent. Counsel for respondent admit that the city might have exercised its option to dispose of the warrants or bonds and pay in cash, but not having done so, and having denied all liability, and not having raised the objection in the court below, that it cannot now be heard to object to the order of the court. Ordinarily there would be merit in the contentions of counsel, but the rights of the parties depend upon the ordinance and the contract. The courts were open to the city to assert what it conceived to be its legal rights, and, because it has done so, it cannot be penalized beyond the terms of its contract.

Aside from these considerations, it is the privilege of every judgment debtor, in the absence of a contract, to discharge his obligation in money. The creditor must be satisfied with that, and find recompense for delay in the only penalty the law admits in such cases; that is, interest.

Nor are we disposed to deny appellants the right to be heard because the question was not raised in the court below. This is a mandamus proceeding to compel the performance of a contract; and, so long as the contract and the ordinances are in the record, we will look to them for the measure of duty, rather than to the general rules of procedure.

The court below ordered warrants issued in denominations of \$500, with interest payable on the 1st days of April and November of each year. It was so provided in Ordinance No. 3982. This was probably an oversight on the part of the court and counsel. By a later ordinance, No. 4520, the city provided that all obligations issued in payment for the work should be issued in denominations of \$1,000, with interest payable on the 1st days of January and July.

Our holding is that respondent is entitled to have his judgment, with interest at 6 per cent. per annum from the date of its rendition, satisfied by the delivery of warrants to be issued in denominations of \$1,000 and the ultimate fraction thereof, each warrant to draw interest at the rate of 6 per cent. per annum, payable semiannually, on the 1st days of January and July in each year, unless the city of Tacoma shall, within 60 days after the remittitur goes down, pay to the respondent the full amount thereof in lawful money. With these modifications, which go to form and not to substance, the judgment is affirmed.

Remanded, with directions to enter a modified judgment. Respondent will have his costs on appeal.

MORRIS, C. J., and HOLCOMB, FULLERTON, MAIN, ELLIS, and PARKER, JJ., concur.

STATE BOARD OF MEDICAL EXAMINERS v. HARRISON. (No. 13180.)

(Supreme Court of Washington. Aug. 25, 1916.)

1. PHYSICIANS AND SURGEONS § 11(1)—REGULATION—POWERS OF LEGISLATURE.

Rem. & Bal. Code, § 8397, providing for revocation of physician's license to practice for unprofessional conduct, and section 8397½, defining unprofessional conduct to include conviction of offense involving moral turpitude, in which case the record of conviction shall be conclusive evidence, is a valid enactment, whether it states a rule of substantive law or rule of evidence; such an enactment being within the power of the Legislature.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11(1).]

2. PHYSICIANS AND SURGEONS § 11(1)—REVOCATION OF LICENSE—POWERS OF BOARD.

Under Rem. & Bal. Code, § 8397, providing for revocation of license to practice medicine on showing of unprofessional conduct, there is no discretion in a board of examiners if conviction of offense involving moral turpitude is shown.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11(1).]

3. PHYSICIANS AND SURGEONS § 11(1)—REVOCATION OF LICENSE—STATUTES—VALIDITY.

Rem. & Bal. Code, §§ 8397, 8397½, providing for revocation of license to practice medicine on showing conviction of offense involving moral turpitude, the term "moral turpitude" is not so vague and uncertain as to render the law unreasonable and void.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11(1).]

4. PHYSICIANS AND SURGEONS § 2—REGULATION—POWER OF LEGISLATURE.

Statutes relating to practice of medicine are within the police power of the Legislature, and not in violation of any constitutional provision.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. § 2.]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Proceedings before the State Board of Medical Examiners for revocation of license of Kathryn M. Harrison, osteopath, to practice medicine. From a judgment affirming order of the Board revoking her license, the defendant appeals. Affirmed.

Dudley G. Wooten, of Seattle, for appellant. W. V. Tanner, Atty. Gen., and Howard Waterman, Asst. Atty. Gen., for respondent.

MOUNT, J. This appeal is from a judgment of the superior court affirming an order of the state board of medical examiners, which order revoked the license of the appellant to practice medicine as an osteopath within this state.

It appears that a complaint was filed with the board of medical examiners, which complaint charged that the appellant had been convicted of an offense involving moral turpitude, in this, that she was indicted and convicted in the United States District Court at Seattle for "knowingly, by means of the United States mail, giving notice and infor-

mation" to certain persons named "when, how, and by whom and by what means an abortion could and would be done and performed and produced." Reference is made to the indictment as part of the complaint.

To this complaint before the state board of medical examiners an answer was filed by the appellant admitting the conviction referred to, but she denied that she had at any time or place or by any means given information of how, when, or by whom an abortion could be produced; denied that she had been given a fair trial in the federal court; denied that she had ever been guilty of any offense involving moral turpitude; and denied that the board could justly revoke her license without inquiring into the truth of the transactions involved in the indictment and the manner in which she was tried and convicted. As an affirmative defense she described at length the facts and circumstances of her trial and conviction in the federal court, to the effect that her indictment was produced by the use of decoy letters and collusive methods, by the prejudice of the federal court and the jury and the prosecuting attorney; that she was not ready for trial at the time her case was tried; that her attorney was appointed by the court and was not familiar with her case; that the indictment stated no offense involving moral turpitude, and should have been quashed in the federal court; and that the charge in the federal court was unsupported at the trial. She also pleaded that she had exonerated her conviction by serving out her sentence in jail; that she was of good moral character personally and professionally; that she was a graduate in osteopathy and licensed as a practitioner; that she is wholly dependent upon her profession for a living and maintenance.

When the case came on for hearing before the state board of medical examiners upon the complaint and answer as above epitomized, a motion was made to strike out the affirmative defenses. This motion was sustained, and the appellant was adjudged guilty of unprofessional conduct as charged. The board thereupon revoked her license. The appellant then appealed to the superior court. In the superior court a demurrer was filed to the affirmative defense set up in the answer. This demurrer was sustained, and a judgment of affirmance was entered upon the admission that she had been convicted in the federal court.

The appellant makes a number of assignments of error. The principal one upon which she relies is that the statute defining unprofessional conduct and making the conviction of an offense involving moral turpitude conclusive evidence is unconstitutional and void. The statute provides at section 8397, Rem. & Bal. Code, that:

"Whenever any holder of a certificate herein provided for is guilty of unprofessional conduct, as the same is defined in this chapter, and said

unprofessional conduct has been brought to the attention of the board granting said certificate, in the manner hereinafter pointed out, * * * it shall be their duty to, and they must, revoke the same at once, and the holder of said certificate shall not be permitted to practice medicine and surgery, or osteopathy, * * * in this state."

Section 8397½ provides that:

"The words 'unprofessional conduct,' as used in this chapter, are hereby declared to mean: "First. The procuring, or aiding or abetting in procuring a criminal abortion. * * *

"Fifth. Conviction of any offense involving moral turpitude, in which case the record of such conviction shall be conclusive evidence. * * *

The appellant contends that the provision that a conviction of any offense involving moral turpitude shall be conclusive evidence is void unless it shall be construed to mean that the state board of medical examiners or the courts may inquire into the facts and circumstances attending such former conviction for the purpose of ascertaining if the offense for which the person was so convicted is one involving moral turpitude. The appellant contends that this provision is a rule of evidence, and not of substantive law; and from that it is argued, if we understand her contention, that it is the duty of the court to hear the evidence and determine as a question of fact, irrespective of the former conviction, whether the accused is really guilty of an offense involving moral turpitude.

It is true that in the case of *State Medical Examining Board v. Stewart*, 46 Wash. 79, 89 Pac. 475, 11 L. R. A. (N. S.) 557, 123 Am. St. Rep. 915, 13 Ann. Cas. 653, in discussing the question whether the statute of limitations could be pleaded in bar in a case of this kind, we said:

"The statute, therefore, constitutes a rule of evidence in such cases to which the statute of limitations does not apply."

[1] But whether the statute under consideration is a declaration of substantive law or a rule of evidence is of no importance; for we are satisfied that the Legislature has the power to declare either a rule of law or a rule of evidence in a case of this kind.

The appellant apparently relies upon a discussion of the power of the Legislature to interfere with judicial powers by Mr. Wigmore in his work on Evidence, vol. 2, at section 1353 and following. But that authority, after such discussion, says:

"Assuming, though, that conclusiveness cannot constitutionally be attributed by the Legislature to any testimonial evidence as such, there still remain two apparent exceptions, in which conclusiveness can lawfully be created under some circumstances; one is the finding of an inferior court, and the other is the finding of an executive officer within his province of action."

That authority conceded the power of the Legislature to make the judgment of an inferior court or an executive officer conclusive of the facts found by such court or officer.

In the note to *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7

Ann. Cas. 750, at page 752, the author of the note, after citing the principal case, where it was determined that the words "grossly unprofessional conduct of a character likely to deceive or defraud the public" were held to be invalid, then said:

"The weight of authority, however, seems to be in favor of the validity of such statutes. Thus statutes empowering certain boards to revoke the licenses of physicians who are guilty of unprofessional and dishonorable conduct, or of immoral conduct or habits, or of intemperance, or of a felony, have been held to be valid as a reasonable exercise of the police power, and not in violation of any provision of the Constitution. The courts have held generally that the acts of such boards in the exercise of this power are not judicial. *Spurgeon v. Rhodes* [167 Ind. 1] 78 N. E. 228; *Meffert v. State Board of Medical Registration, etc.*, 66 Kan. 710, 72 Pac. 247 [1 L. R. A. (N. S.) 811], affirmed 195 U. S. 625, 25 Sup. Ct. 790 [49 L. Ed. 850]; *State v. State Board of Medical Examiners*, 84 Minn. 387, 26 N. W. 123; *Matter of Smith*, 10 Wend. (N. Y.) 449; *State Board of Health v. Roy*, 22 R. I. 538, 48 Atl. 802. See, also, *State v. State Board of Medical Examiners*, 84 Minn. 391, 26 N. W. 125. In *Meffert v. State Board of Medical Registration, etc.*, 66 Kan. 710, 72 Pac. 247 [1 L. R. A. (N. S.) 811], the court said: 'The revocation of a license to practice medicine for any of the reasons mentioned in the statute was not intended to be nor does it operate as a punishment, but as a protection to the citizens of the state. Such requirements go to his qualifications; and where the qualification imposed is reasonable, one has no right to complain that he is deprived of the right to practice his profession because he has not conformed to such reasonable regulations.'

The appellant also cites the case of *Ex parte Mason*, 29 Or. 18, 43 Pac. 651, 54 Am. St. Rep. 772, as holding that the court should go behind the record of conviction and determine the facts upon which such conviction was based. As we read that case, the court held that in order to determine the penalty the court might inquire into the facts upon which the conviction was based, for it was there said:

"The defendant has been convicted of a misdemeanor, and, as has been shown, one involving moral turpitude. The record of his conviction is made conclusive evidence thereof, so that the production of such record established his guilt in the disbarment proceedings. The court may, however, go behind the record, for the purpose of determining upon the extent or severity of the punishment to be administered. * * * Here the penalty is removal or suspension, with full discretion as to which shall be adopted, and, if the latter, then as to the duration and limitation thereof. So we look behind the record here for the purpose only of determining the punishment that should be inflicted."

[2] In the case at bar there is no discretion, either in the state board of medical examiners or in the court, as to the penalty. The statute provides, as quoted above, that it shall be the duty of the board to revoke the license to practice medicine in the state. That is the only penalty.

In the *Stewart Case*, supra, we said:

"A conviction of any offense involving moral turpitude is made conclusive evidence of unprofessional conduct. It is not contemplated by the statute that the examining board shall try

the accused and find him guilty of an offense involving moral turpitude when there has already been a trial and conviction. Such former conviction by a court of competent jurisdiction is conclusive evidence of the moral character and professional conduct of the accused at the time the charge is made against him."

We are satisfied, therefore, that the Legislature had the power and authority to pass the statute under consideration, and that it was the duty of the state board of medical examiners, when the conviction was admitted, to cancel the appellant's certificate.

[3] It is also argued by the appellant that the term "moral turpitude," as used in the statute, is so vague and uncertain as to render the law unreasonable and void. Those words are capable of accurate definition, and are well understood, as we so determined in *Re Hopkins*, 54 Wash. 569, 103 Pac. 805.

[4] That the statutes relating to the practice of medicine within the state are within the police power of the Legislature, and are not in violation of any constitutional provision, has been frequently decided by this and other courts in numerous cases. *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *State ex rel. Smith v. Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *State Medical Examining Board v. Stewart*, 46 Wash. 79, 89 Pac. 475, 11 L. R. A. (N. S.) 557, 123 Am. St. Rep. 915, 13 Ann. Cas. 653; *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002.

We find no merit in the appeal, and the judgment is therefore affirmed.

MORRIS, C. J., and FULLERTON and ELLIS, JJ., concur.

HARVEY v. POCKOCK. (No. 13301.)

(Supreme Court of Washington. Aug. 29, 1916.)

1. HUSBAND AND WIFE ⇨270(7)—COMMUNITY PROPERTY—ACTION TO RECOVER—PLEADING.

In an action to recover from the estate of plaintiff's deceased father the sum of \$2,500 claimed as her deceased mother's interest in the community property of her father and mother left in the father's possession undisposed of by a decree of divorce, the allegation that such community property "was not brought into court in said divorce proceedings, nor divided by the court" sufficiently negated the idea that there was any affirmative adjudication, or any occasion therefor.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 979, 980; Dec. Dig. ⇨270(7).]

2. HUSBAND AND WIFE ⇨272(1)—COMMUNITY PROPERTY—DIVORCE—EFFECT.

Community property of husband and wife not disposed of by decree of divorce remains undisturbed so far as the respective interests of the members of the community therein are concerned, and becomes common property instead of community property, and either of them may thereafter enforce their rights therein by another action; and personal property remaining in the possession of one of the spouses at a divorce decree silent as to its disposition constitutes no exception to the rule.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1003; Dec. Dig. ⇨272(1).]

3. EXECUTORS AND ADMINISTRATORS *Cent. Dig. § 1807-1808; Dec. Dig. § 443(7); Pleading, Cent. Dig. § 881.*

—PRESENTATION OF CLAIMS—ALLEGATION.

In an action to recover from the estate of plaintiff's deceased father a sum claimed as the interest of her deceased mother in the community property left in the father's possession undisposed of by divorce decree, brought by plaintiff individually and as executrix and sole legatee of the estate of her mother while it was still in course of administration, the allegation that the plaintiff presented to defendant as administratrix of her father's estate a claim duly verified according to law amounted to an allegation that she presented the claim both individually and as executrix.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1807-1808; Dec. Dig. § 443(7); *Pleading*, Cent. Dig. § 881.]

4. EXECUTORS AND ADMINISTRATORS *Cent. Dig. § 1472; Rem. & Bal. Code, § 1472.*

—PRESENTATION OF CLAIMS—TIME—EXCUSE.
Rem. & Bal. Code, § 1472, providing that a claim against the estate of a deceased person not presented within one year after the first publication of the notice shall be barred, is a statute of limitation, without any exception, and the mere ignorance of the facts constituting the claim or cause of action will not postpone its operation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 764, 767; Dec. Dig. § 431(2).]

5. EXECUTORS AND ADMINISTRATORS *Cent. Dig. § 1479; Rem. & Bal. Code, § 1479.*

—ACTION—CONDITION PRECEDENT—PRESENTATION OF CLAIM.
Under Rem. & Bal. Code, § 1479, providing that no claimant against an estate shall maintain an action unless the claim shall have been first presented to the executor or administrator, claimant could not recover in an action against the estate of her deceased father, where no claim had been presented to his administratrix prior to the action.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 764, 767; Dec. Dig. § 431(2).]

6. EXECUTORS AND ADMINISTRATORS *Cent. Dig. § 1815, 1816, 1838, 1839, 1841; Dec. Dig. § 444(2).*

—ACTION—ALLEGATION—CAPACITY OF PLAINTIFF.
In an action to recover from the estate of her deceased father a sum claimed as the interest of her deceased mother in community property, the allegation that plaintiff was the sole legatee, and the executrix of the will of her mother sufficiently alleged that plaintiff was the legally qualified and acting executrix of her mother's estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1815, 1816, 1838, 1839, 1841; Dec. Dig. § 444(2).]

Department 2. Appeal from Superior Court, Whitman County; R. L. McCrokey, Judge.

Action by Florence Harvey, individually and as executrix and sole legatee of the estate of Elizabeth M. Harvey, deceased, against Sarah Pocock, as administratrix of the estate of B. F. Harvey, deceased. Judgment for defendant dismissing the action, and plaintiff appeals. Reversed and remanded.

A. O. Colburn, of Spokane, for appellant. Neill & Burgunder, of Oolfax, for respondent.

PARKER, J. The plaintiff seeks recovery from the estate of her deceased father, B. F. Harvey, of the sum of \$2,500, which she claims

as the share of her deceased mother's interest in the community property of her father and mother left in his possession undisposed of by the decree of divorce which dissolved their marriage. The defendant's demurrer to the complaint being by the superior court sustained, and the plaintiff electing to stand upon her complaint and not plead further, judgment of dismissal was rendered against her, from which she has appealed to this court.

The complaint, omitting formal parts, reads as follows:

"Plaintiff alleges that she is the sole daughter of Elizabeth M. Harvey, deceased, and B. F. Harvey, deceased; that her father, B. F. Harvey, died prior to the time of her mother's death leaving an estate of the value of approximately \$15,000, and a will by the terms of which certain legacies were given and the defendant, Sarah Pocock, was made sole residuary legatee. Plaintiff further alleges that she is the sole legatee and executrix of the last will of Elizabeth M. Harvey, and Sarah Pocock is the administratrix of the said B. F. Harvey's estate, and neither estate has yet been closed.

"Prior to the death of said B. F. Harvey and Elizabeth Harvey, to wit, on the 6th day of February, 1913, they were divorced from each other by decree of the above-entitled court. By said decree certain community property belonging to the parties was brought into court by the pleadings and divided. There was certain other property, however, belonging to the community in the possession and control of said B. F. Harvey which was not brought into court in the said divorce proceedings nor divided by the court. The said property was the sum of \$3,000 in cash and a \$2,000 mortgage. The property was sequestered by said B. F. Harvey and purposely withheld from the court so that it would not be divided, and said B. F. Harvey converted said money and property to his own use and had the sole use and benefit thereof. The said property after said divorce became the common property of said B. F. Harvey and Elizabeth M. Harvey, and said Elizabeth M. Harvey was therefore the rightful owner of one-half thereof, to wit, the sum of \$2,500.

"The time within which creditors were to present their claims against the estate of B. F. Harvey, deceased, expired on July 23, 1915. Prior to that time the plaintiff caused to be presented to the said Sarah Pocock, as administratrix of the said estate, a claim duly verified according to the law claiming the sum of \$1,500 as a lawful charge against said estate by reason of the facts hereinbefore alleged. At that time plaintiff had no knowledge or information with regard to any sum sequestered as above alleged except the sum of \$3,000, and did not discover the fact of the existence of the \$2,000 additional until on or about August 5, 1915. Said claim was rejected in writing by said Sarah Pocock and was filed in the said probate proceedings on August 21, 1915. Three months have not yet elapsed since said rejection of claim."

The theory upon which the learned trial court seems to have sustained the demurrer and upon which the argument of counsel for respondent proceeds is that the decree in the divorce action became a final adjudication of the community property rights of Mrs. Harvey, estopping her from thereafter claiming any of the personal community property remaining in the possession of her husband, even though such property was not brought

into the divorce action or specifically disposed of by the decree of divorce.

[1] It is to be noted that the complaint does not allege that there was any allegation in the complaint in the divorce action or adjudication in the decree in that action that there was no other community property than that disposed of specifically by the decree, but the allegation is that this alleged community property "was not brought into court in said divorce proceedings nor divided by the court." This, we think, negatives the idea that there was any affirmative adjudication, or any occasion therefor, that there was no other community property than that specifically brought into the divorce action and disposed of by the decree therein.

[2] It has become the settled law of this state that under such a state of facts the community property undisposed of by the decree of divorce remains undisturbed so far as the respective interests of the members of the community therein is concerned, and that either of them may thereafter enforce their rights in such property by another action. Such property becomes common property instead of community property after the dissolution of the community by the decree of divorce. *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 1103; *Graves v. Graves*, 48 Wash. 684, 94 Pac. 481; *James v. James*, 51 Wash. 60, 97 Pac. 1113, 98 Pac. 1115; *Barkley v. American Savings Bank & Trust Co.*, 61 Wash. 415, 112 Pac. 495; *Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 945; *Schneider v. Biberger*, 76 Wash. 504, 136 Pac. 701.

Counsel for respondent, while conceding this to be the general rule, ingeniously argue that personal property remaining in the possession of one of the spouses at the time of the divorce decree, the pleadings and the decree both being silent as to the disposition of such property, should constitute an exception to this general rule. The argument seems to be that, because this alleged community property in the possession of Mr. Harvey could have been brought into the divorce proceedings and specifically disposed of by the decree, appellant, as the successor in interest of Mrs. Harvey, is thereby estopped from now questioning the right of his administratrix to such property. We have at least one decision of this court which plainly makes the general rule above noticed applicable to personal property remaining in the possession of one of the spouses and undisposed of by the decree of divorce. Such was, in substance, the holding in *Barkley v. American Savings Bank & Trust Co.*, *supra*, where the husband after divorce was permitted to recover one-half of a sum of money the whole of which was community property and in the possession of the wife at the time of the rendering of the decree of divorce dissolving their marriage, and was not brought into the divorce action by the pleadings or disposed of by the decree of divorce. While that ac-

tion was against the bank, it stood in the shoes of the wife, with knowledge of the fact that the money was community property before the divorce and common property of the former members of the community thereafter. Counsel for respondent call our attention to and rely upon observations made by this court in *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431, and *King v. Miller*, 10 Wash. 274, 38 Pac. 1020. There may be some remarks in those decisions lending some support to the theory of counsel for respondent, but we think, in the light of the facts involved in those cases, the remarks there made by the court are not controlling here, especially in the light of our later decisions above noticed. We are of the opinion that the complaint in this action states a good cause of action in so far as appellant's right to recover the \$1,500, the one-half of the \$3,000 in money remaining in Mr. Harvey's hands and undisposed of by the decree of divorce, is concerned.

[3] It is contended in respondent's behalf that the allegations of the complaint fail to show that appellant's claim for the \$1,500 was presented to respondent as administratrix by any one entitled to present the same; this upon the theory that appellant was not individually entitled to present or make such claim because the estate of her mother was still in the course of administration, and because it is not plain from the allegations of the complaint that she presented the same as executrix of her mother's estate. The allegation of the complaint touching this matter is that:

"The plaintiff caused to be presented to the said Sarah Pocoock, as administratrix of the said estate, a claim duly verified, according to the law, claiming the sum of \$1,500 as a lawful charge against said estate."

We think this amounts to an allegation that appellant presented the claim both individually and as executrix. This plainly was a legal presentation, though her presentation of the claim individually may have been unnecessary.

[4] It is contended in appellant's behalf that she has pleaded facts sufficient to excuse her from the necessity of presenting a claim for the one-half of the proceeds of the mortgage; the argument being that she was excused from so doing in bringing this action because of her want of knowledge of her rights to such sum until after the expiration of the year for presentation of claims of creditors. There seems to be two valid reasons why the failure of appellant to present her claim to the executrix of her father's estate defeats her right to recover the one-half of the proceeds of the \$2,000 mortgage in this action. Section 1472, Rem. & Bal. Code, relating to the presentation of claims to the estates of deceased persons, reads:

"If a claim be not presented within one year after the first publication of the notice, it shall be barred."

We find no provision in the statute authorizing us to ignore this plain mandate or extend the time for filing claims because of the want of knowledge on the part of the claimant as to his or her rights. This is, in effect, a statute of limitation without any exception therein, and in such cases the rule seems to be thoroughly established that:

"Mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations." 25 Cyc. 1212; *Cornell v. Edsen*, 78 Wash. 663, 139 Pac. 602, 51 L. R. A. (N. S.) 279.

This is not a cause of action for relief upon the ground of fraud, in which case there might possibly be other controlling considerations, but it is a simple cause of action for the recovery of money the proceeds of the mortgage, which, according to the allegations of the complaint, accrued before the death of Mr. Harvey.

[5] Another valid reason why appellant cannot recover in this action one-half of the \$2,000 proceeds of the mortgage is because no claim has been presented to the administratrix of her father's estate at any time prior to the beginning of this action. Section 1479, Rem. & Bal. Code, reads:

"No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator."

This action has been given full force and effect in our decision in *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239, and *Ward v. Magaha*, 71 Wash. 679, 685, 120 Pac. 395, 397. In our opinion in the latter case it is said:

"The presentation is a fact essential to the cause of action as much so as the instrument sued on."

[6] Contention is made in respondent's behalf that the allegations of the complaint do not show capacity on the part of appellant to sue in this action. The argument seems to be that she has no capacity to sue as an individual because the estate of her mother is still in the course of administration, and that the allegations of the complaint do not show that she is the duly qualified and acting administratrix of her mother's estate. The allegation of the complaint touching her being administratrix is "that she is the sole legatee and executrix of the last will of Elizabeth M. Harvey." This it must be conceded is a somewhat general allegation, but in view of the liberal rules of pleading prevailing in this state, we are constrained to hold that it amounts to a sufficient allegation of her being the legally qualified and acting executrix of her mother's estate. Whether or not she is entitled to sue individually is therefore of no consequence in this action. Her joining as plaintiff in her individual capacity could in no event lessen her right to sue as executrix while the estate remains in the course of administration.

We conclude, therefore, that the complaint states a good cause of action in so far as appellant's claim to the \$1,500, the one-half of the \$3,000 of cash remaining of the community property in the possession of her father at the time of the divorce, is concerned; but that it fails to state a good cause of action in so far as her claim for the \$1,000, the one-half of the proceeds of the mortgage remaining in his possession and undisposed of by the decree of divorce, is concerned.

The judgment is reversed, and the cause remanded to the superior court for further proceedings not inconsistent with the views herein expressed.

MORRIS, C. J., and MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

CLARK LLOYD LUMBER CO. v. PUGET SOUND & C. RY. CO. (No. 18393.)

(Supreme Court of Washington. Aug. 25, 1916.)

1. LIMITATION OF ACTIONS \S 32(1)—STATUTE APPLICABLE — IMMEDIATE DAMAGES — STATUTES GOVERNING.

Rem. & Bal. Code, \S 157, limits action on contract or liability, express or implied, arising out of written agreement, to be brought within six years. Section 159 provides that an action for direct trespass *vi et armis* shall be begun within three years. Section 165 provides that an action for relief not before provided for shall be commenced within two years after accrual of the cause. By contract plaintiff reserved the right to riparian use as fixed at the time of his deed to defendant of adjoining land. Defendant took possession of the land and injured the riparian land for the purposes as used by plaintiff. *Held*, that the action was barred only after three years under section 159.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. \S 143, 145; Dec. Dig. \S 32(1).]

2. EASEMENTS \S 55—RESERVATION OF RIGHTS — RIGHTS OF PARTIES.

Where plaintiff riparian owner deeded a right of way to defendant, and by separate contract reserved the right to use the shore line as it was then occupied, defendant, in constructing a road along the right of way, was liable if it changed the shore line or impaired the use thereof.

[Ed. Note.—For other cases, see *Easements*, Dec. Dig. \S 55.]

3. DAMAGES \S 39 — INJURIES TO PROPERTY — CONSEQUENTIAL DAMAGE.

Where a riparian owner occupied a mill site and shore line with boom, injury to the shore line, with consequential damages to the mill site, gives a right to recover for injuries to the mill site as well; the property being one entire property.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 280-284; Dec. Dig. \S 39.]

4. DAMAGES \S 109—TRESPASS—MEASURE.

Measure of damages for trespass upon property, with impairment of riparian rights, is not the difference between the value before and after the trespass; but where removable things were put upon the property, menacing or destroying its use, the measure was the reasonable cost of removing the things and restoring the property to its original condition.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 273-278; Dec. Dig. \S 109.]

5. DAMAGES — \$138 — EXCESSIVE DAMAGES — TRESPASS — DESTRUCTION OF MILL SITE.

Verdict of \$9,237.75, for impairment and destruction of mill site and riparian rights, held excessive, where cost of restoration to original condition would not exceed \$2,500.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 897, 898; Dec. Dig. § 188.]

Department 1. Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

Action by the Clark Lloyd Lumber Company against the Puget Sound & Cascade Railway Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed conditionally, with provision for filing remittitur.

Kerr & McCord, of Seattle, for appellant. Ryan & Desmond, of Seattle, and Coleman & Gable, of Mt. Vernon, for respondent.

CHADWICK, J. This action is brought to recover for damages to respondent's mill site and boom grounds and for damages to a flume. Another element of damage was rejected by the jury, and will not be noticed in this opinion.

Plaintiff owned property along the shore of the Skagit river. Its mill was on the west shore. It operated a fin boom anchored to the east shore. Appellant desiring to construct a railroad along the east bank of the stream across the property of respondent, the parties, on the 27th day of July, 1912, with intent to preserve their mutual rights, entered into a written contract. The material parts of the contract follow:

"Whereas, said first party has under even date herewith executed to second party a certain right of way deed over certain lands in Skagit county, to wit, lots 6, 7, and 8 in section 30 and lots 8 and 9 in section 29, township 35 north, range 5 of W. M., reference to which deed is hereby made for a more particular description of the lands so conveyed; and whereas, the said first party is desirous of obtaining the rights and privileges herein agreed upon: Now, therefore, for a valuable consideration it is hereby agreed between the parties hereto as follows: (1) That the said party of the first part is hereby granted the right to cross and recross said right of way so conveyed with such logging or skid roads, shutes, or tramways, or to haul logs or bolts across said right of way and railroad at such places and points as may be convenient for first party, and also the right to take and remove across said railroad and right of way in any feasible way whatsoever any and all timber on said described lands: Provided, however, that said first party shall use ordinary care and diligence in taking any and all timber, logs, or bolts over and across said railroad track, having due regard to the condition of the ground and the feasibility and cheapest way to log the timber off said lands and the rights of second party herein in operating its railroad, and in case any damage is done to second party's railroad or track while first party is so logging and removing the timber as hereinbefore provided, it shall not be liable to second party for any injury done or caused unless such injury is caused by the willful, deliberate, or careless act of first party. (2) That the said first party shall have a right to use and occupy all the shore line along the Skagit river for booming, logging, or other purposes, and shall have the right to keep its fin

booms tied on the stumps it is now attached to or any other structure it may place on such shore line or lands: Provided, however, that such occupancy of the shore line and tying and maintaining of said fin boom on said stumps shall not interfere with the construction, operation, and maintenance of the railroad of said second party."

In building the railroad, appellant did not follow the center of the right of way, but followed the shore line as nearly as it could. It blasted the stumps to which the boom was anchored, and wasted the debris from the cut along the shore over the bank of the stream. The contention of respondent is that the anchorage of its boom and a cove in which it floated logs were destroyed, and the currents of the stream were so shifted as to result in material damage to its mill property. A jury found that respondent was entitled to recover damages for the blasting of the stumps, and the deposit of waste rock and dirt in the cove, in the sum of \$9,237.75, and for the destruction of the flume in the sum of \$125. Judgment was entered accordingly.

[1] The first question of law to be considered is whether the action is barred by the statute of limitations. It is contended that this is an action for consequential damages sounding in tort, and is barred under Rem. & Bal. Code, § 165. "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued," and does not come under section 159, which provides that an action for a direct trespass *vi et armis* shall be begun within three years, or section 157, limiting an action upon a contract in writing, or liability express or implied arising out of a written agreement. *Suter v. Wenatchee*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. Rep. 881; *Denney v. Everett*, 46 Wash. 342, 89 Pac. 934, 123 Am. St. Rep. 934; *Welch v. Seattle*, 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047, are relied on. The *Welch* Case in no way bears upon the facts of this case. Indeed the case distinguishes itself. It is said in the opinion that the damages sought were not damages to the freehold, in which plaintiff had no interest, but compensation for the loss of business. There being no element of trespass upon tangible property, in so far as the plaintiff was concerned, it followed that the loss of business complained of was purely consequential. In *Suter v. Wenatchee*, supra, the same question was before the court. In that case the court held that damages, resulting from an overflow from an irrigating canal lawfully built, but without sufficient provision for surplus water, were consequential and the right to recover was barred by the two-year statute. So, too, in *Denney v. Everett*, supra, the court was called upon to consider a lawful act with consequent injury. The *Suter* Case was followed.

These decisions are instructive, and, while

holding on the record made in the particular case, that the action was not for a direct trespass, but a consequential injury, they in no way militate against respondent's right to recover in the case at bar. That section 159 of the Code refers to trespasses that are direct, and not to those fictional trespasses that give rise to actions upon the case, is suggested in the *Suter Case*. The rule for determining the character of the action is best stated in *Blackstone's Commentaries* (Lewis' Ed. book 3, p. 123):

"And it is a settled distinction that, where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass *vi et armis* will lie, but an action on the special case, as the damages consequent on such omission or act."

In none of the cases relied on was there an immediate injury. The blasting of the stumps and the waste of the debris over the bank and into the cove was an immediate injury. The damages which may result do not have to be immediate to sustain an action under section 159. The statute does not concern itself with the moment of time when the damage actually accrues or the amount of the damage. They may continue and grow in volume. It concerns itself only with the character of the trespass. If a thing lawful to be done results in damage, the case falls under the two-year statute. If the thing done is wrongful in its inception to the extent that it presently invades a property right, the three-year statute applies. Our thought is illustrated in the *Suter Case*. In order to avoid the two-year statute, the pleader charged negligent construction as an immediate or direct invasion of his property right. The theory was rejected; the court saying:

"The manner of construction was not in itself wrongful. Appellant had the lawful right to construct as it chose, and to permit the water to flow through the canal to its full capacity. These things were of no concern to respondents, unless they resulted in some injury to them. Such injury, so resulting, must necessarily have been consequential, and not the direct result of wrongful force applied to the respondents' lands, as must have been true to create a trespass."

In the instant case, appellant did not have "a lawful right to construct as it chose." Its rights are defined in the contract which clearly implies the preservation of respondent's property for the uses intended, as well as its own right to build its railroad. In the *Suter Case*, no damage would have resulted from the primary act of building the canal. The damage complained of was the result of its after negligence in filling the canal beyond its capacity. But here the damage, if any, came from a physical act touching the property of respondent, and theoretically, at least, was a damage in its inception. Having decided that the action, if treated as an ac-

tion for trespass, falls within the three-year statute, it will be unnecessary to inquire whether it might also be sustained as an action for breach of contract under the six-year statute. *Harding v. Ostrander R. & Timber Co.*, 64 Wash. 224, 116 Pac. 635; *Murray v. Wishkah Boom Co.*, 76 Wash. 605, 137 Pac. 130.

[2] Appellant contends that, having a deed to the right of way, it had a superior right to construct its road in the manner in which it did, and that the rights of respondent are subservient and subordinate to it. The right to invade the property right of respondent is not given by the deed, nor does a fair construction of the contract sustain it. The right reserved by respondent was to use and occupy the shore line in the manner it was then used. It would have had this right without any contract. This right is not destroyed by the further provision of the contract that such occupancy shall not interfere with the construction, operation, and maintenance of the railroad by appellant. The contract must be construed by reference to its whole context. "Such occupancy" has direct reference to the shore as it was, and gave to appellant no right to deny that use, or to so change the shore as to interfere with respondent's property; the only exception being, possibly, that the contract implies a right to remove the stumps to which the boom was attached, providing, or giving to respondent opportunity to provide, other means for anchoring its boom.

[3] Nor do we find merit in the contention that no damages can be recovered for injury to the mill site. The property was one property, and the damage affected it as a whole.

[4, 5] It is further contended that the court applied the wrong measure of damages, and that the damages are excessive. With this we agree. The court instructed the jury to find the difference between the value of the property before and after the trespass, and to return a verdict for the difference. We think the court fell into error. The measure of damages, where a removable thing is put upon property that menaces or destroys its use, is the reasonable cost of removing it. To illustrate our thought, it will be sufficient if we refer to remedies. The respondent in this case could have removed the loose rock and waste, and put in a "dead man" in place of the stumps which were removed, and recovered the reasonable cost of restoring its property, or it could take the property as it is and recover such sum as a jury might find to be the reasonable cost of removal. *Sutherland on Damages* (8d Ed.) vol. iv, § 1018; *Sedgwick on Damages* (8th Ed.) vol. 3, § 932; *Koch v. Investment Co.*, 9 Wash. 405, 37 Pac. 703.

Under the testimony in this case, we cannot escape the conclusion that the jury has acted as a medium between a willing seller and an unwilling buyer. Both sides submit-

ted testimony tending to show the cost of removing the rock and waste material from the river bank. It is clear, even under respondent's own testimony, that the shore could be restored to its former outline at a cost not to exceed \$2,500. The cost of repairing the damage being reasonably certain, we have concluded to exercise our discretion, and order a conditional remission of the judgment, so that the recovery will not exceed the sum of \$2,500 and \$125 damages to the flume. If, within 30 days after the remittitur goes down, respondent will satisfy the judgment in excess of \$2,625, the judgment will stand affirmed. If it does not, the case will be set down for a retrial by the court below.

The instructions in this case are of great length, and are subject, at least, to the charge of argumentativeness, and in some degree to the charge that they are conflicting. The issue is a simple one, and, in the event of a retrial, we would suggest that it be more sharply defined.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

STATE ex rel. WARSON v. HOWELL,
Secretary of State. (No. 13625.)

(Supreme Court of Washington. Aug. 16, 1916.)

1. STATES — 27 — SENATORS — ELECTION DISTRICTS — APPORTIONMENT — STATUTES — VALIDITY.

Although Const. art. 2, § 3, requires state senators to be elected from districts apportioned according to population, the fact that the latest census shows gross inequalities in the districts is no ground for setting aside the legislative apportionment, which, when enacted, was based upon proper districts.

[Ed. Note.—For other cases, see States, Cent. Dig. § 31; Dec. Dig. — 27.]

2. CONSTITUTIONAL LAW — 48 — APPORTIONMENT — STATUTES — VALIDITY — PRESUMPTION.

Since the Legislature may, aside from constitutional restrictions, apportion the state as it chooses in senatorial districts, the presumption of constitutionality attaches to apportionment acts in the same manner as it does to other statutes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. — 48; Statutes, Cent. Dig. § 56.]

3. CONSTITUTIONAL LAW — 48 — APPORTIONMENT — STATUTES — VALIDITY — PRESUMPTION.

To show unconstitutionality of an apportionment act, the facts adduced must be clear and convincing, and establish beyond question a transgression of the constitutional limitations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. — 48; Statutes, Cent. Dig. § 56.]

4. STATES — 27 — SENATORS — ELECTION DISTRICTS — APPORTIONMENT — POPULATION.

Const. art. 2, § 3, requiring state senators to be elected from districts apportioned according to population, does not require that the apportionment be made with mathematical exact-

ness, but the Legislature exercises a discretion in the apportionment.

[Ed. Note.—For other cases, see States, Cent. Dig. § 31; Dec. Dig. — 27.]

5. STATES — 27 — SENATORIAL DISTRICTS — STATUTES — VALIDITY.

The Apportionment Act of 1901 (Laws 1901, p. 79), fixing the districts from which state senators shall be chosen, is not unconstitutional on the ground of inequality of representation, under Const. art. 2, § 3.

[Ed. Note.—For other cases, see States, Cent. Dig. § 31; Dec. Dig. — 27.]

6. CONSTITUTIONAL LAW — 43(1) — VALIDITY — TIME TO QUESTION.

The Apportionment Act of 1901, even if it be conceded that it was unconstitutional, cannot be questioned by a proceeding brought after 15 years of uncontradicted action under such statute, since a declaration that it is invalid would create great confusion, and affect the validity of many laws enacted by Legislatures elected under it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. — 43(1).]

7. CONSTITUTIONAL LAW — 43(1) — STATUTES — VALIDITY — TIME TO QUESTION — POLITICAL STATUTES.

The argument that, if an act is invalid when passed, the vice continues and the statute may be annulled at any time does not apply to political or administrative legislation, but such laws must be attacked in seasonable time without delay.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. — 43(1).]

En Banc. Original application in Mandamus by the State, on the relation of Robert L. Warson, against I. M. Howell, Secretary of State. Writ denied.

Palmer & Askren, of Seattle, for relator. W. V. Tanner, Atty. Gen., and Glenn Fairbrook, of Olympia, for respondent.

FULLERTON, J. This is an application for a writ of mandamus, made by the relator Warson against I. M. Howell, secretary of state, to compel that officer to accept the relator's filing as a candidate for the office of state senator for the counties of Kitsap and Mason on the Republican primary ticket. The relator's application is based on section 1, article 22, of the Constitution, which apportioned the state into senatorial and representative districts and prescribed the number of senators and representatives that should be elected as the first legislative body following the adoption of the Constitution. In this apportionment the counties of Kitsap and Mason constituted the Twentieth senatorial district, which was entitled to one senator. The secretary of state refused the proffered filing, on the ground that the Legislature has twice since the adoption of the Constitution reapportioned the state, the last apportionment being at the session of 1901 in which the state was divided into 42 single senatorial districts, the counties of Mason, Kitsap, and Island being made the Twenty-Third district entitled to one senator. This act, the secretary contends, super-

sedes the apportionment made by the section of the Constitution cited. The Constitution provides for a reapportionment of the several legislative districts by the Legislature at stated intervals, and if the apportionments made by that body are not violative of the restrictions placed upon the legislative powers by the Constitution, the relator's application was properly denied.

It is the contention of the relator that the apportionments made by the Legislature are violative of the constitutional restriction and hence are void, and that the only lawful apportionment under which members of the Legislature can be legally elected is the one contained in the Constitution. This constitutes the sole question for our determination.

[1] The sections of the Constitution which relate to apportionments are the following:

"The House of Representatives shall be composed of not less than sixty-three nor more than ninety-nine members. The number of senators shall not be more than one-half nor less than one-third of the number of members of the House of Representatives. The First Legislature shall be composed of seventy members of the House of Representatives and thirty-five senators." Article 2, § 2.

"The Legislature shall provide by law for an enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five, and every ten years thereafter; and at the first session after such enumeration, and also after each enumeration made by the authority of the United States, the Legislature shall apportion and district anew the members of the Senate and House of Representatives, according to the number of inhabitants, excluding Indians not taxed, soldiers, sailors, and officers of the United States Army and Navy in active service." Article 2, § 3.

"After the first election the senators shall be elected by single districts of convenient and contiguous territory at the same time and in the same manner as members of the House of Representatives are required to be elected, and no representative district shall be divided in the formation of a senatorial district. They shall be elected for the term of four years, one-half of their number retiring every two years. The senatorial districts shall be numbered consecutively, and the senators chosen at the first election had by virtue of this Constitution, in odd-numbered districts, shall go out of office at the end of the first year, and the senators elected in the even-numbered districts shall go out of office at the end of the third year." Article 2, § 6.

These sections of the Constitution, it will be observed, impose upon the Legislature, when apportioning and redistricting anew the numbers of the Senate and House of Representatives, certain restrictions: (1) Neither the Senate nor House of Representatives may contain more or less than certain specified numbers; (2) senatorial districts must be single and be of convenient and contiguous territory; (3) no representative district shall be divided in the formation of a senatorial district; (4) the apportionment must be made according to the number of inhabitants. There is no contention that the first three of these requirements were violated in either of the apportionment

acts made by the Legislature. The sole contention is that the apportionments were not made according to the number of inhabitants. Tables are presented showing the number of inhabitants in each several district above and below the unit of representation adopted both at the time the apportionments were made and as shown at the time of the taking of the federal census of 1910. Each of these tables shows inequalities—the comparisons based on the census of 1910 showing such inequalities to be exceedingly gross. It may be remarked here, however, that this latter fact furnishes no ground for declaring the legislative apportionment unconstitutional. While it argues strongly against the failure of the Legislature to perform its duty, it states no ground for setting aside a legislative apportionment valid when enacted. It is held by all of the courts that the Legislature cannot be compelled to redistrict the state as directed by the Constitution, and as a corollary thereto it must follow that an apportionment act, lawfully enacted, will continue in force until superseded by a subsequent valid act.

[2, 3] The question, then, turns on the constitutionality of the Apportionment Acts. The act of 1901, being the last upon the subject by the Legislature, repeals the act of 1890 (Laws Sp. Sess. 1890, p. 3), supersedes the constitutional apportionment, and is the law now in force under which the ensuing Legislature must be elected unless it has never been constitutionally valid. It cannot be disputed that the presumption of constitutionality attaches to apportionment acts in the same manner that it does to any other act of the Legislature, and that any doubt as to the power of the Legislature to pass the particular act must result in a finding that the act is within the legislative power. It is axiomatic, also, that the Constitution is a limitation of power, not a grant of power, and that, save for constitutional restrictions, the Legislature could apportion the state in any manner it deemed fit, and the courts would be powerless to inquire into the validity of the act. It follows, therefore, that the facts adduced to show the alleged unconstitutionality of the act in question must be clear and convincing, and must establish beyond question that the Legislature in enacting the law went entirely beyond the limits marked by the Constitution.

[4] It is clear, furthermore, in providing that the apportionment should be made according to the number of inhabitants, the framers of the Constitution did not intend that this should be done with mathematical exactness. Indeed, it requires no demonstration to show that, because of the other restrictions imposed, this is wholly impossible. Something, therefore, was left to the discretion of the Legislature. If in complying with the other mandates of the Constitution it finds that it is compelled to ignore equal-

ty in population to some extent, its enactment will nevertheless be valid because of the necessity of the case. Before it will be invalid, its action must partake of an arbitrary disregard of the requirements of the Constitution, or be so gross and inconsistent as to imply arbitrary action.

[6] Turning then to the Apportionment Act of 1901, we find no reason to hold it unconstitutional on the ground of inequality of representation. There are inequalities, it is true, but none that indicates arbitrary action on the part of the Legislature. Several districts accorded only one representative contain more than the unit of population necessary for one representative, but none of them approaches the population which would entitle it to two representatives. The same can be said of districts whose population was less than the number of units required to entitle them to the number of representatives granted them. In no instance was the deficiency equal to a unit, and in most of them the differences were comparatively insignificant. In the few instances where the surplus or deficiency is considerable, it is evident that some special reason induced the making of the differences, not an intent on the part of the Legislature to ignore the constitutional requirements. On the merits of the controversy, therefore, we are unable to conclude that the writ should be granted.

[6, 7] But even if it were concluded that the act of 1901 was such a departure from the requirements of the Constitution as to disclose a willful disregard of its provisions, we think it now too late for the relator to raise the question. The act complained of has stood uncontradicted for more than 15 years. Seven Legislatures have been elected under it. Laws have been passed which so far affect the rights of the electors that a return to the old districts marked out by the Constitution would result in the utmost confusion, if not chaos, requiring perhaps a session of the Legislature before an election could be held. No court is required, on a complaint made after this lapse of years, to subject the people of the state to the turmoil such a course would cause. This form of legislation is, to a great extent, political and administrative in its nature, and involves no individual rights other than such as pertain to the electorate as a whole. Persons who conceive that the Legislature has acted in disregard of the mandates of the Constitution must therefore act promptly else they will be held to have waived their right to act at all.

"The argument that, if an act is invalid when passed, the vice continued to live in it as long as it remains on the statutes, and therefore may be annulled at any time, is not sound when attempted to be applied to legislation that is political or administrative in its nature. It may be true the laches cannot give validity to a void

act, but when no property right is involved, and the question is purely political and administrative individuals or parties that have seen the act in operation for years, and the affairs of state carried on under it, without offering objection or making protest, will not be heard at a late day to question its validity. They must act in seasonable time, and not delay until the conditions they have acquiesced in and assented to have become firmly established as a part of the system of the government."

The writ is denied.

MORRIS, C. J., and PARKER, MOUNT, MAIN, and ELLIS, JJ., concur. CHADWICK, HOLCOMB, and BAUSMAN, JJ., absent and taking no part.

MOORE v. TWIN CITY ICE & COLD STORAGE CO. (No. 12942.)

(Supreme Court of Washington. Aug. 29, 1916.)

1. LANDLORD AND TENANT § 55(2)—REVERSION—"WASTE"—FORFEITURE.

Under the lease of a lot 50 by 137 feet, not generally valuable for agricultural purposes, adjacent to the tenant's lot, used by it for a grape juice factory and cold storage plant, not specifying the purposes for which it might be used, but providing that the lessee should not, under penalty of forfeiture, make or suffer any waste thereof, or any alteration therein without the lessor's consent in writing, the lessee's placing upon the lot of surface soil, sand, gravel, or rock, excavated from the adjacent lot so that the sand might be used in the concrete mixture for the cellar or basement wall, and that the gravel or rock might be readily moved and the surface soil disposed of, all of which had been removed, with the exception of 12 yards on a corner of the lot left to make a better driveway, did not constitute waste for which the lessor might forfeit the lease; "waste" being an unreasonable and improper use, abuse, mismanagement, or omission of duty touching realty by one rightfully in possession, which results in substantial injury thereto.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 140-142; Dec. Dig. § 55(2).]

For other definitions, see Words and Phrases, First and Second Series, Waste.]

2. LANDLORD AND TENANT § 213(3)—RENT—PAYMENT.

Where the tenant mailed a check for the amount of rent then due, containing a notation "Lot C," when that covered by the lease was "Lot A," not owned by the landlord, he must have known that the check was intended as payment for "Lot A."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 852; Dec. Dig. § 213(3).]

3. PAYMENT § 22—CHECK OR CASH—OBJECTION.

Where tender of rent in the form of a check was not refused because it was not made in cash, the landlord, in his action for a forfeiture, could not claim that the tender should have been made in money and not by check.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 87, 88; Dec. Dig. § 22.]

Department 2. Appeal from Superior Court, Benton County; O. R. Holcomb, Judge.

Action by Mary J. Moore against the Twin City Ice & Cold Storage Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded, with direc-

tion to the superior court to dismiss the action.

Moulton & Jeffrey, of Kennewick, for appellant. O. B. Hamblet, of Kennewick, and Lon Boyle, of Prosser, for respondent.

MAIN, J. This action was instituted by the plaintiff for the purpose of securing the forfeiture of a lease of real estate, for possession of such real estate, and for damages on account of waste claimed to have been caused by the defendant as tenant. After the action had been pending for some time, a supplemental complaint was filed, claiming as an additional ground for forfeiture the failure to pay rent, which had become due subsequent to the time when suit was begun. After the issues were framed the cause was tried to the court without a jury, and resulted in a judgment decreeing the forfeiture of the lease, the possession of the premises to the plaintiff, and \$10 damages. From this judgment the defendant appeals.

The facts are briefly these: On September 9, 1913, the respondent executed and delivered to the appellant a lease for lot A of Moore's First Addition to Kennewick, Wash. By the terms of this lease, the tenancy was to begin on September 15, 1913, and continue for a period of three years. The rent specified was \$10 per year. The lot next adjacent on the west to that covered by the lease was owned by the appellant, and was used by it for a grape juice factory and cold storage plant. Prior to the execution of the lease, and for a period of about six or seven years, the appellant, with the consent of the owner of the lot covered by the lease, had used the same as a yard for its horses; but at no time had paid any rent therefor. Prior to the execution of this lease, the son of the respondent had tendered to the manager of the appellant a lease to be executed, with rent reserved in the sum of \$1 per year. This lease the appellant refused to execute, the reason therefor not appearing in the record. The executed lease does not specify the purpose to which the lot may be devoted. Some time prior to the month of June, 1914, the appellant began the excavation for a cellar or basement under the building occupied by it, as its cold storage plant and grape juice factory. In making this excavation the surface soil, sand, gravel, and rock were taken out on the east side of the lot, and temporarily placed upon the lot covered by the lease from the respondent. When the excavated material was placed upon the lot, the surface soil, gravel or rock, and sand, were separated, and placed in different piles. This was so that such of the sand as was necessary could be used in the concrete mixture for the cellar or basement walls, and that the gravel or rock could be readily moved, and the surface soil properly disposed of. Part of the rock and gravel had been removed from the lot owned by the respondent prior to the time

when the suit was begun; and at the time of the trial it had all been removed, with the exception of approximately 12 yards on the northwest corner of the lot. This was left for the purpose of making a better driveway in approaching the building. The lot covered by the lease was in dimensions 50 feet by 137 feet. The terms of the lease referring to the care and preservation of the premises are as follows:

"The said lessee promises to * * * not make or suffer any waste thereof, nor lease or underlet, or permit any other person or persons to occupy any portion thereof, or improve same, or make, or suffer to be made, any alteration therein but with the approbation of the lessor thereto, in writing, having been first obtained and the lessor may enter to view and make improvements, and to expel the lessee if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof."

On June 26, 1914, the respondent, in writing notified the appellant that she elected to, and did thereby, forfeit the lease, and demanded the surrender of the premises—"because of the waste committed on and to said above-described premises, by placing thereon large quantities of stone, sand, and gravel."

[1] The first question is whether the appellant had committed waste by the use to which it had put the lot leased from the respondent. Waste is an unreasonable and improper use and abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in substantial injury thereto. It is a violation of the obligation of the tenant to treat the premises in such a manner that no harm be done to them, and that the estate may revert to those having the reversionary interest, without material deterioration. *Jones, Landlord & Tenant*, § 625; *Davenport v. Magoon*, 18 Or. 3, 4 Pac. 299, 57 Am. Rep. 1; *Delano v. Smith*, 206 Mass. 365, 92 N. E. 500, 30 L. R. A. (N. S.) 474. In the case last cited it was said:

"Waste is an unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one rightfully in possession, which results in its substantial injury. It is the violation of an obligation to treat the premises in such manner that no harm be done to them, and that the estate may revert to those having an underlying interest, undeteriorated by any willful or negligent act."

The respondent claims that the acts of the appellant constituted waste because such acts materially lessened the value of the lot for agricultural purposes. In this connection it should be remembered that the lot in question was within the corporate limits of the city of Kennewick; that the dimensions thereof were 50 by 137 feet. In addition to this the son of the plaintiff, while testifying in her behalf on cross-examination, placed the value of the lot at \$2,200, and stated that at one time he had arranged to sell it to a person for that sum, who desired to erect a creamery thereon. Another witness on behalf of the respondent said that the value of the lot was approximately \$200 for agricultural

purposes. This witness was a farmer, and only claimed to be familiar with the land for agricultural purposes. It cannot be held that this lot was chiefly valuable for agricultural purposes. Owners of land adapted to that purpose do not plat it into tracts of such dimensions as this lot. If it was worth any substantial part of the sum which the son of the plaintiff testified was its value, there is no known agricultural use to which it could be devoted, and an adequate return realized upon such investment.

From the memorandum opinion of the trial judge, as well as from the findings of fact entered in the case, it appears that he was of the opinion that no waste had been committed. With this view we are in accord. The lease not specifying the purpose to which the property should be devoted, the tenant, no doubt, had the right to make any reasonable use thereof in connection with the operation of its adjacent property. It is true that approximately 12 yards of gravel remained upon the lot at the time of the trial; but this was incidental to the use of the lot in connection with the lot owned by the appellant. The excerpt from the lease above quoted provides, among other things, that the tenant shall not make any alteration in the premises without the written consent of the lessor. But the lease does not reserve to the lessor the right to terminate the lease for such an alteration. The lease, as indicated by the last clause, only gives the right to the lessor "to expel the lessee if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof." It was under this clause in the lease that the respondent claimed the right to a forfeiture when she gave notice to that effect. There is no claim that there was any strip, and if there was neither failure to pay rent, nor waste, the respondent's right to a forfeiture under her notice fails. Here we are not in accord with the view of the trial judge, as he apparently interpreted the covenant against alteration in the lease to be covered by the forfeiture clause. There being no waste, it follows that the respondent had no right to declare the tenancy forfeited for that reason.

[2, 3] The rent for which the forfeiture was claimed was due on September 15, 1914. On that day the appellant called at the home of the respondent for the purpose of paying the rent, but found no one there to whom he could pay it. Thereafter, during the same day, he mailed to the respondent a check for \$10, which was the amount of the rent then due. This check contained a notation "Lot C," when that covered by the lease was "Lot A." The check was returned by the respondent without comment. The respondent did not own lot C, and had no relations with the appellant relative thereto. She must have known, and the fact could not

have been otherwise, that the check was intended as payment upon the lot covered by the lease. Tender of the rent in the form of a check was not refused because it was not made in cash. In the previous dealings between the parties, there was nothing to indicate that the respondent would not as readily accept the check in payment of the rent as cash. The respondent not having refused the check because the rent was offered in that form instead of in cash, is not in a position to now claim that the tender should have been made in money and not by check. *Hidden v. German Sav. & Loan Soc.*, 48 Wash. 384, 93 Pac. 688; *Walsh v. Colvin*, 53 Wash. 809, 101 Pac. 1085.

The judgment will be reversed, and the cause remanded, with direction to the superior court to dismiss the action.

MORRIS, C. J., and MOUNT and BAUSMAN, JJ., concur.

SHERMAN v. BABCOCK. (No. 13025.)

(Supreme Court of Washington. Aug. 21, 1916.)

1. APPEAL AND ERROR \S 47(1)—"AMOUNT IN CONTROVERSY" LIMITING RIGHT OF APPEAL—HOW DETERMINED.

The "amount in controversy," as limiting the right of appeal, is determined by the averments of the pleadings, and not by the demand for judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 202-209; Dec. Dig. \S 47(1).]

For other definitions, see Words and Phrases, First and Second Series, Amount in Controversy.]

2. APPEAL AND ERROR \S 54 — AMOUNT IN CONTROVERSY—INTEREST.

Interest, when recoverable, may be considered in determining the amount in controversy, so that if the principal sum and recoverable interest at the time of commencement of the action exceeds \$200 the Supreme Court has jurisdiction of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 261-265; Dec. Dig. \S 54.]

3. APPEAL AND ERROR \S 47(2) — AMOUNT LIMITING RIGHT OF APPEAL—PLEADING—JURISDICTION.

In an action on a contract, an allegation that defendants agreed to pay \$190 for furnishing and erecting a monument, although it implies a promise to pay when the monument was erected and would draw interest from that date, but not alleging the time at which the monument was to be erected, does not show that the amount in controversy is in excess of \$200 necessary to bring the case within the appellate jurisdiction of the Supreme Court, since in determining jurisdiction, where the question is the amount involved, the jurisdiction must affirmatively appear in the pleadings, and will not be presumed by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 210-218; Dec. Dig. \S 47(2).]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge; Action by John Sherman against Katie

Jamieson and another. From a judgment for the defendant, Mrs. T. A. Babcock, the plaintiff, appeals. Appeal dismissed.

Benton Embree, of Seattle, for appellant. Morris & Shipley and Paul S. Dubuar, all of Seattle, for respondent.

PER CURIAM. The appellant instituted this action against the defendant Katie Jamieson and the respondent, Mrs. T. A. Babcock, to recover upon a written contract for the erection of a tombstone. His complaint, omitting the formal parts, was as follows:

"Comes now the plaintiff herein, and for his cause of action against the said defendants, states and alleges:

"I. That on the 31st day of October, 1910, the plaintiff and the said defendants entered into a written contract wherein and whereby the said defendants (the said defendant Katie Jamieson signing her name as Mrs. Robt. Jamieson) agreed to pay the plaintiff the sum of \$190, for furnishing and erecting a monument in the Lakeview Cemetery in King county, Wash. That pursuant to said agreement, the plaintiff did furnish and erect said monument in accordance with said contract, and such monument was duly accepted by defendants.

"II. That no part of said sum for so furnishing and erecting said monument has been paid, although the plaintiff has often demanded payment of the defendants therefor.

"Wherefore plaintiff prays judgment against the said defendants and each of them, for the sum of \$190, together with interest thereon at the rate of 6 per cent. per annum from and after May 1, 1911, and for his costs and disbursements herein incurred."

Issue was taken on the complaint by Mrs. Babcock, and, after a trial had before the court sitting without a jury, a judgment was rendered in her favor, from which this appeal is prosecuted.

[1] The respondent moves to dismiss the appeal for the reason that the amount in controversy is insufficient to bring the cause within the appellate jurisdiction of this court. This motion must be granted. It is a settled principle that the amount in controversy, as limiting the right of appeal, is determined by the averments of the pleadings, not by the demand for judgment. *Doty v. Krutz*, 13 Wash. 169, 43 Pac. 17; *Ingham v. Harper & Son*, 71 Wash. 286, 128 Pac. 675, Ann. Cas. 1914C, 528; *Jaklewicz v. Lenhart*, 86 Wash. 138, 149 Pac. 642.

[2] It is settled also that interest, when recoverable, may be taken into consideration in determining the amount in controversy, and if the principal sum, together with the recoverable interest thereon up to the time of the commencement of the action, exceeds \$200, the appellate court has jurisdiction of the appeal. *Ingham v. Harper & Son*, supra.

Examined in the light of these principles, we are clear that the complaint does not show that the amount in controversy brings the cause within the appellate jurisdiction of this court. From the allegations of the complaint it will be observed that the defendants agreed to pay the plaintiff \$190 for furnish-

ing and erecting the monument. This would imply a promise to pay when the monument was erected, and, being a liquidated demand, would draw interest from that time at the statutory rate. But it will be observed, further, that there is no allegation as to the time when the monument was furnished and erected. From aught that appears, this time may have been within a few months or within a few days prior to the commencement of the action, so near that time that the accumulated interest, when added to the principal, would not bring the amount due up to the constitutional limit.

[3] In determining its jurisdiction, where the question is the amount involved, the court will not presume jurisdiction. The jurisdiction must affirmatively appear. It is within the power of the pleader to make the fact clear, and if he does not do so, the presumption is that the fact is against him rather than in his favor.

It is not enough that plaintiff may have offered proofs at the trial tending to show that the sum due at the time of the commencement of the action was in excess of the constitutional limit. This does not determine the amount in controversy; that amount is, as we say, determined by the allegations of the parties, the issues as made by the pleadings.

The appeal is dismissed.

CRAWFORD v. SEATTLE, R. & S. RY. CO.
et al. (Nos. 13560, 13570.)

(Supreme Court of Washington. Aug. 28, 1916.)

1. APPEAL AND ERROR §413 — NOTICE OF APPEAL—DISMISSAL—STATUTE.

Under Rem. & Bal. Code, § 1720, providing that, when the notice of appeal is not given when the judgment or order appealed from is made, it shall be served upon all parties who have appeared in the action or proceeding, failure to serve a notice of appeal upon a party which had appeared in appellant's receivership proceeding and had become a party to the judgment or order of sale rendered the appeal from the order ineffectual for any purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2136-2139; Dec. Dig. § 413.]

2. APPEAL AND ERROR §803—NOTICE OF APPEAL—INTERLOCUTORY ORDER—DISMISSAL.

In such case an appeal, regarded as an appeal from an interlocutory order and reviewable by appeal from the judgment or order thereafter entered, would necessarily follow the dismissal of the appeal from the subsequent order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3169-3173; Dec. Dig. § 803.]

3. APPEAL AND ERROR §425 — NOTICE OF APPEAL—TIME.

If the judgment adjudging the relator to be insolvent and denying plaintiff the relief prayed for was a final judgment from which an appeal might be prosecuted, the appeal therefrom would be dismissed, where the notice of appeal was

not given until more than 90 days after the entry of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2155-2161; Dec. Dig. § 425.]

En Banc. Appeal from Superior Court, King County; Ralph Kauffman and A. W. Frater, Judges.

Action by William R. Crawford against the Seattle, Renton & Southern Railway Company and others for the appointment of a receiver, in which the Puget Sound Traction Light & Power Company filed a petition for the payment of a claim against the Railway. From an adjudication of the Railway's insolvency, but denying the plaintiff the relief prayed for, and from an order directing the sale of the property to satisfy claims, the plaintiff appeals. Motions to dismiss the appeals granted.

See, also, 86 Wash. 628, 150 Pac. 1155.

Morris B. Sachs, of Seattle, for appellant. Higgins & Hughes, of Seattle, for respondents.

MAIN, J. These are two motions for the dismissal of appeals presented in the Seattle, Renton & Southern Railway Company receivership proceedings.

On April 30, 1912, William R. Crawford, principal stockholder of the railway company, brought an action against Peabody, Houghteling & Co. and Augustus S. Peabody, trustee, for the mortgage bondholders of the railway company, alleging an attempt on the part of these defendants to wreck the company, and also alleging imminent danger of insolvency, and praying for the appointment of a receiver. To this action the railway company was a party defendant. On September 25, 1912, Peabody, Houghteling & Co. and Augustus S. Peabody answered the complaint. To these answers on October 26, 1912, the plaintiff filed replies.

The trial of the issues made by the complaint, the answers, and the replies thereto was begun on January 30, 1913, and concluded on March 15th following. In that action the defendants had been charged with attempting to wreck the road, and damages in a large sum were sought against them.

On May 17, 1913, the court signed and caused to be entered its findings of fact and conclusions of law, in which it was found that the railway company was insolvent, and that the conduct of the defendants had been blameless. On November 12, 1915, the findings and conclusions were again signed by the trial judge and refiled. On this date a judgment was entered adjudging the railway company to be insolvent, and denying to the plaintiff the relief prayed for.

On September 17, 1914, the Puget Sound Traction Light & Power Company filed in the cause a petition for the payment of power, alleging that it was the assignee of a contract which the Seattle, Renton & South-

ern Railway Company had entered into for the purchase of power, and that this contract did not expire until April 24, 1926. It was stated in the petition that there was due upon the contract at the time the petition was filed a sum in excess of \$103,810.57. In this petition it was asked that the contract be decreed a first lien upon the property in the hands of the receiver, and that the property should be sold subject to the contract.

On January 19, 1916, an order was entered allowing claims which had been filed with the receivers and fixing the priorities thereof. On February 9, 1916, an order was entered directing the sale of the property to satisfy claims. This order, among other things, provided that any purchaser at the sale should take the property or properties purchased, subject to the provisions of the contract for power held by the Puget Sound Traction, Light & Power Company.

On February 24, 1916, the plaintiff served and filed written notice that he appealed from the judgment entered on November 12, 1915. On the same day he served and filed written notice that he appealed from the order and decree of sale entered on February 9, 1916. The notice of appeal from the judgment entered on November 12, 1915, was served upon Peabody, Houghteling & Co. and Augustus S. Peabody, trustee, and upon the receivers. The notice of appeal from the order of sale on February 9, 1916, was not served on the Puget Sound Traction Light & Power Company, nor upon a number of creditors who had appeared by counsel and presented their claims, and whose claims were classified and allowed in the order entered on January 19, 1916.

[1] As above indicated, the motions are to dismiss both appeals. Considering first the motion directed to the appeal from the order of sale entered on February 9, 1916: It appears that that was an order entered in the receivership proceeding directing the sale of the property for the purpose of satisfying the claims of creditors, and providing in the order that the property should be sold subject to the contract for power held by the Puget Sound Traction, Light & Power Company, which did not expire until April 24, 1926.

The statute (Rem. & Bal. Code, § 1720) requires that, when the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, it shall be served in the manner required by law for the service of papers in civil actions and proceedings, upon "all parties who have appeared in the action or proceeding. * * *"

The Puget Sound Traction, Light & Power Company was a party to the judgment or order of sale, and as such was entitled to notice of the appeal. It was not so served, and because of this failure the appeal from this order became ineffectual for any purpose. In *Robertson Mortgage Co. v. Thomas*, 63

Wash. 316, 115 Pac. 312, speaking of the necessity for serving a notice of appeal upon a party to the judgment, it was said:

"He thereby became a party to the judgment, and as such there can be no escape from holding that he should have been served with notice of the appeal. He was not so served, and under the established rule of this court the appeal is, because of such failure, ineffectual for any purpose."

A number of creditors who had filed claims and formally appeared in support thereof were not made parties to the appeal. But it is not necessary to consider the question of the necessity for service of the notice of appeal upon them, since the failure to serve a party to the judgment was fatal to the appeal.

The appeal in this case cannot be sustained by the holding in *Jensen v. Angeles Brewing & Malting Co.*, 87 Wash. 392, 151 Pac. 825. In that case the receiver had filed a report of his doings as such receiver from the time of his appointment to a date specified. The court thereupon made an order fixing a time and place for a hearing upon the report, and caused notice thereof to be given to all persons interested in the trust estate. At the time appointed objections were made to the report by certain creditors of the insolvent, and evidence was taken upon the objections. The court directed the receiver to file a supplemental report, and fixed a date as a time for hearing objections to such report. The supplemental report was filed, as directed, and notice served upon the parties interested, as ordered. A hearing was thereupon had upon both reports, and an order was entered. From this order, the receiver appealed.

In that case the notice of appeal was served on all claimants who had appeared in the proceeding in response to the notice given of the hearing in which the order appealed from was made. The notice of appeal was not served upon certain parties who had filed claims with the receiver, and had taken no further part in the proceeding. It was there held that the phrase in the statute "parties who have appeared in the action or proceeding" refers, in cases like the present, "to those parties who have appeared in the particular proceeding in which the order appealed from is entered, not to those who may have filed claims with the receiver and have taken no further part in the proceedings."

The holding in that case is expressly limited to its particular facts; and what is said in the opinion must be read in the light of the facts before the court. The holding there would not support an appeal where a party to the judgment was not served. Neither would it support an appeal where creditors who had filed claims and formally appeared in support thereof were not parties. The portion of the opinion relied on by the appellant was not necessary to the decision, and was merely dictum. To give this its full effect, as contended for by the appellant, would repeal the statute, and permit the court to determine a cause when all the parties who would be affected by the proceeding were not parties to the appeal. Obviously it was not the intention to so hold. The only reason that a notice of appeal given in open court at the time when the judgment appealed from is rendered is effective as to parties not then present is because the statute makes it so.

The case of *Kato v. Union Oil Co.*, 157 Pac. 688, is upon a statement of facts wholly different from that here presented, and consequently that case does not support the appeal.

[2,3] The motion to dismiss the appeal from the judgment entered on November 12, 1915, will next be considered. If it be assumed that that judgment was merely an interlocutory order in the case which could be reviewed by appeal from the judgment or order entered on February 9, 1916, then the appeal from that judgment would necessarily follow the disposition of the appeal from the order of sale. If, on the other hand, that judgment was a final judgment from which an appeal might be prosecuted, then there is a jurisdictional defect in that appeal because the judgment was entered on November 12, 1915, and the notice of appeal was not given until February 24, 1916, which was more than 90 days after the judgment had been entered.

These motions, owing to the importance of the case, have by the court of its own motion been considered en banc. There is no alternative but to dismiss both appeals, and it is so ordered.

MORRIS, C. J., and MOUNT, HOLCOMB, PARKER, ELLIS, and CHADWICK, JJ.; concur.

SAPPINGTON v. OWENS et ux. (No. 13315.)
(Supreme Court of Washington. Aug. 29, 1916.)

1. MORTGAGES ⇐218 — ACTION ON NOTE — PERSONAL LIABILITY—BURDEN OF PROOF.

In an action on a note, disregarding a realty mortgage given therewith, the makers, admitting their execution of the note, but claiming that the parties agreed that the plaintiff would look entirely to the mortgage for the payment of his debt, and that they should not be personally liable, had the burden of establishing such agreement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 568-585; Dec. Dig. ⇐218.]

2. MORTGAGES ⇐218—ACTION ON NOTE—DEFICIENCY JUDGMENT—SUFFICIENCY OF EVIDENCE.

In such action, where the makers alleged an agreement that they would not be personally liable on the note and that the payee was to look solely to the mortgage, evidence held to sustain a finding that parties had made such agreement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 568-585; Dec. Dig. ⇐218.]

3. MORTGAGES ⇐556—ENFORCEMENT—JUDGMENT—STATUTE.

Under Rem. & Bal. Code, § 1119, relating to judgments for deficiency in the foreclosure of a mortgage, the mere erasure from the note of the clause providing for a deficiency judgment would be ineffective, and such judgment could be had, unless it was expressly provided that there could be none.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592-1595, 1597; Dec. Dig. ⇐556.]

4. MORTGAGES ⇐218 — ACTION ON NOTE — MISREPRESENTATION—BURDEN OF PROOF.

In an action on a mortgage note, plaintiff, claiming that the makers had misrepresented the value of the mortgaged premises, and hence could not in equity ask for the reformation of the note and mortgage in respect to the provision for a deficiency judgment, had the burden of proving such claim by fair preponderance of the evidence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 568-585; Dec. Dig. ⇐218.]

5. APPEAL AND ERROR ⇐1010(1)—REVIEW—FINDING OF COURT.

In an action on a note, disregarding a realty mortgage given therewith, where the plaintiff claimed that the makers had misrepresented the value of the mortgaged premises, and where there was substantial evidence to support the finding that there had been no such misrepresentation, and no evidence preponderating against it, the finding could not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ⇐1010(1).]

Department 2. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by L. J. Sappington against Burt Owens and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Thos. H. Brents and John F. Watson, both of Walla Walla, for appellant. Sharpstein, Pedigo, Smith & Sharpstein, of Walla Walla, for respondents.

HOLCOMB, J. This action was brought by appellant against respondents Owens and

wife upon their joint promissory note for the sum of \$1,800, disregarding a mortgage on realty given therewith. The note is of the ordinary printed form, and contains a stipulation for a deficiency judgment, which was scratched out, and underneath was written the following:

"The clause above erased was agreed to before delivery of the note; that is, it was agreed by all parties to be erased."

By virtue of Rem. & Bal. Code, § 1119, there could still be a deficiency judgment on this note, as there was no express provision prohibiting one. The respondents answered, admitting the execution of the note, but alleging that it was secured by a mortgage on a quarter section of land in Walla Walla county, Wash., and that it was the agreement and understanding between the parties that the makers were not to be personally liable thereon, but that the payee was to look solely to the mortgaged lands for satisfaction of the debt evidenced by this note, and that, through mutual mistake of both parties and inadvertence of the scrivener, the note failed to express the true intent of the parties and should be reformed to express such intention. Appellant replied to this answer by way of denial, and further alleged, as against any reformation, that respondent Owens, in order to get appellant to accept the note and mortgage, represented the mortgaged lands to be of the value of \$4,000, whereas in fact they were worth not to exceed \$1,000, and also promised appellant that he would pay off the note in installments within one year from its date. The trial court made findings in conformity with the allegations of respondents' answer, and allowed appellant a lien against the mortgaged premises, but refused to enter a personal judgment against either of respondents, this appeal resulting.

[1-3] Appellant urges as error the finding of the trial court that all parties agreed appellant would look entirely to the mortgaged premises for payment of the debt. The burden of proof was upon respondents to establish an express agreement intended to constitute their contract and reform the instrument accordingly. Both respondents and one Cook, the scrivener and notary who drew the note, and who, so far as the record discloses, was a disinterested witness, testified that this agreement was entered into by the parties to this action before the deal was consummated. This was contradicted by appellant, but the trial court found that the agreement as testified to by respondents and Cook was entered into by the parties, and the circumstances surrounding the transaction seem to lend force to this finding, though as a matter of law the mere erasure of the clause providing for a deficiency judgment would have been ineffective, and a deficiency judgment could be had, unless it was expressly provided that there could be

none. The parties to this action, both being laymen, were doubtless unfamiliar with the rule of law on this subject. When they erased the deficiency judgment clause, if done without any agreement that there could be no such deficiency, legally they did a useless thing. But we are of the opinion that they did not consider they were doing a useless thing, but believed they were doing it effectually for some purpose, which from the very nature of the act of erasing this clause and the facts coincident therewith, could be only for the purpose of preventing a deficiency judgment. If this is true, there must have been some agreement to that effect, and there was therefore no error, having resolved the testimony in favor of respondent, in making the finding complained of. The fact that the parties could have made an immediate and complete transfer of the property, instead of such a transaction as this, is immaterial, if they did, in fact, make the express contract as found.

[4, 5] Appellant's last contention is that respondents committed a fraud in misrepresenting the value of the mortgaged premises, and for this reason respondents cannot come into a court of equity and ask for the reformation of the note and mortgage, which is an equitable remedy, as it would violate the equitable maxim that he who comes into a court of equity must come with clean hands. This conclusion is based upon the premise that as a matter of fact respondents did misrepresent to appellant the value of the mortgaged land. The only testimony concerning the alleged misrepresentation of the value of the mortgaged premises was that of respondents and appellant, which was in sharp conflict; but, as this misrepresentation was alleged by appellant as an affirmative defense to the reformation of the instruments, it became incumbent on him to prove it by a fair preponderance of the evidence. The trial court, who had the advantage of hearing the witnesses testify and of weighing the credibility of each, was of the opinion that no misrepresentation as to value was made by respondents, as evidenced by the finding to that effect. There was substantial evidence to support this finding, and none preponderating against it. We are not, therefore, to disturb it. Judgment affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and PARKER, JJ., concur.

SCANDINAVIAN-AMERICAN BANK v. KING COUNTY. (No. 18448.)

(Supreme Court of Washington. Aug. 29, 1916.)

1. TAXATION \Leftrightarrow 509 — PRIORITY OF LIEN — POWER OF LEGISLATURE.

The state has an undoubted power to create a priority of lien in aid of its taxing power;

but such priority will not be indulged unless sustained by some positive statute, and will not be sustained by resort to construction.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 943-945; Dec. Dig. \Leftrightarrow 509.]

2. TAXATION \Leftrightarrow 508—PERSONAL TAX—LIEN—DESIGNATION—STATUTES.

Under Rem. & Bal. Code, § 9230, declaring all taxes a lien upon the realty upon which they may be assessed, with priority over any lien, etc., to which such realty may become liable, section 9235, providing that taxes assessed on personalty shall be a lien upon all real and personal property, unaffected by any transfer of such property, and section 9245, providing that when it is necessary to charge the tax on personal property against real property in order to collect it, the county treasurer shall select some particular realty owned by the delinquent and designate, in his tax roll and certificate of delinquency, the particular realty against which such personal property tax is charged, a delinquent personal tax is not a lien upon realty owned by the tax debtor at the time of its levy, but which was subject to a voluntary lien, or had been conveyed to another prior to the county treasurer's selection of it to be charged with the delinquent tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 942; Dec. Dig. \Leftrightarrow 508.]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by the Scandinavian-American Bank against King County. Judgment for plaintiff, and defendant appeals. Affirmed.

Alfred H. Lundin and Edwin C. Ewing, both of Seattle, for appellant. Ballinger, Battle, Hulbert & Shorts, and R. W. Capps, all of Seattle, for respondent.

CHADWICK, J. The issue presented is whether a delinquent personal tax is a lien upon real property owned by the tax debtor at the time the tax was levied, but which was subject to a voluntary lien or had been conveyed to another prior to the time the county treasurer selected real property to be charged with the delinquent tax, and noted the charge upon the tax rolls.

Many cases from other states are cited and discussed, but, inasmuch as our decision must rest upon our own statutes, it will serve no purpose to review them.

The sections of the revenue laws pertinent to our inquiry are the following:

"All taxes and levies which may hereafter be lawfully imposed or assessed shall be and they are hereby declared to be a lien respectively upon the real estate upon which they may hereafter be imposed or assessed, which liens shall include all charges and expenses of and concerning the said taxes which, by the provisions of this [chapter] are directed to be made. The said lien shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which said real estate may become charged or liable." Rem. & Bal. Code, § 9230.

"* * * The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real

or personal property shall in any way affect the lien for such taxes upon such property." Rem. & Bal. Code, § 9235.

[1, 2] The state has an undoubted power to create a priority of lien in aid of its taxing power (Carstens & Earles v. Seattle, 84 Wash. 88, 146 Pac. 381), but the general rule is that such priority will not be indulged unless sustained by some positive statute; it will not be sustained by resort to construction. Cooley on Taxation (2d Ed.) p. 444; Central Trust Co. of New York v. Third Ave. R. Co., 186 Fed. 291, 110 C. C. A. 1. Other cases are collected in Ann. Cas. 1913B, at page 621, under the title "Construction."

Taxes upon real property are made a lien upon the specific property charged, and taxes upon personal property are made a lien upon the specific personal property charged from and after the date of the assessment. Rem. & Bal. Code, §§ 9230-9235, supra. It will be noted that the lien upon real property is made a lien, prior in time, over any existing or subsequent lien or incumbrance. Personal taxes are given no such priority of lien, either upon the specific property or upon real property then owned by the debtor (section 9235), and under the rule cited, a purchaser of real property or an incumbrancer, if prior in time, takes the property or a lien upon it without liability to pay the amount of the delinquent personal tax. This is so, unless the right of the state to charge real property with a lien antedating a voluntary lien or incumbrance is found in section 9245, which is as follows:

"When it becomes necessary, in the opinion of the county treasurer, to charge the tax on personal property against real property, in order that such personal property tax may be collected, such county treasurer shall select for that purpose some particular tract or lots of real property owned by the person owing such personal property tax, and in his tax roll and certificate of delinquency shall designate the particular tract or lots of real property against which such personal property tax is charged, and such real estate shall be chargeable therewith." * * * [Italics ours.]

Manifestly the lien for delinquent personal taxes does not attach to real estate prior to the

time specific real property is selected by the county treasurer, and he has charged it by proper entry upon the tax rolls, and then only when the property is owned by the person owing the delinquent personal property tax. Not until then is such real estate (real property owned by the person, etc.) "chargeable therewith."

The very terms of the statute compel the conclusion that the tax is not a lien generally upon all property, but only upon such as may be thereafter specifically selected and charged. For the treasurer may not select and charge all real property arbitrarily but shall "select some particular tract or lots," etc. (section 9245). But if we grant that a lien does exist, the county is in no better position, for up to the time of selection and charging the lien is floating and inchoate. The lien attaches only to such interest as the delinquent tax debtor may have in the property at the time the charge is made by the county treasurer. At that time, the property charged was subject to an existing lien which has been foreclosed.

Counsel for appellant cites a number of our own decisions to sustain its contention that the state has asserted a general and continuing lien upon all property that is subjected to taxation. We are not called upon to decide whether the Legislature has the power to create a general lien, or to continue it in some inchoate form. It is enough that if it has done so, it has not saved a priority on real estate in favor of a personal tax as against a prior incumbrancer or a vendee whose interest in the property has attached prior to the time the real property to be charged is selected by the county treasurer, and the part to be charged is so identified that it could be ascertained by one interested in the title.

The title, unincumbered by the tax, is in respondent, and the judgment is affirmed.

MORRIS, C. J., and PARKER, HOLCOMB, and BAUSMAN, JJ., concur.

**SOUTHWESTERN SURETY, INS. CO. v.
PACIFIC COAST CASUALTY CO.**
(No. 13457.)

(Supreme Court of Washington. Aug. 29, 1916.)

**1. RECEIVERS ⇨174(5)—ACTIONS AGAINST—
NECESSITY OF LEAVE TO SUE.**

An order entered after action begun against a receiver would likely cure the irregularity of its commencement without leave of court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 337-343; Dec. Dig. ⇨174(5).]

**2. RECEIVERS ⇨174(3)—ACTIONS AGAINST—
NECESSITY OF LEAVE TO SUE.**

Objection that action was begun against receiver without leave of court does not go to the jurisdiction, but is an irregularity that may be waived, or cured, at any stage of the proceedings.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 340; Dec. Dig. ⇨174(3).]

3. RECEIVERS ⇨86—DUTIES—CONVERSION.

The duties of a receiver are to take charge of, and safely keep and account for, all of the assets of the estate, and to abide all orders of the court with reference thereto.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 160; Dec. Dig. ⇨86.]

**4. RECEIVERS ⇨214 — BREACH OF DUTIES —
LIABILITY OF SURETY.**

It is a breach of duty for which the receiver's surety is liable if the receiver, pending replevin of launch alleged to belong to the estate, sells the launch; that being in law a conversion.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 423; Dec. Dig. ⇨214.]

**5. RECEIVERS ⇨212 — SURETIES — LIABILITY
ON RECEIVER'S BOND—EXTENT.**

Where a receiver brought replevin for a launch belonging to the estate in which action the party in possession was decreed to have a lien for labor and materials, and such party then recovered judgment from the surety on the replevin bond, such surety was subrogated to his rights and could recover from the surety on the receiver's bond the amount of the loss sustained through the receiver's conversion of the launch pending replevin by sale thereof; the receiver's surety being bound by its bond, although not a party to the judgment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 422; Dec. Dig. ⇨212.]

**6. SUBROGATION ⇨1 — CONTRACTS — CON-
STRUCTION.**

Subrogation is not founded on contract and may be enforced where no contract exists between the parties, but it is equally well settled that, where liability of a party is fixed by contract or statute, courts will not resort to equity to either enlarge or defeat it.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 1, 2; Dec. Dig. ⇨1.]

**7. JUDGMENT ⇨563(1) — CONCLUSIVENESS —
PRESUMPTIONS.**

A court cannot assume that another court has adjudicated anything not expressly comprehended in its judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1002; Dec. Dig. ⇨563(1).]

**8. REPLEVIN ⇨69(2) — DETERMINATION OF
VALUE OF PROPERTY—ALLEGATIONS OF COM-
PLAINT.**

Allegations of complaint in replevin as to value of property do not determine its value,

but, under Rem. & Bal. Code, § 434, the court must determine the value.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 257-264; Dec. Dig. ⇨69(2).]

**9. RECEIVERS ⇨216—LIABILITY ON RECEIV-
ER'S BOND—EXTENT.**

Where a receiver brought replevin for a launch belonging to the estate, in which action the party in possession was decreed to have a lien for labor and materials, and such party then recovered judgment from the surety on the replevin bond, but the court in the replevin action failed to find the value of the property, the surety on the receiver's bond, though liable to the surety on the replevin bond, was not bound as to the extent of its liability, and could have the extent determined in suit by the replevin surety for the amount paid on the judgment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 425; Dec. Dig. ⇨216.]

**10. RECEIVERS ⇨212—LIABILITY ON RECEIV-
ER'S BOND—EXTENT.**

In such case the replevin surety could claim only the sum that the property, if sold and turned into money, would have liquidated upon the claim if tried as that of a general creditor.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 422; Dec. Dig. ⇨212.]

Department 2. Appeal from Superior Court, King County; K. Mackintosh, Judge.

Action by the Southwestern Surety Insurance Company against the Pacific Coast Casualty Company and others. Judgment for plaintiff, and the Casualty Company appeals. Reversed and remanded.

Geo. McKay and Henry S. Noon, both of Seattle, for appellant. Ballinger, Battle, Hulbert & Shorts, of Seattle, for respondent.

CHADWICK, J. The defendant, Charles Shubart, was appointed as receiver for an insolvent corporation. The appellant, which will be called the Casualty Company, became surety on his bond. The bond was conditioned for the faithful discharge of the duties of the receiver. One of the assets of the insolvent estate was a launch, then in the possession of one Miller. Miller refused to deliver possession to the receiver who began an action in replevin. He gave bond with respondent, which we will call the Surety Company, as surety, and took possession of the launch. Pending the trial, the receiver, without any order of the court, exchanged or traded the launch for a five-acre tract of land in Kitsap county. Miller answered in the replevin suit, setting up a lien in the sum of \$627.35 for labor performed and material furnished in the repair of the launch, and claimed the right of possession pending the payment of his claim. The court entered a judgment against the receiver for the sum of \$627.35, with interest and costs, amounting in all to the sum of \$773.88.

Miller then proceeded against the Surety Company, and it paid the full amount of

the judgment which had been rendered against its principal, the receiver in the replevin action. The Surety Company then began this action to recover the amount so paid from the receiver and the Casualty Company upon the receiver's bond. From a judgment in favor of the Surety Company, the Casualty Company has appealed. It is first contended that the action cannot be maintained because the action was not begun with leave of the court.

[1, 2] This objection is not now material for two reasons: (a) It is likely that an order entered after the action was begun would cure the irregularity; (b) the objection does not go to the jurisdiction of the court. It is no more than an irregularity that may be waived, or cured, at any stage of the proceedings. *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429.

[3] The briefs have taken a wide range, but the main reliance of the Casualty Company is that the act complained of and its consequences were not within the contemplation of the parties, and that recovery for moneys paid upon a replevin bond are not within either the letter or the legal effect of the receiver's bond. The obligation assumed by the Casualty Company was that the receiver should faithfully discharge his duties as receiver. The duties of a receiver are to take charge of, and safely keep and account for, all of the assets of the estate, and to abide all orders of the court with reference thereto. 34 Cyc. 15-17; *High on Receivers* (4th Ed.) § 1.

[4] The sale of the launch, pending a trial of the replevin action, was clearly a breach of duty on the part of the receiver, and subjects his surety to answer for his default. It was, in law, a conversion of the property. While, as we have said, the briefs take a wide range, counsel are in accord upon the fundamental principle. Counsel for appellant says:

"For the receiver's conversion of the launch the law fixes the legal consequences, viz., liability for its value."

Counsel for respondent repeats many times that by his neglect of duty the receiver converted the launch to his own use.

[5] As we view the case, therefore, there is but one question open to inquiry, and that is the extent of the Casualty Company's liability. In the replevin action the court entered a judgment:

"* * * That the defendant, Miller, is given possession of said boat and the plaintiff is not entitled to possession of the said launch Pacific, which was replevined by said plaintiff from said defendant herein, except on condition that said plaintiff pay to said defendant the said sum of \$627.35, with legal interest thereon since April 15, 1912, together with the costs and disbursements herein.

"It is further ordered and decreed that the said Miller has a lien on said launch for the payment of said \$627.35, with interest and costs, and was rightfully in possession of the same at the time of said replevy thereof."

The value of the property was not determined by the court. In the trial of this case the court refused to permit appellant to show the value of the launch.

It is asserted that the Casualty Company is liable for the full amount paid by the Surety Company in satisfaction of the replevin bond, and that the court did not err when it denied the offer of appellant to show the value of the launch, for the reason that the receiver had alleged the value of the launch to be \$800 in his complaint in the replevin case, and—

"* * * It makes no difference what the value of the launch was because the receiver had disposed of it without authority, converted it to his own use as found and decreed by the court, and a money judgment was rendered against him for the amount sued for in this case on account of the receiver's neglect. * * *"

Counsel for the Surety Company rightfully assumes that respondent is subrogated to the rights of Miller, and, while it can, no doubt, assert its judgment for the whole thereof against the receiver or possibly against the estate, we cannot agree that it may recover against the appellant for more than the loss which Miller sustained by reason of the conversion of the launch. The argument of counsel and the ruling of the trial court rest upon the same fault; that is, failing to distinguish between the claim of Miller and the damage or loss he sustained by reason of the destruction of his security.

The engagement of appellant was to answer for the value of all property which might come into the hands of the receiver. It did not bind itself to pay the claims of creditors, nor could it be bound by the judgment in the replevin case beyond the value of the property. It was not a party to that judgment, and cannot be made privy beyond the terms of the bond. In other words, its liability rests upon its own obligation as evidenced by the receiver's bond, and not upon the judgment.

[6] We have not overlooked the principle, which is so strongly urged by counsel, that:

"Subrogation is not founded upon contract, but upon principles of equity, and may be enforced where no contract or privity of any kind exists between the parties."

This we have held many times, but it is equally well settled that, where the liability of a party is fixed by contract or by statute, courts will not resort to equity to either enlarge or defeat them.

[7-9] Respondent stands in the shoes of Miller, and can claim no greater right, and can recover no more, than Miller lost, which was the value of his security. If the court had found the value of the property, as the statute (Rem. & Bal. Code, § 434) directs that it should, we have no doubt that appellant would be bound, although not a party to the suit, but, failing to find the value, that question is still open to it. Counsel says the

receiver, in his complaint, alleged the value to be \$900. The question of value cannot be determined by reference to the complaint. We cannot assume that the court adjudicated anything that is not comprehended in the judgment.

It seems to us that the judge who tried the replevin action lost sight of the question of value, or rejected it as immaterial, upon the theory that the receiver might not set up the value as against his destruction of the lien, regarding it possibly as in the nature of a devastavit. If this were so, a judgment might be entered against the receiver personally, and the amount of the judgment could not thereafter be questioned by him, but in ascertaining the liability of the Casualty Company to answer for his wrong, we are not called upon to inquire whether a judgment should have been entered as a personal judgment *de bonis propriis* (*Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 308), or a judgment "*de bonis testatoris*" (*Ranney, Adm'r, v. Thomas*, 45 Mo. 111), for the judgment was, in fact, entered against the receiver in his representative capacity. Nor would the form of the judgment estop the Casualty Company from asserting its legal right to be held to the liability fixed by its undertaking. If the question of value had been really adjudicated and evidenced by the judgment, we would incline to the holding that the surety could not deny its liability to pay the full amount thereof. In *State v. Dalley*, 7 Mo. App. 548, an action was brought upon a similar state of facts, but in that case the judgment in the replevin action followed the statute. The value of the property, if return could not be had, was fixed. It was held that the surety who paid the judgment "stood in the shoes of the defendant in the replevin action and ought to be in no worse position." We are holding that he should be in no better position. The principle is the same whichever way it is applied. The question of value was not raised in that case.

The amount of a recovery, if a recovery might be had, seems not to have been questioned. We hold, then, that in order to bind the receiver's surety, the value of the property must affirmatively appear in the judgment. Otherwise the surety must have its day in court.

[10] There is another way to look at the case. The failure of the court to find the value of the property in the replevin action may be rejected as an immaterial thing; for, in legal effect, the judgment was no more than the establishment of Miller's claim against the estate. The receiver was not made liable personally by the judgment. The claim being established, the liability of the receiver's surety is to answer for the property, and, if it is not forthcoming, for its value. The Surety Company is, in legal effect, the assignee of Miller's claim. Whatever the claim may be, and however it may have originated, it can claim no more than the sum that the property, if sold and turned into money, would have liquidated upon the claim if treated as the claim of a general creditor. Or, stated in another way, having a judgment, the Surety Company could not issue an execution, but must seek its recovery in the receivership proceeding (*High on Receivers* [4th Ed.] § 255); or, which is the same thing, a suit against the receiver and the surety upon his bond, subject, of course, to all the defenses that would have been available to the surety if the claim had been presented as a claim. If it were not so, a creditor who ignored the receivership and prosecuted his claim to judgment could claim against the property, or on the bond to the extent of the undertaking, and to the exclusion of general creditors, or the expenses of administration.

Reversed and remanded for further proceedings.

MORRIS, C. J., and PARKER, HOLCOMB, and BAUSMAN, JJ., concur.

BRODIE et al. v. WASHINGTON WATER POWER CO. (No. 12986.)

(Supreme Court of Washington. Aug. 25, 1916.)

DEATH \Leftrightarrow 25—ACTIONS FOR CAUSING DEATH—DEFENSES—SATISFACTION OR RELEASE.

The right in the widow and children to maintain an action under Rem. & Bal. Code, § 194, providing that no action for a personal injury to any person occasioning his death shall abate or determine by reason of such death if he have a wife or child living, and section 183, providing that, when the death of a person is caused by the wrongful act or neglect of another, his heirs or representatives may maintain an action for damages against the person causing his death, is barred by a release and satisfaction given by the person injured of his right of action for the injury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 27; Dec. Dig. \Leftrightarrow 25.]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Lucy G. Brodie and others against the Washington Water Power Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Robertson & Miller, Hibschan & Dill, and C. H. White, all of Spokane, for appellants. Post, Avery & Higgins, of Spokane, for respondent.

PER CURIAM. On November 28, 1909, A. C. Brodie, while a passenger on a street car of the Washington Water Power Company, was injured as the result of a collision occurring between the car upon which he was riding and another car of the company. Later on he made a claim upon the company for damages based on the injuries received. The company thereafter settled with him, paying him \$2,500, and taking a release from him in which he acknowledged full payment and satisfaction of any and all claims and demands which he then had against the company, or which he might thereafter have, by reason of the injuries received by him in the collision. On December 31, 1910, Brodie died, and the present action was instituted by his widow and children to recover for his death. In the complaint it was alleged that the death was the result of the injuries received in the collision, and that the collision was caused by the negligence of the company. To the complaint the company set up the settlement and satisfaction as an affirmative defense. A demurrer was interposed to the defense which the trial court overruled. The plaintiffs thereupon elected to stand upon the demurrers and refused to plead further, whereupon the court entered judgment to the effect that the plaintiffs take nothing by their action. This is an appeal from the judgment entered.

The statutes of this state relating to actions for death by wrongful or negligent act

provide for two causes of action. By section 194 of the Code (Remington's) it is provided:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, * * * but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children. * * *"

By section 183 (Id.) it is provided:

"When the death of a person is caused by the wrongful act or neglect of another, his heirs or * * * representatives may maintain an action for damages against the person causing his death. * * * In every such action the jury may give such damages, as under all circumstances of the case may to them seem just."

The statutes were enacted to overcome defects thought to exist in the common law. By the common law no person had the right to recover for the death of another, no matter how wrongfully or negligently caused, and the right of action possessed by a person injured did not survive his own life. The first section of the statute cited is plainly a survival statute. Its purpose is to preserve in the beneficiaries named therein such right of action as the injured person himself had because of the wrongful or negligent act causing the injury, and is confined to such personal loss as the injured person sustained. The second, although originating in the same wrongful act or neglect, begins where the other ends, and is confined to such loss and damage as the beneficiaries named have suffered by the death of the person injured. *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Thompson v. Seattle, Renton & S. R. Co.*, 71 Wash. 436, 128 Pac. 1070.

But, notwithstanding the seeming separate nature of the two causes of action the courts hold with substantial unanimity that a release and satisfaction by the person injured of his right of action for the injury bars the right in the beneficiaries to maintain an action for his death occasioned by the injury. Thus Tiffany, in his work *Death by Wrongful Act* (2d Ed. § 124), states the prevailing rule as follows:

"If the deceased, in his lifetime, has done anything that would operate as a bar to recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus a release by the party injured of his right of action, or a recovery of damages by him for the injury is a complete defense in the statutory action."

The cases, however, are not unanimous. The contrary view has been maintained with great force, and seemingly with much logic, especially under statutes like our own which create two separate causes of action.

But we need not pursue the inquiry. The arguments for and against the proposition, with a collation of the authorities, will be found in the opinions of the court and in

the opinions of the dissenting judges in the cases of *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694, and *Rowe v. Richards*, 35 S. D. 201, 151 N. W. 1001, 1 L. R. A. 1915E, 1075, the first of which maintains and the second of which denies the rule.

It is the opinion of the majority of this court that the better reason is with the cases holding with the affirmative. This view requires an affirmance of the judgment of the court below; and it is so ordered.

STATE v. GIPSON. (No. 13436.)

(Supreme Court of Washington. Aug. 29, 1916.)

1. PARENT AND CHILD \S 17(1) — DUTY TO SUPPORT CHILD—STATUTES—CONSTRUCTION. 8 Rem. & Bal. Code, \S 5933, subd. 1, providing that every person who, first, having a dependent child under age of 18 years, deserts such child with intent to abandon it; second, willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance—shall be guilty of a gross misdemeanor, defines the offense disjunctively, and the above subdivisions must be read as if "or" occurred between them, each making the violator answerable to the same punishment.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. \S 177; Dec. Dig. \S 17(1).]

2. INDICTMENT AND INFORMATION \S 125(4)—DUPLICITY — ALTERNATIVE ALLEGATIONS — PROPRIETY.

Under such statute, an information may allege desertion and nonsupport, and it does not then charge two offenses, there being no inherent distinction between desertion and nonsupport.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 336-338, 343-348; Dec. Dig. \S 125(4).]

Department 2. Appeal from Superior Court, Franklin County; Bert Linn, Judge.

Forest D. Gipson was convicted of an offense, and from an order granting a new trial, the State appeals. Reversed, with instructions.

A. J. Elrod, of Pasco, for the State. Edward A. Davis, of Pasco, and E. M. Gibbons, of Ritzville, for respondent.

HOLCOMB, J. Respondent was convicted upon the following information:

"That the said Forest D. Gipson, in the county of Franklin, state of Washington, on the 1st day of April, 1915, did then and there unlawfully and feloniously, being the father of three children, to wit, a girl 10 years old named Opal, a girl 9 years old named Jennie, and a girl 4½ years old named Angeline, dependent upon him for care, education, and support, desert his said children, with the intention of abandoning them, and did willfully omit, without lawful excuse, to furnish his said children with necessary food, clothing, shelter, and medical attendance," etc.

A new trial was granted upon motion of respondent, on the ground that the informa-

tion was duplicitous in charging two separate offenses. The statute denouncing the offense or offenses is section 5933—1, 8 Rem. & Bal. Code, being section 1, c. 28, Laws 1913, p. 71, and is as follows:

"*Family Desertion.* An act concerning domestic relations and to prevent and punish family desertion or nonsupport of wife or child or children, and providing for support bonds and suspension of trial and sentence. * * *

"Be it enacted by the Legislature of the state of Washington:

"Section 1. Every person who,

"1st: Having any child under the age of 18 years dependent upon him or her for care, education or support, deserts such child in any manner whatever, with intent to abandon it;

"2nd: Willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children or ward or wards; * * *

"Shall be guilty of a gross misdemeanor."

The third subdivision prohibits neglect or abandonment or failure to support and provide for a wife.

[1] It will be seen that the information in this case follows the statute covering the first and second alternative subdivisions thereof. It is for this reason that the respondent contended and the trial court thought that two counts were charged in the information. At first we inclined to the belief that the theory of the trial court and of the respondent was correct, but upon further and more mature consideration we are of the opinion that that view cannot be sustained.

"When the statute enumerates several acts in the alternative, the doing of any one of which is subjected to the same punishment, all of such acts may be charged cumulatively as one offense. And where the statute provides in the alternative several means by which the offense may be committed, or where the intent or purpose is set out in several aspects disjunctively, they may all be charged in setting out one and the same offense." 10 Enc. Pl. & Pr. 596; *State v. Adams*, 41 Wash. 552, 83 Pac. 1108; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372.

In the last-cited case it was said:

"When a statute makes it an offense to do some one or another act, naming them disjunctively, either of which would constitute one and the same offense, and amenable to the same punishment, all the acts may be charged conjunctively in the one count as constituting a single offense."

In *People v. Gusti*, 113 Cal. 177, 45 Pac. 263, the court said:

"Of course, an indictment or information must charge but one offense (Pen. Code, \S 954), and if it charges more than one, it is subject to demurrer upon that ground. The question then is, Did the information here charge two offenses? We do not think it did. It is a well-settled rule of law that 'When a statute enunciates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count, for the reason that notwithstanding each act may, by itself, constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.'"

See, also, *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873; *State v. Meyerkamp*, 82 Wash. 607, 144 Pac. 942; 1 Bishop, *Crim. Proc.* (3d Ed.) § 536; 1 Wharton, *Crim. Law* (10th Ed.) § 1027; 22 Cyc. 380; 29 Cyc. 1878.

All the authorities cited in 22 and 29 Cyc. as to the requirements and sufficiency of an indictment or information under statutes similar to ours have been examined, and there is only one authority—that of *Richie v. Commonwealth*, 64 S. W. 979, 23 Ky. Law Rep. 1237—where the view is asserted that it is essential that the particular facts, showing the circumstances of the alleged desertion of the child, should have been set out in the indictment with such particularity and detail as to advise the accused of the specific offense with which he is charged.

[2] The statute in question denominates the offense "Family Desertion," and it entitles itself, "An act concerning domestic relations and to prevent and punish family desertion or nonsupport of wife or child or children." It defines the offense disjunctively and, although it expresses itself categorically in three separate subdivisions or clauses, the word "or" being omitted between the several clauses, the first and second subdivisions are to be read as if the word "or" occurred between them in one subdivision describing the one offense disjunctively, and amenable to the same punishment. The first subdivision specifies the dependents, and denounces desertion of them, broadly, "in any manner whatever." The second refers to the same dependents, and prohibits nonsupport. There is no inherent distinction between physical abandonment and desertion of a child or children and actual failure to support which, under the statute, constitutes abandonment or desertion. One might at the same time absent himself, thus physically abandoning and deserting his dependents, and also fail to support them. And he might, without physically absenting himself from his children, fail to support them. In any event, he would come within the purview of the various alternative provisions of the first and second subdivisions of the statute in question, and the same gross misdemeanor would be committed and subject to the same penalty or order of the court. We are therefore of the opinion that his honor erred in his conclusion that two separate and distinct crimes had been charged, and that the information was therefore duplicious.

The judgment will be reversed, with instructions to enter a proper order and judgment upon the verdict of the jury.

MORRIS, O. J., and MAIN, PARKER, and BAUSMAN, JJ., concur.

METROPOLITAN BLDG. CO. v. CITY OF SEATTLE. (No. 13459.)

(Supreme Court of Washington. Aug. 29, 1916.)

1. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — ESTOPPEL TO OBJECT.

Though the owner of property recovered judgment for damages in condemnation proceedings for street improvements, where plaintiff, after acquiring the property, recognized an assessment by asking for its reduction in accordance with a stipulation filed in the condemnation proceedings, it is estopped to question the validity of the assessment as reduced, on the ground that the judgment awarding damages was a final and conclusive determination of the right to assess the property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147, 1151, 1152; Dec. Dig. ¶¶ 488, 489(1).]

2. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — ESTOPPEL OF CITY.

The defendant city is also estopped from claiming any other assessment but the reduced assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1091-1093, 1161, 1165; Dec. Dig. ¶¶ 493(6).]

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by the Metropolitan Building Company against the City of Seattle. Judgment for defendant, and plaintiff appeals. Affirmed.

Douglas, Lane & Douglas, of Seattle, for appellant. Hugh M. Caldwell and Walter F. Meier, both of Seattle, for respondent.

HOLCOMB, J. Appellant's action was to cancel certain alleged assessments against a tract of land known as the "University Grounds" in Seattle and appellant's leasehold interest therein. Cancellation of the assessments was denied in the court below. Appellant derived its interest by assignment to it of the lease to its predecessor in interest, the Seattle Realty & Building Company, which was made in December, 1907. In December, 1905, the city council of Seattle, by Ordinance No. 13074, authorized and directed condemnation proceedings to acquire the right to regrade and make certain physical changes in Fourth avenue and other streets adjacent to this property. Pursuant to this ordinance condemnation proceedings were commenced on or about February 14, 1906, in the superior court of King county, the cause being designated No. 50820 on the files of that court. That cause, so far as this property is concerned, resulted in a verdict and judgment in favor of appellant's predecessor, the Seattle Realty & Building Company, for the sum of \$15,000 for property taken and \$1 damages to the remainder. It appears from the undisputed evidence in this

case that that verdict resulted from an oral stipulation to that effect between the city and the Seattle Realty & Building Company entered into during the trial. The verdict and judgment were rendered in accordance with the stipulation, which had been reduced to writing and was placed on file in that cause. It was further agreed in that stipulation as follows:

"It is stipulated and agreed that said respondent [Seattle Realty & Building Company], its successors and assigns, shall pay any lawful assessments that may be levied by the city of Seattle for the improvement of Seneca street along the southerly side of said University tract, but that said tract of land shall not be assessed for the regrading of Fourth avenue or Fourth avenue produced over and across said tract of land from Seneca street to Union street."

In November, 1906, the city council, by Ordinance No. 14784, created local improvement district No. 1810, and provided for the payment of the cost of the improvement contemplated by special assessments against the property within the district benefited thereby. An assessment roll was made and confirmed by the city council in October, 1907, by Ordinance No. 17186. In the fall of 1910 appellant, having succeeded to the interest of the Seattle Realty & Building Company, made application for a reduction in the assessment of its properties affected by the proceedings referred to, and on December 14, 1910, to carry out the terms and provisions of the stipulation and agreement, according to the contention of respondent, Ordinance No. 25893 was passed by the city council, whereby the assessment against the property of appellant was reduced to \$8,235, the same being the amount chargeable, according to respondent's contention, on account of the improvement in Seneca street. No objections were made to the original assessment and assessment roll in local improvement district No. 1310 as approved and confirmed by Ordinance No. 17186; the contention of the appellant being that, where the assessment is in itself void, as it contends this assessment was by reason of the lack of jurisdiction in the city council, no objections were necessary. Nor were any written objections made to the assessment as reduced by Ordinance No. 25893. Nor was the regularity, validity, or correctness of the proceedings relating to such an improvement or to the assessment therefor, including the action of the council upon the assessment roll or confirmation thereof, in any manner contested or questioned in the assessment proceeding or in the proceedings for the reduction of the amounts of the assessment. The assessment as reduced has never been paid, nor has any part or installment thereof nor any part of the penalty, interest, or costs thereon. The original assessment against the property of appellant amounted to the sum of \$27,000, which was reduced, as before stated, to some \$8,000.

Passing for the present the first contention of appellant, that it is entitled to resist

these assessments irrespective of its lack of objection to the original or other proceedings for the assessment of the property for the special improvement, it is next contended that, in levying the assessment which purported to be for the cost of the work, the entire University grounds, including that portion laid out and used as streets, was assessed, and for that reason alone the assessments were void. The charter of Seattle in force at the time provided that no greater area than 120 feet back from the street could be assessed in such proceedings for such purposes. We have here, however, the undisputed testimony of the city engineer and of an assistant who prepared the assessment rolls and of the city attorney to the effect that the assessment as reduced in 1910 was levied only upon the area extending back 120 feet from Seneca street. The language of Ordinance No. 25893 reducing the assessment is not specific as to the exact area it was the intention to assess, but it is specific that it was the intention to eliminate from the original assessment all that portion of the assessment levied against the property for the improvement of Fourth avenue; the assessment for the improvement of Seneca street to remain. Appellant's property fronted on Seneca street two blocks and a half from Fourth avenue to the alley beyond Fifth avenue next west and one-half block from Fourth avenue to the next alley east intersecting the block. It extended for two blocks from Seneca street to Union street across University street. Originally the assessment for the improvement of Fourth avenue covered almost the entire half blocks on each side of Fourth avenue from Union street across University street as projected through this land to Seneca street. It is the undisputed testimony of the witnesses for respondent that, upon the application by appellant for the reduction of the assessment, the city authorities recognized that they had violated the terms of the stipulation entered into, to the effect that the Seattle Realty & Building Company, its successors and assigns, should pay any lawful assessment that might be levied by the city for the improvement of Seneca street along the southern side of the University tract, but that the tract should not be assessed for the regrading of Fourth avenue or Fourth avenue produced over and across the tract of land from Seneca street to Union street, and that they made the correction and reduction in order to comply with the terms of the stipulation and the judgment thereon, and with the clear agreement with the Seattle Realty & Building Company. It was their intention to eliminate all assessments except from the property extending back 120 feet from Seneca street to the south, and upon that the reduced assessment was placed, and everything beyond that limit, as they express it, was not assessed. Concluding, therefore, that Ordinance

No. 25893, reducing the assessment, confined the assessment to the area in these blocks 120 feet back from the south line of Seneca street, we conclude that there is no merit in this contention of appellant.

The next point made by appellant is that the verdict in cause No. 50320 was rendered and filed June 6, 1906; that respondent by parol evidence attempted to modify the final judgment and verdict; that the verdict and judgment are conclusive; and that, where damages have been awarded to the remainder in condemnation cases, there can be no assessment for benefits. It is argued that, since the verdict and judgment in that cause awarded damages to appellant's predecessor as the then owner of the property, that was a final and conclusive determination of the right to assess the property. *Seattle & P. S. Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093, is cited and quoted to this effect:

"As soon as it was finally determined by the judgment of the court in condemnation proceeding that the property of the appellant was damaged over and above all local and special benefits arising from the proposed improvement, the right and power to levy special assessment against the property to defray the expenses of that improvement were gone, and the subsequent attempt on the part of the city to assess the property, notwithstanding the previous verdict and judgment, was mere usurpation, and beyond its jurisdiction. When once judicially determined that the property of the appellant was damaged and not benefited by the improvement, it had a right to rest on that adjudication, and was not compelled to take further notice of what the legislative department of the city might thereafter do or attempt to do."

To the same effect *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, is also cited; and *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970, involving the same condemnation proceedings as those here involved, is claimed as conclusive of this question. The *Inner-Circle Property Company Case*, to which this appellant was a party, followed the other two cases cited, to the effect that property found by the jury to be damaged by an improvement is not subject to an assessment for benefits. It was also held in that case that, upon a reassessment, the question of the benefits and the apportionment thereof is an original question in no way controlled by the original assessment. It was there also held regarding appellant's property involved that an award of damages to a leasehold interest in the lands, being an adjudication that the property was not benefited, exempts the same from a re-

assessment levied to make up a deficiency in the original assessment; and the last holding in that case is relied upon by appellant in this case as being conclusive of the right of the respondent to recover the assessments now charged against the property in this case, or of the right of the appellant to have the same canceled.

It does not appear, however, in the decision in the *Inner-Circle Property Company Case*, that the stipulation which has been heretofore set forth and mentioned was called to the attention of this court. It appears now that the verdict for damages to appellant in that case and the judgment thereon were entered in view of the stipulation between the parties thereto that the assessment, so far as the appellant is concerned, should not affect any of its property except that fronting on Seneca street, and that as to the improvement of Seneca street the appellant's predecessor had no objection and was willing to pay the assessment.

[1, 2] In any event what we consider a very important factor in the case is the fact that the *Metropolitan Building Company*, after having succeeded to the rights of the *Seattle Realty & Building Company*, recognized the assessment now in question by asking that it be reduced, and that, acting upon that application, respondent reduced the assessment after a conference between all the parties interested; and this fact is not disputed. It would seem that appellant, together with the other parties interested, construed the stipulation in the original condemnation proceedings as imposing an obligation on the appellant to pay assessments for the improvement of Seneca street adjacent to its property, and that such construction, having been placed on it by the parties, ought to control. *Nelson v. Western Steam Nav. Co.*, 52 Wash. 177, 100 Pac. 325; *General L. & P. Co. v. Wash. Rubber Co.*, 55 Wash. 461, 104 Pac. 650; *Allen v. Granger*, 66 Wash. 455, 119 Pac. 817; *Causten v. Barnette*, 49 Wash. 659, 96 Pac. 225.

This act, we think, estops appellant from questioning the validity of the assessment as reduced, and, of course, reciprocally estops respondent from claiming any other assessment than the reduced assessment.

The determination of this matter disposes of all contentions raised in the case.

The judgment is affirmed.

MORRIS, C. J., and BAUSMAN, PARKER, and MAIN, JJ., concur.

JORGENSEN v. CRANE. (No. 123397.)

(Supreme Court of Washington. Aug. 29, 1916.)

1. NEGLIGENCE ⇐136(19)—TRIAL—QUESTION FOR JURY.

In an action for personal injuries received by a child six years and eight months old while playing with a wheel scraper, whether the defendant was negligent in leaving the scraper unguarded, either on school grounds or within a few feet of the boundary thereof, *held* for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 313, 322; Dec. Dig. ⇐136(19).]

2. NEGLIGENCE ⇐136(29)—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries received by a child six years and eight months old while playing with a wheel scraper left unguarded by defendant, whether the plaintiff was guilty of contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 347-349; Dec. Dig. ⇐136(29).]

3. NEW TRIAL ⇐75(4) — VERDICT CONTRARY TO EVIDENCE—INADEQUATE DAMAGES.

Under Rem. & Bal. Code, § 399, subd. 5, providing that new trial may be allowed because of inadequate or excessive damages appearing to have been given under the influence of passion or prejudice, in an action for personal injuries sustained by a child 6 years and 8 months old, it appearing that, although plaintiff's injury was not necessarily permanent, the femur of the left leg was broken, causing pain for several weeks, and that the cost of proper care was \$362, the court did not abuse its discretion in granting plaintiff a new trial on the ground that a verdict for \$363 was inadequate.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 152; Dec. Dig. ⇐75(4).]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Herbert D. Jorgenson, by his guardian ad litem, C. M. Jorgenson, against Charles O. Crane. From an order denying defendant's motion for a judgment of dismissal notwithstanding a verdict for plaintiff, and from an order granting plaintiff a new trial, defendant appeals. Affirmed.

See, also, 86 Wash. 273, 150 Pac. 419, L. R. A. 1915F, 983.

Palmer & Askren, of Seattle, for appellant. Green & Chester, of Seattle, for respondent.

PARKER, J. The plaintiff, Jorgenson, by his guardian ad litem, seeks recovery of damages which he suffered, when he was six years and eight months old, as the result of the alleged negligence of the defendant Crane in leaving on or near the school ground where the plaintiff was attending school a wheel scraper, which attracted the plaintiff and other children, resulting in their playing with it and causing his injury.

A former appeal to this court from findings and judgment in favor of the defendant, following a trial by the court without a jury, resulted in a reversal of that judg-

ment and the remanding of the case for new trial. This court, being of the opinion that the plaintiff was entitled to recover upon the evidence introduced at the trial, stated the law of the case, in its opinion, as follows:

"If the wheel scraper was an appliance with which it was dangerous for children of such tender years as were in attendance on this school to play in the manner in which they did play with it, and the respondent knew, or as a reasonable person ought to have known, that they would so play with it when he left it upon the school grounds, then it was negligence on his part to leave the scraper on the school grounds in an unfastened and unguarded condition, and he is responsible in damages for any injury to any such child caused thereby." *Jorgenson v. Crane*, 86 Wash. 273, 150 Pac. 419, 420 (L. R. A. 1915F, 983).

The new trial in the superior court, being had with a jury, resulted in a verdict in the plaintiff's favor for the sum of \$363. The evidence seems to show without dispute that the father of the plaintiff incurred \$362 indebtedness in hospital expenses and physician's fees in rendering the plaintiff proper care, as the result of his injury. So the jury seems to have awarded the plaintiff the nominal sum of \$1 for his pain and suffering. While the jury could have concluded from the evidence that the plaintiff's injury was not permanent, and that, having no earning power, he sustained no loss in that respect, yet it is plain that he was very severely injured, the femur of his left leg being broken, and that he suffered pain for several weeks.

Following the return of the verdict, counsel for the defendant moved for judgment of dismissal notwithstanding the verdict, upon the ground of "insufficiency of the evidence to justify the verdict," having also challenged the sufficiency of the evidence to sustain any judgment against him by appropriate motions during the trial. Counsel for the plaintiff moved for a new trial, "because the damages awarded to plaintiff by the jury are wholly inadequate, appearing to have been so limited under the influence of passion or prejudice." The trial court denied the defendant's motion for judgment notwithstanding the verdict, and granted the plaintiff's motion for a new trial. From this disposition of the cause the defendant has appealed to this court.

[1] The principal contention of counsel for appellant seems to be that the leaving of the wheel scraper by him as shown by the evidence introduced upon the second trial, did not constitute negligence on his part, and that the trial court erred in declining to so rule as a matter of law, in denying the motion for judgment of dismissal notwithstanding the verdict. Our decision upon the former appeal answers this contention unless, as counsel claims, the evidence upon the second trial conclusively shows that the scrap-

er was not left on the school ground, and for that reason appellant is not chargeable with negligence. It is true that our former decision proceeds upon the theory that the scraper was left by appellant on the school ground, as the evidence introduced upon the first trial, we may now concede, seemed to show. However, the evidence introduced upon the second trial we think warranted the jury in concluding that the scraper was left unguarded by appellant, either on the school ground or within a few feet of the boundary thereof, where it was as readily accessible to the school children as if it had actually been left unguarded upon the school ground. This, we think, prevented the trial court from ruling, as a matter of law, that appellant was not negligent. We are of the opinion that a defendant's negligence under such a state of facts is not determinable, as a matter of law, by the fact that the attractive dangerous appliance is left by him on one side or the other, near to an imaginary line, as in this case. Our decision in *Haynes v. Seattle*, 69 Wash. 419, 125 Pac. 147, is in harmony with this view.

[2] Contention is made in appellant's behalf that the evidence conclusively shows that respondent was guilty of contributory negligence and fully appreciated the danger in playing with the scraper. We may concede that there is room for argument that it might be so determined as a matter of fact, but we are quite convinced that it cannot be so held as a matter of law. It would, indeed, require a very strong and convincing showing to warrant a court in holding a child of such tender years guilty of contributory negligence, as a matter of law, such as to prevent his recovery for injuries received as the result of the negligence of a person of mature years. We conclude that appellant has no cause to complain of the leaving of the question of respondent's contributory negligence to the jury by the trial court.

[3] We do not understand that counsel for appellant seriously contend that the trial court erred in granting respondent a new trial apart from the denial of appellant's motion for judgment of dismissal notwithstanding the verdict. If, however, such contention is intended, we think it is without merit, in view of the fact that the evidence seems to plainly warrant a more substantial recovery by respondent, if he is entitled to any recovery. It is plain, therefore, that the trial court did not abuse its discretion in granting a new trial upon the ground of inadequate damages. Subdivision 5, § 399, Rem. & Bal. Code. This, of course, does not mean that the jury were bound to find for respondent; but, having so found, the trial court did not abuse its discretion in granting a new trial in respondent's behalf upon this ground.

The order denying appellant a judgment of dismissal notwithstanding the verdict and the order granting respondent a new trial are affirmed.

HOLCOMB, ELLIS, and BAUSMAN, JJ., concur.

SCHARF v. SPOKANE & I. E. R. CO.

(No. 13059.)

(Supreme Court of Washington. Aug. 21, 1916.)

1. RAILROADS §356(3)—OPERATION—INJURIES TO LICENSEES.

Where decedent was killed while walking on the tracks of defendant's switchyard, which until two days before the accident had been necessarily used as a thoroughfare because a parallel street was impassable, although the use of the yard had never been forbidden, he was a naked licensee using the switchyard by sufferance of defendant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1230; Dec. Dig. §356(3).]

2. RAILROADS §391(4) — OPERATION — INJURIES TO LICENSEES—NEGLIGENCE.

Where it was impossible for the engineer of a motor engine to see the deceased on the track ahead of the engine in defendant's switchyard, and the switchman riding on the footboard had not seen him after a time when he had ample opportunity to leave the track, although there was no warning by bell or other signal, the defendant was not wantonly or willfully negligent in causing his death.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1830; Dec. Dig. §391(4).]

3. RAILROADS §387—INJURIES TO LICENSEES—PROXIMATE CAUSE.

Where the decedent on entering defendant's switchyard, and after looking at the switching engine, then standing still, proceeded walking between the rails, although there was a clear space upon which he could have walked with safety, without looking further until struck by the engine, although no warning by bell or otherwise was given, his own negligence was the proximate cause of the accident.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1293, 1814-1818; Dec. Dig. §387.]

4. RAILROADS §381(3) — OPERATION — INJURIES TO LICENSEES—CARE REQUIRED OF LICENSEE.

In making use of a railway switching yard, the decedent was under a duty to exercise the highest degree of care, choose the safer of two paths, and make constant use of his sight and hearing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1287; Dec. Dig. §381(3).]

5. RAILROADS §391(3)—INJURIES TO LICENSEES—WILLFUL OR WANTON INJURY.

Willfulness or wantonness cannot be imputed to defendant because its engine before striking decedent had no forward lookout and did not sound any bell or other warning signal.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1323, 1829; Dec. Dig. §391(3).]

6. RAILROADS §377—INJURIES TO LICENSEES—DEGREE OF CARE.

The operators of a train have a right to rely on a bare licensee or trespasser to perform the

primary duty upon him to keep out or get out of danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1230; Dec. Dig. ¶377.]

7. NEGLIGENCE ¶97—COMPARATIVE NEGLIGENCE—INJURIES TO TRESPASSERS.

Where contributory negligence was the proximate cause of decedent's death in defendant railroad's switchyard, the fact that defendant was negligent is immaterial, as the doctrine of comparative negligence does not obtain.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 162; Dec. Dig. ¶97.]

8. RAILROADS ¶358(1)—INJURIES TO LICENSEES—LIABILITY—WILLFUL OR WANTON INJURY.

A naked licensee or trespasser who is injured upon the tracks or right of way of a railway company can recover for such negligence only as arises from wantonness on the part of the railway or its employes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1236; Dec. Dig. ¶358(1).]

9. RAILROADS ¶390—INJURIES TO TRESPASSERS—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where the contributory negligence of the decedent in walking on the tracks in defendant's switchyard continued up to the moment of his death, and the defendant, although negligent in not giving a warning signal or keeping a lookout, had no actual knowledge of the danger, the doctrine of last clear chance had no application.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. ¶390.]

Department 2. Appeal from Superior Court, Spokane County; John R. Mitchell, Judge.

Action by Caroline Scharf, widow of Fred S. Scharf, deceased, and as guardian ad litem of Charles Scharf and others, against the Spokane & Inland Empire Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Plummer & Lavin, of Spokane, for appellants. Graves, Kizer & Graves, of Spokane, for respondent.

FULLERTON, J. Fred S. Scharf was killed by being run over by one of the defendant railway's electric motor engines in its switching yards at Spokane. His widow brings this action to recover on behalf of herself and his minor heirs for his death.

The facts as disclosed by the evidence are, in substance, these: Front avenue, one of the streets of the city of Spokane which parallel the switchyard of defendant, was almost impassable for some length of time, and people, under the necessity of passing to and from their homes in that section of the city, had been making use of the switchyard for a thoroughfare. Portions of the yard between the tracks were hard, smooth, and generally dry, affording a good footway; the space between the two main line tracks being 12 feet wide. About two days before the accident in which Scharf was killed Front avenue had been put in condition for

travel, and no necessity existed longer for using the switchyards as a pathway. The defendant, however, had never forbidden the use of its yard to people who sought to cross or travel through it. There were altogether ten tracks in the yard, including the east and west main lines. The main lines are connected by what is known as a crossover track; the west-bound main line being north of the east-bound main line. This crossover track connecting the two main lines is about 175 feet long, according to the engineer, but only 78 feet 6 inches, according to another witness who claims to have measured it. On February 9, 1915, the day of the accident, at about 5 o'clock in the afternoon, the appellant and her husband, the decedent, were on their way home through the switchyard, the decedent walking between the rails of the east-bound track, and appellant upon the outer edges of the ties. There were clear spaces and good paths on each side of the track upon which the couple could have walked with safety, one of the clear spaces being 12 feet wide. As they entered on the track they looked for approaching trains or engines, and noticed nothing except a switch engine standing still on the west-bound main line some 50 or 60 feet westward from their point of observation. They continued walking the track at an ordinary gait without giving the engine any further attention, except perhaps to look back at a time before it began to move. The engine noticed by appellant and decedent had stopped on the west-bound main track just beyond the switch for the crossover track for the purpose of uncoupling and leaving a car. It then took the switch for the crossover track, stopping long enough to allow the switchman to reset the switch, and then ran down the crossover track and struck the deceased at the point where the crossover track unites with the east-bound main line. There was no warning either by bell, whistle, or other signal given to deceased. The headlight was not burning. The day was still light enough to enable persons to be distinguished more than 100 feet distant. There was evidence that the bells were usually rung on engines moving in the yard; also that a motor engine in running slowly does not make much noise. This switch engine was a double-headed electric motor which could be worked from either end of the cab by shifting the brake valve handle and the operating lever. At the time of the accident the engineer was operating the engine from the west end cab, from which place it was impossible for him to see the deceased upon the track to the south of the crossover track on which he was running. The only employe of respondent who saw the Scharfs was the switchman, who was at the front of the engine on the footboard. He was then about 40 or 50 feet west of the crossover switch. The Scharfs at

that time were walking east along the east-bound main track within from 50 to 60 feet of the place where the accident occurred. The switchman then passed to the other end of the engine, uncoupled a car, boarded the footboard of the engine at that end, got off to throw the switch when the engine had stopped for that purpose after passing onto the crossover track, and again boarded the same footboard, where he was riding at the time of the accident. The switchman did not see the Scharfs again after he had noticed them on the east-bound track, prior to his change of position on the engine.

At the conclusion of the plaintiff's evidence, defendant moved the court to discharge the jury and render judgment for defendant upon the ground that the evidence was insufficient to justify a recovery in favor of the plaintiff. The court sustained the motion and entered judgment accordingly. The plaintiff appeals, assigning as error the sustaining of defendant's challenge to the sufficiency of the evidence, the order discharging the jury, and the entering of judgment in favor of defendant.

[1-4] We think the evidence establishes that the appellant's decedent was a naked licensee using the respondent's switching yard by sufferance of the latter; that the respondent was not wantonly or willfully negligent in occasioning his death; and that his own negligence was the proximate cause thereof. In making use of such a dangerous place as a railway switching yard, decedent owed it to the respondent as well as to himself to exercise the highest degree of care for his own safety. It was incumbent on him to choose the safer of two paths through the yard which were equally convenient and to make constant use of his sight and hearing. He did neither. He selected the middle of a railway track to pursue his way through the yard, while on either side of its rails were paths equally good which he could have traveled in safety. He saw the switch engine on a parallel track, at the time it had stopped to allow a car to be uncoupled, and thereafter never looked to see whether it was again put in motion, although he knew that it was possible for it to enter the track on which he was walking. He was run down by the engine without having heard its approach. The presumption necessarily arises that he was not exercising the senses of sight and hearing with which he was endowed. It is true no bell was rung on the engine, but a moving motorcar would give warning of its approach to a man not absorbed in other matters than the dangers of his situation. There was nothing to obstruct his view. He knew that the yard was used for the movement of engines and cars forward and backward. He had no right to lull himself into a sense of security from having seen the only engine in the yard at rest. All the circumstances of the case show negli-

gence on decedent's part continuing up to the moment of death.

[5, 6] We incline to the view that there was some negligence on respondent's part in running its engine without sounding its bell, or having some one, either motorman or switchman, in a position on the engine to keep a forward lookout. But wantonness or willfulness cannot be imputed to respondent because of its omission of duty in that respect. The motorman had no knowledge of the dangerous situation of decedent. The switchman had noticed him upon the track, but doubtless, if he gave the matter a second thought, assumed naturally that he would get out of the way of the engine, as people in full possession of their faculties of seeing and hearing are accustomed to do. The primary duty was upon decedent to keep out, or get out, of the way of danger, and the operatives of trains have a right to rely on a bare licensee or trespasser so doing.

[7, 8] The proximate cause of decedent's death being his own act of negligence, and even though that of respondent may have contributed thereto in some degree, the fact is immaterial, as the doctrine of comparative negligence does not obtain in this state. The present case is governed by the well-settled rule that a naked licensee or trespasser who is injured upon the tracks or right of way of a railway company can recover for such negligence only as arises from wantonness or willfulness on the part of the railway or its employees. As it is expressed in 3 Elliott, Railroads (2d Ed.) § 1250:

"The better rule is that the licensee takes his license subject to its concomitant perils, and the licensor, as a general rule, owes him no duty except to refrain from willfully or wantonly injuring him, or to exercise ordinary and reasonable care after discovering him to be in peril."

In 2 Thompson, Negligence (2d Ed.) §§ 1713, 1715, it is said:

"This doctrine is that, where a trespasser or bare licensee exposes himself to the risk of being run over upon a railway track or in a railway yard, and is killed or injured, there can be no recovery against the railway company unless it is made to appear that the accident was the result of willful misconduct, or of negligence or recklessness so gross as to amount, in theory of law, to willful misconduct."

"It seems entirely plain, from what has preceded, that the failure of the railway company to take special precautions beforehand in anticipation of the presence of trespassers upon the tracks, or in its yards, as by stationing a lookout, or giving danger signals, or running at a diminished rate of speed, or using care to discover trespassers in positions of danger, cannot be ascribed to it as gross, reckless, wanton, or willful negligence within the meaning of the rule under consideration, since the great mass of holdings refuses to impute simple negligence by reason of such acts."

In Kroeger v. Grays Harbor Const. Co., 83 Wash. 68, 145 Pac. 63, we say:

"The rule is that the defendant owes no duty of actual care, while a duty of vigilance or the highest degree of care is put upon one who, for

his own purposes, goes upon the premises of another and puts himself in a place of danger."

See, also, *Illinois Central R. Co. v. Elcher*, 202 Ill. 556, 67 N. E. 376; *Cannon v. Cleveland, etc., R. Co.*, 157 Ind. 682, 62 N. E. 8; *Cleveland, C., O. & St. L. Ry. Co. v. Tartt*, 64 Fed. 823, 12 C. C. A. 618; *Id.*, 99 Fed. 369, 39 C. C. A. 568, 49 L. R. A. 98; *Huff v. Chesapeake & Ohio Ry.*, 48 W. Va. 45, 35 S. E. 866; *Spicer v. Chesapeake & Ohio Railway Co.*, 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385.

[9] The appellant has cited numerous authorities bearing on the doctrine of "last clear chance," but that doctrine has no application to the present case. It is founded on the duty of a defendant who has knowledge of the dangerous situation in which a person has placed himself to use reasonable care to avoid injuring him, notwithstanding the latter's own negligence has brought him into a place of danger. The doctrine is based on the fact of actual knowledge on defendant's part of the danger to the injured party. Under such circumstances plaintiff's negligence is regarded as the remote cause and that of the defendant as the proximate cause of the injury inflicted. As we have seen in this case, the respondent was without knowledge of the probability of injury to the decedent, and the decedent's negligence continued up until the instant of his death. Conceding that respondent might have been negligent, its negligence was merely concurrent with that of the decedent. The contributory negligence of decedent was the proximate cause of his death, inasmuch as his negligence in walking the track without due care had not terminated. It is stated in 29 Cyc. 531:

"This rule [last clear chance] has no application where the negligence of the person injured and of defendant are concurrent, each of which at the very time when the accident occurs contributes to it."

See, also, *Dyerson v. Railroad Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, 11 Ann. Cas. 207; *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; *O'Brien v. Washington Water Power Co.*, 79 Wash. 82, 139 Pac. 771; *Kiely v. Seattle Electric Co.*, 78 Wash. 396, 139 Pac. 197.

In discussing the rule this court has said: "It is not intended to permit a recovery in spite of the plaintiff's negligence, but relieves that negligence of its contributory character in cases where, by reason of the defendant having the last clear chance to avoid the injury, his negligence in not using reasonable care to avoid it is the proximate or efficient cause of the injury, while the negligence of the plaintiff is only a remote cause, condition or incident." *Herrick v. Washington Water Power Co.*, 75 Wash. 156, 134 Pac. 984, 48 L. R. A. (N. S.) 640.

See, also, *Nicol v. Railroad Co.*, 71 Wash. 409, 128 Pac. 628, 43 L. R. A. (N. S.) 174; *Mosso v. Stanton Co.*, 75 Wash. 220, 184 Pac. 941, L. R. A. 1916A, 943; *O'Brien v. Washington Water Power Co.*, 79 Wash. 86, 139 Pac. 771.

The facts of the present case do not bring it within the last clear chance rule, but, as we have said, the case falls within the rule denying recovery to a mere licensee negligently using dangerous premises of another, and injured by that other without wantonness or willfulness.

The judgment is affirmed.

HOLLOMB, MAIN, MOUNT, and PARKER, JJ., concur.

STATE BOARD OF MEDICAL EXAMINERS v. MACY. (No. 18151.)

(Supreme Court of Washington. Aug. 29, 1916.)

1. PHYSICIANS AND SURGEONS ⇨11(3) — REVOCATION OF LICENSE—APPEAL—SCOPE—PRESENTATION OF OBJECTIONS.

Where the record fails to show that sufficiency of a complaint before the medical examiners for revocation of license was challenged before the board or on appeal to the superior court, it must be given a liberal construction to sustain the judgment.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. ⇨11(3).]

2. PHYSICIANS AND SURGEONS ⇨11(8) — REVOCATION OF LICENSE—COMPLAINT—SUFFICIENCY.

Complaint for revocation of license to practice medicine, couched in statutory words of Rem. & Bal. Code, § 8397½, though indefinite, but supplemented by stipulation filed on appeal to the superior court, serving as bill of particulars, by setting out the alleged unethical advertising, cannot be held insufficient to support revocation, in the absence of attack before the board or in the superior court.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. ⇨11(3).]

3. PHYSICIANS AND SURGEONS ⇨2—REVOCATION OF LICENSE—STATUTES—VALIDITY.

Rem. & Bal. Code, § 8397½, subd. 3, stating unprofessional conduct for which license may be revoked to embrace all advertising of medical business intended or having tendency to deceive public or impose on credulous or ignorant persons, and so be harmful or injurious to public morals or safety, is not unconstitutional, as so vague and uncertain as to leave determination to arbitrary personal opinion of the medical board.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. ⇨2.]

4. STATUTES ⇨47 — PHYSICIANS AND SURGEONS—REVOCATION OF LICENSE—VALIDITY OF STATUTE.

Nor is subdivision 4, as to advertising medicine or means to regulate or establish menses, unconstitutional, as vague and uncertain.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. ⇨47.]

5. JURY ⇨10—RIGHT TO JURY TRIAL.

Although the Constitution provides that the right to jury trial shall remain inviolate (article 1, § 21), that provision applies only where the right existed on adoption of the Constitution, so that, no provisions as to license of physician and revocation of license having then existed, no constitutional right to jury trial in such case exists.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 15, 16, 27½; Dec. Dig. ⇨10.]

6. JURY ⇨14(1)—RIGHT TO JURY TRIAL — "CIVIL ACTION."

Rem. & Bal. Code, § 8399, providing for trial de novo on appeal from medical board in license revocation proceedings, and that they shall stand for trial as ordinary civil actions, does not give the right to a jury trial; "civil action" being a generic term, not necessarily implying jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 63, 72, 81, 83; Dec. Dig. ⇨14(1).]

For other definitions, see Words and Phrases, First and Second Series, Civil Action.]

Department 2. Appeal from Superior Court, King County; R. B. Albertson and J. I. Ronald, Judges.

Proceeding before the State Board of Medical Examiners for revocation of license of M. C. Macy, an osteopath. From a judgment affirming decision of the Board revoking the license, Macy appeals. Affirmed.

Carl J. Smith, of Seattle, for appellant. W. V. Tanner, Atty. Gen., and Howard Waterman, Asst. Atty. Gen., for respondent.

PARKER, J. This is an appeal from a judgment of the superior court for King county, affirming the decision of the state board of medical examiners, revoking the license of appellant, M. C. Macy, as a licensed osteopathic physician practicing his profession in Seattle.

[1] It is first contended by counsel for appellant that the complaint filed against him, and upon which the action for the revocation of his license was tried before the state board of medical examiners, and thereafter upon appeal in the superior court, does not state facts constituting cause for the revocation of his license. There is nothing in the record before us indicating that the sufficiency of the complaint was in any manner challenged before the state board of medical examiners or in the superior court, so we conclude that its sufficiency is challenged in this court for the first time. This fact calls for a most liberal construction of its allegations looking to the sustaining of the judgment, even if the proceedings should be regarded as purely judicial. *Mosher v. Bruhn*, 15 Wash. 332, 46 Pac. 397; *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 988; *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114.

[2] The complaint, after charging that appellant "advertised his medical business" in certain named newspapers in Seattle and Tacoma upon certain specified dates; charges:

"That such advertising of his medical business was intended and has a tendency to deceive the public and impose upon credulous and ignorant persons and so be harmful and injurious to public morals or safety. That such advertisements consist in part in advertising of medicine or of means whereby the monthly periods of women can be regulated, or the menses re-established if suppressed."

This quoted portion of the complaint follows in substance the language of subdivisions 3 and 4 of section 8397½, Rem. & Bal. Code, denning unprofessional conduct, for which the licenses of osteopaths and other physicians may be revoked by the state board of medical examiners. The argument is, in substance, that the complaint is defective, in that it does not set out or describe with sufficient certainty the advertisements charged as the unprofessional conduct on the part of appellant. It might well be argued that this, in any event, would only entitle appellant to have the complaint

against him made more specific and certain or that he be furnished a bill of particulars before trial, and that, having proceeded to trial before the state board of medical examiners without insisting upon this right it was waived. However that may be, when the case was pending upon appeal in the superior court, where, in accordance with section 8399, Rem. & Bal. Code, it was tried de novo, a stipulation was entered into between counsel upon both sides, before the trial in the superior court, that certain specified advertisements, copies thereof being made a part of the stipulation, which appeared upon their face to have been published by appellant in certain named Seattle and Tacoma newspapers, might be introduced in evidence upon the trial in the superior court, subject only to objections as to their "competency and materiality." The record before us renders it apparent that this stipulation served all the purposes of a bill of particulars, and advised appellant of the specific charge against him as much as any language of the complaint, standing alone, could possibly have done. It seems quite clear to us that he cannot now complain of the insufficiency of the complaint, and that in no event can the complaint be said to be so defective as to be insufficient to support the judgment. It seems to be well settled by the authorities that proceedings of this nature are not purely judicial, in the sense that they must be attended by the strict rules of pleading and procedure incident to actions at law. *Meffert v. Packer*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811; *Munk v. Frink*, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. (N. S.) 439; *State Medical Board v. McCrary*, 95 Ark. 511, 130 S. W. 544, 30 L. R. A. (N. S.) 783, Ann. Cas. 1912A, 631; *State v. State Board of Medical Examiners*, 34 Minn. 387, 26 N. W. 123.

[3] Among the seven definitions of acts declared to constitute unprofessional conduct for which a practitioner's license may be revoked, found in section 8397½, Rem. & Bal. Code, is the following:

"Third. All advertising of medical business which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety."

This portion of the statute, it is contended in appellant's behalf, is unconstitutional, in that it is so vague and uncertain as to leave the acts constituting unprofessional conduct, attempted to be so defined, subject to the mere personal opinion of the members of the state board of medical examiners before whom the question of the unprofessional conduct is to be tried, and furnishes no standard for the guidance of the board in determining what is unprofessional conduct so attempted to be defined by the statute. This contention touches a question with reference to which the courts are not in entire harmony, but we are constrained to adopt the view that this

definition of unprofessional conduct is not void or unconstitutional because of its vagueness or uncertainty, in harmony with what we regard as the weight of authority and better reason, in view of the fact that this is not a criminal statute, enacted with any purpose of imposing penalties as such.

In *State ex rel. Williams v. Purl*, 228 Mo. 1, 128 S. W. 196, there was involved the revocation of a license of a dentist by the state board of dental examiners upon the ground of unprofessional conduct in the publication of advertisements of his business. The statute invoked by the prosecution was assailed by defendant's counsel as being unconstitutional, in that it merely defined the alleged unprofessional conduct by the words "fraud, deceit or misrepresentation in the practice of dentistry." The statute was held constitutional, and not void for uncertainty. It seems plain to us that the third subdivision of section 8397½, above quoted, is no less certain than these words under consideration by the Missouri court. The words of our statute, "advertising * * * which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons," surely are no less certain as defining unprofessional conduct.

In *State Medical Board v. McCrary*, 95 Ark. 511, 130 S. W. 544, 30 L. R. A. (N. S.) 783, Ann. Cas. 1912A, 631, the same conclusion was reached by the court, having under consideration alleged unprofessional conduct of a physician defined by the statute as "publicly advertising special ability to treat and cure chronic and incurable diseases."

In *State v. State Medical Examining Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575, and *State v. State Board of Medical Examiners*, 34 Minn. 391, 26 N. W. 125, unprofessional conduct warranting the refusal to issue or to revoke a license, defined by the statute as "unprofessional or dishonorable conduct," was recognized as being constitutional.

In *Berry v. State* (Tex. Civ. App.) 135 S. W. 681, the statutory words "other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public," following specified unprofessional acts, was held a sufficient statutory specification of conduct warranting revocation of licenses, and not void for uncertainty. In view of the element of deceit in our statutory definition of unprofessional conduct, the following observations of the Texas court in that case is of interest here:

"The terms 'unprofessional' or 'dishonorable' conduct, used in the law of 1907, are qualified and modified by the language 'of a character likely to deceive or defraud the public,' to distinguish them from acts that are unprofessional or dishonorable under the code of ethics prescribed by the honorable profession of medicine that would not, directly, at least, react to the disadvantage of the public, such as not advertising, or not entering into a consultation with an attending physician without his consent, and

other acts that go to form and constitute the code of the honorable and upright practitioner of medicine. The law leaves the enforcement to the medical profession of its rules of ethics, and, however conducive they may be to creating and preserving the high standard of one of the most important and honored professions in the world, takes no cognizance of them, and does not seek to enforce them, except in so far as their infraction may infringe upon the rights and welfare of the public. But when the unprofessional conduct of the member of the medical profession is of such a character as to deceive or defraud the public, then the law denounces such conduct, and strips the offender of the means which make it possible to impose upon the credulous and unwary. Such unprofessional conduct would necessarily be closely allied to crime, because it is defrauding the public, and yet it was never intended to confine such conduct to the kind or class of offense that is denounced by the Criminal Code of Texas. That is provided for in a different subdivision of the statute from the one under which this case is prosecuted."

In *Richardson v. Simpson*, 88 Kan. 684, 129 Pac. 1128, 43 L. R. A. (N. S.) 911, a statute authorizing the revocation of a dentist's license for specified offenses the additional phrase "or for any other dishonorable conduct" was held, as to the latter, not unconstitutional for indefiniteness.

In *Aiton v. Board of Medical Examiners*, 13 Ariz. 354, 114 Pac. 962, L. R. A. 1915A, 691, a statutory definition of unprofessional conduct, reading "any grossly immoral or unprofessional conduct rendering him or her unfit to practice medicine," was held sufficiently definite and certain so far as constitutional objections are concerned.

The only decisions of the courts coming to our attention which we regard as lending support to appellant's contention and in conflict with the holdings of the above noticed decisions are *Matthews v. Murphy* (Ky.) 63 S. W. 785, 54 L. R. A. 415, *Czarra v. Board of Medical Supervisors*, 25 App. D. C. 443, and *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750. This California case, however, deals with a statutory definition of unprofessional conduct reading, "all advertising of medical business in which grossly improbable statements are made." The element of tendency to deceive or intent to deceive found in the above quoted definition of our statute was apparently not present in the California statute, and this it might well be argued distinguishes that case from the one before us.

[4] We conclude that the definition of unprofessional conduct found in the third subdivision of section 8397½, Rem. & Bal. Code, above quoted, is not void or unconstitutional for vagueness or uncertainty. The same contention is made by counsel for appellant against the constitutionality of the fourth subdivision of section 8397½ upon which the judgment of the state board of medical examiners and the superior court seems to have been also rested. We think there is much less ground for the contention

of counsel for appellant to rest upon with regard to the fourth subdivision than with respect to the one we have above discussed and that what we have already said disposes of that contention against appellant.

[5] It is contended by counsel for appellant that he was entitled to a jury trial in the superior court, his counsel having made demand therefor prior to the trial therein. This contention rests apparently upon the theory that, since section 8399, Rem. & Bal. Code, provides for a trial de novo upon appeal to the superior court, he is entitled to a jury trial therein. That section, among other things, provides:

"The clerk of such court shall thereupon [upon filing of the appeals] docket such appeal causes, and they shall stand for trial in all respects as ordinary civil actions, and like proceedings be had thereon. Upon such appeal said cause shall be tried de novo."

So far as appellant's claim of right to jury trial is rested upon the Constitution is concerned, it seems plain that we are dealing with a proceeding wherein the right of trial by jury did not exist prior to the adoption of our state Constitution. Indeed, an examination of our statutes then in existence will show that there was then no such proceeding triable in any court or before any tribunal. The statute then in existence made no provision for the licensing or revoking of licenses of physicians (Code 1881, § 2284 et seq.; Laws 1886, p. 169; Laws 1887, p. 159), the first act, providing for the issuing and revocation of licenses of physicians, being passed after the adoption of our Constitution (Laws 1890, p. 114), which act, so far as procedure touching the revocation of licenses is concerned, is in substance the same as prescribed by the law we are now considering. It is also apparent that there was no such proceeding at common law. We have held, in harmony with the general rule, that our constitutional provision (Const. art. 1, § 21) that "the right to trial by jury shall remain inviolate" means only that such right shall continue as it existed at the time of the adoption of our Constitution. *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; *Garey v. City of Pasco*, 154 Pac. 433. It would seem to follow, therefore, that this constitutional guaranty has no reference to proceedings of this nature.

In *State Board of Health v. Roy*, 22 R. I. 588, 48 Atl. 802, there was involved the question of the right to trial by jury in a proceeding involving the revocation of a license of a physician upon substantially the same grounds as are here involved and under a statute which apparently contemplated a trial de novo in court upon appeal from the decision of the board of substantially the same nature as is provided by our statute. Touching the question of jury trial in such cases, having in view their constitutional guaranty of jury trial in the exact

words of ours, Justice Rogers, speaking for the court, observed:

"In *Mathews v. Tripp*, 12 R. I. 256, 258, Durfee, C. J., says: "Trial by jury is a well-known kind of trial. The right of trial by jury, as secured by the Constitution, is in our opinion simply the right to that kind of trial. And the right remains inviolate so long as the jury continues to be constituted substantially as the jury was constituted when the Constitution was adopted, and so long as all such cases as were then triable by jury continue to be so triable without any restrictions or conditions which materially hamper or burden the right." A jury trial is not required by the law of the land in all civil cases, and unless it can be shown that previous to the adoption of the Constitution of the state cases of the class now under consideration were required to be tried by a jury, the provision of the statute in question would not be invalid because of not providing for such a trial. It is clear that this is not one of the classes of cases in which jury trial is reserved by the Constitution, as it belongs to a class which has arisen since the adoption of the Constitution."

We are of the opinion that there is no constitutional right of trial by jury in proceedings of this nature.

[8] Was appellant entitled to a trial by jury because of the provision of section 8399, that cases on appeal to the superior court involving the revocation of licenses of osteopaths and other practitioners "shall stand for trial in all respects as ordinary civil actions, and like proceedings be had thereon"? In other words, is this a statutory awarding of a jury trial in such cases? Manifestly not unless the words "civil actions," used in the statute, compel such a conclusion. The decision of the Rhode Island court in the *Roy Case*, above noticed, seems to argue against the contention that such statutory provision has the effect of awarding a jury trial. The exact terms of the statute involved in that case do not appear in the opinion of the court, but it does appear from remarks of the court therein that if the decision of the board is against the defendant upon the question of the revocation of his license and he appeals to the court his case is there "tried in full." The court apparently reached the conclusion that the defendant was not entitled to a jury trial upon the theory, that while the proceeding was in the nature of a civil action it was not for that reason alone triable by jury, the court observing that "jury trial is not required by the law of the land in all civil cases." This observation of the Rhode Island court seems peculiarly applicable here, in view of the fact that the words "civil action" have been the name common to all actions "for the enforcement or protection of private rights or the redress of private wrongs" by the express terms of our statute since long before the adoption of our Constitution. Rem. & Bal. Code, § 153. The name has no more application to actions triable by a jury than to those not so triable.

Counsel for appellant call our attention

to and rely principally upon the decision of the Supreme Court of Indiana in *Reilly v. Cavanaugh et al.*, 32 Ind. 214, holding that an attorney in a disbarment proceeding against him was entitled to a jury trial under a statutory provision reading "if he [the accused attorney] appear, pleadings may be filed and trial had as in other cases." This does seem to lend support to counsel's contention in the light of the similar provision of our statute; but that was a proceeding involving something more than the question of the disbarment of an attorney. It was apparently an action against the attorney by his client to recover money which he neglected to turn over to his client; the prayer being "for a judgment for the same with ten per cent. damages, and that he be suspended from the practice in the courts of this state." While the opinion does not show the exact language of the statute other than that above quoted, it is apparent that the statute authorized an action against the attorney to recover the money and incidentally involving his suspension from practice. This, we think, furnishes some reason for construing the statute, as that court did, as awarding defendant attorney a jury trial. If this does not differentiate that case from the one before us, with all due deference to that learned court, we would feel constrained to entertain a different view from that reached by it, in view of the theory of disbarment proceedings adopted by us, which are of the same nature as that here involved, that they are not criminal proceedings, nor are they purely civil actions in a common law sense, but are special proceedings. *State ex rel. Mackintosh v. Rossman*, 53 Wash. 1, 101 Pac. 357, 21 L. R. A. (N. S.) 821, 17 Ann. Cas. 625; *State ex rel. Murphy v. Snook*, 78 Wash. 671, 675, 139 Pac. 764.

Counsel for appellant also cite and place some reliance upon decisions of the Supreme Court of Louisiana in *Chevalon v. Schmidt*, 11 Rob. (La.) 91, and *Turner v. Walsh*, 12 Rob. (La.) 383. These decisions, however, hold the defendant entitled to a jury trial in proceedings seeking his disbarment, because of the peculiar language of the statute there involved, and upon the theory that it was there, in effect, a criminal proceeding. In view of the nature of the proceeding in this state, we conclude that the statute does not mean that appellant is entitled to trial by jury in the superior court.

We find no error prejudicial to appellant, the evidence is not before us presenting the merits of the case, so we conclude that the judgment of the superior court, affirming the decision of the state board of medical examiners, must be affirmed. It is so ordered.

MORRIS, C. J., and CHADWICK and BAUSMAN, JJ., concur.

STATE ex rel. WHITTEN v. CITY OF SPOKANE et al. (No. 13475.)

(Supreme Court of Washington. Aug. 29, 1916.)

1. EMINENT DOMAIN §271 — TAKING — ACTION FOR DAMAGES.

Where a city in regrading a street damaged relator's property without instituting condemnation proceedings as against her, she had a right to an action for damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 725-736, 741; Dec. Dig. § 271.]

2. MANDAMUS §3(2)—RIGHT TO RELIEF—ADEQUATE REMEDY AT LAW.

Such owner had an adequate remedy at law to recover damages, and mandamus to compel the city to institute a condemnation proceeding to assess and pay the damage would not lie.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 8; Dec. Dig. § 8(2).]

3. LIMITATION OF ACTIONS §32(2)—DAMAGES TO PROPERTY.

An action for damages brought more than two years after the doing of the work, and the resulting damage, was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 143; Dec. Dig. § 32(2); Eminent Domain, Cent. Dig. § 783.]

4. LIMITATION OF ACTIONS §170—RIGHT TO RELIEF—DAMAGE TO PROPERTY.

The fact that an abutting owner permitted an action against a city for damages from the regrading of a street to be barred by the two years' statute of limitations did not entitle him to mandamus to compel the city to institute condemnation proceedings to assess and pay his damages.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 656; Dec. Dig. § 170.]

5. EMINENT DOMAIN §177 — CHANGE OF GRADE—PROCEEDING—PARTIES DEFENDANT.

In a proceeding to change the grade of a street, it is not incumbent upon a city to institute condemnation proceedings against any others than those whom it believes will be damaged, as the law affords an owner claiming to be damaged opportunity to protect himself by intervention.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 478, 480, 481, 483, 485; Dec. Dig. § 177.]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Proceedings in mandamus by the State of Washington, on the relation of Georgia B. Whitten, against the City of Spokane and others. Demurrer to application sustained and relator appeals. Affirmed.

R. L. Edmiston of Spokane, for appellant. H. M. Stephens, Ernest E. Sargeant, and Dale D. Drain, all of Spokane, for respondents.

MORRIS, C. J. Proceedings in mandamus to compel the city, through its officials, to institute condemnation proceedings, and assess and pay damages claimed to have been suffered by relator's property by reason of a

regrade of the street in front thereof, during the summer of 1911. A demurrer was sustained to the application for the writ, and relator appeals.

[1] The claim for damages here sought to be enforced is of the same character as those attempted to be set up in *Spokane v. Onstine*, 86 Wash. 4, 149 Pac. 1, in which several of the appellants, who were not made parties to the original condemnation suit, sought to offset damages at the hearing upon the assessment roll against the amount assessed against their property by the eminent domain commission. This right was denied for the reason that the only question that could then be tried was whether there was an equitable and ratable assessment upon the property benefited, it being further stated that neither the court nor the eminent domain commission had any power to take into consideration any damages the property might have sustained by reason of the change of grade. It was also there said that the appellant should have commenced action against the city to recover the damages claimed to have been sustained by them or have intervened in the eminent domain proceedings. That a property owner has an adequate remedy at law against a municipality seeking to damage property without instituting statutory condemnation proceedings is too clear for argument. Such right is recognized in *Spokane v. Onstine* supra; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; and *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304. In the latter case, speaking with reference to damages for change of grade, it was said, "Plaintiffs' only remedy in this case is to recover damages," and the rule of the *Kincaid* Case was recognized to the effect that, where there had been a taking and the public function had been exercised, the only remedy of the property owner was to take compensation. The city, having proceeded to damage relator's property without instituting condemnation proceedings as against her, she had a clear right to an action for any damages sustained by reason of the city's action. This right was again recognized in the late case of *Domrese v. Roslyn*, 89 Wash. 106, 154 Pac. 140.

[2] Having a plain, speedy, and adequate remedy at law, this proceeding cannot be maintained, for it is a well-established rule that mandamus will not lie where there is an adequate remedy at law. *State ex rel. Brunn v. State Board, etc.*, 61 Wash. 623, 112 Pac. 746.

[3, 4] This action was not commenced until October 4, 1915, which, as will be seen by a reference to the *Onstine* Case, was more than two years after the doing of the work and the resulting damages. Such delay is fatal to the right of action. The two-year statute of limitations applies to actions for damage

to abutting property resulting from a change of grade. *Denney v. Everett*, 46 Wash. 342, 89 Pac. 934, 123 Am. St. Rep. 934. The fact that relator has slept upon her rights, and permitted the period to lapse in which she could have brought an action for damages, thus depriving herself of a legal right, does not protect her in seeking to make use of mandamus to obtain the same relief for which, had she proceeded in time, her right in law would have been ample.

[5] Relator's position seems to be that inasmuch as the city, in instituting condemnation proceedings, is acting in its sovereign capacity, that no cause of action rests in the property owner, even though as to him the proceeding is without notice. The mere fact that the city in a condemnation proceeding acts in its sovereign capacity does not differentiate it from an individual who, without right, damages another's property, and when the city elects so to proceed it can be made to answer for the damages done in a direct action by the property owner. In seeking to change the grade of its streets, it is not incumbent upon the city to institute proceedings against any other than those it believes will be damaged. If any property owner, as was said in the *Kincaid Case*, asserts a contrary belief, the law affords him ample opportunity to protect himself, either by intervention in the original proceedings, or by a separate action for damages in his own behalf.

The judgment is affirmed.

BAUSMAN, MAIN, PARKER, and FULLERTON, JJ., concur.

ANKENY v. CITY OF SPOKANE. (No. 13056.)

(Supreme Court of Washington. Aug. 21, 1916.)

1. MUNICIPAL CORPORATIONS §419—"LOCAL IMPROVEMENT"—CONSTITUTIONAL AND STATUTORY PROVISIONS—PERMANENCY—ELECTRICITY FOR LIGHTING PLANT.

Laws 1911, p. 442, as amended by Laws 1913, p. 409, providing that, on petition signed by the owners of two-thirds of the linear frontage and two-thirds of the area of the improvement district, a city may order the construction of a street-lighting system, together with the cost of furnishing electrical energy thereto, and levy and collect special assessments to pay the whole or any part of the cost thereof, does not violate Const. art. 7, § 9, providing that the Legislature may vest the corporate authorities of cities with power to make local improvements by special assessments, on the ground that the furnishing of electrical energy for the system is not a local improvement, since the lamp posts, conduits, wires, and lamps, are of themselves no benefit to abutting owners without the electric current necessary to operate the system, and since a "local improvement," to be chargeable upon private property, while required to be such as a municipality would be justified in constructing and maintaining by general taxation, and such as to confer a special benefit upon the property sought to be specially charged with its creation and

maintenance, need not possess the element of permanency.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. §419.

For other definitions, see *Words and Phrases*, First and Second Series, *Local Improvement*.]

2. MUNICIPAL CORPORATIONS §419—PUBLIC IMPROVEMENT—LIGHTING SYSTEM—ORNAMENTAL FEATURES.

Under such statute, the character of the lighting plant which may be installed rested largely in the discretion of the municipal officers, and was not abused by a system of underground conduits carrying wires to the several lamp posts which were of cast iron fastened to a concrete post carrying at the top a lamp of the type known as the "inverted ornamental luminous arc lamp," and doing away with overhead wires with their accompanying wooden poles, since the posts, though designed for ornament, did not so far depart from ordinary construction as to warrant the court in saying as a matter of law that the proportional part of the cost which the city assessed for the property benefited was in excess of its legitimate powers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. §419.]

3. MUNICIPAL CORPORATIONS §419—PUBLIC IMPROVEMENT—LIGHTING SYSTEM—ABUSE OF DISCRETION—REMEDY.

The remedy for the council's abuse of its discretion by attempting to levy special assessments to meet the cost of ornamental features of a lighting system would be to allow assessments only up to the value of a proper system.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. §419.]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Objections by Mary Ridpath Ankeny, as executrix of the estate of W. M. Ridpath, deceased, to the assessment roll in a local improvement proceeding by the city of Spokane. From a judgment of the superior court on her appeal, overruling her objections to the roll, and confirming it, she appeals. Affirmed.

D. W. Henley and James M. Geraghty, both of Spokane, for appellant. H. M. Stephens, Ernest Sargeant, and Dale D. Drain, all of Spokane, for respondent.

FULLERTON, J. Section 6 of chapter 98 of the Laws of 1911, relating to local improvements in cities and towns, as amended by chapter 131 of the Laws of 1913 (omitting parts not essential to the questions in controversy here), reads as follows:

"Sec. 6. Whenever the public interest or convenience may require, the council, or other legislative authority of any such city or town, is hereby authorized to order the whole or any part of the streets * * * within * * * such city or town to be * * * improved, and to order * * * street lighting systems, together with the cost, and expense of furnishing electrical energy to said street lighting systems, * * * to be constructed, * * * therein, * * * and to levy and collect special assessments to pay the whole or any part of the cost and expense of any such improvement. * * * Any local improvement payable, in whole or in part, by special assessments, which shall include a charge for the cost and expense of furnishing electrical energy to any system of street lighting shall be initiated only upon petition signed by the owners of two-thirds of the linear frontage upon the improvement to be made and two-thirds

of the area within the limits of the proposed improvement district."

Acting under and in pursuance of this section of the statute, and in pursuance of a petition of the requisite number of property owners, the legislative authority of the city of Spokane passed an ordinance ordering the improvement of a part of the First avenue in that city, "by installing, operating, and maintaining for a period of ten years after installation, an ornamental street lighting system therein," according to specifications adopted by the ordinance. The ordinance provided that the cost of installing, operating, and maintaining the system for the time specified, including all the necessary and incidental expenses, should be borne by and assessed against the property included within the district therein created, except 25 per centum of the cost, which it was provided should be borne by the city from its general fund. Subsequently a contract was let for the construction and maintenance of the system. The contract price was for a lump sum of \$66,429, payable in 10 equal annual installments, without interest, save on deferred payments. While the contract covered three distinct and several items, namely, the construction of the lighting plant proper, the maintenance of the plant for a period of 10 years, and the supplying of it with electrical energy for the same period, the cost of the individual items is not set forth therein. Their relative proportions to the whole can be gathered, however, from the preliminary estimates of the city engineer. That officer estimated the total cost of the three items mentioned at \$63,624, allowing for the first item \$17,600, for the second \$10,824, and for the third \$35,200; thus showing that the cost of furnishing the electrical energy for the 10-year period exceeds the cost of the plant plus the cost of its maintenance for a like period.

One W. M. Ridpath owned property situated in the improvement district, and on the initiation of the improvement proceedings filed a protest against the same. Between the initiation of the proceedings and the return of the assessment roll Ridpath died, and his widow, the appellant in the present proceeding, was appointed administratrix of his estate. As such administratrix she filed objections to the assessment roll, which were disallowed by the city, and the roll confirmed. She appealed therefrom to the superior court of Spokane county, when again her objections were overruled, and a judgment entered confirming the roll in all respects. From the last-mentioned judgment she appeals to this court.

[1] The appellant makes no question as to the regularity of the proceedings, nor does she question the sufficiency of the statutory grant of authority to the city to create the improvement, apart from the constitutional power in the Legislature to make the grant. Her principal contention is that the statute

itself is unconstitutional, because not within the grant of power conferred by section 9 of article 7 of the Constitution, which provides that "the Legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited"; the precise contention being that the furnishing of electrical energy for street lighting purposes is not a "local improvement," within the meaning of that term as used in the Constitution. Certain minor contentions will be stated later.

All of the authorities agree that a local improvement, to be chargeable upon private property as such, must possess at least two essential elements: (1) The improvement must be of a public nature, as contradistinguished from one purely private, that is, it must be an improvement of such a nature as the municipality would be justified in constructing and maintaining by general taxation; and (2) it must confer a special benefit on the property sought to be specially charged with its creation and maintenance, over and above that conferred generally upon property within the municipality. To these some of the courts have added a third element, namely, that of permanency, denying the power of local assessment in those instances where the improvement is of an evanescent nature or type. It is on this principle the appellant bases her contention that the statute authorizing a local assessment for the cost of furnishing electrical energy to a street lighting plant is unconstitutional. She argues that the phrase "local improvement" necessarily presupposes permanent physical addition to the streets, and that electrical energy is not a permanent physical addition, but is of an evanescent nature, vanishing as soon as the mechanical operation which creates it ceases.

The idea that permanency of the improvement is an essential to the charging of the expense thereof as a local improvement to property benefited is peculiarly the doctrine of the courts of Illinois. A case frequently cited is *City of Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412, where it was held that the sprinkling of streets is not a local improvement, subject to be made a charge upon abutting or adjacent property. The power to sprinkle the street at the expense of the general taxpayer was not denied, but it was held that such work was not of a character that the cost of the same could be charged to the abutting property as a local improvement. In the course of the opinion it was said:

"A local improvement, within the meaning of the statute, is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality. The only basis upon which either special assessment or special taxation can be sustained is that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the ex-

tent of the burthen imposed. * * * If, therefore, from an inspection of the ordinance authorizing the making of the improvement, it appears from the nature of the work proposed that the market value of abutting or adjacent property would not be increased thereby, as a matter of law it would not be a local improvement, within the meaning of the statute, and no declaration of the corporate authorities could make it so.

* * * But the term 'local improvement,' prior to the adoption of the Constitution and passage of the act in question, had, by common usage, a well-defined meaning, and it will be presumed to have been employed in the sense thus attributed to it. It was understood, as applied to a street, as signifying the improvement of the street, as such, and for the purposes for which it was designed, made in a particular locality, by reason of which the real property abutting or adjacent was specially benefited in its market value.

* * * Further citation will be unnecessary. Used, as it is, in connection with special assessments, which are necessarily based upon the idea of equivalent benefits to the property owner, the idea of permanency in the improvement is necessarily involved; that is, the benefit must flow from the actual or presumptive betterment of the street, and must be of such character as to enhance the market value of the property.

* * * It cannot, we think, in any just sense, be said that street sprinkling is an improvement, within the contemplation of article 9 of the Cities and Villages Act. In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled."

The same principle was announced in *Kansas City v. O'Connor*, 82 Mo. App. 655, in *New York Life Insurance Co. v. Prest* (C. C.) 71 Fed. 815, and in *Stevens v. City of Port Huron*, 149 Mich. 536, 113 N. W. 291, 12 Ann. Cas. 603, likewise street sprinkling cases.

In *State v. Reis*, 38 Minn. 371, 38 N. W. 97, also a street sprinkling case, a different view of the question was taken. In the opinion is the following:

"The relator's main contention, however, is that street sprinkling is not an 'improvement,' within the meaning of this section of the Constitution, because it lacks the element of permanence; that its results are transient; that, to constitute an improvement, there must be some work or structure, such as a pavement, sidewalk, or the like, that will remain after the labor is performed, and permanently enhance the value of the property. But, if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration, or imperishable in character. We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays, and has to be rebuilt, every few years. When a pavement or sidewalk has worn out, the future value of the property is not enhanced by it, any more than it is by street sprinkling when that ceases. Neither do we see that it makes any difference whether the substance applied to the surface of the street is wood, which has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts, and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a 'local improvement' are those which the term it-

self implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally in the city. If it does this, rendering the property more attractive and comfortable, and hence more valuable for use, then it is an improvement. That the regular and systematic sprinkling of a street has this effect upon the property fronting on it is a matter of common knowledge. This construction is fully warranted by the definitions of the word 'improvement' given by lexicographers. It has been defined as 'that by which the value of anything is increased, its excellence enhanced, or the like,' or 'an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.'

The view taken by the Minnesota case was followed in *Sears v. Boston*, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834. In that case it was said:

"It is a grave question whether the benefit that comes to abutting property from the watering of the street in front of it is such an improvement to the property that it can be made the subject of an assessment upon it. There must be a real, substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. The watering of streets produces only transitory effects, and makes no permanent change in the condition of the property. It greatly promotes the health and comfort of the people generally, who use the streets from time to time, but its greatest benefit is to the abutting estates as places for residence or the transaction of business. Indeed, so much more important to the occupants than to the general public have been the benefits from watering streets that until lately the expense of the work in this commonwealth has usually been borne by the abutters, who have procured the watering to be done by private contractors. If a special benefit, accruing from day to day, which very materially increases the rental value of real estate by reason of the proximity of the property to the place where the beneficial work is done, can be treated as an improvement within the reason of the rule which permits special assessments, then such assessments may be made to pay the expense of watering streets. With some hesitation, we hold that there is an improvement of private property, when this work is done by a city regularly from day to day, which may warrant an assessment upon the abutters."

But whatever doubts may then have existed in the mind of the court the principle has become settled law in Massachusetts. *Sears v. Street Commissioners*, 173 Mass. 350, 53 N. E. 876; *Phillips Academy v. Andover*, 175 Mass. 118, 55 N. E. 841, 48 L. R. A. 550; *Stark v. Boston*, 180 Mass. 296, 62 N. E. 375; *Hodgdon v. Haverhill*, 193 Mass. 327, 79 N. E. 818. To the same effect is *City of Roswell v. Bateman*, 20 N. M. 77, 146 Pac. 950, although the court does not specially discuss the idea of permanency of the improvement as affecting the power.

In *Reinken v. Fuehring*, 130 Ind. 382, 30 N. E. 414, 15 L. R. A. 624, 30 Am. St. Rep. 247, it was held that the cost of sweeping the streets could be made a charge on the abutting property as a local improvement. In the opinion it is said:

"It is matter of common observation, of which we must take notice, that property located upon

well-improved streets, kept clean, is more desirable than property on unimproved streets, where mud and filth are permitted to accumulate and obstruct their use. It is safe to assert, we think, that keeping a street clean adds to the rental, if not to the permanent, value of property located thereon; and for this reason, among others, the abutting property owner has a special interest in such cleaning not enjoyed by the general community. For the reason that the public in general has an interest in keeping the streets free from filth, the city may, in exercising the police power conferred upon it by the state, order them swept, and for the further reason that the abutting property owner derives a benefit from such sweeping not enjoyed by the general public he may be required, by assessments, to pay the expenses incident to such sweeping. It follows from what we have said that the assessments provided for by the act under consideration do not amount to a taking of private property without compensation and without due process of law. Assessments of the kind we are now considering are made upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they can be sustained."

In none of our own cases have we been called upon to meet the question. The nearest approach to it, perhaps, is the case of *Northern Pac. R. Co. v. Adams County*, 78 Wash. 53, 138 Pac. 307, 51 L. R. A. (N. S.) 274, where we held constitutional the statute imposing upon abutting property the duty of destroying noxious weeds growing upon the public highways. The case was rested upon the police power. This language, however, was used in the opinion:

"Their [the noxious weeds] destruction is a benefit principally to the property owners, because, if the property owners are required to destroy the noxious weeds upon their lands, and such weeds are permitted to grow in the highways, the destruction of the weeds upon their lands is of no practical benefit. It is necessary that the weeds upon the highways be destroyed, as well as those upon the adjoining lands. It is reasonable, we think, that the owners of lands may be required to destroy noxious weeds to the center of the highways abutting thereon as a special benefit to their own lands."

In *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612, we quoted with approval the definition of a local improvement found in the case of *State v. Reis*, supra. We also quoted with approval from *Cooley on Taxation*, to the effect that the maintenance of water mains "and the supplying of water are necessarily a continuing expense, and for these reasons the assessment of the cost upon adjacent property is within the general principle of local assessments." Neither of these cases called for a determination of the question whether permanency is an essential to a local improvement, but it is inferable from the reasons given to sustain the rulings made that the court was inclined to the doctrine of the court of Minnesota rather than that of the court of Illinois.

All of the cases where the question has been raised seem to agree that the expense of erecting the lamp posts, the conduits for

the wires, and the cost of the wires and lamps necessary for an electric street lighting system, may be charged to the property benefited as a local improvement. No case has been called to our attention, however, where it has been determined that the electric energy necessary to light the plant may be treated as a part of the plant and the cost thereof charged to the property benefited as a local improvement.

Following the rule of the courts which do not require permanency as an essential element of a local improvement, we see no reason why it may not be so charged. It is from the electric current that the light is derived, and it is the light that furnishes the entire benefit to the property. The lamp posts, the conduits, wires, and lamps, are but the means of carrying the current and diffusing the light at the proper places. Of themselves they are of no benefit to property abutting upon the streets in which they are constructed. On the contrary, standing alone, they would be obstructions in the streets, narrowing and hindering its use as such, of no possible benefit to the public at large, and rendering abutting property of less rather than of greater value. No rule of law would justify their erection and maintenance in a street, were they not the necessary means to a desired end. It is difficult to understand, therefore, why the cost of this mechanical part of the improvement can be charged to abutting property specially benefited by the lighting of the street, while the cost of the electric energy, without which there can be no completed improvement, cannot be so charged. We think there is no room for such a distinction, that the mechanical contrivances and the electrical energy are but parts of a complete whole, and that it is the whole, and not one of the parts, that confers the benefits. As such it seems to us clear that the cost of the whole may be charged as a local improvement in so far as private property is benefited thereby.

But it is said there is a difference between the construction of a local improvement and its operation, that while the one may be of such a local benefit as to justify a local assessment for its cost, the cost of operation cannot be so charged, because that is a general municipal duty rather than the duty of any particular locality. But we can conceive of no reason for this distinction. There are, of course, many public improvements, from which private property receives an incidental advantage, which are held to justify only general taxation. The rule has been especially applied to public thoroughfares which have been improved at the expense of local property, and which have by use become out of repair; it being held that the local property could not be charged with the cost of keeping the street in repair. But the improvement of a street usually causes an increase of travel thereon by the general public, and conse-

quently an increase of wear over normal conditions. It is not just that the abutting property owners should be charged with the expense caused by this increase of travel, and the courts generally hold that the burden cannot be placed on them. But the situation with reference to an electric lighting system is in no way analogous. The system may have a local situs, benefiting only that part of the city wherein it is situated. It is of such a nature that increased use of the street by the public does not impair its efficiency, or add to the cost of its maintenance or operation. When, therefore, the system does not extend over the city at large, but is confined to a part of the city only, it is manifest that it may be almost wholly of local benefit, rendering it unjust to the general taxpayers of the city to be charged with the entire cost of its maintenance and operation. Such is the situation here. This plant is local with relation to its situs. While it may benefit the city at large in some degree, its greatest benefit is to the locality wherein it is situated, and we see no reason why its cost of operation, as well as the cost of construction and maintenance, may not be charged to the local property to the extent of the benefits.

[2, 3] A further contention is that the assessment is void because the improvement contained features of purely ornamental nature, thus greatly increasing the cost of the plant and the consequent assessments beyond the necessities of the case. But the character of the plant which may be installed must rest largely in the discretion of the municipal officers having the authority to direct its installation. It may be that this discretion could be so far abused as to require the courts to hold void any attempt to levy a local assessment to meet its cost, but the ordinary remedy would be to allow an assessment up to the value of a proper plant. In the instant case we think that, if any remedy could be afforded, it would be the latter. Here, however, the evidence does not justify even this modification. The nature of the improvement is shown only in the plans and specifications for the work. These show a system of underground conduits carrying wires to the several lamp posts, which are of cast iron fastened to a concrete base, carrying at the top a lamp of the type known as the "inverted ornamental luminous arc lamp." The scheme does away with overhead wires, with their accompanying wooden poles in common use. The system in its general scheme is clearly within the powers of the municipality, and the posts, which are the only part of the plant designed for ornament, do not so far depart from ordinary construction as to warrant the court in saying as a matter of law, that the proportional part of the cost which the city assessed to

the property benefited was in excess of its legitimate powers.

The judgment below should be affirmed; and it is so ordered.

MOUNT, MAIN, PARKER, and HOLCOMB, JJ., concur.

STATE v. SPANGLER. (No. 13363.)
(Supreme Court of Washington. Aug. 29, 1916.)

1. HOMICIDE \Leftrightarrow 157(2)—EVIDENCE—QUARRELS—ADMISSIBILITY.

In prosecution for uxoricide, evidence of quarrel ten days prior to offense is admissible against the husband.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 289; Dec. Dig. \Leftrightarrow 157(2).]

2. CRIMINAL LAW \Leftrightarrow 393(1)—EVIDENCE—EXPERT OPINION—ADMISSIBILITY.

Opinion of specialist in mental diseases as to defendant's sanity, based on examination prior to trial, though without consent of defendant's attorneys, and without objection by defendant, is admissible, unless the fact that it was also partially based on testimony of other witnesses renders it incompetent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 871; Dec. Dig. \Leftrightarrow 393(1).]

3. CRIMINAL LAW \Leftrightarrow 1036(1)—APPEAL—RE-
EVALUATION OF EXCEPTIONS—EVIDENCE.

Objection to evidence on any ground not presented to the trial court is not available on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639; Dec. Dig. \Leftrightarrow 1036(1).]

4. CRIMINAL LAW \Leftrightarrow 484—EVIDENCE—EXPERT
OPINION—ADMISSIBILITY.

Opinion of expert as to sanity of accused, based on testimony of a few witnesses in whose testimony there is no substantial conflict, is admissible if it is not probable that the expert and the jury understood the testimony differently.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1072; Dec. Dig. \Leftrightarrow 484.]

5. CRIMINAL LAW \Leftrightarrow 354—EVIDENCE—INSANITY—REBUTTAL—CONDUCT OF ACCUSED—ADMISSIBILITY.

Where one accused of murder pleaded insanity, and showed in substantiation thereof his prior acts and conduct, the state was not limited to explanation of such acts, but could show other acts and conduct tending to show sanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. \Leftrightarrow 354.]

Department 2. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

J. H. Spangler was convicted of murder in the first degree, and sentenced to life imprisonment, and he appeals. Affirmed.

Forney & Ponder, of Chehalis, for appellant. C. D. Cunningham, of Centralia, C. A. Studebaker and H. E. Donohoe, both of Chehalis, and W. O. Grimm, of Centralia, for the State.

MAIN, J. The defendant killed his wife at Vader, Wash., on August 13, 1915. Thereafter an information was filed against him, by

which he was charged with the crime of murder in the first degree. To the information a plea of not guilty was entered, and a special plea of mental irresponsibility at the time the offense was committed, but that such mental irresponsibility had disappeared at the time of entering the plea. Upon the issues thus framed the trial resulted in a verdict of guilty of murder in the first degree. A motion for a new trial being made and overruled, judgment was entered upon the verdict. The defendant was sentenced to life imprisonment. From this judgment and sentence the appeal is prosecuted.

The appellant and the deceased were married about 7 years prior to the homicide. Some time after the marriage trouble between them arose, largely, if not entirely, due to the appellant's habits as to intoxication. For some time prior to August 13th they had been conducting a small confectionery business at the town of Vader. Some days before the date mentioned the deceased had instituted an action for divorce against the appellant. From about the time when the action was instituted until the time of the killing the wife had been conducting the confectionery business alone, though the appellant was about the store from time to time. The deceased had a son by a former marriage who was a lad of 10 or 12 years of age. On the evening of August 13th the appellant came to the store and requested of the deceased that her son be permitted to accompany him to Kelso, where he was to repair an automobile. This request was refused. He then left the store, but shortly afterwards returned. Upon his return two ladies in addition to the deceased were in the store. The appellant requested the deceased to step to a room in the back part of the building, as he desired to talk to her. This request was refused. He then requested that she step out upon the sidewalk in front of the building, and this was likewise refused. The two ladies mentioned were sitting at an ice cream table. After the second request was made and refused the deceased turned around preparatory to sitting down at the table at which the other two ladies were seated. While thus standing with her back toward the appellant, he drew a revolver from his pocket, placed the muzzle near the back of the deceased's head, and fired. The shot caused instant death. There is evidence that during this day the appellant had been in the city of Centralia, and had been drinking to some extent.

[1] Upon the trial evidence was offered by the state touching a quarrel which occurred between the husband and wife about ten days prior to the shooting. It is claimed this was error. The rule is well settled that in cases of marital homicide the state has the right to prove ill treatment or quarrels with his wife on the trial of the husband for her murder. 1 Wharton, Criminal Evidence, §

43; Sayres v. Commonwealth, 88 Pa. 291; Hall v. State, 31 Tex. Cr. R. 565, 21 S. W. 368; McCann v. People, 3 Parker, Cr. R. (N. Y.) 272; Parsons v. People, 218 Ill. 236, 75 N. E. 903. In the case last cited, upon this question it was said:

"It is contended by the plaintiff in error that the court erred in admitting evidence as to quarrels and disagreements between plaintiff in error and his wife. But we are of the opinion there was no error in permitting such testimony to be introduced. It has been held that where a husband or wife is charged with the murder of the other, it is competent to prove their mutual conduct towards, and treatment of, each other, as manifested by acts and words."

[2] Objection is made to the testimony of Dr. D. A. Nickelson, a specialist in nervous and mental diseases, who was permitted upon the trial to give his opinion as to the appellant's sanity at the time the offense was committed, based upon an examination made of the appellant, and also upon the facts as they appeared upon the trial from the testimony of other witnesses. This witness examined the appellant while he was in jail awaiting trial, with the knowledge of the sheriff and at the request of the prosecuting attorney, but without the knowledge or consent of the appellant's attorneys. The evidence does not show the nature or extent of the examination. Neither does it show that the defendant was unwilling that the examination take place. No evidence was offered of any act done by the appellant or statement made by him. In brief, the evidence only showed that the examination was made, and that, based upon such examination, and upon the facts as they appeared from the testimony of other witnesses, he was of the opinion that the appellant was sane at the time of the homicide. This evidence was properly admissible, unless the fact that the witness' opinion, as shown by the question, was based, not alone upon the examination, but also upon the testimony of other witnesses, renders it incompetent. 8 R. C. L. p. 194, § 190. In *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9, it was said:

"It is urged that the court erred in permitting the physicians, called as witnesses for the people, to testify as to the mental condition of the prisoner. The argument is that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. These physicians were sent to the jail by the district attorney to make an examination of the prisoner's mental and physical condition. On the stand they were not inquired of as to the conversations had with him, or as to the transactions in the jail. Their testimony was simply their opinion of his mental condition, as they saw him in his cell and in the courtroom, but they gave no evidence of his statements, or of his physical condition. Such evidence is quite unobjectionable."

In such a case the rule relative to evidence which is obtained by duress or by putting in fear has no application. As stated, the question propounded to the witness called for his opinion as to the sanity of the accused, based, not alone upon his examination,

but upon the facts as they appeared upon the trial from the testimony of other witnesses.

[3, 4] It is claimed that it was error to permit the witness to give his opinion based upon his understanding of the testimony of other witnesses as he had listened to it during the trial. To this objection there are two answers: One is that the question was not objected to upon the ground now urged against it; the other, that the testimony was competent under the facts in this case. The objection to the question was upon the ground that the examination was compulsory, was without the knowledge of the appellant's attorneys, was done surreptitiously and against the wishes of the defendant, and on the further ground that it was not relevant. By the objection the trial court's attention was not called to the fact that the evidence was claimed to be inadmissible because the question called for an answer based upon the testimony of other witnesses as well as upon the examination. The objection to the evidence upon the ground here urged, not having been presented to the trial court, cannot be made available upon appeal. *Pittman v. State*, 51 Fla. 94, 41 South. 385, 8 L. R. A. (N. S.) 509; *State v. Brady*, 100 Iowa, 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560; *People v. Burman*, 154 Mich. 150, 117 N. W. 589, 25 L. R. A. (N. S.) 251; *State v. Martin*, 47 Or. 282, 83 Pac. 849, 8 Ann. Cas. 769; 2 R. C. L. p. 90, § 67. In the authority last cited the rule is stated thus:

"The purpose of requiring an objection to rulings of the trial court is to call to the attention of the court the specific error complained of, and not only must the grounds of the objection be stated with sufficient certainty, but the appellate court will only consider such grounds of objection as are specified."

But assuming that the objection was sufficient to save the question, the evidence was properly admissible for the reason that there was no substantial conflict in the testimony of the witnesses upon which the opinion of the witness as to the sanity of the accused was partially based. The rule is that such a question is proper where based upon the testimony of a single or a few witnesses in whose testimony there is no substantial conflict, so that it is not probable that the expert witness and the jury understood the testimony differently. 1 *Thompson, Trials* (2d Ed.) § 595; *Cornell v. State*, 104 Wis. 527, 80 N. W. 745. In the case last cited, speaking upon a similar question, it was said:

"That such question is proper where based upon the testimony of a single or a few witnesses, whose testimony is not conflicting, so that there is no likelihood that the expert witness and the jury can understand it differently."

[5] Objection is made also to the ruling of the court in admitting evidence in rebuttal that the accused, when drunk, had a quarrelsome disposition, and on one occasion agitat-

ed a fight. In defense, evidence had been offered as to the habits of intoxication of the accused; and also that on August 18th, previous to the homicide, he seemed nervous and worried and did not act naturally. As a defense the appellant put his sanity at the time the offense was committed in issue. In support of this he offered evidence of his previous conduct. Where such a defense is interposed, and evidence of the previous conduct of the accused is offered by him as sustaining his claim of insanity, the state, in rebuttal, is not limited to an explanation or denial of the particular conduct of the accused or declarations put in evidence by the defendant, but may offer evidence of other acts or conduct of the accused as tending to show that he was sane at the time the act was committed. *United States v. Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; *Upstone v. People*, 109 Ill. 169. In the case last cited it was said:

"Evidence of previous intoxication on the part of defendant was properly enough admitted, as bearing upon the question of intoxication at the time of the homicide, and of the conduct of defendant when in that state."

The rule that the state cannot offer testimony impeaching the defendant's character until his character has first been placed in issue by himself has no application here. The question in issue was the state of his mind at the time the offense was committed; and the testimony offered bore upon that question, and was competent.

The judgment will be affirmed.

MORRIS, C. J., and HOLCOMB, PARKER, and BAUSMAN, JJ., concur.

SPARKS v. STANDARD LUMBER CO. (No. 13415.)

(Supreme Court of Washington. Aug. 25, 1916.)

1. TAXATION ⇨ 708(3)—ACTION TO FORECLOSE DELINQUENCY CERTIFICATE—PARTIES.

On foreclosure for delinquent taxes, the person appearing on the treasurer's rolls as the owner at the time the certificate of delinquency was issued was the only necessary defendant, and a subsequent owner was not a necessary party.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1294, 1406, 1638; Dec. Dig. ⇨ 708(3).]

2. TAXATION ⇨ 708(6) — ENFORCEMENT — ACTIONS—UNNECESSARY PARTY—SERVICE.

Under Rem. & Bal. Code, § 9257, making a proceeding to foreclose for delinquent taxes a proceeding in rem, failure to serve an unnecessary party defendant could not be asserted in a collateral action to foreclose a mortgage on the property.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1296, 1406, 1640; Dec. Dig. ⇨ 706(6).]

3. TAXATION ⇨ 788(3) — TAX DEED — EFFECT AS EVIDENCE IN COLLATERAL PROCEEDING.

Under Rem. & Bal. Code, § 9267, providing that tax deeds shall be prima facie evidence in

all controversies and suits in relation to the right of the purchaser, the burden is on the one asserting the invalidity of a tax title to overcome the deed by competent and controlling evidence, except in cases of fraud and where the owner has paid or made a bona fide attempt to pay the taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1559; Dec. Dig. ¶ 788(3).]

4. TAXATION ¶ 796(1)—TAX TITLES—RIGHTS AND REMEDIES.

One whose duty it was to meet a tax must find his rights as well as his remedies in the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1578, 1579; Dec. Dig. ¶ 796(1).]

5. TAXATION ¶ 363—ASSESSMENTS—NOTICE.

The owner of property must take notice of the fact that taxes will be assessed against his property and must be paid, and, if not, the property will be sold to satisfy the tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 603-606; Dec. Dig. ¶ 363.]

6. TAXATION ¶ 588 — PROCEEDINGS TO COLLECT—JURISDICTION.

Under Rem. & Bal. Code, § 9254, a proceeding to collect a tax being a proceeding in rem, objections going to jurisdiction over the person will find no favor unless based upon some recognized principle of equity; the tax laws taking account of the property rather than the owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1201; Dec. Dig. ¶ 588.]

7. TAXATION ¶ 734(1) — TAX TITLE — VALIDITY.

A title issued under a void tax foreclosure being a good title if not attacked within three years, such title is equivalent to a decree quieting the title in the purchaser as a grant from the sovereign state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1408, 1470, 1471; Dec. Dig. ¶ 734(1).]

8. PROCESS ¶ 87—SERVICE ON NECESSARY DEFENDANT—NECESSITY.

A necessary defendant may not be served by publication where personal service might have been had by the exercise of ordinary diligence.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 101; Dec. Dig. ¶ 87.]

9. TAXATION ¶ 708(1)—PROCEEDINGS—PROCEDURE.

Tax proceedings do not necessarily depend upon the practice acts.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291, 1292; Dec. Dig. ¶ 708(1).]

10. CONSTITUTIONAL LAW ¶ 285—TAXATION—PROCEEDING IN REM—DUE PROCESS.

A special proceeding in rem for delinquent taxes, in the form of foreclosure of a delinquency certificate, not being a suit between the parties, but an exercise of the sovereign power to tax, does not in any way violate the constitutional guaranties of due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 897-908; Dec. Dig. ¶ 285.]

11. TAXATION ¶ 363—ASSESSMENT AND LEVY—NOTICE TO OWNER.

The owner of property is bound to take notice of every step from the initial listing and levy of taxes until the power of the sovereignty then in motion is exhausted; personal notice to the owner not being required unless demanded by statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 603-606; Dec. Dig. ¶ 363.]

12. TAXATION ¶ 461 — RIGHTS OF OWNER — VALIDITY OF TAX.

The owner of property may question the validity of a tax either before or after the tax is levied or is made a charge upon the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 816, 817; Dec. Dig. ¶ 461.]

13. TAXATION ¶ 461—RIGHTS OF OWNER TO QUESTION—PROCEDURE.

An owner may not question the procedure assessing a tax if the record is fair upon its face and shows a compliance with the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 816, 817; Dec. Dig. ¶ 461.]

14. TAXATION ¶ 531(2) — PROCEEDINGS — RIGHTS OF MORTGAGEE.

Under Rem. & Bal. Code, § 9258, providing that any person interested in land sold for delinquent taxes may pay taxes and costs before the tax deed is issued, and have a lien on the property for the amount so paid, a mortgagee of such property may pay a delinquent tax and assert it as a lien.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 987; Dec. Dig. ¶ 531(2).]

15. TAXATION ¶ 697(5)—TAX TITLES—RIGHTS AND REMEDIES.

Under Rem. & Bal. Code, § 9259, providing for the redemption of property upon which a certificate of delinquency has been issued, a mortgagee may redeem property upon which a certificate of delinquency has been issued in the aid of his mortgage at any time before the deed is issued.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1899; Dec. Dig. ¶ 697(5).]

Department 1. Appeal from Superior Court, Spokane County; Edward H. Wright, Judge.

Suit by O. M. Sparks against the Standard Lumber Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

F. W. Girard and Roche & Onstine, all of Spokane, for appellant. Joseph Rosslow, of Spokane, for respondent.

CHADWICK, J. Appellant began this action to foreclose a mortgage upon a certain tract of land in Spokane county. The complaint, in addition to the usual averments, sets up a tax foreclosure proceeding, and a tender to the respondent, the present owner under the tax title, of the full amount bid at the tax sale, with costs and 15 per cent. interest from the time of the sale, asserting that the tax foreclosure proceeding and sale was void. Respondent set up title deraigned through the tax foreclosure proceeding, and other defenses not necessary to be mentioned.

[1] The invalidity of the tax foreclosure is alleged to be in that, although the delinquency certificate was taken out in the name of Feninger, who is named as defendant, one Le Roy Price was the record owner at the time the certificate was foreclosed; that the holder of the certificate made Price a party defendant, and, having known the fact of his ownership, was bound to serve him under penalty of voiding the whole proceeding. Service was made on Feninger personally,

and on Price by publication, but it is insisted that no reasonable or honest effort was made to make personal service on Price. The proceeding would not be open to question had the plaintiff in the tax foreclosure been content to make Feninger alone the party defendant. *Williams v. Pittcock*, 35 Wash. 271, 77 Pac. 385; *Spokane Falls & N. R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192; *Ballard v. Ross*, 38 Wash. 209, 80 Pac. 439; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Darnell M. Co. v. Ruckles*, 45 Wash. 180, 88 Pac. 101; *French v. Taylor*, 54 Wash. 624, 104 Pac. 125; *Radcliff v. Hughes*, 82 Wash. 167, 143 Pac. 980; *Rockwood v. Turner*, 154 Pac. 465.

[2] The only question calling for consideration is whether the service on Price was essential to give the court jurisdiction. We shall assume that Price was at the time a resident upon the land, and might have been served personally, and that no effort was made to make personal service, although the fact is not established to our entire satisfaction. Under the statute and the authorities cited, Price was not a necessary party to the proceeding. It will require no citation of authority to sustain the proposition that a failure to serve an unnecessary party to a proceeding in rem cannot be asserted in a collateral attack upon a judgment. This is the logic of *French v. Taylor*, 54 Wash. 624, 104 Pac. 125.

[3, 4] Aside from the rules governing in ordinary cases, we are reminded of the statute (Rem. & Bal. Code, § 9267) which declares that tax deeds "shall be prima facie evidence in all controversies and suits in relation to the right of the purchaser: * * * That the sale was conducted in the manner required by law." This means that the former rule and the one even now prevailing in many states, that a purchaser at a tax sale buys caveat emptor and has the burden of sustaining his title, is overthrown, and the burden is on the one who asserts its invalidity to overcome the deed by competent and controlling evidence. This rule has been relaxed only in exceptional instances, in cases of active fraud, and where a party had actually paid, or had made a bona fide attempt to pay, his taxes, and the fault was that of the public officials. But these cases were made to rest upon equitable principles. The record disclosed no fault in the one whose duty it was to meet the tax. Such an one must find his rights as well as his remedies in the statute.

[5, 6] The nonpayment of a tax is held to be a fault. We have said in many cases that one must take notice of the fact that taxes will be assessed against his property and must be paid, and, if not, the property will be sold to satisfy the tax. *Williams v. Pittcock*, 35 Wash. 271, 77 Pac. 385. We have emphasized the fact that the tax laws take account of the property rather than the owner. *Allen v. Peterson*, 38 Wash. 599, 80 Pac.

849. This is no more than to say that a proceeding to collect a tax is a proceeding in rem, and that objections going to jurisdiction over the person will find no favor unless based upon some recognized principle of equity.

The Legislature has for 25 years, by the clearest expressions, made a tax foreclosure a proceeding in rem, and a tax title a favored title as contradistinguished from the ordinary conception of a tax title—a title tainted with the suspicion of illegitimacy. In keeping with its purpose, it has even made a title issued under a void tax foreclosure a good title if not attacked within three years. *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166; *Hamilton v. Witner*, 50 Wash. 689, 97 Pac. 1084, 126 Am. St. Rep. 921; *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082; *Fish v. Fear*, 64 Wash. 414, 116 Pac. 1083; *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522; *Radcliff v. Hughes*, 82 Wash. 167, 143 Pac. 980.

[7] To this purpose the courts have given liberal response. So that, with the passing of the old rule, it may fairly be said that a tax title is no longer nullius in filius, but is equivalent to a decree quieting the title in the purchaser as a grant from the sovereign state. *Wilson v. Korte*, 157 Pac. 47; *Savage v. Ash*, 86 Wash. 43, 149 Pac. 325; *Gustavson v. Dwyer*, 78 Wash. 336, 139 Pac. 194; *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927.

[8] Appellant relies upon certain of our decisions. It may be that we have allowed some confusion to creep into them, but we think the cases, in their final analysis, are not inconsistent with the cases relied on by respondent or with our present holding.

In *Pyatt v. Hegquist*, 45 Wash. 504, 88 Pac. 933; *Id.*, 45 Wash. 699, 88 Pac. 935, the land was assessed to an unknown owner. The decision was made to rest upon the "peculiar facts" of the case; the holding being that where land is assessed to an unknown owner, and the true owner is known, and is actually living on the land at the time of the foreclosure, it is a fraud to publish summons "under the circumstances and conditions of the record." The circumstance dwelt on throughout the opinion was that the land was assessed to an unknown owner. In *Olson v. Johns*, 56 Wash. 12, 104 Pac. 1116, the certificate was issued in the name of the defendant, who was the only party defendant. So in *Rust v. Kennedy*, 52 Wash. 472, 100 Pac. 998, the certificate was issued in the name of Rust who lived on the land. No personal service was made or attempted in either case, although it might have been made. It was held to be a fraud on the right of the property owner to resort to a service by publication. The holding in these cases rests, not upon the tax statutes, but upon the general rules of law that a necessary defendant may not be served by publication where personal service might have

been had by the exercise of ordinary diligence. In the latter case the court distinguishes the cases, referring to *Allen v. Peterson*, supra, which we shall have occasion to notice, and further laid down the test, in actions in rem, that the statute must be strictly followed, which is but another way of saying, if the statute is strictly followed, the proceeding is not void.

[9] That a proceeding against the land in the name of the one described as owner in the certificate is within the statute is held by all the cases where the question is discussed. To hold that a proceeding, regular upon its face, is void because an unnecessary defendant under the statute is made a party and not served, would be to open tax foreclosure judgments to attack where the owner of the delinquency certificate had, or should have had, notice that a change of ownership had occurred. The fact that a present record owner is named as a defendant would in no sense alter the rule. It would be no more than evidence of notice of a subsequent ownership, and would subject every tax title to the hazard of collateral inquiry. To say that it is only necessary to follow the statute and make the one named in the certificate a defendant in order to make a perfect record, and at the same time to hold that, if there be knowledge of a subsequent ownership, the owner should be served, would be to make the proceeding depend on notice to such subsequent owner, and not upon the procedure outlined in the statute. It would be the abandonment of the special proceeding in favor of the rules of practice provided in the Code of Civil Procedure. Tax proceedings do not necessarily depend upon the practice acts. *Cooley on Taxation*, vol. 1, p. 59; *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335.

[10] Nor does our special proceeding, in form a foreclosure of a delinquency certificate, in any way violate the constitutional guaranties of due process. The proceeding is in rem and may be prosecuted, as is said in *Allen v. Peterson*, supra, regardless of ownership. A tax proceeding is not a suit between parties. It is the exercise of the sovereign power to tax. The state is the one party; the property is the other. Personal notice to the owner is not required unless demanded by statute. *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; *Kentucky R. Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414.

[11] The owner of the property is bound to take notice of every step from the initial listing and levy until the power of the sovereignty then in motion is exhausted. *Williams v. Pittock*, supra.

[12] It is enough that the owner may question the validity of the tax either before or after the tax is levied or is made a charge upon the property. *Cooley on Taxation*, vol.

1, p. 60; *McMillen v. Anderson*, supra; *Davidson v. New Orleans*, 90 U. S. 97, 24 L. Ed. 616.

[13] But this means an inquiry into the legality of the tax. It gives no right to question the procedure if the record is fair upon its face and shows a compliance with the statute.

We are not disposed to extend the doctrine of *Pyatt v. Hegquist*, supra, but rather to reassert the doctrine of *Williams v. Pittock*, supra, where the court said:

"If * * * a lienholder is chargeable with knowledge that taxes are unpaid, by so much more should an owner be so chargeable. The primary duty rests upon him to see that the taxes are paid, if he would prevent his land from being sold therefor. He is chargeable with knowledge of every step in the tax procedure, including the listing by the assessor, the sitting of the board of equalization to hear complaints, the completion of the rolls, their delivery to the treasurer, and the issuance of the certificate of delinquency. He must also know that, after the lapse of the statutory period, the right of redemption will be foreclosed. With such knowledge, and after his neglect to pay the taxes within the long period which the state has graciously given him, he cannot complain," etc.

—and of *Allen v. Peterson*, supra, holding:

"* * * A tax foreclosure proceeding in this state is a proceeding against property, and is in no sense an action against the person of the owner of such property. Its purpose is to charge such property with its just proportion of the public revenues, and the state's dominion over the land exists for that purpose without regard to its ownership. When, therefore, the Legislature provided that the lien for taxes might be foreclosed in the courts against the person to whom the land was assessed, whether that person was or was not the owner of the property, it acted within its powers, and the person foreclosing acquires a legal title by proceeding as the statute directs."

[14, 15] Aside from these considerations, it may well be doubted whether appellant is in a position to even question the tax title by showing independently of the record that Price was, in fact, within the jurisdiction of the court and might have been served. He is met by a judgment of the court that is fair on its face. He does not show a payment or an attempt to pay by the reputed owner, or a compliance, or an attempt to comply, with any of the privileges given him as a mortgagee. He might have paid the tax as a mortgagee and asserted it as a lien (*Rem. & Bal. Code*, § 9258), or he might have redeemed in aid of his mortgage at any time before the deed was issued (*Rem. & Bal. Code*, § 9259). His case, when stripped to its elements, is no more than an attempt to redeem in equity beyond the time of redemption.

It is assumed, of course, that a mortgagee has a sufficient interest to maintain a suit in equity to clear the title in aid of his mortgage.

Affirmed.

MORRIS, O. J., and FULLERTON, MOUNT, and ELLIS, JJ., concur.

ENGSTROM v. CITY OF SEATTLE.**TONKIN v. SAME.**

(No. 13427.)

(Supreme Court of Washington. Aug. 21, 1916.)

1. MUNICIPAL CORPORATIONS ¶220(9)—CIVIL SERVICE—INJURY TO EMPLOYÉ—PENSION.

Seattle City Charter, art. 16, § 32, providing that any person in the city's service under civil service appointment, who should be disabled in the discharge of his duty, should receive full pay during such disability not to exceed 30 days, and half pay not to exceed 6 months, was intended to establish a pension system for civil service employes whenever discharging their duties, in consideration of employment and service rendered under the employment, and an employe's remedy against a third party negligently injuring and disabling him was cumulative, so that his recovery therein did not relieve the city from paying the wages and benefits accruing under the provision.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ¶220(9).]

2. MUNICIPAL CORPORATIONS ¶220(9)—CIVIL SERVICE—INJURY TO EMPLOYÉ—COURSE OF EMPLOYMENT.

Under such provision, a civil service employe, who while working upon the streets was injured by the negligence of a third party, was injured in the line of his employment.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ¶220(9).]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Separate actions by Oscar Engstrom and by H. F. Tonkin against the City of Seattle. Judgment for defendant in each case, and plaintiffs appeal. Reversed, and causes remanded, with instructions to enter judgments for plaintiffs.

Morton T. Hunter, of Seattle, for appellants. Hugh M. Caldwell and Walter F. Meier, both of Seattle, for respondent.

MOUNT, J. These two case involve the same principle of law, and the decision of one decides the other.

The facts in the Engstrom case are as follows: On August 27, 1913, Mr. Engstrom was a civil service employe of the city of Seattle, engaged in work upon the streets and sewer system of that city at a daily wage of \$2.75. On that day Mr. Engstrom was injured while engaged in his work, through the negligence of the Puget Sound Electric Railway Company, a common carrier, operating across, along, and over the streets of the city of Seattle. He was injured and incapacitated for a period of 13 months. On or about January 14, 1914, Mr. Engstrom commenced a suit against the railway company, and recovered a judgment in the sum of \$4,000, on account of injuries and for loss of time. This judgment was paid. Thereafter on May 12, 1915, this action was brought by Mr. Engstrom against the city of Seattle to recover the sum of \$288 alleged to be due under the charter provision hereinafter quoted. Upon these facts the

trial court was of the opinion that the plaintiff was not entitled to recover, and dismissed the action. The plaintiff has appealed.

[1] At the time of the employment, and at the time of the injury, the city charter of the city of Seattle contained this provision:

"Art. 16, § 32. *Payment of Persons Disabled in Service—Medals of Honor.*—Any person in the service of the city under civil service appointment who shall be disabled in the discharge of his duties, shall receive full pay during such disability not to exceed thirty days, and half pay not to exceed six months, or who shall be permanently injured or disabled while in the line of duty, shall receive pay while such disability continues, to be fixed by the city council, not exceeding twenty per cent. of the pay received by such person at the time of injury. The commission shall prescribe such rules as may be necessary for carrying out the purposes of this section, and may provide a suitable medal of honor for distinguished bravery or service while in the line of duty."

In March, 1916, this section of the city charter was amended so as not to include persons engaged in extra hazardous occupations, or who were not included in any other state law providing for pensions or disability allowances. But it is conceded that this amended section does not apply to these cases.

The trial court was of the opinion that this section of the city charter was not intended to establish a pension system for civil service employes whenever discharging their duties; that the provision was merely compensatory and not cumulative; and, because the plaintiff had recovered from the railway company which caused the injury, that he was not again entitled to compensation from the city for time lost by reason of the injury. In this we think the trial court was in error.

The section of the charter above quoted clearly provides that any person in the service of the city under civil service appointment, who shall be disabled in the discharge of his duties, shall receive full pay during such disability not to exceed 30 days, and half pay not to exceed 6 months, etc.

When the appellant Engstrom entered the employ of the city, this provision of the charter was as much a consideration for his services as the wage of \$2.75 per day. It was clearly the intention of the charter of the city of Seattle, when this section was enacted, that when any person falling within the terms of the charter was disabled in the discharge of his duties, he was to receive pay for the time stated. This was in addition to his daily wage. And if no other person were responsible for an injury or the disability of an employe, it is too clear for argument that the city would be liable, not only for the daily wage during the time the disabled person had worked, but also for full and half pay for the time specified in the charter provision after disability. In short, it seems clear that this section was a part consideration for the services of the employe.

It was in the nature of a pension for the services which had theretofore been rendered by the employé.

In *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 Pac. 843, where a suit was brought by a policeman who had been injured by the negligent act of a taxicab company, and where an instruction was asked to the effect that if the jury believed from the evidence that the plaintiff had been reimbursed for his loss of wages out of the police pension fund of the city of Seattle, and for his hospital and medical bills, then the plaintiff was not entitled to recover against the defendant in that case the sums for which he had already been reimbursed by the city out of that fund, we held upon appeal to this court that the trial court properly refused to give the instruction, saying:

"The plain purpose of the act is to create a fund for the benefit of the policeman, into which he pays 1½ per cent. of his monthly salary as a consideration for participation in its benefits. It is, in its essence, municipal insurance for which a consideration is paid. We can see no difference in principle between this and ordinary accident insurance, so far as the question here involved is concerned. The fact that a person injured by another's negligence, having accident insurance for which he has paid, is reimbursed by the insurance company for his loss of time and expenses caused by the injury, cannot preclude him from maintaining an action for these same items against the person causing the injury. It would be contrary to public policy, and shocking to the sense of justice, to hold that the proceeds of insurance paid for by the injured person for his own benefit or that of his widow and children should inure to the benefit of, and grant immunity to, the person whose negligence, willful or otherwise, injured him or caused his death [citing a number of cases]."

That was a case apparently where at the time of the trial the city had paid to the plaintiff the benefits under the charter; while this is a case where at the time the suit was brought against the traction company the city had not paid the benefits under the charter. If it was not error to refuse to give the requested instruction in that case, it clearly would not have been error to refuse to give a similar instruction in the case of Engstrom against the railway company, for the reasons stated in the *Heath Case*. It is true in the *Heath Case* 1½ per cent. of the monthly salary of the policeman was placed in the fund from which injured policemen were paid. But we are of the opinion that the taking of this small percentage from the salary of the policeman and placing it into this fund did not place him in a better position than Mr. Engstrom was in when under his contract with the city he was entitled to \$2.75 per day for the days he worked, and full pay for 30 days and half pay not to exceed 6 months while disabled, under the charter. We think there was ample consideration for the benefits to be received under the city charter, and that the benefits in the *Heath Case* were no more a pension than were the benefits in this case.

We think the *Heath Case* is in point; and that the trial court should have followed the rule there announced. It is no doubt the rule that Engstrom could not collect against the city more than once for his services. *Longfellow v. Seattle*, 76 Wash. 509, 136 Pac. 855. The fact that he collected damages from the persons injuring him while he was in the employment of the city and in the line of his duty, did not relieve the city from complying with its contract of employment with Mr. Engstrom.

[2] The respondent also contends that Mr. Engstrom was not disabled in the discharge of his duties. It is conceded that he was injured while engaged in his work through the negligence of the electric railway company. The respondent cites *Rhodes v. United States*, 79 Fed. 740, 25 C. C. A. 186, where an act of Congress provided that a soldier "disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty," should be entitled to a pension. It seems that the trial court in that case instructed that the service must have been the cause of the disease, and not merely coincident with it in point of time; and the court held that this definition was right, because the statute allows a pension for wounds or injuries received and diseases contracted in the service and in the line of duty. In that case it was necessary that the soldier must have been both in the service and in the line of duty at the time he contracted the disease, or that he would not be entitled to a pension.

In this case the provision is that any person in the service of the city who shall be disabled in the discharge of his duties shall be entitled to the benefits under the charter provision. It is conceded here that the respondent was in the service of the city and in the discharge of his duties when he was injured. It is true he was injured by the negligence of some other agency than that of the city. But no exception is made in the charter provision; and, conceding that in the discharge of duty means in the line of duty, he was so injured in this case. And he was injured by reason of the fact that he was in the line of his duty and in the discharge of his duty. We are satisfied that the rule in the *Rhodes Case*, supra, is not opposed to the rule we now announce, because in this case the appellant at the time he was disabled was in the discharge of his duties and in the line of his duties. We are of the opinion, for the reasons above stated, that the charter provision above quoted provides for a pension in substance, that the consideration therefor was the employment and service rendered under the employment, and that the remedy against the person injuring him was cumulative, which he might pursue if he saw fit, and that in pursuing that remedy he did not relieve the

city from paying the wages and the benefits accruing under the charter provision.

The judgment of the trial court is reversed, and the cause remanded, with instructions to enter a judgment for the amounts prayed for in the complaints.

MORRIS, C. J., and CHADWICK, FULLERTON, and ELLIS, JJ., concur.

McNEIL et al. v. KREDO et al. (Civ. 1774.)

(District Court of Appeal, First District, California. July 11, 1916. Rehearing Denied Aug. 10, 1916; Denied by Supreme Court Sept. 7, 1916.)

1. VENDOR AND PURCHASER \S 341(2) — RECOVERY OF PAYMENT—COMPLAINT—RESCISSION OF CONTRACT.

The complaint of the purchasers to recover of the vendor a payment made on the executory contract, alleging that he without cause repudiated the contract, declared it canceled, and denied to them any right or interest thereunder, states a cause of action; they by his action being relieved from obligation of further performance and privileged to consider and accept his renunciation of the contract as a rescission thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 1011; Dec. Dig. \S 341(2).]

2. VENDOR AND PURCHASER \S 341(2)—RECOVERY OF PAYMENT—COMPLAINT—PLACING IN STATU QUO.

The complaint of purchasers to recover of the vendor a payment made on the executory contract, because of his rescission thereof, sufficiently alleging that they had not received and retained by virtue of the contract any thing of value from him, need not allege that they had placed or offered to place him in statu quo before electing to accept his rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 1011; Dec. Dig. \S 341(2).]

3. PARTNERSHIP \S 219(3)—ACTIONS AGAINST—PLEADING.

Allegation of the complaint that the contract involved was the partnership obligation of defendants does not prevent proof that it was the individual obligation of one of them, and recovery from him; Code Civ. Proc. \S 578, providing that judgment may be for or against one or more of several defendants.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 434; Dec. Dig. \S 219(3).]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by James McNeil and others against F. L. Kredo and others. From an adverse judgment and order, the named defendant appeals. Affirmed.

A. M. De Vall, of San Francisco, for appellant. E. B. Mering, of San Francisco, for respondents.

PER CURIAM. The defendants herein were sued individually and as copartners.

The appeal is from the judgment entered in favor of the plaintiffs and against the defendant F. L. Kredo individually and from an order denying him a new trial.

The action was for the recovery of the sum of \$980 alleged to have been paid to the defendants pursuant to the terms of an executory contract for the purchase and sale of certain ranch property situate in the county of Mendocino. The plaintiff's complaint proceeded upon the theory that, subsequent to the payment of the sum sued for and without default by the plaintiffs, the defendants repudiated the contract and elected to rescind the same. Upon the trial of the case it developed in evidence that the contract in controversy was not a partnership obligation, and that it had been executed only by and between the plaintiffs and the defendant F. L. Kredo individually. Accordingly a nonsuit was granted to the defendant H. F. Kredo and the partnership.

[1-3] The complaint states a cause of action. It in effect alleged that the defendants without cause repudiated the contract, declared it canceled, and denied to plaintiffs any right or interest thereunder. This being so, the plaintiffs were relieved from the obligation of further performance on their part and were privileged to consider and accept the defendant's renunciation of the contract as a rescission of the same. *Liver v. Mills*, 155 Cal. 459, 463, 101 Pac. 299; *Simmons v. Sweeney*, 13 Cal. App. 283, 289, 109 Pac. 265; *Seals v. Davis*, 25 Cal. App. 68, 142 Pac. 905. In the absence of a special demurrer the complaint is sufficiently certain in its allegations to the effect that the plaintiffs had not received and retained by virtue of the contract, anything of value from the defendants. Consequently it was not essential to the statement of a cause of action to allege that the plaintiff had placed or had offered to place the defendants in statu quo before electing to accept the defendant's alleged rescission of the contract. The allegation of the complaint that the contract in controversy was a partnership obligation did not preclude proof of the fact that it was the individual obligation of the defendant F. L. Kredo. Code Civ. Proc. \S 578; *Grangers' Union v. Ashe*, 12 Cal. App. 757, 108 Pac. 533.

The evidence, in our opinion, sustains the findings of the trial court as to the making of the contract, its performance by the plaintiffs, the sums paid by them thereunder, and its repudiation and rescission by the defendants. The findings support the judgment. Standing alone, finding No. 6 may, as a result of a clerical misprision, be somewhat uncertain; but, when considered and construed with the context of the findings as a whole, their numerical order and general arrangement, it is fairly certain that finding No. 6 refers to paragraph 6 of the complaint.

This disposes of all of the points made in support of the appeal which we deem worthy of discussion.

The judgment and the order appealed from are affirmed.

BONE v. TRAFTON. (Civ. 1789.)

(District Court of Appeal, First District, California. July 5, 1918.)

1. ATTACHMENT \Leftrightarrow 186—AFFIDAVIT—DEFECT—AMENDMENT.

A defect in attachment proceedings consisting of omission of the word "free" or "house," in the blank space before the word "holder," in the affidavit of justification of sureties, alleged to be an unintentional oversight on the part of the officer or notary taking the affidavit, is amendable.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 378-381, 383, 384; Dec. Dig. \Leftrightarrow 136.]

2. UNDERTAKINGS \Leftrightarrow 2—AMENDMENT—EFFECT.

Where a statute permits the correction of an original undertaking or the substitution of a new one, it has the effect of validating the proceeding from its inception.

[Ed. Note.—For other cases, see Undertakings, Cent. Dig. § 1; Dec. Dig. \Leftrightarrow 2.]

3. SHERIFFS AND CONSTABLES \Leftrightarrow 138(1)—ACTION—WRONGFUL SALE OF PROPERTY—BURDEN OF PROOF.

Under Code Civ. Proc. § 558, providing that, if a writ of attachment was improperly issued, it must be discharged, unless amended before hearing, where a mortgage was taken after a defective original affidavit of sureties, but before a new affidavit and undertaking, and subsequent amendment to the original affidavit and undertaking, and it appeared that the sheriff, levied upon, held possession, and sold the personal property by virtue of the original attachment, the burden is on the chattel mortgagee, in an action against the sheriff, to prove that the new affidavit and undertaking constituted an abandonment of the original.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 290; Dec. Dig. \Leftrightarrow 138(1).]

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by W. H. Bone against H. V. Trafton. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward J. Kelly, of Watsonville, for appellant. George P. Burke, of Watsonville, for respondent.

PER CURIAM. This is an appeal from the judgment. In this case the trial court prepared an opinion, which correctly sets forth the facts and the law applicable thereto, and which, omitting what is said touching one point not necessary, we think, to a disposition of the case, we adopt as follows:

In this action plaintiff seeks to recover damages from the defendant, as sheriff, for the alleged wrongful sale of personal property under a writ of attachment, without having first tendered to plaintiff the amount of a chattel mortgage owned by plaintiff,

and which plaintiff claims antedated said writ of attachment.

The decision in the case involves a question of law based upon the following facts, which are undisputed, viz.: On October 7, 1914, in an action filed in this court (the superior court of the county of Santa Cruz), entitled, "Arbanasin v. Radovan," Radovan was sued for \$370, and costs, alleged to be due for merchandise sold to him by assignor of Arbanasin. On the day the action was filed an affidavit and undertaking for attachment were also filed, and the writ of attachment was issued and placed in the hands of the sheriff for service. The writ was levied by the sheriff upon personal property the title to which, so far as this action was concerned, was vested in Radovan free from incumbrance. On October 16, 1914, nine days subsequent to the levying of the attachment, Radovan executed and delivered to the plaintiff in this action, W. H. Bone, a chattel mortgage for \$630 covering the attached property. The mortgage was duly recorded on October 17, 1914. Thereafter, on the same day, Radovan filed a notice of motion that he would on October 23d move the court to discharge the attachment, on the ground "that the undertaking required by law before the writ should issue was not accompanied by the affidavit of the sureties thereon and therein that they were freeholders or householders within this state." Thereafter, to wit, on October 19, 1914, Arbanasin made and filed another affidavit and undertaking on attachment, and had issued thereon another writ of attachment, which was also placed in the hands of the sheriff for service. On October 23d, the day on which the motion to discharge the attachment was heard, Arbanasin presented to the court an application and asked permission to file a third undertaking, amending the undertaking filed on October 7th, and he based his application upon an affidavit in which, among other things, it was stated that the defect in the first undertaking was the omission of the word "free" or "house" in the blank space before the word "holder" in the affidavit of justification of sureties attached to said undertaking, and was "a mere unintentional oversight on the part of the officer or notary taking such affidavit." The court thereupon on said 23d day of October, 1914, allowed the amended undertaking to be filed, and denied the motion to discharge the attachment. No appeal was taken from the order of the court in this respect, and it became final. The plaintiff Bone now claims that the act of Arbanasin in filing the second affidavit and undertaking on October 19th, and having procured thereon a new writ of attachment, all of which was done before the court permitted the filing of the amended undertaking, constituted a total abandonment of the original or first attach-

ment, and that thereby the mortgage lien of Bone became and was a first lien.

[1,2] The defect in the affidavit was amendable (*Tyson v. Reinecke*, 25 Cal. App. 693, 700, 145 Pac. 153; *Peterson v. Beggs*, 26 Cal. App. 760, 148 Pac. 541; *Jones v. Leadville*, 10 Colo. 484, 17 Pac. 272), and there is ample authority holding that, where a statute permits the correction of an original undertaking, or the substitution of a new one, it has the effect of validating the proceeding from its inception (*Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; *Standard Encyc. of Pro.* vol. 3, p. 460; *McCraw v. Welch*, 2 Colo. 284; *State Bank v. Morris*, 13 Iowa, 136; *Pierse v. Miles*, 5 Mont. 549, 6 Pac. 847; *Langstaff v. Miles*, 5 Mont. 554, 6 Pac. 356; *Drake on Attachment*, § 148).

[3] Accordingly, in the present case, under the broad terms of section 558, Code of Civil Procedure, it must be assumed that at all times subsequent to the filing of the first undertaking there was a valid attachment, unless, as claimed by the plaintiff, the first attachment was abandoned by the filing of the new affidavit and undertaking. In the case at bar the evidence shows without contradiction that the sheriff levied upon, at all times held possession of, and finally sold the personal property by virtue of the first attachment; and the sheriff in thus holding and selling the property did not attempt to levy the second attachment at all, but entirely ignored it. There was no evidence that Arbanasin or the sheriff intended to abandon the first attachment. In order to prevail it was incumbent upon the plaintiff to make such proof; and, having failed to do so, judgment was properly rendered against him. The authorities support this view. *Stephens v. Mansfield*, 11 Cal. 363; *Marquart v. Bradford*, 43 Cal. 526-529; *Wood v. Etiwanda Water Co.*, 147 Cal. 228, 234, 81 Pac. 512; *Utt v. Frey*, 106 Cal. 392-397, 39 Pac. 807; *Words and Phrases*, vol. 1, p. 4. In the case of *Wright v. Westheimer*, 3 Idaho (Hasb.) 232, 28 Pac. 430, 35 Am. St. Rep. 269, the facts are almost identical with the facts of the case at bar. In that case an attachment was levied upon real estate. That was an action to quiet title to land by removing a cloud therefrom caused by the issuance and levy of certain attachments. Subsequently a second attachment was obtained by the same plaintiff and levied by the sheriff upon the same property. Defendant claimed, among other grounds, that the act of procuring the second attachment operated as an abandonment of the first. The court said:

"The appellant alleges in the complaint that the levy of the first writ was abandoned by reason of the issuance of the second writ and levying it upon the identical property on which the first writ was levied. The respondents by their answer deny the abandonment of the levy of the first writ, and state in their answer the rea-

son for procuring the issuance of the second writ as follows: 'The said plaintiff having at that time come into more open and notorious assertion of rights and ownership in the said real estate, the defendants herein caused a new writ to issue, as provided by law, and procured the same to be levied on all the interest the said D. D. Wright then had in said real estate.' The abandonment of the first writ made an issue in the pleadings, the burden resting on the plaintiff. The record contains no evidence of abandonment. It is, however, contended that the abandonment was established by the issuance of the second writ, and the levying of the same upon the identical parcel of land on which the first writ had been levied. The answer to this is that the respondents denied any intention of abandoning the lien secured by the first writ, and aver that they procured the issuance of the second writ as a precautionary measure only. The law does not presume or favor abandonments. The issue having been made by the pleadings, it was incumbent upon the appellant to establish the fact of abandonment, which he failed to do."

Judgment affirmed.

UNION TRUST CO. OF SAN FRANCISCO v. PACIFIC TELEPHONE & TELEGRAPH CO. (Civ. 1794.)

(District Court of Appeal, First District, California. July 7, 1916. Rehearing Denied Aug. 5, 1916. Denied by Supreme Court Sept. 5, 1916.)

EXECUTORS AND ADMINISTRATORS \Leftrightarrow 519(1)—
ANCILLARY ADMINISTRATOR—ACTION—DEFENSE.

That stock of a domestic corporation, owned by a resident of another state at the time of his death, was voluntarily surrendered by it to his foreign domiciliary executor, and, subsequently to his devisee, prior to any local ancillary administration, is a good defense to action for the stock, by the local ancillary administrator, subsequently appointed, against the corporation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2310-2315, 2317, 2318, 2322; Dec. Dig. \Leftrightarrow 519(1).]

Appeal from Superior Court, City and County of San Francisco; Daniel O. Deasy, Judge.

Action by Union Trust Company of San Francisco against the Pacific Telephone & Telegraph Company. From an adverse judgment and order plaintiff appeals. Affirmed.

Heller, Powers & Ehrman, of San Francisco, for appellant. Pillsbury, Madison & Sutro, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of the defendant. The facts as set forth in the brief of appellant are conceded to be correctly stated, and, so far as they are material to the questions of law involved, are as follows: David R. Downer died in the state of New Jersey on March 1, 1911, being then a resident of that state. Thereafter his will was admitted to probate in the courts of New Jersey having jurisdiction of his estate. A part of the property of the estate of the decedent consisted of fifteen shares of preferred capital

stock of the defendant corporation, valued at \$1,500. The defendant's office and principal place of business was and is in the city and county of San Francisco. At the time of the death of the decedent the certificates of stock in question were in his possession in the state of New Jersey, and came into the possession of the executor named in his will, who thereafter, as such executor, surrendered the certificates of said stock to the defendant, which transferred the shares of stock on its books to said executor and issued to him a new certificate for the same. Thereafter the said executor duly indorsed and transferred said stock to Edith A. Barnes, one of the devisees under the will of said decedent, who subsequently surrendered the same to the defendant, which thereupon issued to Edith A. Barnes a new certificate for the stock in question. On July 29, 1913, the courts of New Jersey approved the final accounts and acts of the executor in said estate. Thereafter an exemplified copy of the will of said decedent was admitted to probate by the superior court of the city and county of San Francisco, and ancillary letters of administration with the will annexed issued to the plaintiff, which thereupon demanded of the defendant that it issue to plaintiff, as such ancillary administrator with the will annexed, a certificate for the fifteen shares in question, and, this demand being refused, brought this action against the defendant for the possession of said stock.

The trial court from the foregoing facts found in favor of the defendant and entered its judgment accordingly, and from that judgment the plaintiff prosecutes this appeal.

The sole question presented for determination upon this appeal is as to whether the delivery by the defendant of the shares of stock in question to the foreign administrator of the decedent, and also to his devisee entitled thereto, in the absence of prior ancillary administration, and the appointment of the plaintiff as administrator with the will annexed in this state, constitutes a good defense to this action by such ancillary administrator to recover said stock. The appellant chiefly relies for its right to such recovery upon the case of *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90, as approved in the cases of *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732, and *McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027. It is pointed out on behalf of the respondent that the case of *Murphy v. Crouse* involved a controversy between the domiciliary administrator of a foreign state and the ancillary administrator appointed here as to which had the better right to the possession of the personal property of the decedent, and that in such a case the respondent concedes that the local ancillary administrator has the better right; but insists that such is not the

situation in the case at bar, and in support of such insistence directs our attention to the early case of *Brown v. San Francisco Gaslight Co.*, 58 Cal. 426, wherein it was held that, in the absence of local ancillary administration, the foreign administrator of a decedent was entitled to a transfer of the stock of a nonresident decedent in a California corporation without taking out letters here; and that the case of *Brown v. S. F. Gaslight Co.* was considered and distinguished in the case of *Murphy v. Crouse* upon the very ground contended for by the respondent here; and that the two later cases above cited do not undertake to lay down a contrary rule. Our attention has not been called by the appellant to any case in this or other jurisdictions declaring a different rule to that invoked in the case of *Brown v. S. F. Gaslight Co.*; but, on the contrary, the respondent cites a large number of cases from other states wherein the principle for which it contends has found adoption, and in many of which the facts are identical with those of the instant case—notably the cases of *Luce v. Manchester & L. R. R.*, 68 N. H. 588, 3 Atl. 618; *Hutchins v. State Bank*, 12 Metc. (Mass.) 421; *In re Cape May, etc., Co.*, 51 N. J. Law, 78, 16 Atl. 191; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41. The principle invoked in these cases has been well set forth in the one last mentioned, wherein the court says:

"The modern decisions * * * have so far drifted away from former narrow views as to hold almost universally that, although the executor or administrator of the domicile cannot maintain a suit in another state to recover personal property, or collect a debt due the estate, yet he may take possession of such property peaceably without suit, or collect a debt if voluntarily paid; and that, if there is no opposing administration in the state where the property was situated, its courts will recognize his title as rightful, and protect it as fully as if he had taken out letters of administration there; also, that the voluntary payment of the debt by the debtor under such circumstances would be good, and constitute a defense to a suit by an ancillary administrator subsequently appointed."

We think the foregoing embodies a correct statement of the principle declared in the case of *Brown v. S. F. Gaslight Co.*, supra, and that the cases of *Murphy v. Crouse*, *Richards v. Blaisdell* and *McDougald v. Low*, supra, are not to be understood as departing from it or as applicable to cases of the voluntary delivery of the stock of a local corporation to a foreign domiciliary administrator prior to any local ancillary administration, or to cases involving no rights arising out of the inheritance tax laws, or out of the claims of local creditors; and that the defendant herein, having voluntarily surrendered the possession of the stock in question to the foreign domiciliary executor of the decedent, and subsequently to the rightful devisee under his will prior to any local ancillary administration, has by proof of so

doing established a good defense to this action.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

LYNCH et al. v. BEKINS VAN & STORAGE CO. (Civ. 1982.)

(District Court of Appeal, Second District, California. July 7, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 1071(5)—**MATTERS CONSIDERED—IMMATERIAL FINDINGS.**

The evidence sustaining the finding of an express contract that the storage should be in a fireproof warehouse, it is immaterial whether, as also found, an implied contract to the same effect arose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4238; Dec. Dig. \Leftrightarrow 1071(5); Trial, Cent. Dig. § 940.]

2. EVIDENCE \Leftrightarrow 355(5) — **COMPETENCY — CORROBORATION.**

To corroborate plaintiffs' evidence of defendant's express contract to store in a fireproof warehouse, evidence of representations by advertisements and printed matter that defendant had at its disposal fireproof warehouses and offered to customers to furnish storage of that kind is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1488, 1489; Dec. Dig. \Leftrightarrow 355(5).]

3. EVIDENCE \Leftrightarrow 271(7)—**SELF-SERVING DECLARATIONS—BOOK ENTRIES.**

The entry made by defendant's agent in its order book at the time of the giving of the order to it for warehouse storage, not having been seen or known of by plaintiffs when the transaction was closed, is self-serving and not admissible to corroborate its evidence, consisting of the positive statement of its agent, contradicting plaintiffs, that nothing was said in the conversation about fireproof storage, that the contract was for non-fireproof storage.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1075; Dec. Dig. \Leftrightarrow 271(7).]

4. CUSTOMS AND USAGES \Leftrightarrow 12(1) — **KNOWLEDGE—HABIT OF PARTY.**

Defendant's practice or habit of charging a different price for storage, according to whether or not it was fireproof, not being known to plaintiffs prior to contracting for storage, is inadmissible on the issue of an express contract for fireproof storage.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 23; Dec. Dig. \Leftrightarrow 12(1).]

5. CUSTOMS AND USAGES \Leftrightarrow 12(1) — **KNOWLEDGE.**

There being no question of misrepresentation of the character of plaintiffs' goods, a general custom, undisclosed to plaintiffs, among warehousemen to insert in warehouse receipts a provision limiting their liability for loss by fire to \$50 per package, or one of refusing to accept antiques and jewelry of great value, is inadmissible in an action for the value of goods which defendant contracted to store for plaintiffs, and which were burned after delivery to defendant and before a receipt therefor was issued.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 23; Dec. Dig. \Leftrightarrow 12(1).]

6. WITNESSES \Leftrightarrow 406—**CONTRADICTION—COMPETENCY OF EVIDENCE.**

As tending to contradict defendant's agent, who, denying there was an express contract for

storage in a fireproof building, as testified by plaintiffs, stated that nothing was said in the conversation to the effect that the storage should be fireproof, defendant's advertisement of ability to furnish fireproof storage, though unknown to plaintiffs, was admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. \Leftrightarrow 406.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by John G. Lynch and others against the Bekins Van & Storage Company. From an adverse judgment and order, defendant appeals. Affirmed.

Collier & Clark and Jones & Evans, all of Los Angeles, for appellant. Williams, Goudge & Chandler, of Los Angeles, for respondents.

JAMES, J. Plaintiffs in this case were awarded judgment for the sum of \$11,376 as the value of certain household goods, antique articles, bric-a-brac, etc., which had been delivered into the charge of defendant as a warehouse keeper. The merchandise had been transported from an Eastern point to Los Angeles by a corporation conducted as an adjunct to the defendant, although separate in its operation and management. On the arrival of the merchandise in Los Angeles plaintiffs visited the office of the defendant and there, through the agent of defendant, arranged for the storage of the goods. The merchandise was taken in charge by the defendant and stored in a warehouse near the railway station, but before a receipt therefor had been delivered to the plaintiffs a fire occurred which destroyed the warehouse and its contents, including the property of plaintiffs. The warehouse in which the property was stored, as has already appeared, was not fireproof. Plaintiffs, in suing to recover the value of their property, alleged that an express contract had been made with them that the storage should be in a fireproof warehouse; second, that, irrespective of the express verbal contract, defendant had by numerous advertisements which had come to the attention of plaintiffs, represented that the storage furnished by it was fireproof, and that the plaintiffs relied upon such representations; and nothing having been said by any agent of the defendant to the contrary, by the storage of the goods with defendant, plaintiffs contended that an implied contract arose that the merchandise was to be protected in a fireproof building. Both of these contentions were sustained by the trial judge, although the further claim that the fire occurred through the negligence of the defendant was decided against the plaintiffs. An appeal was taken from the judgment.

[1, 2] The trial judge having determined that there was an express contract for the furnishing of fireproof storage, and the record disclosing evidence amply sufficient to

sustain that finding, the judgment should be affirmed, unless alleged errors pointed out in the admission and rejection of testimony are found to be meritorious. We think it unnecessary to go into any discussion of the question as to whether the implied contract arose by reason of the printed representations made by defendant as to the character of storage furnished by it. On the part of the plaintiffs the testimony showed that, when the order was given to the defendant to store the goods of the plaintiffs, inquiry was made on the part of the plaintiffs of the person in charge of defendant's office as to whether the storage would be "fire-proof," to which the defendant's agent replied, "Oh, yes." The plaintiffs were strangers in the city of Los Angeles, and were not acquainted with the buildings used by the defendant for warehouse purposes. It seems that the defendant had a fireproof storehouse under its control, which was at a greater distance from the railroad tracks than the non-fireproof building in which the goods were stored. It is admitted that the defendant was able to and could furnish, when required, storage which by reason of the character of the building would furnish absolute protection against fire. The admission of evidence showing representations, by advertisements and printed matter, to the effect that the defendant had at its disposal fireproof warehouses and offered to customers to furnish storage of that kind, was without error, as it tended to corroborate the evidence given by plaintiffs as to the express contract made and found by the court. That it also tended to furnish a basis for an implied contract we need not discuss, for the reasons already given.

[3] It is claimed on the part of appellant that the court erred in rejecting the evidence of an entry made in the defendant's order book at the time of the giving of the order. This entry was made by the agent of defendant, and it was offered as corroborative evidence tending to sustain defendant's contention that the contract was for non-fireproof storage. It was not claimed that the plaintiffs saw this entry, or had any knowledge thereof at the time the transaction was closed. Such a declaration would be purely self-serving, and incompetent to be introduced in evidence. It was not claimed that defendant's agent, when she testified, needed to refer to the order as a memorandum refreshing her recollection, for she testified very positively that nothing was said in the conversation to the effect that the storage to be furnished should be fireproof.

[4, 5] It is claimed again that the court erred in rejecting evidence as to the difference between the prices charged by the defendant for fireproof and non-fireproof storage. It is not contended that any knowledge of such difference had been conveyed to the plaintiffs prior to the making of the con-

tract for storage, and, so far as they were concerned, this practice or habit of the defendant was a secret matter which could not in any way affect the contract. Defendant was allowed to show by its employé that the charge as made against the plaintiffs for the storage of their goods was a charge customarily made by it for non-fireproof storage. This evidence, no doubt, was considered by the trial judge in making up his conclusion of fact as to the existence of the express contract, the correctness of which conclusion we have no right to here consider. It must be deemed to be the fact. There was no error committed by the court in rejecting evidence offered by the defendant to prove a general custom among warehousemen to insert in warehouse receipts a provision limiting their liability for loss by fire to \$50 per package, or a custom of refusing to accept antiques and jewelry of great value. Such a custom, undisclosed to plaintiffs, as it was, could not have been considered to their detriment in the trial of the issues presented. There is no claim that there was any misrepresentation made by the plaintiffs as to the character of their goods, or that they refused upon demand to truly state that character.

[6] It is also contended that as to some of the evidence of representations by advertisements, there was no proof that the plaintiffs saw or relied upon such statements, and that the court for that reason should not have received the evidence. The evidence objected to under this head consisted of a calendar upon which was printed an advertisement that defendant was able to provide fireproof storage. It was objected that, as the plaintiffs had not seen this calendar at the time they gave their order for storage, it furnished no evidence in support of their cause of action because they could not have relied upon such representations. The trial judge limited the effect of this evidence and admitted it for a proper purpose when he said:

"They cannot claim that they relied upon the advertisement unless they saw it. They did not see it. They are not offering this in evidence to prove that they relied upon this, but to show that at that time the person representing the company with whom they were dealing knew that her company advertised that it had a fireproof building. That being so, there being one fireproof building and one that was not, it may legitimately be argued that, if nothing was said about it being a fireproof building, she would naturally have said, 'We have one which is fireproof and one which is not; which do you want?' On the other hand, if the plaintiff did contract for a fireproof building, there would be no occasion for saying that, or for calling their attention to the fact that there was one fireproof building and one which was not, because, if they had contracted for it, and this witness knew it, she would either order the goods to be sent to the building which was fireproof or else notify them of not doing so. In other words, the advertisement of the fireproof warehouse is a circumstance that has some tendency to contradict her present testimony, to show that her recollection is not accurate; that

is, that there is to some extent an inconsistency between her saying that there was no contract for a fireproof warehouse, and her knowledge that there was an advertisement that there was a fireproof warehouse.

"Mr. Collier (for the defendant): I see the purpose which the court presents.

"The Court: That is the purpose for which it may be admitted. I presume that is the reason running through counsel's mind."

The brevity of this opinion may not seem commensurate with the voluminous record and briefs as filed in this cause, but to our minds the appeal is entitled to no more extended consideration than has been given to it. The trial court, by its determination that an express contract had been made for fireproof storage, determined the whole case, except as the defendant might be able to show that there was error committed at the trial. We think that none of the contentions for error is of merit, and that the judgment should be affirmed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

WILLIAMS v. PARBOTT & CO. (Civ. 1761.)

(District Court of Appeal, First District, California. July 10, 1916. Rehearing Denied by Supreme Court Sept. 7, 1916.)

FACTORS ¶6 — CANCELLATION OF CONTRACT WITH PRINCIPAL.

Plaintiff's contract to deliver to defendants for sale on commission a certain number of cases of salmon of the pack of the next year, if defendants assented to the price thereafter to be named, was not canceled by plaintiff subsequently negotiating with defendants to handle its entire pack for that year, the defendant declining the business by letter referring to the letters, by dates, containing the proposition.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 7; Dec. Dig. ¶6.]

Appeal from Superior Court, City and County of San Francisco; John L. Childs, Judge.

Action by E. Williams against Parrott & Co. From an adverse judgment and order, defendant appeals. Reversed.

J. Early Craig, of San Francisco, for appellant. Chickering & Gregory, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment and from an order denying the defendant's motion for a new trial.

The action was brought by plaintiff for sums alleged to be due from the defendant to the assignor of plaintiff, the Apex Fish Company, for a consignment of canned salmon which defendant had sold for the account of said fish company, which was a corporation engaged in the business of packing salmon having its principal place of business in the state of Washington. Defendant in its answer admitted itself to be accountable for the moneys received from the trans-

action set forth in plaintiff's complaint, but set up a counterclaim for \$1,084, and denied liability for anything in excess of the difference between that sum and plaintiff's demand, and which difference it paid.

The facts of the case were stipulated to, except when consisting of letters, which were introduced in evidence. The counterclaim was based on the following facts:

On October 7, 1908, the Apex Fish Company entered into an optional agreement with defendant, whereby the former agreed to deliver to the defendant 5,100 cases of certain kinds of canned salmon of the pack of the year 1909, to be sold by the defendant at what is conventionally termed the opening price for the pack of that year, thereafter and before delivery to be named, and to be communicated by the Fish Company to the defendant, and to be by the defendant confirmed and assented to within five days after the same had been communicated to it. Defendant was to receive a brokerage of 5 per cent. upon its sales of the 5,100 cases. Thereafter in the month of December, 1908, the defendant entered into six optional contracts with different persons for the sale of these goods, subject to approval of opening price of the year 1909 when named. The "opening price" was annually fixed by certain large packers in the early fall, and it was the custom of packers to notify those holding contracts for salmon of the naming of the opening price. The six contracts referred to were accepted by the Apex Fish Company.

In the early part of the year 1909 the company entered into negotiations with the defendant for the handling by the latter of the whole of its 1909 pack of salmon, amounting to some 50,000 cases. These negotiations were terminated on May 12, 1909, when the defendant wrote the Apex Fish Company a letter, in which it stated, referring to the company's offer to allow the defendant to handle its entire pack for 1909, that after duly considering the matter "we have concluded that it is best to decline the business, which we do, thanking you for your offer and the courtesies extended." Subsequent to the writing of this letter the opening price was named. The fish company gave to the defendant no notice thereof; but immediately upon learning of it the defendant telegraphed to its representative, who was then in Washington, to confirm to the Apex Fish Company the opening price on its behalf. Its representative did so, and requested delivery of the 5,100 cases agreed to be delivered under the contract of October 7, 1908. The fish company refused to make the delivery taking the position that the contract was canceled by the fact of the negotiations for the entire pack of 1909 and their termination in the spring of that year. This was the view adopted by the trial court, which rendered its judgment accordingly in

favor of the plaintiff in the sum of \$1,034, with interest and costs.

We are of the opinion that the contention of the defendant must be sustained that the contract of October 7, 1908, between the Apex Fish Company and the defendant, and the subsequent negotiations relative to the entire pack of salmon for the year 1909, were separate transactions, and that the letter of May 12, 1909, written by the defendant, declining the business, referring as it did to the letters by dates containing the proposition, had reference to the latter negotiations alone, and did not operate as a cancellation of the earlier contract. Accordingly it must be considered that the refusal of the Apex Fish Company to deliver the 5,100 cases of salmon, when defendant confirmed the opening price, constituted a breach of contract, for which the defendant is entitled to recover, and that the conclusion reached by the court that the contract of October 7, 1908, was canceled in May, 1909, is not supported by the evidence, and that its judgment based on such conclusion cannot stand.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

HAGAN v. HAGAN. (Civ. 1840.)

(District Court of Appeal, First District, California. July 6, 1916.)

1. HUSBAND AND WIFE — 232(3) — CONVEYANCES — EVIDENCE.

Evidence held to justify decree that wife took a deed to land from her husband and held an undivided one-half thereof for his use and benefit.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 848, 981; Dec. Dig. 232(3).]

2. APPEAL AND ERROR — 1011(1) — SCOPE — REVERSAL.

Decree on conflicting evidence, consisting of testimony of husband and wife, will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3988-3988; Dec. Dig. 1011(1).]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit by James W. Hagan against Emma J. Hagan. From that part of the decree adverse to her, defendant appeals. Affirmed.

Morrison, Dunne & Brobeck, of San Francisco (R. L. McWilliams, of San Francisco, of counsel), for appellant. Milton L. Schmitt, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from that portion of a judgment which is in plaintiff's favor in an action wherein the plaintiff seeks a decree that the defendant, his wife, holds the title to several certain pieces of

real estate in the counties of Santa Clara, San Diego, and Kern in trust for the plaintiff's use and benefit. The trial court held that the properties in Santa Clara and San Diego counties were the sole and separate property of the defendant by virtue of certain deeds of gift from the plaintiff to her but that as to the Kern county property, which the plaintiff had also transferred to the defendant by a conveyance in the form of a deed of gift, she took and held an undivided one-half of the same in trust for the plaintiff's use. It is from this latter portion of the judgment of the lower court that the defendant has appealed.

Practically the only question presented for the consideration of this court is whether the evidence is sufficient to sustain the findings and judgment of the trial court as to the property involved in this appeal. There are certain undisputed facts which may be first recited. The plaintiff and defendant were married in the city of New York in the year 1887. The plaintiff had been married before and had three daughters. At the time of his second marriage he was 45 years of age, while the defendant was then but 25 years old, and was a school-teacher with a salary of from \$40 to \$50 a month, but with no other income or property. The plaintiff had been for several years a traveling salesman for a large jewelry house in which he had an interest, and was earning from \$15,000 to \$20,000 a year. At the time of his marriage he was the owner of some personal and real property including the Kern county ranch consisting of about 640 acres of land, which was at that time however believed to be of comparatively small value. The married life of plaintiff and defendant was for many years a happy and congenial one. He was a fond, trustful, and doting husband, and she a faithful helpmeet, traveling with him, looking after the details of his financial affairs, collecting his earnings and depositing them in various banks, and drawing upon them and upon his account with his firm at her own pleasure and without any question on her husband's part. At Christmas in 1888, being in Santa Clara county, he bought a lot in San Jose and gave it to his wife for a Christmas present. In the following year he executed and delivered to her a deed of gift to the Kern county lands. In December, 1890, being in San Diego, he bought at the suggestion of a mutual friend the San Diego lot, and gave it also to her for a Christmas present. In the year 1900 he acquired and conveyed to her lands in Tacoma, Wash., by like deed of gift; in fact, the plaintiff at various times conveyed to his wife all of his real estate which he owned before marriage and all that he acquired afterwards; and he also practically placed in her control all of his earnings and personal property. He also had his life insured in her favor in sums

amounting to \$13,000, some of the policies of which have matured and their amounts become available to her. In the meantime the plaintiff had grown old, and had lost his position and earlier earning capacity and been otherwise unfortunate in certain business ventures. In the year 1911 the plaintiff and defendant quarreled over some trifling financial matter, and the difficulty then occasioned presently involved the whole question of their property rights. The defendant claimed all of the property which had been given into her hands as her own, and left the plaintiff penniless and practically dependent upon his daughters for support. Thereupon the plaintiff commenced this action to have a trust in his favor declared as to the California property rights.

Thus far the evidence in the case is practically undisputed; and the trial court upon this state of the record was entirely justified in finding that the plaintiff had presented the defendant outright with the title to the Santa Clara and San Diego lots; but as to the Kern county property the testimony of the plaintiff and of the defendant is in sharp conflict as to the real purpose of the purported gift, the plaintiff testifying that his intention in placing the title to said property in the name of his wife was simply for their mutual protection in view of the perils incident to his nomadic life, and as an assurance of a means of livelihood for them both in their old age; and he also testified to numerous incidents tending to illustrate his claim that they both considered and spoke of it as their common property. The plaintiff is supported in his testimony by the testimony of his three daughters and their husbands as to similar illustrative conversations and incidents occurring between the parties. On the other hand, the defendant testifies that at all times the conveyance of the Kern county property to her was intended and considered to be a gift absolute investing her with the whole title to the property; and in this she also is in a measure supported by the testimony of her relatives and friends.

[1, 2] If the trial court believed, as it was entitled to do, the testimony offered by and on behalf of the plaintiff in preference to that presented by and on behalf of the defendant, we make no question but what a sufficiently clear and convincing case was made justifying the court's decree that the defendant had received and held at least an undivided one-half of the Kern county property for the plaintiff's use and benefit; and the trial court having so decreed upon evidence of such character and conflict this court will not under well-settled rules disturb the findings and judgment of the lower tribunal.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

MAJORS v. GIRDNER. (Civ. 1492.)

(District Court of Appeal, Third District, California. July 6, 1916.)

1. CORPORATIONS §94 — "CERTIFICATE OF STOCK"—NATURE.

A certificate for the stock of a corporation is only the evidence of the ownership thereof, and merely constitutes proof of property which may exist without it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. §94.]

For other definitions, see Words and Phrases, First and Second Series, Certificate of Stock.]

2. CORPORATIONS §92 — RESCISSION OF CONTRACT — PREREQUISITES — RETURN OF PROPERTY.

One who gave his note for corporate stock, and defended an action thereon for alleged fraud, and sought rescission, was under the duty of returning, or offering to return, the stock, even if the certificate was, as alleged, never delivered to him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 386; Dec. Dig. §92.]

3. CORPORATIONS §90(6) — SALE OF STOCK — EXECUTION — EVIDENCE.

Evidence held to show executed contract for sale of corporate stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416; Dec. Dig. §90(6).]

4. CORPORATIONS §94 — SALE OF STOCK — WHEN CONSUMMATED.

When the corporation approves application for purchase of stock by accepting the applicant's note, the sale is complete, and title is in the applicant, though certificate does not issue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. §94.]

5. CORPORATIONS §80(11) — SALE OF STOCK — NOTES — ACTION — EVIDENCE.

Evidence held insufficient to sustain finding that note in suit, given for corporate stock, was induced by fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 263; Dec. Dig. §80(11).]

6. CORPORATIONS §80(10) — STOCK SALES — RIGHTS OF PURCHASER.

Even if failure to resell stock at certain price were legitimate ground for rescission of original sale contract, the purchaser, having made a payment on the original note given therefor, and having given a new note for the balance subsequent to the expiration of the time within which he was authorized to require the corporation to resell his stock, thereby waived that covenant, or is by that act estopped from setting up the breach thereof as against the honesty and good faith of the transaction, or as against the legal integrity of the note itself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 262; Dec. Dig. §80(10).]

7. CORPORATIONS §92 — STOCK SALES — RIGHTS OF PURCHASER.

Where corporation failed to issue certificate of stock sold defendant, and he thereby lost dividends, his only remedy was to counterclaim for their amount against suit on his note given for price of stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 386; Dec. Dig. §92.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by E. A. Majors against Mark A. Girdner. From judgment for defendant and

order denying new trial, plaintiff appeals. Reversed, with directions.

E. J. Dole, of Petaluma, for appellant. L. G. Scott, of Sebastopol, for respondent.

HART, J. The action is on a promissory note for the sum of \$350 which, it is alleged, was made and delivered by the defendant to the Pacific Coast Securities Company, a corporation (for brevity to be hereinafter referred to as "the corporation"), and after such execution and delivery, assigned by the original payee to the plaintiff, "who is now the lawful owner and holder thereof."

The answer admits the execution and delivery of the note as alleged in the complaint, but asserts that the instrument was procured from the defendant by the corporation above named through misrepresentation and fraud.

The gist of the charges of fraud set out in the answer may thus summarily be stated: That the corporation, through its duly accredited agents, called upon the defendant and offered him the stock of the corporation at the price of \$15 per share, the par value of which was \$10 per share; that said agents guaranteed and warranted said stock to be of the value at least of \$15 per share; that at said time, as an inducement to the defendant to buy said stock, said agents entered into an agreement in writing, whereby they bound the corporation "to extend the time of payment of note to suit applicant for stock and to resell stock for \$20, if so desired, by January 15, 1914," said agreement being signed by "E. H. McConkey, by Clements & Harold, Agent." The further representations were made, so the answer states, that said stock "was very valuable," that the same could be turned and sold at any time for \$15 per share, and that the corporation was in a flourishing condition and was financially sound. It is alleged that each and all of said representations were made for the purpose of inducing the defendant to purchase said stock, and that they were false and fraudulent, made with the intent to deceive the defendant and to persuade him to buy the stock; that said stock was not, at said time, of any real market value, that there were no prospects of the same being of any material market value, and that it was not then "worth \$10 per share, or any other amount, and that said corporation never intended to resell the same for \$20 per share, or \$15 per share, or \$10 per share, or for any other amount so far as said corporation had any knowledge"; that said corporation "was not in a money-getting and flourishing financial condition at the time, or at any other time." It is alleged that the defendant believed the representations so made, and was thus deceived and misled into purchasing, and did purchase, 25 shares of said stock "which he would not otherwise have purchased."

It is further charged that the corporation represented and agreed that, upon the execution and delivery by the defendant to it of the note in suit, it would, at once and without delay, issue to said defendant 25 shares of its stock, which would, as it was then represented was true of other stock of the same kind, earn and return dividends of not less than 7 per cent. per annum, "which was the only consideration for the execution of said note to said corporation, and that this was the only consideration ever to be given or paid for said promissory note, but defendant alleges that said corporation did not execute and deliver or issue stock to defendant, or in his name, or in any other person's name for him, and did never deliver to said defendant any certificate of stock, or thing at all, and there was nothing whatever given for said promissory note, and the same was without consideration, and has been at all times without consideration." These facts, it is declared, were not discovered by the defendant until the time at which he applied for a renewal of the note so as to extend the time for the payment thereof, when, upon giving the renewal note and at the same time paying to the corporation \$25 in cash as and for principal and paying the interest accrued upon the original note, he asked what had become of the corporate stock certificate which the corporation had agreed to issue to him, and that he was then told and assured that the certificate for the 25 shares of stock had been issued as agreed upon, "which statement was false, and said corporation and the officers and members thereof knew that the same was false and untrue"; * * * that "said stock was not then, nor had it ever at any time, issued to defendant." It is averred, in effect, that but for the false representation then made as to the issuance of said stock and the further false representations as to the value of said stock and the flourishing and sound financial condition of the corporation, the defendant would not have made and delivered to the corporation the renewal note in lieu of the original note or paid to the corporation the sum of \$25 on the principal and the accrued interest on the original note.

The "separate and further defense" set up in the fourth paragraph involves, in effect, along with some conclusions of the pleader, an iteration, substantially, of the allegations of the preceding paragraphs of the answer. It is to the effect that all the agreements, etc., between the corporation and the defendant "were purely executory, in that the matters and things and agreements on the part of said corporation were never performed, and were matters precedent to the issuance of said note and notes, in that said corporation was, as per the stipulations, to execute and deliver to defendant the certificate of stock * * * before said note or notes were to be delivered or to take effect, and said corporation was to place defendant in a

position that he should be protected, and guaranteed that the stock would and should be of the guaranteed value of \$15 per share, and in that said stock should meanwhile be drawing dividends, none of which matters and things were done or performed by said corporation, and the defendant had the right to rescind the same at any time, and did rescind the same in writing before the bringing of this action, and before the acquisition or possession thereof by plaintiff herein, all of which matters and things plaintiff well knew before the taking over of said note by him," etc.

The efficacy of the answer in the statement of a defense to the action was not challenged by demurrer.

The cause was tried by a jury and a verdict returned in favor of the defendant. Judgment was entered accordingly. The plaintiff appeals from the judgment and the order denying him a new trial.

In the outset, it is proper to state that no claim is here made that the plaintiff is an innocent purchaser of the note for value. On the contrary, it is conceded that the plaintiff is acting solely in this action for the corporation, the original payee, and that the note was assigned to him for the purpose of collection only.

The point is made for the first time in this court that the answer does not state facts sufficient to constitute a defense to the cause of action pleaded by the plaintiff.

[1-4] One of the objections specifically made against the answer is that the defendant, who asks for affirmative relief by way of a rescission of the contract of sale upon the ground of fraud and the surrendering up and cancellation of the note in suit for want of consideration therefor by reason of such fraud, has not, by appropriate or other averment in his answer, offered to restore the stock which he alleges he purchased from the corporation. The point is well taken. The transaction between the corporation and the defendant constituted, according to the history thereof as it is explained by the answer, an executed contract of sale, and the stock became the property of the defendant upon the consummation of that transaction, notwithstanding that the certificate for the stock was not, so the answer declares, issued and delivered to the defendant. *Mason v. Lievre*, 145 Cal. 514, 78 Pac. 1040. A certificate for the stock of a corporation is only the evidence of the ownership thereof, or, as the cases put the proposition, it merely constitutes proof of property which may exist without it. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110, and cases therein cited. In that case, it is among other things said:

"When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration."

In this case, according to the answer, the defendant made application for the purchase of the stock, and the same was approved by the corporation by accepting the note of the defendant in payment therefor. This, as stated, constituted a sale. (Civ. Code, § 1721; *Johnson v. Dixon Farms Co.*, 155 Pac. 134; 35 Cyc. 25), and thereupon the title to or ownership of the stock, ipso facto, vested in the defendant.

It is a settled rule in equity, and expressly affirmed by legislative fiat (Civ. Code, § 1691, subd. 2), that in an action for rescission the party seeking the remedy "must restore to the other party everything of value which he has received from him under the contract," etc. While there are in the answer some vague and indefinite allegations intended to disclose that the stock was not of the value it was represented to be by the agents of the corporation, there is no allegation in the defendant's pleading that it is wholly valueless. If it was of some value (and it may be assumed that it was, it being property), it was the duty of the defendant, as a prerequisite to his right to a rescission of the contract on the ground of fraud, to restore, or offer to restore, by appropriate and sufficient averment in his answer the stock to the plaintiff or to the corporation, for whose benefit the plaintiff is admittedly suing (*Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797), and to do this it was not requisite, as we have already shown, that he should have previously had issued to him, or had in his possession, the certificate for the stock, which is, as suggested, the mere physical evidence of the interest he owned in the capital stock of the corporation.

[5] The answer, as a pleading seeking affirmative relief, is in other respects by no means an exemplar in pleading. But, taken in its entirety, we are able to say that the allegations of fraud on the part of the corporation in the transaction, eventuating in the sale of the stock, are sufficient in substance for the purpose for which they were intended to place the answer, as a pleading looking for affirmative relief, beyond the reach of a general demurrer.

But, notwithstanding the defectiveness of the answer, the case appears to have been tried by the plaintiff upon the theory that the defendant's pleading was sufficient in all respects, no objection whatever having been made by the plaintiff to the evidence offered by the defendant in support of the charge of fraud as set forth in his answer. Even if it be true, however, that, by failing to demur to the answer and to object to evidence offered in support of the allegations thereof, the plaintiff waived restoration of the stock by the defendant, and that the case was tried by the plaintiff upon the theory that the defendant had, in the matter of pleading, gone as far as required in an action for rescission,

still the evidence falls far short of supporting the verdict.

The defendant's was the only oral testimony offered and received in his behalf; and, since the plaintiff presented no evidence from which even the remotest inference of fraud on the part of the corporation in the transaction may be drawn, it necessarily follows that the jury predicated their verdict wholly upon the testimony of the defendant. The facts of the transaction will therefore be taken from his version thereof, and, as so taken, may be briefly stated as follows: On the 22d day of October, 1913, the defendant made an application to the corporation for 25 shares of its capital stock for \$15 per share. The application was in printed form, presumably the form regularly used by the company for that purpose, and, the same was signed by the defendant. At the same time that said application was executed and delivered to the agents of the corporation, Messrs. Clement & Harold, by whom the transaction was conducted for the corporation, the defendant as in payment for said stock made and delivered to said agents his promissory note for the sum of \$375, payable on the 15th day of January, 1914. For this note a receipt was delivered to the defendant, the same being signed:

"E. H. McConkey [vice president and manager of the corporation], by Clement & Harold, Agents."

Among other things, said receipt contained the following agreement on the part of the corporation:

"We agree to extend time of payment on note to suit applicant for stock and to resell stock for \$20, if desired, by January 15, 1914."

The defendant, some time before the 15th day of January, 1914, made a demand upon or request of the corporation to sell the stock in accordance with the above agreement. The corporation did not sell the stock. On or about January 15, 1914, the defendant gave the corporation a renewal note for the original one (page 25, transcript) and, on the 19th day of that month, the corporation, through its secretary, W. B. Slade, forwarded the original note to the defendant, with the following letter:

"Inclosed you will find your old note for \$375, due on January 15, 1914, marked 'canceled.'"

On the 15th day of May, 1914, the defendant paid the corporation the accrued interest and the sum of \$25 on the principal of the note previously given, and asked for and was granted a further extension of time for the payment of the balance of said note, giving in lieu thereof the note in suit for the sum of \$350. Said note was dated on the day of its execution and delivery (May 15, 1914), and made payable four months after date, or on the 16th day of September, 1914. On the 11th day of September, 1914, the defendant addressed to McConkey, manager of the corporation, the following letter:

"It will be necessary for you to extend the time on my note to Oct. 15, 1914, as I have no funds at present, but expect to cash some securities before that time to pay same with. I have explained to the lady in the office as she can tell you."

On September 5, 1914 (ten days prior to the date of the maturity of the note in suit), the defendant received from the corporation a duly executed certificate for the 25 shares of stock purchased by him.

The defendant testified: That, when the matter of the sale and purchase of the stock was under negotiation between him and the agents of the corporation, the said agents "represented that they had the agency for the California State Life Insurance Company; that they were reselling all of their business for them." As I had stock in the California State Life Insurance Company, I took a chance. They represented that the dividends were enormous, and that the dividends were already earned; they had the money to pay the dividends. * * * After representing that they had the agency for the California State Life, and as I knew that they were doing a big business, and representing that the dividends were earned, they had them there to pay, and that if I didn't want the stock, that they would resell it on the 15th day of January. Q. Now, you are speaking about this stock in the Pacific Securities Company? A. Yes, sir. Q. This was the stock that these agents tried to sell you? A. Yes, sir." The defendant, after so testifying, further said that the reason he renewed the note on the several occasions referred to above was because he was told that the stock had been issued to him, although he had not received the certificate therefor. He declared that the agreement was that the certificate would be issued and dated at the time of the delivery of the original note, and that he would therefore be entitled to any dividends earned by the stock from that time on; that, as a matter of fact, the certificate was not issued until nearly a year after he had bought the stock, and that he would, as a consequence, lose the dividends, if any accrued upon the stock, for the entire time during which he believed he was the owner of it. On cross-examination, however, the defendant testified that the reason he renewed the note as indicated was because he did not have ready money with which to take the note up. The above is the sum of the testimony upon which the jury founded their verdict.

Nowhere is there any testimony to be found in the record that the corporation was not financially sound or not doing a business profitable to its stockholders. Nor did the defendant testify or show by any other testimony or proof that the capital stock of the corporation was not of the value that it was represented to be by the corporation's agents. And there is absolutely no proof whatever

that the stock purchased by the defendant was not dividend earning property.

As to the representations made by the corporation's agents to the defendant at the time the stock was purchased by the latter, it is difficult to say from the testimony of the defendant whether, in making said representations, the agents were referring to the California State Life Insurance Company and its stock or to Securities Company and its stock. In any event, the testimony of the defendant, as it is presented in this record, is that he personally knew that the stock to which said agents were referring, and as to which the representations mentioned were made, was of great value and profitable to the stockholders.

But, when boiled down to its actual purport, the real gist of the defendant's complaint against the transaction involved herein, as the same is gathered from his testimony, is that he has been defrauded of the dividends to which he was entitled on his stock because the corporation failed to keep its alleged agreement that, contemporaneously with the delivery to it of the original note, it would issue and deliver to the defendant a certificate for the 25 shares of stock purchased by him, and, furthermore, that he suffered injury because it failed to keep its agreement to sell said stock for him, upon his demand, at a price in advance of that paid by him therefor, by January 15, 1914. It is very obvious that these omissions on the part of the corporation do not involve such misrepresentation or fraud as will work a rescission of the contract of sale. Indeed, they cannot be said to involve misrepresentation at all. They amounted to a mere breach of certain covenants of the contract. As above stated, the stock purchased by the defendant became his property the moment that the sale was completed, and the certificate amounted only to tangible proof of such ownership. He was, of course, entitled to a certificate showing his ownership of the stock, but the failure of the corporation to issue and deliver it to him could not have the effect of violating the contract of sale or impairing his title to the stock. It was, as above suggested, merely the violation by the corporation of an obligation which the defendant by appropriate legal proceedings could have compelled it to discharge.

[8] As to the point involving failure by the corporation to resell the stock, it is perfectly clear that, even if that were a legitimate ground upon which rescission of the sale could be worked, the defendant, having made a payment on the original note and given a new note for the balance subsequent to the expiration of the time within which he was authorized to require the corporation to resell his stock, thereby waived that covenant or, at any rate, is by that act estopped from setting up the breach thereof as against the

honesty and good faith of the transaction culminating in the making of the note in dispute, or as against the legal integrity of the note itself.

[7] Our conclusion is that the proofs utterly fail to disclose fraud on the part of the plaintiff in the transaction involved herein, and that if the stock of the defendant earned dividends during the period of time intervening between the date of the purchase thereof and the date of the issuance and delivery to the defendant of the certificate for said stock for which the corporation has not accounted or which it has not paid to the defendant, the latter should have set up the amount of such dividends as a set-off or counterclaim to the note in suit. This was the only recourse left to him under the facts of the transaction as he himself has detailed them in this case.

The judgment and the order are reversed, with directions to the court below to grant the defendant leave, if he may elect to take that course, so to amend his answer as to plead therein any counterclaim available to him by reason of the stock dividends claimed by him.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

CURTIN et al. v. KINGSBURY, Surveyor General. (Civ. 1552.)

(District Court of Appeal, Third District, California. July 6, 1916. Rehearing Denied by Supreme Court Sept. 1, 1916.)

CONSTITUTIONAL LAW § 83(1) — TAXATION § 696 — SCHOOL LANDS — TAX SALE — REDEMPTION — STATUTE — VESTED RIGHTS.

Pol. Code, § 3817, prescribing the method for the redemption of school lands sold for delinquent taxes, was amended by St. 1895, p. 333, to apply where the full amount of the purchase price at \$1.25 per acre had not been paid, except where the deed to the state provided by section 3785 had been filed with the surveyor general, and was amended by St. 1909, p. 42, by adding, "and an application has been filed therefor in that office." Section 3785, as amended by St. 1895, p. 328, provided that, where the full price of the land had not been paid, and the tax deed to the state had been forwarded to the surveyor general, the state should dispose of the land as prescribed in section 3788, which section, as amended by St. 1895, p. 329, provided that the land should become subject to entry and sale, that the former possessors should be preferred purchasers for six months after the deed was filed with the surveyor general, if they paid all the delinquent taxes, penalties, and costs, and, as amended by St. 1909, p. 122, gave the former possessors the right to repurchase within the six months' period, before any other application therefor, on payment of taxes, costs, and unpaid interest, and which was repealed by St. 1915, p. 605, §§ 1-3, requiring unsold school lands to be sold at public auction. Land purchased in 1901 upon payment of 20 per cent. of the purchase price was in 1904 assigned to petitioners, and in 1909 was sold to the state for delinquent taxes, followed by deed to the state in 1912. Held, that the sale and deed to the state passed the title to it, subject to redemption, and

that the state had power to say upon what terms its title might be divested and sold to either the original purchasers or a new purchaser, so that petitioners had no vested right violated by the repealing statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 203, 213; Dec. Dig. ¶¶ 93(1); Taxation, Cent. Dig. § 1393; Dec. Dig. ¶¶ 696.]

Application for writ of mandate by C. Curtin and R. C. Jay, administrator of the estate of W. C. Hensley, deceased, against W. S. Kingsbury, Surveyor General of the State of California and ex officio Register of the State Land Office. Application denied.

W. H. Larew and Jos. Barcroft, both of Madera, for petitioners. U. S. Webb, Atty. Gen., and Robertson T. McKlaick, Deputy Atty. Gen., for respondent.

CHIPMAN, P. J. Mandate. It appears by the petition that on November 19, 1901, the state of California issued its certificate of purchase to one J. Frank Miller, for all of section 36, township 9 south, range 19 east, M. D. B. & M., in Madera county, for which he paid 20 per cent. of the purchase price of \$1.25 per acre, said land being "only fit for grazing purposes"; that there remained due to the state \$1.00 per acre, or \$640, with interest at 7 per cent. per annum; that in 1904 said Miller assigned said certificate of purchase to plaintiff Curtin and W. C. Hensley, who "entered into the possession of said land and became and were the sole owners thereof, subject only to the paramount title of the state." On February 21, 1910, said Hensley died, and thereupon petitioner R. C. Jay was appointed and now is administrator of his estate. On June 22, 1907, the land in controversy was sold to the state for non-payment of taxes, followed by a deed to the state dated July 16, 1912. On June 13, 1913, petitioner Curtin applied for and received from the auditor of Madera county an estimate of the amount necessary to redeem said land from tax sale, and on the same day paid to the treasurer of said county the amount of said estimate, together with other delinquent taxes on the land, which "redemption was duly recorded, and it was noted upon the recorded certificate and the recorded tax deed that the land was redeemed." On September 10, 1915, at the request of petitioners, the auditor and treasurer furnished them "a statement of all interest then due and unpaid on said" land, and petitioners paid to the treasurer the amount shown by said statement. It is then alleged that the certificate of sale issued to said Miller has been lost, and that the defendant refuses to accept from the treasurer of Madera county the amounts paid by petitioners, and refuses to issue a new certificate of purchase in lieu of the lost one. It is alleged, upon information and belief, that there are no claims adverse to petitioners to said land. There is also an allegation:

"That no foreclosure for nonpayment of interest ever was had or attempted in the matter of

the delinquency in payment of interest as provided in the Political Code or at all; that the certificate of purchase remains uncanceled by any foreclosure."

The prayer is for an alternative writ of mandate directing defendant to receive the moneys tendered by petitioners and to issue a new certificate of purchase in lieu of the lost one. The issue presented is raised by a general demurrer filed by respondent to the petition.

By an act approved May 19, 1915 (Stats. 1915, p. 605), which, for convenience, will hereinafter be referred to as chapter 389, it was provided that "the unsold portions of the sixteenth and thirty-sixth sections of school lands * * * shall be sold at public auction by the surveyor general." It is the contention of respondent that "under this method all applications to purchase school lands at a fixed statutory price are abolished. Nobody can apply to purchase lands of the character described in the act. Intending purchasers must attend the sale at the time and place stated in the notice of sale, and there bid in open competition against any and all other persons who desire to acquire the land," and respondent maintains that "this act conflicts with the provisions of section 3783, Political Code, in toto, and with so much of section 3817 as affects school lands"; that "under the law as it stood when the sale was made the sole remedy of the delinquent purchaser was to repurchase the land within six months from that date"; that the delinquent purchaser had no vested right to redeem the property, his only right being a preference given him to repurchase within six months; and that this privilege was withdrawn by chapter 389, supra.

Petitioners' reply to the above contention that "the state may diminish the penalties, extend the time for redemption, or lessen the burden upon the delinquent taxpayer, but the state cannot increase the penalties, shorten the time for redemption, or add further penalties, burdens, and conditions of redemption, after the date of sale to the state," and "none of the statutes relied upon by the defendant purport to be retroactive."

The method prescribed by section 3817, Political Code, in 1883 for the redemption of school lands sold for delinquent taxes applied only to purchasers who had paid "the full amount of one dollar and twenty-five cents per acre." Stats. 1883, p. 23. This section remained unchanged until 1895, when it was made to apply to purchasers "when the full amount of the purchase price of one dollar and twenty-five cents per acre has not been paid, except where the deed to the state, provided for in section three thousand seven hundred and eighty-five has been filed with the surveyor general." Stats. 1895, pp. 308-340. By this act there were many changes made in the sections of the Political Code relating to the sale, redemption, and disposition of lands sold for delinquent taxes.

School lands were made subject to the act, and were referred to in sections 3785 and 3788, as well as in section 3817. By section 3785 it was provided that, where the full price for the land has not been paid, and where the tax deed to the state has been forwarded by the county recorder to the surveyor general, "the state shall dispose of such lands in the manner provided in section three thousand seven hundred and eighty-eight." Section 3788 provided that in such case "the said lands shall again become subject to entry and sale, in the same manner, and subject to the same conditions, as apply to other state lands of like character, except that the former possessors * * * of the land thus deeded to the state, their heirs or assigns, shall be preferred purchasers thereof for the period of six months, after the deeds are filed with the surveyor general." It was required of the intending purchaser that as a condition to his purchase he should pay, in addition to the price of the land, all delinquent taxes, penalties, costs and accrued costs prior to and subsequent to the date of sale to the state. The sections of the Political Code as amended by the act of 1895 was the law of 1901 when the purchase was made by plaintiffs' assignor. By that act (section 3788, Pol. Code) the right given to the purchaser whose land had been sold to the state for delinquent taxes was not to redeem, as was the right given by the act of 1883, but was a right to become a purchaser in preference to any other person if, when application was made, there was no other conflicting application. His rights were no greater than those of any other purchaser, except that he was a preferred purchaser for a limited period.

We have seen that the taxes became delinquent and the land was sold to the state in 1907, and a deed made to the state in 1912 which was duly filed with the surveyor general. Had no other statute intervened, plaintiffs' right would have been that of a preferred purchaser, and not of a redemptioner.

Section 3817 was amended in 1897, 1901, and 1905 (St. 1897, p. 433; St. 1901, p. 651; St. 1905, p. 499), but not affecting that part of the section referring to school lands. In 1909 the Legislature added to the section the following: "And an application has been filed therefor in that office." This act was passed February 22, 1909, and took effect 60 days thereafter. Stats. 1909, p. 42. At the same session, on March 2, 1909, section 3788 was also amended, retaining the provision making the former possessor or owner of the lands sold a preferred purchaser for a period of six months after the filing of the deed in the office of the surveyor general. And it was further provided: "That the former possessors or owners of said land thus deeded to the state, their heirs or assigns, shall have the right to be restored to their former state and title (at any time either during the said period

of six months above referred to, or afterwards, and before application for said land is made and filed with the surveyor general by any other person) upon paying to the county treasurer"—(1) A sum equivalent to the taxes, penalties, and accruing costs; (2) all delinquent taxes, penalties, and costs which have accrued upon such lands subsequent to the date of the certificate of purchase under which the former possessors or owner, or their heirs or assigns, claimed title to said lands; (3) also all unpaid interest up to the 1st day of January following the day when he shall make payment to the county treasurer. Stats. 1909, p. 122.

The payments made by plaintiffs to the county treasurer, as appears from the petition, seem to have been made as redemptioners, whereas whatever right they had was given to them by the statute as preferred purchasers. It is perhaps immaterial whether these payments were made as redemptioners or as purchasers if they were sufficient to comply with the law applicable when the payments were made. Now, the sale to the state for delinquent taxes extinguished all rights of plaintiffs to the lands subject to the right of redemption during the five-year period and before the deed passes the legal title to the state. Such sale vests the equitable and the deed the legal title of the land in the state. *Santa Barbara v. Savings Soc.*, 137 Cal. 463, 465, 70 Pac. 457. As against the state the property owner at the end of five years has forfeited all rights to the property, except the privilege accorded him by the statute of redeeming it at any time before the state actually enters, sells or disposes of it. *Baird v. Monroe*, 150 Cal. 560, 567, 89 Pac. 352. The state had the power to say upon what terms and in what manner the title thus vested in the state might be divested. It could have denied all right to redeem or to purchase.

In 1907, when the land was sold for delinquent taxes, plaintiffs' right under the amendments to the Political Code by the act of 1895 was that of a preferred purchaser for the period of six months after the deed is filed with the surveyor general. Pol. Code, § 3788. They did not avail themselves of that right, and it was lost to them. By the acts of 1909 the state offered to restore them "to their former state and title" upon conditions more favorable than were given by the act of 1895, for they were allowed to comply with the statute as preferred purchasers within six months, and were to be restored to their title at any time before another application was made for the same land and upon terms no different than were imposed by the act of 1895, except that the payment of interest upon the unpaid purchase price was required to be paid. As this was an obligation attached to the original contract, its payment cannot be regarded as an additional burden. But whether it was or not, we think the state

had the right as the absolute owner of the land under the tax deed to dictate the terms upon which it might be repurchased by the original or a new purchaser, or the conditions upon which the purchasers or owners or their assigns might be restored to their original state and title.

The payments made by the plaintiffs to the county treasurer were made June 13, 1913, at which time no other application had been made to purchase the land, but the payment did not include interest, and no interest was then paid or tendered and on September 10, 1915, they again attempted to redeem from delinquent tax sale by paying the then accrued taxes, penalties, and costs, and they also paid to the auditor and treasurer of Madera county "all interest then due and unpaid on said land."

It appears from the petition that on July 15, 1915, the surveyor general advised petitioners that said land could be redeemed under section 3788 of the Political Code, but also advised petitioners of the act of 1915 (S. B. 906, c. 390), copy of which was inclosed in the letter of advice, stating that said "act became effective August 8, 1915, superseding section 3788 of the Political Code" and that, in the opinion of the surveyor general, "all land that had been sold to the state for nonpayment of taxes wherein the tax deed was filed in this office would be subject to sale under the provisions of said S. B. 906. Inasmuch as the land was not redeemed on or before August 8, 1915, this office considers" (describing the land) "to be vacant state land and subject to sale under the provisions of S. B. 906." Petitioners were therefore fully aware of the attitude of the state and that they were required to make payment on or before August 8, 1915, in order to preserve their rights. This they did not do.

The act of 1915 provided:

"Section 1. The unsold portions of the sixteenth and thirty-sixth sections of school lands * * * shall be sold at public auction by the surveyor general. * * *

"Sec. 3. Those parts of all acts in conflict with this act are hereby repealed."

Stats. 1915, p. 606.

Without question, section 3788 of the Political Code is in conflict with this act, and is thereby repealed so far as it provided a different method for the disposition of school land.

We do not think petitioners had any vested right which was violated by the act of 1915. The absolute title to the land, as we have said, vested in the state by the tax deed, and the state could provide any method it chose for the subsequent disposition of the land, and could at any time change such method without impairing the right of any applicant to purchase who had not complied with the then existing law.

Petitioners claim that:

"The penalty provided by law for the nonpayment of interest is foreclosure, whereby the principal paid upon the purchase price becomes forfeited and the certificates canceled upon foreclosure and not otherwise."

And it is hence contended that, as there has been no such foreclosure, petitioners were not required to pay accrued interest as a condition to the repurchase or redemption of the land, and that it was a violation of their contract to require such payment.

It was held in the recent case of Aikins v. Kingsbury, 170 Cal. 674, 151 Pac. 145, that:

"The method of * * * procedure * * * by the act of 1867-68 for terminating the right of a defaulting purchaser of school lands purchased under that act was not exclusive, and he may not complain of a different method of procedure subsequently established by the state for accomplishing that end which did not impose upon him more onerous conditions than the former." Syllabus.

As above suggested, we do not think the method of enforcing payment of interest by making it a condition for repurchase or redemption where the land is sold for nonpayment of delinquent taxes is any more burdensome than to enforce payment by foreclosure. Certainly it is less expensive and less annoying to the intending purchaser or redemptioner. But, aside from this consideration, we think, as already pointed out, the sale to the state for nonpayment of taxes culminating in a deed to the state extinguished all rights of petitioners, and that they thereafter could be restored to their former or any rights only by compliance with the law existing at the time they might apply for such restoration.

The writ is denied.

We concur: HART, J.; ELLISON, Judge pro tem.

SULZBERGER & SONS CO. OF OKLAHOMA v. STRICKLAND.
(No. 7813.)

(Supreme Court of Oklahoma. June 6, 1916.
Rehearing Denied Sept. 1, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 172—REPLY—RIGHT TO FILE.

On the day of the trial the court, over the objection and exception of the defendant, permitted the plaintiff to file a reply to the answer of defendant. In the light of section 6006, Rev. Laws of Oklahoma 1910, this action complained of by the defendant on the part of the trial court did not constitute any substantial violation of any statutory right of the defendant. This section was in full force at the time the trial court permitted plaintiff to file his reply and make the amendment complained of.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 334-338; Dec. Dig. \S 172.]

2. NEGLIGENCE \S 1 — "ACTIONABLE NEGLIGENCE"—WHAT CONSTITUTES.

To constitute "actionable negligence" upon the part of defendant where the wrong is not willful and intentional, three essential elements are necessary: (1) There must be some duty ow-

ing by it to the plaintiff; and (2) a failure upon its part to perform that duty; and (3) injury proximately resulting to the plaintiff from such failure upon its part. *C. v. R. I. & P. v. Duran*, 38 Okl. 719, 134 Pac. 876.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 1; Dec. Dig. ¶ 1.

For other definitions, see *Words and Phrases*, First and Second Series, *Actionable Negligence*.]

3. MASTER AND SERVANT ¶101, 102(1)—INJURIES TO SERVANT—DUTY OF MASTER.

The master is bound to exercise reasonable care and diligence to provide a reasonably safe place in which the employé or servant is to work, and also reasonably safe machinery, tools, and appliances with which to work, and to supply the servant with reasonably safe materials upon which to perform the work required of him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 185, 171, 178, 179; Dec. Dig. ¶¶ 101, 102(1).]

4. MASTER AND SERVANT ¶289(1)—INJURIES TO SERVANT—CARE.

In cases like the one at bar, which turn on the question whether the party exercised ordinary care or was guilty of negligence, after the usual appropriate definitions of these particular terms by the court, it is the province of the jury to say, from a consideration of the evidence, whether in the particular case ordinary care was exercised, or whether there was negligence. In other words, what is ordinary care or what is negligence in the particular case is a question of fact for the jury, and not of law for the court.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1089; Dec. Dig. ¶ 289(1).]

5. MASTER AND SERVANT ¶121(2)—INJURIES TO SERVANT—APPLIANCES—STATUTES.

"3748. *Machinery to have Safety Devices.* The owner or person in charge of a factory or any institution where machinery is used shall provide belt shifters or other mechanical contrivances for the purpose of throwing belts on or off pulleys, whenever practicable. All machines shall be provided with loose pulleys and all vats, pans, planers, cogs, gearing, belting, shafting, setscrews and machinery of every description shall be properly guarded. * * *

"3756. *Penalty for Violating this Article.* Any person who fails to comply with any of the provisions of this article shall be deemed guilty of a misdemeanor, except as otherwise provided, and on conviction thereof shall be fined in a sum not less than ten dollars nor more than one hundred dollars for each offense."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 229; Dec. Dig. ¶ 121(2).]

6. MASTER AND SERVANT ¶293(11) — INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

The trial judge in this case charged the jury under the Factory Act, and also went further and charged the jury as to the law touching the duty of the defendant to furnish the plaintiff with a reasonably safe place in which to work and reasonably safe machinery with which to work, and also charged the jury concerning the assumption of risk. Had the court simply charged the jury under the Factory Act, then it would not have been necessary to have charged them as to the common-law liability as to a reasonably safe place in which to work, and reasonably safe machinery with which to work and the defense thereto of assumption of risk. But, having done so by proper instructions, we see no reversible error therein.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1150; Dec. Dig. ¶ 293(11).]

7. MASTER AND SERVANT ¶94, 286(1), 289(1) — INJURIES TO SERVANT — STATUTES — JURY QUESTIONS—"NEGLIGENCE PER SE."

This Factory Act is a mandatory statute. The things expressly enumerated therein, together with machinery of every description, shall be properly guarded. This declares the fixed and settled public policy of the state touching these matters and things, and a violation of this act is made a crime and punishable as such. The sovereign, in order to afford greater and better protection to the lives and limbs of the subject who earns a livelihood by working with and around machinery, and in order to lessen the chances of accidents, has expressed her will in the solemn mandates of this mandatory and penal statute, which must be obeyed, and a failure to obey it becomes and is "negligence per se"; and those who disobey it are not entitled to the defense of assumption of risk, but may interpose the defense of contributory negligence. These matters were questions of fact for the jury. They were submitted to the jury. The jury by their verdict have found under the law and the evidence that the defendant was negligent as complained of. This court will not disturb their verdict.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 159, 1001, 1089; Dec. Dig. ¶¶ 94, 286(1), 289(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Negligence Per Se*.]

8. DECISIONS — CONSTRUCTION — EJUSDEM GENERIS.

The doctrine of ejusdem generis was applied in an Ontario case so as to limit materially the effect of the earlier statute. In Indiana the Supreme Court has been inconsistent in its construction of the statute providing: "All vats, pans, saws, planers, cogs, gearing, belting, shafting, setscrews and machinery of every description." The rule finally adopted is that the phrase, "machinery of every description," does not modify in any way the specific appliances mentioned, but embraces all other kinds of machinery, which would be too numerous for the Legislature to mention, although an earlier decision of the Supreme Court, to the effect that the general terms simply referred to other appliances of the same general description as those indicated by the specific terms, under the doctrine of ejusdem generis, was not in terms overruled. The doctrine of the Washington court is the same as that which appears to prevail in Indiana. And a somewhat similar view is taken of the statute in New South Wales.

9. MASTER AND SERVANT ¶121(2)—INJURIES TO SERVANT — STATUTES — "EJUSDEM GENERIS."

The doctrine of "ejusdem generis" is that where a general word follows particular and specific words of the same nature as itself, it takes its meaning from them, and is presumed to be restricted to the same genus as those words. The language here does not admit of the application of the ejusdem generis doctrine. The phrase "and machinery of every description" cannot be limited by the prior enumeration, for the reason that such enumeration is not an enumeration of machines at all—the genus of those words is not of the same nature as of "machinery of every description." A vat is not a machine; neither is a pan, nor a saw. Cogs, gearing, belting, shafting, and setscrews are not machines, but may each or all enter into and be a part of various machines. Since no enumeration of machinery precedes the general terms, there is nothing to limit those terms, and they are broad enough to cover any machine that is

dangerous to life or limb, and which, without impairing its utility, can be guarded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 229; Dec. Dig. ¶121(2).

For other definitions, see Words and Phrases, First and Second Series, *Ejusdem Generis*.]

10. TRIAL ¶296(4, 5)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action for damages based on negligence, wherein contributory negligence on the part of the plaintiff is pleaded as a defense, and there is evidence tending to sustain such defense, an instruction which ignores the defense of contributory negligence in authorizing the jury to find the issues in favor of the plaintiff, according as the jury may determine certain facts in support of plaintiff's theory of his case, will not be held erroneous when the court immediately follows said instruction with another, beginning with the words, "But, upon the other hand," etc., and correctly states the law of assumption of risk and of contributory negligence to the jury under the defendant's theory of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ¶296(4, 5).]

11. MASTER AND SERVANT ¶291(1)—INJURIES TO SERVANT—INSTRUCTION.

Instructions examined, and held, on the whole, to substantially state the law applicable to the cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1133; Dec. Dig. ¶291(1).]

Commissioners' Opinion, Division No. 4. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by Daniel W. Strickland against the Sulzberger & Sons Company of Oklahoma, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Keaton, Wells & Johnston, of Oklahoma City, for plaintiff in error. John R. Guyer, Robert A. Rogers, and T. E. Robertson, all of Oklahoma City, for defendant in error.

DAVIS, C. For convenience the parties will be designated throughout this opinion as in the court below, the defendant in error as plaintiff, and the plaintiff in error as defendant.

Suit was filed in the district court of Oklahoma county by Daniel W. Strickland against Sulzberger & Sons Company, of Oklahoma, on the 14th day of December, 1914. The plaintiff in his petition alleges that on the 4th day of November, 1914, he was employed by the defendant company, which is engaged in the business of running a packing plant in the city of Oklahoma City; that in said packing plant there was a machine, commonly known as the "gut reel," used for the purpose of winding the intestines of cattle during the process of cleaning and preparing such intestines for use as casings for the products of said packing plant, which said gut reel was composed of a certain large wheel made up of rim and spokes, which said spokes said defendant negligently maintained in an unguarded and unprotected condition, in that no protection was provided by defendant to guard against injury to plain-

tiff while passing near such gut reel in the performance of his duty; that a part of said machine consisted of a clutch, to which was connected a lever, the function of which was to throw the machine out of gear and stop said gut reel when in motion upon the sliding and shifting of said lever by the person desiring to stop said reel; that the defendant negligently maintained the said machine in a defective condition, so that the said lever would not work and perform its function of throwing out the said clutch and thus stopping the said machine; that said defendant knew of such unguarded and unprotected and dangerous condition, and that said condition had existed for a sufficient length of time that the defendant, in due exercise of ordinary care, should have known it; that the defendant negligently failed to provide necessary and proper receptacles and vessels for the handling of hog intestines about and near the machine, and as a result of said negligence of the defendant the slime and mucons was on the floor of the room in which said machine was located, rendering it very slick and dangerous for this plaintiff to walk upon in the course of his duties as an employé of the defendant; that it was the duty of the defendant to furnish plaintiff with a reasonably safe place in which to work and with reasonably safe appliances with which to work, and to exercise ordinary care to keep the same safe; that on the 4th day of November, 1914, while in the service of said defendant, while passing the aforesaid gut reel, his foot slipped upon said floor, so dangerously and negligently maintained as aforesaid, and he fell, and in falling his right hand was caught in said gut reel; that his hand became entangled in the spokes of the gut reel, so that his right arm was severed from his body at a point about three inches above the wrist; that after he became entangled in said gut reel and before his arm was so severed from his body, he attempted to slide or shift said lever and thereby stop the machine and thus prevent his arm from being severed; that, owing to the defective condition of said lever, it failed and refused to work and perform its function of throwing out said clutch and thus stopping the said gut reel. Plaintiff asked for judgment against the defendant in the sum of \$34,560.

Defendant's answer consisted of a general denial and an allegation that said accident was caused by the contributory negligence of the plaintiff, in that he attempted to remove a portion of the hog intestines from the reel, referred to and described in said petition, without stopping same, and a further allegation that plaintiff was entirely familiar with the character and condition of said reel, its attachments and mode of operation at the time and for a considerable period prior to said accident and injury; consequently by

remaining in the employ of the defendant, he assumed all the risks incident to said employment.

Plaintiff replied, denying any negligence upon his part, and denying that he was familiar with the defective condition of said reel.

Trial was begun on April 28, 1915, and the testimony on behalf of the plaintiff, as to the manner in which the injury occurred, was substantially as follows:

Daniel W. Strickland testified that he was working for Sulzberger & Sons Company at Oklahoma City on November 14, 1914, on what is known as the beef-casing machine, or the beef department; that it was his work to run one of the machines that they call "No. 1 Casing Machine"; that the purpose of said machine was to take the fat off the beef casings; that he had been engaged in running said machine something like five or six weeks prior to the injury; that said machine stands about 2½ feet off the floor on legs, and is possibly 3 feet wide and 3 or 4 feet long; that it is run by a leather belt, and partly by a chain belt, what is called a "ratchet chain"; that the reel was run by a sprocket chain; that the casing or guts are run through two rollers and brushes that take the fat off of same, and, after being run through said rollers and brushes, are attached to the reel and are wound up on said reel; that on the evening he was hurt, about 6 o'clock, he had gotten through running the guts that he had in the tub and went over to get a drink of water, across on the other side of the room; that after he got the drink he came back, and when he got to the corner of the machine he stepped, or must have stepped, on a piece of gut or something, and slipped and fell, and as he fell his right hand got between the frame of the machine and the reel; that there is a lever that throws the clutch out that comes out from the framework; that when he fell he threw himself back against this lever, and could not throw it out and stop the machine; that he had never tried to use this lever before he got his hand caught; that there was a lever overhead, but that he would have to stand and reach it, but that he could not reach it; that it was about 6 feet from the floor, and an ordinary man has to reach up to reach it; that you have to pull it out in order to stop the machine; that he dropped down on his knees in order to keep the machine from pulling him into it; that he was taken to St. Anthony's Hospital, and his hand and a portion of his arm were amputated; that he was caught down near the hub of the reel, and that the spokes on the reel were about 1½ inches apart at the place he was caught; that the reel in operation made about 3 or 4 revolutions per minute; that he was about 39 years of age at the time of his injury.

In cross-examination he testified that he had been working in the packing business

about 4 years; that he was working at machinery more or less of the time, and was pretty well acquainted with machinery; that he had worked at similar machinery while employed by Morris & Co.; that he started in running the machine in question about the 17th or 18th day of September, and was running it up to the time of the accident; that the floor was slick and wet around there, and you could not prevent it. On rebuttal he testified, over the objection of the defendant, that the back end of the reel could be guarded by getting a guard and putting it on the edge of the frame of the machine extending up to the rim of the reel. At page 53 of the record he testified that a piece of sheet iron could be put between the spokes of said reel. On recross-examination he testified that in operating the machine he would be on the south side of same practically all the time; that in the operation of the machine nothing would require him to get towards the middle or north end of the reel; that he left the machine running when he went to get the drink of water. On being recalled, the witness testified that he slipped and fell on the south side of the machine near the east end; that he was going west, and in falling and in trying to save himself his left arm struck the rim of the reel and came in contact with the spokes near the hub of the reel; that his hand was caught on the north end of the reel; that he was in the habit of taking the guts off the reel without stopping the machine.

Mr. Higginbottom testified that he had run the machine on which the plaintiff received his injury prior to the time Strickland began to work the same; that during the time he run said machine the clutch did not work properly.

T. E. Robertson testified as to expectancy of plaintiff as shown by the American Table of Mortality.

At the conclusion of the plaintiff's testimony, the defendant demurred to the evidence, which demurrer was by the court overruled. Thereupon the defendant produced substantially the following testimony:

George W. Flabell testified that he was the assistant pork superintendent for Sulzberger & Sons Company; that he was in the fire hall at the plant shortly after the accident while Mr. Strickland was there; that he asked Strickland how the accident occurred, and he told him that some of the casing had slipped off the reel, that he put his hand through, as had been the custom to put the casing back if he could without stopping the reel, and that when he did that he got his fingers caught; and that he tried to pull his hand out and could not and that he could not pull it out at all.

G. E. Long testified that he was fire marshal for Sulzberger & Sons Company, and that he was in the fire hall at the company's plant shortly after the accident when Strick-

land was there; that he heard Flabell ask him how he got his hand hurt, and that he said some of the casings had fallen off the reel; and that he reached after them and caught his hand.

L. C. Vincent testified that he had charge of the machine and engine department of the defendant company. He identified the picture shown at record page 80 as being approximately a correct likeness of the machine; that he had worked around machinery for 10 or 12 years, and that he was familiar with the operation of this particular kind of machine; that the purpose of the clutch on the machine is to stop the reel to put or take things off of it without stopping the whole machine; that it was his custom to inspect these particular machines once a week; that he examined this particular machine the next morning after the accident and found the clutch blocked; that it was blocked by having a wedge driven in, a block of wood up against this lever, and it was driven in between the end of the frame and the clutch that releases the reel and stops it.

John Shanahan testified that he was assistant foreman in the casing department in which this plaintiff worked; that three or four days prior to the accident he had been working on the machine and fixed it up; that the plaintiff told him that he could not keep the clutch in on his reel, and he told him to go ahead; that plaintiff said it kept slipping out all the time and he put a block in the machine and the witness pulled it out; that he saw plaintiff put the block in the clutch, and that he had taken it out; that he told him not to put the block in there; that he was 30 years old, and had been working around casing machines since he was 13 years old, and had worked in about eight different plants and for about six or seven different companies; and that it was not the custom of any of the companies for which he had worked to put guards in between the spokes on the side of the reel next to the frame.

James A. McNeese testifies as to the wages received by plaintiff.

Dr. T. L. Lauderdale testified that he was called to attend the plaintiff on November 4, 1914, and that he found that there were three distinct lacerations across the fingers and scratches up and down the arm for about three inches; that he was taken to the hospital; that on the way to the hospital the plaintiff made a statement with reference to how the accident occurred, in which he said, in reaching over the reel, he got his fingers caught, and could not get them out, and that he dropped down in order to keep the machine from pulling him into it; that the gut machine had become bound up in some way, and he was reaching over to disentangle a portion of the gut.

Daniel Strickland testified in rebuttal that he had not made the statements as testified

to by Flabell, Long, Shanahan and Lauderdale.

A verdict was returned in favor of plaintiff for \$5,500; motion for new trial filed, overruled, and excepted to, and time extended for preparation and service of case-made, and the cause properly brought here for review.

[1] The first assignment of error argued by the defendant in its brief is that the trial court erred in forcing defendant to trial within ten days from the time the issues in the case were made up. Plaintiff's petition contained the following allegations:

"Plaintiff says, that on the 4th day of November, 1914, while engaged in the service of the defendant as aforesaid in its said packing plant in Oklahoma City, Okla., in the exercise of due care and caution for his own safety, without fault or negligence upon his part. * * *

On the day of the trial the court, over the objection and exception of the defendant, permitted the plaintiff to file a reply to the answer of defendant, denying contributory negligence on the part of the plaintiff; and denying that the accident and injury were proximately caused by the negligence of the plaintiff, which directly contributed thereto; and denying that he was cognizant of the defective condition of said reel, as alleged in his petition; and denying each and every material allegation contained in defendant's answer; and denying that at the time of such injury he attempted to remove a portion of hog intestines from the reel referred to and described in his petition; and denying that by remaining in the employ of the defendant he assumed all risks incident to his said employment; and reaffirming the allegations set up and contained in his petition, and reiterating his prayer for relief. In the light of section 6005, Rev. Laws Okla. 1910, this action complained of by the defendant on the part of the trial court did not constitute any substantial violation of any statutory right of the defendant. This section was in full force at the time the trial court permitted plaintiff to file his reply and make the amendment complained of. *Frisco Lumber Co. v. Ethridge*, 45 Okla. 586, 148 Pac. 441.

In the case of *Title Guaranty & Trust Co., v. Turnbull*, 40 Okla. 294, 137 Pac. 1178, it is said:

"Section 4791, Rev. Laws 1910, was in force when *City of Ardmore v. Orr*, supra, 35 Okla. 305, 129 Pac. 867, and *Conwill v. Eldridge*, supra, 35 Okla. 537, 130 Pac. 912, were decided. Said section was taken from the Code of Civil Procedure of Kansas, and in force there when the Supreme Court of Kansas held that it was error to compel the trial of a case on objection within ten days after the issues were made up. Section 6005, Rev. Laws 1910, does not apply to this case, as said section was first incorporated in Rev. Laws 1910, and under the act adopting the Code said section 6005 does not apply to pending causes."

[2-4] The defendant next complains that the trial court erred in overruling the de-

murrer of defendant to the evidence of the plaintiff.

The plaintiff in his petition in this case alleged three grounds of negligence: First, that the floor around the machine, and on which plaintiff had to stand, was slippery; second, that a certain lever would not work and perform the function of throwing out the clutch and stopping the reel; third, that the reel was not properly guarded. As to the first ground of negligence, the plaintiff introduced the following testimony: Plaintiff testified as follows:

"When I got to the corner of the machines, my machine there, I stepped, I must have stepped on a piece of gut or something, and I slipped and fell."

Plaintiff again testified with reference to the slippery condition of the floor as follows:

"Q. What did you say that you slipped on? A. I could not say. Q. Well, the floor along there was always wet, was it not? A. No; I would not say that. Q. Don't you know that it was? A. Well, I could not say that; no, sir. Q. Well, what was on the floor, a sort of drip from the guts? A. Well, it was a slime. Q. And that slime was always there while they were running? A. Not necessarily. Q. Was not that slime there all of the time that you were operating there? A. Not necessarily, but of course when you were working there with the casings of course it would create a little slime, more or less, of course. Q. Was there not a drain there to carry this away? A. Yes, but it did not always hold all of it. Q. There was a drain or something there to carry this slime to keep this away from the machines? A. Yes, sir. Q. Was there ever any lot of stuff there where they washed these casings, and did it not make a lot of this stuff or slime, and was that not carried down the floors there in this runway to the sewer, and was not the majority of it carried away in the sewer? A. Well, it was intended to carry away this slime, but it did not do it, that is, all of it, and the floors would be slick and wet around there, and you could not prevent it. Q. Then you think that what there was there on the floor was just what could not be prevented? A. I think—yes, I think that it could not be prevented."

That is to say, that the drain or receptacle, or something provided by the defendant to carry away the slime and refuse from these casings, was not of sufficient size or capacity to always carry it all off, and the floor would be slick and wet around the casing machine, and you could not prevent this condition because of the insufficiency of this drain or receptacle or something provided by the defendant to at all times carry away from the vicinity of the casing machine, where plaintiff worked, all of the slime and refuse and waste matter from said casings while in process of being run through said machine. This was properly a question of fact for the jury.

"Plaintiff was employed as head sewer, and it was his duty to stand at one end of the compress and sew together the bagging around the bales as same was compressed, and in order to do this it was necessary for him to stand on the floor or platform at the end of the compress. He was also required to straighten any of the bales that might not be in the proper position on the press, and to do this it was necessary for him to

step down on the platen or a portion of the compress itself, which was beneath the level of the floor, and which moved up and down as the compress was operated, and quickly straighten the bale, and step back. For several days before the date of the accident the weather had been extremely cold, and the compress had not been in operation. The compress itself was inclosed by a structure covered over with sheet iron and with openings in the sides. A pipe came down from the top platen of the press and went into the floor near where plaintiff was required to work, the purpose of which was to carry water from the roll or top of the platen. It appears that this pipe had frozen, and that water therefrom leaked upon the floor at the place where plaintiff was required to work. On the day in question they were compressing about 120 bales per hour, and the cotton was brought in from the platform, and as it was compressed, the ice and snow therefrom accumulated on the floor where plaintiff was required to stand, and in connection with the water leaking from the pipe froze and became slick, and when plaintiff had straightened a bale that was not in proper position in the compress and stepped back, he slipped upon the ice so accumulated and fell, and his right hand was caught in the compress and injured.

"The defendant urges that there was no evidence of negligence upon its part in the first instance, and that plaintiff's own negligence was the proximate cause of his injury. To constitute actionable negligence upon the part of defendant, where the wrong is not willful and intentional, three essential elements are necessary: (1) There must be some duty owing by it to the plaintiff; and (2) a failure upon its part to perform that duty; and (3) injury proximately resulting to the plaintiff from such failure upon its part. C. R. I. & P. v. Duran, 38 Okl. 719, 134 Pac. 876.

"The master is bound to exercise reasonable care and diligence to provide a reasonably safe place in which the employé or servant is to work, and also reasonably safe machinery, tools, and appliances with which to work, and to supply the servant with reasonably safe materials upon which to perform the work required of him. Chickasaw Comp. Co. v. Bow, 149 Pac. 1166; Midland Valley Ry. Co. v. Williams, 42 Okl. 444, 141 Pac. 1103; C. R. I. & P. Ry. Co. v. Brazzell, 40 Okl. 460, 138 Pac. 794; Great Western Coal & Coke Co. v. Malone, 39 Okl. 693, 136 Pac. 403; C. R. I. & P. Ry. Co. v. Wright, 39 Okl. 84, 134 Pac. 427; C. R. I. & P. Ry. Co. v. Duran, 38 Okl. 719, 134 Pac. 876.

"The allegations of negligence are that plaintiff was required to assist in compressing cotton covered with snow and ice, and in permitting the pipe mentioned to become frozen and water to leak upon the place where plaintiff was required to stand. Whether this constituted ordinary care upon the part of the defendant was a question of fact for the jury.

"In Dewey Portland Cement Co. v. Blunt, 38 Okl. 182, 132 Pac. 659, it was said: 'Where the question whether or not the master has been negligent depends upon the nice distinction between that which is reasonably safe and that which is not so, it is a question entirely of degree, and one exclusively for the decision of a jury; and, where a jury, with all the evidence before them, have found a verdict, this court on review will not interfere to disturb their finding, by setting aside the verdict on the ground that there was no evidence of neglect.'

"In M. K. & T. Ry. Co. v. Shepherd, 20 Okl. 628, 95 Pac. 243, this court quoted with approval from the case of Gulf, C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, 4 C. C. A. 454, this language: 'In cases like the one at bar, which turn on the question whether the party exercised ordinary care or was guilty of negligence, after the usual and appropriate definitions of those [particular] terms by the court, it is the prov-

ince of the jury to say from a consideration of the evidence whether in the particular case ordinary care was exercised, or whether there was negligence. In other words, what is ordinary care, or what is negligence, in the particular case is a question of fact for the jury, and not of law for the court.

"In *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 489, the Supreme Court of the United States said: 'There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms, 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot arbitrarily be defined. What may be termed 'ordinary care' in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties, in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs.'

"What is and what is not negligence is generally a question for the jury, and not for the court. Where the standard of duty is not fixed, but variable, and shifts with the circumstances of the case, it is incapable of being determined as a matter of law, and, where there is sufficient evidence, must be submitted to the jury to determine what it is and whether it has been complied with. On the other hand, when the standard is fixed and when the measure of duty is defined by law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court. It is only in cases where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence becomes one of law for the court, and then only when no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish. *Littlejohn v. Midland Valley Ry. Co.*, 148 Pac. 120. On the contrary, if the evidence is such that reasonable men may draw different conclusions respecting the question of negligence, then such question is one of fact, and should be submitted to the jury. *Littlejohn v. Midland Valley Ry. Co.*, supra, and authorities cited; *Sans Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153; *St. L. & S. F. Ry. Co. v. Copeland*, 23 Okl. 537, 102 Pac. 104.

"All the authorities agree that this duty is a continuing one on the part of the master, who is required to see to it from time to time as the work progresses, and not permit the servant to work himself into a dangerous place, owing to limited space or accumulated entanglement on the floor, calculated to trip him and cause him to fall when heavily burdened.' *C., R. I. & P. Ry. Co. v. Townes*, 43 Okl. 568, 143 Pac. 680.

"The business in which the defendant was engaged and about which plaintiff was employed was the compressing of cotton bales, which under ordinary circumstances is more or less hazardous, and it certainly would not be denied that it was more so when the cotton to be compressed was frozen and covered with snow and ice, and, to say the least of it, this was not the usual and ordinary conditions under which such work was carried on. To say whether or not the master would be guilty of negligence and want of ordinary care in requiring the cotton to be compressed under the circumstances disclosed, or was in the exercise of ordinary caution upon its part, taking into consideration the fact that the plaintiff had had no experience with or knowledge of the dangers of compressing cotton under like conditions, can hardly be said to be a ques-

tion of law for the court. In addition to requiring the work to be done under the circumstances with only such arrangements upon the part of the defendant as had been made for the prosecution of such work under ordinary conditions, the pipe running down into the floor at the place where plaintiff was required to stand had become frozen and clogged, and water permitted to leak upon the floor and freeze during the progress of the work, and it cannot be said that the leakage of the pipe was an incident necessary to carrying on of the business. The weather had been extremely cold for four or five days, and defendant's superintendent was in and about the building and around the compress during the progress of the work, and the jury were justified in finding that defendant had knowledge of these conditions. Under all the circumstances disclosed by the evidence, the court was right in submitting this issue to the jury.

"A large part of defendant's brief is devoted to argument upon the proposition that plaintiff knew of the conditions, and with full knowledge thereof continued in the discharge of his duties. This argument goes to the question of assumption of risk or contributory negligence, and these questions, under the Constitution, are exclusively for the determination of the jury. *C., R. I. & P. Ry. Co. v. Duran*, 88 Okl. 719, 134 Pac. 878; *St. L. & S. F. Ry. Co. v. Long*, 41 Okl. 177, 137 Pac. 1156," *Ann. Cas.* 1915C, 482.

The *Interstate Compress Co. v. Arthur*, opinion by Mr. Justice Hardy, 155 Pac. 861, not yet officially reported.

In the instant case the allegations of negligence in this connection are that the defendant—

"at said time and place, negligently failed to provide necessary and proper receptacles and vessels for the handling of hog intestines about and near the said machine, as a result of which said negligence of defendant, the slime and mucous from off the said intestines was on the floor of the room in which said machine was located, rendering the floor very slick and difficult and dangerous for this plaintiff to walk upon in the course of his duties as an employé of the defendant."

Whether this constituted ordinary care upon the part of the defendant was a question of fact for the jury under proper instructions from the court. The jury by their verdict in this case have found that the defendant was negligent in this regard, and that this negligence contributed to the plaintiff's injury. If the plaintiff had not slipped and fallen and thrown out his right hand and arm to save himself, would the accident have occurred as he has alleged it. Most certainly not. That which caused plaintiff to slip and fall was the cause of the fall, and, the cause of his fall being the negligence of the defendant in failing to perform the duty it owed him of furnishing him with a reasonably safe place in which to work, had the plaintiff injured his spine or head by simply in contact with the floor, then and in that case his slipping and falling would be the proximate cause of his injury; but, on the other hand, the defendant being negligent in maintaining the floor about the casing machine in question in a dangerous and unsafe condition, the plaintiff thereby slipping and falling contributed to his injury and started him on his way to the proximate cause thereof, to wit, the negligence on the part of the

defendant in failing to properly guard the casing machine as compelled to do under the mandatory law. *Bales v. McConnell*, 27 Okl. 407, 112 Pac. 978, 40 L. R. A. (N. S.) 940.

[5-9] To sustain the second ground of negligence, to wit, that the lever would not work and perform the function of throwing out the clutch and stopping the machine, the plaintiff introduced the following testimony:

"I slipped and fell, and I caught, of course, just like any man would do to keep from falling, and as I fell my right hand got between the frame of this machine and this reel, just like that, and before I could get back up and out and get a hold of myself my fingers were broken right here. And there is a lever there that throws that clutch out that comes out this way, from this framework, and when I fell I threw myself back against this lever, and I could not throw it out and stop the machine. There is a lever overhead, but you have to stand like that to reach it, and I could not reach it; it is about 6 feet from the floor, and an ordinary man has to reach up to reach it. And you have to pull it out in order to stop the machine. But when this lever down here on the frame is in working order, you can pull it out and stop the machine, but that lever there would not work and would not pull the clutch out, and I could not reach the other lever and could not throw the machine out of gear."

Had this lever performed its function when the plaintiff threw his body against it after his hand was caught in the spokes of the reel on this casing machine, this injury could not have been as severe as it was. This negligent condition of this lever then contributed to augment or increase the extent of the injury, but was not the direct or proximate cause of the same, and was properly a question for the jury to consider in determining how and to what extent the plaintiff was so injured and in arriving at the amount of damages he should receive to compensate him therefor.

Plaintiff testified as to the manner in which said gut reel could be guarded as follows:

"Q. I will ask you whether or not if you know if there is a way by which these spaces in between these spokes on this reel could be filled in or closed up or protected so as to protect and keep the human hands out of them, so that a person would not become injured. A. Why, yes. Q. Well, will you state to the jury how it could be done? A. You could get a guard and put on the edge of the rim of the machine and let it extend up against the rim of the reel, I mean put it from the edge of the frame of the machine to the rim of the wheel, and it would take the whole period of five minutes' time—well if I had two hands I would or could have fixed it in an hour so any man absolutely could not put his hands into it; it could be fixed in an hour's time by a man with two hands easy. Q. If the guards that you have spoken of and just described were placed on that machine, would the machine still have answered and served the same purpose that it was at the time that you was injured? A. I understand that it would have no effect on the machine whatever. Q. Now explain to the jury as nearly as you can where you mean that there should be guards placed, to protect the human life and arms. A. Well, in here, in between these spokes. Q. Well, just explain to the jury where you would place them and how you would place them. A. Well, simply put a piece of sheet iron, or— Q. Just explain to the jury where you would place that, where it should be placed to

protect such accidents. Where should this guard be placed on this frame, this gut reel to prevent such accidents that occurred to you? A. The guards should be placed on the frame of the machine, just take a piece of casting or sheet iron, or piece of sheet steel and put in there from the frame of the machine there between the spokes from the frame of the machine down to the axle, and that would be cut in kind of an oval shape, and that would close up that opening so that it would be impossible for you to get your hand or fingers caught in it the way that I got my hand caught. Q. Is there any other way that this reel, this gut reel, could have been readily fixed so that such accidents would not occur? A. Well there would be one safe way to fix it; that would have been a safe way to fix it so that this accident would not have occurred."

And the testimony in this case is undisputed that this part or portion of this machine could have been guarded by the expenditure of but little time and money without affecting the efficiency of its operation, and without rendering it useless for the purposes for which it was intended. Section 3746, Rev. Laws Okl. 1910, art. 4, a part of our Factory Act, reads in part as follows:

"3746. *Machinery to Have Safety Devices.* The owner or person in charge of a factory or any institution where machinery is used shall provide belt shifters or other mechanical contrivances for the purpose of throwing belts on or off pulleys, whenever practicable. All machines shall be provided with loose pulleys and all vats, pans, planers, cogs, gearing, belting, shafting, setscrews and machinery of every description shall be properly guarded. * * *"

Section 3756, Rev. Laws Okl. 1910, and a part of article 4, supra, reads as follows:

"3756. *Penalty for Violating this Article.* Any person who fails to comply with any of the provisions of this article shall be deemed guilty of a misdemeanor, except as otherwise provided, and on conviction thereof shall be fined in a sum not less than ten dollars nor more than one hundred dollars for each offense."

Section 8029 (70871) vol. 3, Burns' Ann. Ind. Stat., Revision 1908, reads in part as follows:

"It shall be the duty of the owner of any aforesaid establishment, or his agent, superintendent or other person in charge of the same, to furnish and supply, or cause to be furnished and supplied therein, in the discretion of the chief inspector, where machinery is used, belt shifters or other safe mechanical contrivances for the purpose of throwing on or off belts or pulleys; and whenever possible, machinery therein shall be provided with loose pulleys; all vats, pans, saws, planers, cogs, gearing, belting, shafting, setscrews and machinery of every description therein shall be properly guarded. * * *"

And section 8045 (7087y), of the same statutes of Indiana, supra, reads as follows:

"Any person who violates or omits to comply with any of the provisions of this act or who refuses to comply with the orders of the chief inspector, properly made under the provisions of this act, who suffers or permits any young person or child to be employed in violation of its provisions, shall be deemed guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars for the first offense, and not more than one hundred dollars for the second offense, to which may be added imprisonment for not more than ten days, and for the third offense a fine of not less than two hundred and fifty dollars and not more than thirty days' imprisonment in the county jail."

New York and the state of Washington also have statutes very similar to those of our state and the state of Indiana, set forth hereinabove.

Counsel for defendant make the following argument and citation of authority in their brief, after quoting section 3746, supra:

"It is our contention that the term 'machinery of every description' in the above section of the statute does not mean that it is the absolute duty of every owner of a factory to guard every piece of machinery used in running his factory, without regard to the question of whether or not the machine was inherently dangerous to those employees using or working around same, or whether same was of such simple construction and design that a reasonably prudent person could not anticipate any danger from the use of same. This would be impracticable, and would make the owner an absolute insurer of the safety of his employees. The more reasonable and, we submit, the proper construction of the term 'machinery of every description,' as used in the section of the statute above referred to, is that same does not include any and all machinery, but is a mere general term, following words of specific description, and covers only machinery of like character to those designated by the specific words, and that said section only requires the guarding of such machinery as is inherently dangerous to employees whose duty requires them to work in the immediate vicinity thereof. The courts of Indiana and New York have given the term 'machinery of every description,' as used in the factory acts of those states, the construction for which we contend. The factory acts of those states are practically the same as section 3746, Rev. Laws 1910, as above set out.

"In the case of Laporte Carriage Co. v. Sullender, 165 Ind. 290, 75 N. E. 277, paragraphs 2 and 3 of the syllabus are thus stated:

"'Factory Act, § 9 (Burns' Ann. St. 1901, § 7087i), provides that all vats, pans, saws, planers, cogs, gearing, belting, shafting and set-screws, and "machinery of every description" shall be properly guarded. Held that the term "machinery of every description" did not include all machinery, but was a mere general term, following words of specific description, and therefore included only things or cases of a like character to those designated by the specific words.

"'Factory Act, § 9 (Burns' Ann. St. 1901, § 7087i), requiring that all vats, pans, saws, planers, etc., and "machinery of every description" shall be properly guarded, only requires the guarding of such parts of machinery in a factory within the statute as are dangerous to employees whose duty requires them to work in the immediate vicinity thereof, and which may be properly guarded without rendering it useless for the purposes for which it was intended."

They follow this with a lengthy quotation from the body of the opinion of the Sullender Case. They then cite and quote from the case of Glens Falls Portland Cement Co. v. Travelers' Insurance Co., 162 N. Y. 399, 56 N. E. 897; Bemis Indianapolis Bag Co. v. Krentler, 167 Ind. 653, 79 N. E. 974; Powalske v. Cream City Brick Co., 110 Wis. 461, 86 N. W. 153; Schoultz v. Eckardt Mfg. Co., 112 La. 568, 36 South. 593, 104 Am. St. Rep. 452; National Fire Proofing Co. v. Roper, 88 Ind. App. 600, 77 N. E. 370; Jenkins v. Lafayette Box Board & Paper Co., 43 Ind. App. 463, 87 N. E. 992; National Drill Co. v. Myers, 40 Ind. App. 322, 81 N. E. 1103; Byrne v. Nye & Wait Carpet Co.,

46 App. Div. 479, 61 N. Y. Supp. 741; Dillon v. National Coal Tar Co., 181 N. Y. 186, 73 N. E. 978; King v. Reid, 124 App. Div. 121, 108 N. Y. Supp. 615. With this proposition propounded and argued by counsel for defendant, and with these authorities cited and quoted in support thereof, we cannot agree. The Indiana decisions are largely relied upon by counsel for defendant to support this point. Let us see the true condition of said decisions in that state as they now stand on this question. Mr. Labatt, in his work on Master & Servant (2d Ed.) vol. 5, at pages 5684-5686, in the body of the text says:

"The doctrine of ejusdem generis was applied in an Ontario case so as to limit materially the effect of the earlier statute. In Indiana the Supreme Court has been inconsistent in its construction of the statute providing: 'All vats, pans, saws, planers, cogs, gearing, belting, shafting, setscrews, and machinery of every description.' The rule finally adopted is that the phrase 'machinery of every description' does not modify in any way the specific appliances mentioned, but embraces all other kinds of machinery, which would be too numerous for the Legislature to mention, although an earlier decision of the Supreme Court to the effect that the general terms simply referred to other appliances of the same general description as those indicated by the specific terms, under the doctrine of ejusdem generis, was not in terms overruled. The doctrine of the Washington court is the same as that which appears to prevail in Indiana. And a somewhat similar view is taken of the statute in New South Wales."

In his notes to this portion of his text he says:

"In Laporte Carriage Co. v. Sullender (1905) 165 Ind. 290, 75 N. E. 277, the court held that an emery wheel was not embraced within the statute, since that form of machinery was not specifically mentioned. The court said: 'The rule generally affirmed by our decisions, and also by other authorities, is that where words of a particular or specific description in a statute are followed by general words which are not so specific and limited, the latter are to be construed as applicable to persons, things, or cases of like character to those designated by the preceding particular or specific words, unless there is a clear manifestation on the part of the Legislature of a contrary purpose.'"

"* * * The rule in question is commonly denominated by the authorities "ejusdem generis," because it usually restricts expressions in a statute, such as "all others" or "any others," to persons and things of the same kind or class of those specifically designated by the preceding words. There being nothing in the statute in question to indicate to the contrary, the general phrase, namely, "and machinery of every description therein," must, under the rule stated, be construed as meaning and including machinery or appliances belonging to or of the class or character designated as "vats, pans, saws," etc. The paragraph in question, however, utterly fails to aver facts to show that the emery belt mentioned therein is of the kind or character of the class of machinery specifically designated by the statute to be guarded. Aside from the fact that it throws off particles of emery as alleged, there is nothing to show a necessity for guarding it, for the reason that its operation or use is attended with danger to the employees of appellant who work in the vicinity thereof."

"In National Fire Proofing Co. v. Roper (1906) 88 Ind. App. 600, 77 N. E. 370, the

court, after citing the Sullender Case, said: "The fact that a particular appliance, machine, or part of a machine, is dangerous to those using it, or passing near it in the line of duty as employes, would not be sufficient to bring the injury caused by its being unguarded within the statute; for manifestly there are many kinds of appliances and machines and parts of machines, wholly different from those particularly mentioned in the statute, which may be thus dangerous."

"But in *United States Cement Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69, the same court, in holding that a screw conveyor was within the statute, said that the word 'all' qualifies each class or genus of things specified, and leaves nothing of any class mentioned for the general words 'and machinery of every description' therein to embrace under the rule of ejusdem generis, so that these words must be held to embrace all the great body or mass of machinery not expressly mentioned in the statute. Unfortunately the *Cooper* Case makes no mention of the Sullender Case upon this point, although it is apparently impossible for the two cases to stand together.

"In *Inland Steel Co. v. Kachwinski* (1907) 151 Fed. 219, 80 C. C. A. 571, it was said that the Sullender Case was decided merely upon questions of pleading, and that the emery belt in question might have been brought within the statute by averring and proving that it was of the same kind as an unguarded vat, pan, saw, etc., with respect to danger of operating and practicability of erecting guards. The language used in the Sullender Case does not tend to support this view, but it is supported by the fact that the plaintiff was given leave, upon request, to file an amended complaint.

"In *Pein v. Miznerr* (1908) 41 Ind. App. 255, 83 N. E. 784, the Appellate Court was of the opinion that a mangle in a laundry was within the terms of the statute, but they were confronted with the Sullender Case, and consequently transferred the case to the Supreme Court, with the recommendation that the Sullender Case be overruled or modified so that it would accord with the expressed legislative intent and the current of the decisions in that state; but when the case came before the Supreme Court in *Pein v. Miznerr* (1908) 170 Ind. 359, 84 N. E. 981, the question was not discussed at all, the lower court being directed to sustain a demurrer to the complaint upon the ground that it disclosed contributory negligence upon the part of the plaintiff.

"The argument of the Appellate Court in the *Pein* Case appears very clear and conclusive: "The doctrine of ejusdem generis is that where a general word follows particular and specific words of the same nature as itself, it takes its meaning from them, and is presumed to be restricted to the same genus as those words. * * * The language here does not admit of the application of the ejusdem generis doctrine. The phrase "and machinery of every description" cannot be limited by the prior enumeration, for the reason that such enumeration is not an enumeration of machines at all—the genus of those words is not of the same nature as of "machinery of every description." A vat is not a machine; neither is a pan, nor a saw. Cogs, gearing, belting, shafting, and setscrews are not machines, but may each or all enter into and be a part of various machines. Since no enumeration of machinery precedes the general terms, there is nothing to limit those terms, and they are broad enough to cover any machine that is dangerous to life or limb, and which, without impairing its utility, can be guarded. * * * In the * * * (Sullender Case) an emery belt was held not to "come within the term or word 'belting,' as employed in the statute." But if an emery belt is a "machine," it is the same kind of a machine as "belting"; if it is a "thing," it is of like character to "belting."

Whether it is a "machine" or a "thing," it should have been held to be within the statute. If an emery belt does not come within the general words, it is difficult to conceive of any machine or thing which could possibly do so. It is the dangerous quality of machinery which the statute seeks to guard against, and it is because of that danger that "all other machinery" is brought within the scope of the statute. Whether the danger lies in a wheel drop of a foundry (*Green v. American Car & Foundry Co.* [1904] 163 Ind. 135, 71 N. E. 268); in a dovetailing machine (*N. D. Huey Co. v. Johnston* [1905] 164 Ind. 489, 73 N. E. 996); in the bits of a shaper (*United States Furniture Co. v. Taschner* [1907] 40 Ind. App. 672, 81 N. E. 739); in the bits of a boring machine (*Buehner Chair Co. v. Neulner* [1905] 164 Ind. 363, 73 N. E. 818); in a screw conveyor (*United States Cement Co. v. Cooper* [1907, Ind. App.] 82 N. E. 981; or in an emery belt used to polish metal parts of vehicles; or in the mangle of a laundry—should make no difference. They are all dangerous machines, and should be guarded, provided, of course, the same can be done without impairing their utility."

"In *Ward v. National Lumber & Box Co.* (1909) 54 Wash. 304, 103 Pac. 1, the court said: "The appellant invokes the rule of ejusdem generis, and insists that the friction wheel, not being specified in the Factory Act and not being of the same kind or genus as any of the machinery specially mentioned, does not fall under the head of machinery of other or similar description, and that therefore the assumption of risk attaches in this kind of a case. Considering the whole scope of the Factory Act and the evident intention of the Legislature, we are unable to reach the conclusion contended for by the appellant. There is no doubt that the general rule is that the general word must take its meaning and be presumed to embrace only things or persons of the kind designated in the specific words; but * * * the maxim has no application where there is no room for construction, but only when the meaning is not apparent from the language itself; and it is also said: "Nor does the rule obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety. In such case, the general term must receive its natural and wide meaning." 28 Am. & Eng. Enc. Law, 610. This is peculiarly the case under our statute, where the specific words signify subjects greatly different from one another, vats, pans, trimmers, cut-off, gang edger, and other saws, planers, cogs, gearings, belting, shafting, coupling, setscrews, live rollers, conveyors, mangles in laundries, etc., all, or nearly all, being machinery, or parts of machinery, of different character. We think, in the face of the statute, it would be doing violence to the evident intention of the Legislature to hold that the duty to guard the machinery in question was not imposed upon the mill owner; and the testimony is undisputed that this machine could have been guarded without affecting the efficiency of its operation."

"In *Davis v. Langdon* (1911) 11 New So. Wales St. Rep. 149, it was held that section 28 of the New South Wales Factories and Shops Act 1896 imposes an absolute obligation on the occupier of a factory to fence all dangerous parts of machinery therein, whether they are the particular parts specified in subsections (1), (2), and (3), or not."

This construction of the phrase "and machinery of every description," is, in our opinion, the correct one, and in accord with the construction placed thereon by the Supreme Court of this state.

In the case of *Frisco Lumber Co. v. Ethridge*, 45 Okl. 566, 146 Pac. 441, the decas-

ed, W. P. Ethridge, while assisting in the operation of a lath machine, which was located in the sawmill building of the plaintiff in error, and while his back was turned to a trimmer machine located in said building on the same floor about 30 feet from the lath machine, and while he was in the exercise of care and caution on his part, was struck on the side of the head by a block of green pine timber, 2x4x5 inches, which was thrown from the said trimmer machine a distance of some 20 feet with great force and violence, and severely injured, dying from said injuries in about an hour thereafter. In an action for damages brought by his surviving widow against the company, the verdict and judgment of the trial court were upheld by this court, Chief Justice Kane, after quoting section 3746, *supra*, speaking for the court, making use of this language:

"The statute requires that 'machinery of every description shall be properly guarded.' Clearly the 'trimmer machine' must be held to be embraced within this phrase. *Green v. American Car & Foundry Co.*, 163 Ind. 135, 71 N. E. 268; *Inland Steel Co. v. Kachwinski*, 151 Fed. 219, 80 C. C. A. 571; *Jones v. American Caramel Co.*, 225 Pa. 644, 74 Atl. 613; *Goodwin v. Newcomb*, 1 Ont. L. Rep. 525."

In the case of *Jones v. Oklahoma Planing Mill & Mfg. Co.*, 147 Pac. 999, Mr. Justice Hardy, speaking for this court, said:

"The section of the statute upon which plaintiff relies is section 3746, Rev. Laws 1910, which in terms requires that machinery of every description shall be properly guarded, and, where this statute has been violated, and injury results to an employé as the direct and proximate result of the failure of the master to properly guard his machinery, it has already been established by previous decisions of this court that the employé does not assume the risks occasioned by failure of the master to perform this statutory duty. *Sans Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153; *Curtis & Gartside Co. v. Pribyl*, 38 Okl. 511, 134 Pac. 71, 49 L. R. A. (N. S.) 471; *Chicago, R. I. & P. R. Co. v. Duran*, 33 Okl. 718, 134 Pac. 876; *Great Western Coal & Coke Co. v. Coffman*, 48 Okl. 404, 143 Pac. 30."

The trial judge in this case charged the jury under the Factory Act, and also went further and charged the jury as to the law touching the duty of the defendant to furnish the plaintiff with a reasonably safe place in which to work and reasonably safe machinery with which to work, and also charged the jury concerning the assumption of risk. Had the court simply charged the jury under the Factory Act, then it would not have been necessary to have charged them as to the common-law liability as to a reasonably safe place in which to work, and reasonably safe machinery with which to work and the defense thereto of assumption of risk. *Jones v. Oklahoma Planing Mill & Mfg. Co.*, *supra*. But having done so by proper instructions, we see no reversible error therein. This Factory Act is a mandatory statute. The things expressly enumerated therein, together with machinery of every description, shall be properly guarded. This declares the fixed

and settled public policy of the state touching these matters and things, and a violation of this act is made a crime and punishable as such. The sovereign, in order to afford greater and better protection to the lives and limbs of the subject who earns a livelihood by working with and around machinery, and in order to lessen the chances of accidents, has expressed her will in the solemn mandates of this mandatory and penal statute which must be obeyed, and a failure to obey it becomes and is negligence per se, and those who disobey it are not entitled to the defense of assumption of risk, but may interpose the defense of contributory negligence. These matters were questions of fact for the jury. They were submitted to the jury. The jury by their verdict have found under the law and the evidence that the defendant was negligent as complained of. This court will not disturb their verdict. *Curtis & Gartside Co. v. Pribyl*, 38 Okl. 511, 134 Pac. 71, 49 L. R. A. (N. S.) 471; *Frisco Lumber Co. v. Ethridge*, *supra*; *Jones v. Oklahoma Planing Mill & Mfg. Co.*, *supra*.

[10, 11] Counsel of record for the defendant complain of the giving of instruction No. 9, which reads as follows:

"If after a fair and impartial consideration of all of the testimony in this case and in compliance with the instructions herein given you, you believe that the plaintiff has established by a preponderance of the testimony that while in the employ of the defendant in and about the operation of the machine, known as the 'gut reel,' he was injured in the manner alleged in his petition, and that such injury was the direct or proximate result of the negligence of the defendant, as alleged in his petition, and on account of such injury so received he has suffered physical pain and mental anguish, and loss of time from his work, and that he will continue to suffer physical pain and mental anguish on account of said injury, as alleged in his petition, and that as a result of said injuries his earning capacity has been impaired, as alleged in his petition, it would be your duty to find for the plaintiff, and assess his recovery in damages in such sum as you find from the evidence will compensate him for the injury so sustained, not to exceed the sum of \$34,560"

—and cite in support of their contentions, *Oklahoma Ry. Co. v. Milam*, 45 Okl. 742, 147 Pac. 314; *C. R. I. & P. Ry. Co. v. Clark*, 148 Pac. 998. But the record discloses in this case that the trial court followed instruction No. 9, with instruction No. 10, which reads as follows:

"But, upon the other hand, if after a fair and impartial consideration of all of the testimony in this case, and in compliance with the instructions herein given you, you find that the plaintiff has failed to establish the allegations of his petition by a preponderance of the testimony, it would be your duty to find for the defendant; or, if you find that the defendant has established by a preponderance of the testimony that the injuries sustained by the plaintiff was occasioned by the risks of his employment which he assumed, or was occasioned, and was the direct or proximate result of his own contributory negligence, it would be your duty to find for the defendant."

This, we think, was sufficient and was to the same purpose and effect as though it was

contained in one instruction, and sufficiently answers the requirements of the cases cited by counsel for defendant and set out herein, *supra*.

As to the assignments of error touching the giving and refusing to give instructions, we have carefully examined all of the instructions given and refused by the trial court, and are of the opinion that, as a whole, they are substantially correct, and that no reversible error can be predicated thereon. Upon the entire record, after a careful examination thereof, it does not appear that there was any misdirection of the jury, or improper admission or rejection of evidence, or error in any matter of pleading or procedure which probably resulted in a miscarriage of justice, or constitutes any substantial violation of a constitutional or statutory right of the defendant. That the verdict is excessive is not complained of. Under such circumstances, "No judgment shall be set aside or new trial granted by any appellate court of this state." Section 5005, Rev. Laws 1910.

The judgment of the court below is therefore affirmed.

PER CURIAM. Adopted in whole.

FARMERS' NAT. BANK v. HARTOON et al.
(No. 7381.)

(Supreme Court of Oklahoma. July 11, 1918.
Rehearing Denied Sept. 12, 1918.)

(Syllabus by the Court.)

1. EVIDENCE \S 177—BEST EVIDENCE RULE.

The best evidence the nature of the case will admit of shall always be required, if possible to be had; but when the best evidence is not available and its absence properly accounted for, secondary evidence is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 557; 570-579; Dec. Dig. \S 177.]

2. EVIDENCE \S 181—BEST EVIDENCE—DOCUMENTARY EVIDENCE.

Where a written contract is material to support the issues in a cause, the writing itself is the best evidence, and where this is not produced and its absence is not properly accounted for, i. e., it is not shown to be lost or not available to the party whose duty it is to produce it, *held*, that it was prejudicial error to admit, over the objection, parol testimony as to the terms of such written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 600; Dec. Dig. \S 181.]

Commissioners' Opinion, Division No. 2. Error from District Court, Pottawatomie County; Chas. B. Wilson, Judge.

Action by the Farmers' National Bank against Mattie Hartoon and others. There was judgment for defendants, and plaintiff brings error. Reversed.

G. A. Outcalt, of Tecumseh, for plaintiff in error. T. G. Cutlip, of Tecumseh, for defendants in error.

GALBRATTH, C. The Farmers' National Bank, as plaintiff, commenced this action in the trial court to recover the amount of three promissory notes for \$185.60 each, bearing 10 per cent. interest from June 1, 1912, executed by Mattie Hartoon, C. B. Hartoon, E. J. Dickerson, and W. J. Carson, payable to the order of F. M. Redding. The plaintiff alleged in its petition that it was the owner and holder of said notes in due course; that they were past due, and no part thereof had been paid. It is further alleged that a real estate mortgage had been executed by C. B. and Mattie Hartoon to secure the payment of said notes, and charged a breach of the conditions thereof. The prayer was for judgment for the amount of the debt and foreclosure and sale of the mortgaged premises.

The answer of the defendants admitted the execution of the notes, but alleged that they had been executed and delivered upon a condition, as evidenced by a written contract made at the time of the execution of the notes, and that the condition agreed upon had been performed, and there was no consideration for the notes. It also alleged that the bank was not a holder of the notes in due course, but that they still belonged to the payee, Redding. A reply to the new matter in the answer was filed denying the same. Upon the issues thus formed the cause was tried to the court and a jury, and a verdict returned for the defendants, upon which judgment was rendered, and from which an appeal has been prosecuted to this court.

It is assigned as error that the court erred in admitting parol evidence to establish the written contract, setting out the alleged conditions upon which the notes in suit had been executed, over the objection of the plaintiff in error, and without proper foundation having been laid for the admission of secondary evidence. One of the material issues in the cause was whether or not the bank was the owner and holder of said notes in due course, and whether the notes had been executed upon a condition, and, if so, whether or not the bank had notice of such condition. It was alleged in the answer that the notes were executed upon a condition, and that this condition was evidenced by a written contract between the makers of the note and the payee therein named, Mr. Redding. This writing was not offered or introduced in evidence, but secondary evidence of its contents was admitted over the objection of the plaintiff in error. The record on this point is as follows:

Mr. Dickerson while on the stand testified, in part as follows:

"Q. I will ask you to state whether or not you had a written agreement with Mr. Redding as to the terms of the execution of these notes. A. Yes, sir; there was some written contract or agreement. Q. That contract was in writing

was it, Mr. Dickerson? A. Yes, sir; it was in writing. * * * Q. Mr. Dickerson, you haven't the contract in your possession at this time? A. No, sir; I have not. Q. I ask you whether or not you saw the contract while it was in the possession of Mr. Caldwell. A. Yes, sir. Q. Do you know what he done with it? A. He handed it to you. Q. To Mr. Outlip? A. Yes, sir. Q. Do you know what Mr. Outlip did with it then? A. No; I don't; I didn't see it again."

Mr. C. B. Hartoon was recalled, and testified as follows:

"Q. Mr. Hartoon, do you know this contract? A. I know it when I see it. Q. Do you have it now? A. No, sir. Q. Did you have it when you were on the witness stand? A. Yes, sir. Q. To whom, if any one, did you give it to? A. I handed it to you and I think you handed it to the court. Q. Have you got it now? A. No, sir. Q. When it was handed to the court what became of it? A. That was the last I saw of it. Q. Who had it? A. I think he put it on his desk; it was laying right there the last I saw of it" right there.

"The Court: Proceed with the trial.

"Mr. Outlip: Are you satisfied as to its loss, Mr. Outcalt?

"Mr. Outcalt: No; I am not satisfied."

Mr. Dickerson was then recalled, and testified as follows:

"Q. Have you? You say, I believe, you had a written contract with reference to the matter now in controversy; did you or did you not? A. Yes, sir; I had it. Q. That is the same written contract which probably has been lost and we have been inquiring about? A. Yes, sir. Q. Do you remember the date of that contract? A. It was dated at or near the time or the same date of the date of the notes. Q. Do you remember by whom it was prepared? A. No, sir. Q. I will ask you to state whether or not you signed the contract? A. Yes, sir; I signed it. Q. Who else was it signed by, if any one? A. F. M. Redding. Q. F. M. Redding? Now do you remember the terms of the contract? A. Yes, sir. Q. You may state the terms of the contract.

"Mr. Outcalt: Objected to as incompetent, irrelevant, and immaterial, and not the best evidence, unless it is shown that the Farmers' Bank knew of the contract and its contents.

"The Court: Objection overruled."

[1, 2] The witness was then permitted to testify, over objection, as to the contents of this written contract. Motion was then made by the attorney for the plaintiff in error to strike out the testimony, which was in turn overruled.

In *Landon v. Morehead*, 34 Okl. 701, 713, 126 Pac. 1027, 1032, it is said:

"A fundamental in the rule of evidence is that which requires the production of the best evidence of which the case, in its nature, is susceptible. This rule naturally leads to the division of evidence into primary and secondary. Primary is that which we have just mentioned as the best evidence; that kind of proof which, under any possible circumstance, affords the greatest certainty of the fact in question. All evidence falling short of this in its degree is termed secondary. Such is the substitution of oral for written evidence. This class is divided by Greenleaf, in his work on Evidence (15th Ed.) § 85, into three classes, as follows: 'The cases which most frequently call for the application of the rule now under consideration are those which relate to the substitution of oral for written evidence; and they may be arranged into three classes, including in the first class those instruments which the law requires should be in writing; in the second, those contracts which the parties have put in writing; and in

the third, all other writings the existence of which is disputed, and which are material to the issue.'

"The written option falls within the latter, if not also within the two former, of the classes named. In order to render competent secondary evidence of a lost instrument, it must be first given in evidence that such a paper once existed, though slight evidence may be sufficient for this purpose, and that a bona fide and diligent search has been unsuccessfully made for it in the place it was most likely to be found, (if the nature of the case demands such proof)—citing *Barnes v. Lynch et al.*, 9 Okl. 156, 59 Pac. 996, and various authorities.

Proceeding, the court says:

"It is expected that the party offering such evidence should be able to show that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him."

In *Commercial Union Assur. Co. v. Wolfe*, 41 Okl. 342, 346, 137 Pac. 704, 705, it is said:

"Secondary evidence is admissible in the absence of primary evidence, especially where the absence of primary evidence is satisfactorily accounted for. 'And the one general rule that runs through all the doctrine of trial is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed. 3 Blackstone, p. 368.'"

In *M. O. & O. R. Co. v. West*, 151 Pac. 212, the rule is announced in the first paragraph of the syllabus as follows:

"The general rule admitting secondary evidence is that there must be a showing that the primary evidence is lost, or destroyed, or otherwise unavailable, through no fault of the party making the offer. It is not error to exclude the copy of a written contract where it appears that the party making the offer has the custody or control of the original and the original is not available through the carelessness or negligence of such party."

Here it appears that the primary evidence, the written contract, was in the possession of the defendants, or had been during a part of the progress of the trial, and that one of the defendants had the writing in his possession while he was giving his testimony in the cause, and that he passed the paper to his attorney. Just what became of the writing does not appear, nor is it made to appear that it had been lost. It seems to have been passed to the court.

There was a failure to show that all sources of information and means of discovering the writing available to the defendants had been exhausted. If the court had the writing, it was not lost. Nor was it lost if the defendant's attorney had it. The attorney was not sworn and did not testify that the writing was lost, and that he was unable to produce it for that reason. He was content with offering two of the defendants who testified that they did not have the writing and did not know where it was. This showing was clearly insufficient to justify the admission of secondary evidence for the reason that it failed to show that the primary evidence was not available. The terms of this

written contract were of prime importance under the issues formed by the pleadings. In the absence of a proper showing to justify it, the admission of secondary evidence of the written contract was highly prejudicial.

Other errors are assigned, but, in view of the conclusion announced on the above assignment, it does not seem necessary to consider them.

The judgment appealed from should be reversed, and the cause remanded, with directions to grant a new trial.

PER CURIAM. Adopted in whole.

STANDARD FASHION CO. v. JOELS.
(No. 7634.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

1. PAYMENT ~~§~~59—PLEADING—NECESSITY.

Payment is an affirmative defense and to be available must be expressly pleaded. It cannot be shown under a general denial.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 143½; Dec. Dig. ~~§~~59.]

2. PAYMENT ~~§~~65(1, 6) — PRESUMPTIONS — BURDEN OF PROOF.

Payment is not presumed, and when the antecedent existence of an indebtedness is proven, the burden of proving its discharge by payment is upon the debtor or person alleging the payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 162, 196; Dec. Dig. ~~§~~65(1, 6); Evidence, Cent. Dig. § 110.]

Commissioners' Opinion, Division No. 4.
Error from District Court, Atoka County;
J. H. Linebaugh, Judge.

Action by the Standard Fashion Company against Sam Joels. There was a judgment for defendant, and plaintiff brings error. Reversed.

Humphreys & Cook, of Atoka, for plaintiff in error. James H. Gernert and J. G. Ralls, both of Atoka, for defendant in error.

EDWARDS, C. This is an action to recover a balance alleged to be due upon an account for merchandise sold under a written contract. The petition is in the ordinary form, with an itemized, verified statement of the account, together with a copy of the contract, attached. The defendant filed a verified answer, and, first, denies that the plaintiff is a corporation; second, denies that defendant is indebted to plaintiff in the amount sued for or in any other sum; third, alleges that said goods were sold upon a commission, and, as sold, the price, less the commission, was remitted to the plaintiff; fourth, a general denial. The reply of plaintiff is a general denial.

Several errors are discussed in the briefs, only one of which, however, it will be necessary to notice at length.

In the instructions to the jury the court gave the following:

"The court instructs you that this is a suit based upon a contract, and that the defendant, having admitted the execution of the contract, would be bound by the terms thereof, and if you find by a fair preponderance of the evidence in this case that the defendant received from the plaintiff certain goods, wares, and merchandise during the existence of said contract, and that the same, or any part thereof, have not been paid for, it would be your duty to return a verdict in favor of the plaintiff for such amount as you find is still due and owing from the defendant to the plaintiff"

—which instruction was excepted to by the plaintiff at the time and the giving of the same assigned as error in the motion for new trial and in the petition in error.

[1, 2] It is fundamental that payment is a matter of defense, and must be pleaded and proven, and the burden of proof is on the debtor or person alleging payment.

In 22 A. & E. Ency. of Law (2d Ed.) 587, the general rule sustained by all the authorities, is as follows:

"The general rule is well settled that payment is an affirmative defense, and will not, in the first instance, be presumed, but after the antecedent existence of the indebtedness has been proved by the creditor, the burden of proving its discharge by payment is upon the debtor or person alleging the payment."

The same general rule is stated in 30 Cyc. 1253, in these words:

"Payment is an affirmative defense which cannot be relied upon unless expressly pleaded, and cannot be shown under general denial."

In the instruction complained of the court tells the jury that before it can render a verdict for plaintiff it must find from a preponderance of the evidence that the goods have "not been paid for"; while the law is that plaintiff would be entitled to recover unless the jury find from a preponderance of the evidence that the goods have been paid for. In *Woodson Mach. Co. v. Morse*, 47 Kan. 429, 28 Pac. 152, the court holds:

"Where the burden of proof under the pleadings and the law rests upon the defendant, it is material error for the court to instruct the jury otherwise."

In the case of *Winton et al. v. Myers*, 8 Okl. 421, 58 Pac. 634, it is said:

"Payment is always a matter of defense, and, as a general rule, must be specifically pleaded and proven by him who claims payment. The burden of showing payment was on the defendants, and no error was committed in overruling the demurrer to the evidence. *Larche v. Brahs*, 104 N. Y. 157, 10 N. E. 58; *Lovelock v. Gregg* [14 Colo. 53] 23 Pac. 88."

We think there is no sufficient allegation nor proof of payment, although the trial court treated the answer as a plea of payment, and the proof as sufficient. But, as it will be necessary to reverse the cause upon the grounds just stated, these errors may be cured upon a new trial.

The antecedent indebtedness having been proven by the plaintiff, the instruction placing the burden upon the plaintiff is reversible error, for which the cause is reversed and remanded.

PER CURIAM. Adopted in whole.

FT. SMITH & W. R. CO. v. KNOTT et al.
(No. 6573.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 8, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 1078(1) — REVIEW — WAIVER OF ASSIGNMENTS.

Only such assignments of error as are argued in the brief of plaintiff in error will be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. —1078(1).]

2. TRIAL — 156(3) — DEMURRER TO EVIDENCE — OVERRULING.

Unless the evidence and all inferences which a jury could justifiably draw from it is insufficient to support the verdict for plaintiff, a demurrer to the evidence should be overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 356; Dec. Dig. —156(3).]

3. DEATH — 75 — RIGHT OF RECOVERY — CIRCUMSTANTIAL EVIDENCE.

In an action for damages for the negligent killing, though the evidence be circumstantial, a recovery may be properly had if such circumstantial evidence is sufficient to prove the facts alleged in the petition.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 93, 95; Dec. Dig. —75.]

4. MASTER AND SERVANT — 220(3) — INJURIES TO SERVANT — ASSUMPTION OF RISK.

A servant does not assume the risks and hazards of the failure of the master to provide a reasonably safe place in which to work and reasonably safe appliances with which to work, unless the want of care on the part of the master and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe the one and appreciate the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 663; Dec. Dig. —220(3).]

5. TRIAL — 252(11) — INSTRUCTIONS — APPLICABILITY TO FACTS.

It is not error to refuse to give a requested instruction upon the question of the assumption of risk which deals solely with the ordinary risks and hazards, and embodies no definition of such risks and hazards, nor any qualification appropriate to the particular facts of the case, which involves a question of extraordinary hazards.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. —252(11).]

6. REMOVAL OF CAUSES — 12 — RIGHT TO REMOVAL.

Where the plaintiff, as a resident of the Western judicial district of the United States for the state of Oklahoma, brings an action in the District Court of a county in the Eastern judicial district of the United States for the state of Oklahoma, a petition by the defendant to remove said cause from the said district court to the United States Circuit Court of the Eastern Judicial District of the State of Oklahoma, upon the sole ground of diversity of citizenship, should be denied.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. —12.]

7. MASTER AND SERVANT — 278(1) — INJURIES TO SERVANT — ACTIONS — EVIDENCE — SUFFICIENCY.

Evidence in this case carefully examined, and held sufficient to sustain the verdict rendered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 957; Dec. Dig. —278(1).]

(Additional Syllabus by Editorial Staff.)

8. MASTER AND SERVANT — 85 — INJURIES TO SERVANT — "ACTIONABLE NEGLIGENCE."

As between master and servant, three elements are essential to constitute "actionable negligence," when the wrong charged is not willfully and wantonly done, viz.: (1) The existence of the duty on the part of the master to protect the servant from the injury; (2) failure of the master to perform that duty; (3) injury to the servant resulting from said failure.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 136, 139, 140; Dec. Dig. —85.]

For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence.]

Commissioners' Opinion, Division No. 1. Error from District Court, Pittsburg County; A. H. Huston, Judge.

Action by Ella L. Knott, administratrix, etc., against the Ft. Smith & Western Railroad Company and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

C. E. & H. P. Warner, of Ft. Smith, Ark., for plaintiffs in error. Johnston, Robinson & Rice, of Perry, W. N. Redwine, of McAlester, J. N. Roberson, of El Reno, and Henry S. Johnston, of Perry, for defendant in error.

COLLIER, C. This action was instituted against the plaintiffs in error, St. Louis, El Reno & Western Railroad Company, A. F. Daugherty, and J. F. Flickenstein, by defendant in error, to recover damages for the death of the son of the defendant in error, caused by the negligence of the plaintiffs in error. Hereinafter the parties will be referred to as they appeared in the trial court.

The record shows that the plaintiff was a resident of the Western United States judicial district of the state of Oklahoma; that the Ft. Smith & Western Railroad Company was a corporation nonresident of the state of Oklahoma; that the other defendants resided in this state; and that the cause was pending in the district court of Pittsburg county, which is in the Eastern United States judicial district of the state of Oklahoma. On the 25th day of August, 1910, said Ft. Smith & Western Railroad Company filed its petition and bond for removal of the cause to the United States Circuit Court of the Eastern District of Oklahoma, on the sole ground of diversity of citizenship, which was denied on the 19th day of October, 1910, upon the ground that there was no diversity of citizenship, as several of the defendants were residents of the state of Oklahoma. Thereafter the Ft. Smith & Western Railroad Company filed its demurrer to the petition, on the ground that the petition does not contain facts sufficient to constitute a cause of action against the said defendant, which demurrer was overruled and the overruling of said demurrer duly excepted to. Thereupon the defendant filed answer, denying the allegations of the petition.

The uncontradicted material evidence in the case is that the plaintiff was the duly appointed and qualified administratrix of the estate of the deceased; that at the time of his death the deceased was the head brakeman on the train from which the car hereinafter referred to was detached; that he was in the employ of the Ft. Smith & Western Railroad Company as brakeman; that he was about 30 years old, nearly 6 feet tall, and strong, and had had about 10 years' experience as a brakeman; that on the day of his death he was on the car which had been switched to the main line, cut loose, and was proceeding alone down the main track at the rate of from four to six miles an hour; that the car was partially loaded with coal, and that the last time the deceased was seen alive he was about 6 feet from the end of the car, going in the direction of the brake; that no one saw him fall from the car; that within a few minutes after he was seen walking towards the end of the car his body was found between the rails and 30 or 40 feet in the rear of the car upon which he had been, and about 250 feet from the point where the car was switched to the main line; that the body had not been crushed, but had the appearance of having been rolled.

The evidence is in conflict as to the condition of the car being called to the attention of the Ft. Smith & Western Railroad Company and as to when said car was repaired and as to its condition at the time of the fatal accident.

There was evidence to show that the running board, for the brakeman to stand upon, of the car was split and wabbly; that there were defects in the braking apparatus; that the ratchet wheel had one tooth missing; that the brake staff was slightly bent; that in setting the brake it was hard to move; that the wheel or brake staff was loose; that the wheel would play up and down and did not fit tight on the staff; that the staff was bent about halfway down from the brake wheel to the end of the staff; that the end of the staff fits on a keeper and has a hole through it for the pin to be placed, but the pin was gone, and the brake staff could not be lifted up out of the keeper; that the car was examined immediately after the finding of the body, and the brake was not set; that in winding up the brake the brake staff would strike the end of the car where the bend was and would bind; that immediately after the accident an examination was made of the brake of the car upon which the deceased had just previously been, and the result thereof showed that the person attempting to operate said brake was thrown from the car and caught on the bumpers, and consequently was not thrown to the ground. The car inspector for the company testified that their records did not show that any inspection of the car in question had been made between December and March 19th;

that after the accident the inspector was sent to inspect the car, and found it in good serviceable condition; that the brake staff had a slight bend in it just above the ratchet wheel, which was all, except the footboard had a slight crack, running a short distance from one end.

The defendant also offered evidence that on the night preceding the accident plaintiff's intestate was intoxicated and carried liquor with him to Sparks, the point at which he met his death the next morning, and that the deceased was a little lame in one foot.

In rebuttal, plaintiff offered evidence that the deceased was sober when he came to work on the morning of the day on which he was killed, and parties who saw him several times during the day did not observe any indications of liquor upon him.

There was evidence as to the expectancy of the life of the plaintiff; that the deceased was unmarried and left no children; that prior to his death he lived with his mother; that he contributed to her support; that his wages were from \$60 to \$70 per month, and sometimes ran up as high as \$100 or \$102 per month, and that he always helped to support his mother, and gave her from \$30 to \$40 per month; that when he was at home, as long as she had anything to buy, he was always there with the money to pay for it; that he was more like the father of the family than a brother and son; that when he was at home she never had anything to do with the grocery bill; that he would pay all that; that he would ask if they wanted anything, and, if they did, would tell him what they wanted, and he would get it for them; that he was absent from home a good deal during the last two years; that he was home once in a while; that during the time of his absence he contributed to her support. Thereupon a demurrer was interposed to the evidence by the defendants, and the same sustained as to all of said defendants except the Ft. Smith & Western Railroad Company, there being no liability shown against said defendants, except said Ft. Smith & Western Railroad Company, to which said company duly excepted. Upon the sustaining of the demurrer as to all of the defendants except the Ft. Smith & Western Railroad Company the said railroad company tendered for filing its second petition and bond for removal of the cause from the district court of Pittsburg county to the United States Circuit Court for the Eastern District of the State of Oklahoma, which was denied, to which ruling of the court said defendant duly excepted. Thereupon the Ft. Smith & Western Railroad Company moved the court for peremptory instructions, in its favor, which motion was overruled, and to which action of the court the defendant duly excepted.

The instructions given by the court, to which exceptions were duly saved, and which

are argued in defendant's brief are in the following words:

"(8) A master or employer owes his servants or employees the duty of furnishing to them a reasonably safe place wherein to work and reasonably safe tools and appliances with which to work, and his failure to use reasonable and ordinary care in providing a reasonably safe place and reasonably safe tools and appliances may constitute negligence; and, if the injury results to the employé by reason of such negligence, and the employé exercises reasonable care himself to avoid injury, then the employer would be liable in damages for such resulting injury.

"An employer cannot be held to insure the safety of his employées, but he must, as I have said, exercise reasonable care and diligence in providing a reasonably safe place where, and reasonably safe appliances with which, to work.

"Before you can find for the plaintiff in this case you must find from a preponderance of the evidence that the defects, or some of the defects complained of in connection with the braking apparatus of the car, actually existed; second, that the defects were of such a character as could have been seen and known by the agents and employees of the company whose duty it was to examine and inspect the same in the exercise of reasonable care and diligence upon their part in making such inspection or examination; third, that such defects must have been of such character as that it could have been reasonably foreseen that some injury would result to a person operating said brakes while the car was in motion; and, fourth, that such defects were the proximate cause of the death of the deceased. If the plaintiff has failed to establish all of these matters by a preponderance of the evidence, then she cannot recover.

"Upon the other hand, if you find from a preponderance of the evidence that the defendant the Ft. Smith & Western Railroad Company had the deceased in its employ as a brakeman, and that in the course of his employment he went upon a certain car of said company known as 5373 to operate the brake thereon, and that such car, or the braking appliances thereon, had been permitted to become defective and out of repair in the manner set forth in the petition, and that such defects were of such character as that it could reasonably have been foreseen that some injury would result to a person operating the braking appliances, and that such defects actually caused the deceased to fall from the car, and that the plaintiff himself was in the exercise of due care for his own safety, and did not, by his own carelessness, contribute to the accident which caused his death, then your verdict should be for the plaintiff."

"No. 10. If you find for the plaintiff, then the measure of her damages would be the pecuniary value of the life of her son to her. That is, the amount of money or value of any property which you may find the plaintiff would have received from her son had he lived. She cannot recover for any suffering on the part of the deceased, nor for any mental distress or grief upon her own part by reason of the death of her son, nor for any loss of his society, but only, as I have stated, for such money or property as you may find he would have contributed to her during his life. And in estimating such amount you may take into consideration the general health of the deceased, his general habits of life, his earning capacity, measured by what he ordinarily had earned, his disposition to contribute to the plaintiff, and his power to contribute in view of his manner of life, and also the probable duration of the life of the plaintiff."

The instructions requested and refused by the court and argued in defendant's brief are:

"(12) The jury are instructed to find for the defendant if they find from the evidence that the

brake rod or staff attached to the car in question was bent in such manner as to endanger the safety of the deceased, Thad Knott, or if they find that the running board on the car in question was split in such manner as to endanger safety; and, if they find that such defects did in fact exist, and that they were obvious and patent, such as could be seen by the said deceased in the exercise of ordinary and reasonable care, then you are instructed the said deceased assumed the risk of injury from such patent and obvious defects, and, if you so believe, your verdict will be for the defendant."

"(17) The jury are instructed that a servant, when he engaged in a particular employment, is presumed to do so with the knowledge of and a taking of the risks of its ordinary hazards; that is to say, in this case, if you find that the deceased, Thad Knott, was in the employ of the defendant railroad as a brakeman, the law presumes that he accepted such employment as a brakeman with the knowledge of and a taking of the risks of the ordinary hazards of such employment.

"(18) The jury are instructed as a matter of law that a servant when he enters the service of an employer impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service in which he engages; and, if the jury believe from the evidence that the injury to the deceased, Knott, was only the result of one of the risks ordinarily incident to the work in which the said Knott was engaged, and not otherwise, the plaintiff cannot recover in said cause, and your verdict should be for the defendant."

The jury returned a verdict in favor of the plaintiff and against the Ft. Smith & Western Railroad Company in the sum of \$4,000, to which defendant duly excepted. Timely motion was made for a new trial, which was overruled and duly excepted to, and this appeal prosecuted.

In neither the original nor the reply brief of defendant are assignments of error set out as required by rule 25 (137 Pac. xl.) of this court, but in the reply brief of defendant is copied the petition in error filed herein. In the original brief of defendant the following statement is made:

"The petition in error filed herein contains numerous assignments of error, but in argument we will consider the propositions which are embraced in the petition in error under the following divisions: (1) The injury complained of is not connected with the negligence alleged, and the demurrer to plaintiff's evidence should have been sustained; (2) error in refusing and giving instructions; (3) error in refusal of removal to the federal court."

The only errors argued in the brief of defendant are the overruling of the demurrer to the evidence, the giving of the instructions respectively numbered 8 and 10, and the refusal to give requested instructions respectively numbered 12, 17, and 18, and the refusal of the court to remove the cause from the said district court to the United States Circuit Court for the Eastern Judicial District of Oklahoma.

[1] Our review will be confined to the alleged errors argued in the brief of defendant.

[2-4] It is a settled rule that a demurrer to the evidence admits every act which the evidence in the slightest degree tends to prove and all inferences and conclusions which may be logically drawn from the evi-

dence. *St. L. & S. F. R. Co. v. Snowden*, 149 Pac. 1083; *Wm. Cameron & Co. v. Henderson*, 40 Okl. 648, 140 Pac. 404.

[8] In every case involving negligence, as between master and servant, three elements are essential to constitute actionable negligence, when the wrong charged is not willfully and wantonly done, viz.: (1) The existence of the duty on the part of the master to protect the servant from the injury; (2) failure of the master to perform that duty; (3) injury to the servant resulting from said failure. *M. V. R. Co. v. Williams*, 42 Okl. 444, 141 Pac. 1103; *St. L. & S. F. R. Co. v. Snowden*, 149 Pac. 1083.

While the evidence is in part in conflict, and much of it circumstantial, we are of opinion that there is evidence from which a jury could reasonably find that the defendant did not furnish plaintiff's intestate with a reasonably safe place in which to work and reasonably safe appliances with which to work, as was its duty, and that the failure to perform this duty was the proximate cause of the injury, and that such defects in the braking apparatus were not so obvious that an ordinarily careful man would observe such defects and apprehend the danger.

"Where decedent was killed by the operation of an elevator and there was no direct proof, but circumstances indicated a strong probability of his death resulting from the defective condition of the brake and the fall of a counterbalancing weight, the judgment will be affirmed, although the evidence is wholly circumstantial. The existence of an ultimate fact need not be shown by direct evidence but may be proven by circumstances." *Winkle v. Peck D. G. Co.*, 182 Mo. App. 656, 112 S. W. 1026.

"In an action against a railroad company for damages for negligently causing the death of the plaintiff's intestate, if, from all the facts and circumstances proved, the inference arises that the deceased was exercising due care, and that his death was caused while using a defective brake on one of the defendant's cars, a recovery is justified, although no direct evidence is given by witnesses of the accident. In such a case, it is not the province of a court to say to a jury, as a matter of law, what facts and circumstances were sufficient to show that the death of the plaintiff's intestate was caused by defective machinery." "The verdict will be upheld if these facts are made to affirmatively appear, either directly or circumstantially." *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67.

"Even though an employe has opportunity to notice some defects, the master is not relieved from failure to provide safe place for the employes." *Allison v. Stivers*, 81 Kan. 713, 106 Pac. 996.

"Where evidence, although circumstantial, is sufficient to show probability of the facts alleged, plaintiff has proven his case." *Patty v. Salem F. M. Co.*, 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298.

We are of opinion that the court did not err in overruling the demurrer to the evidence.

"It is only when the evidence, with all the inferences the jury could justifiably draw from it, will be insufficient to support a verdict for plaintiff that the court is authorized to direct a verdict for defendants; and, unless the conclusion follows as a matter of law that no recovery

can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury, under proper instructions." *Abbott v. Dingus*, 44 Okl. 567, 145 Pac. 365.

We have carefully considered instructions given by the court, respectively, 8 and 10, and are of the opinion that each of said instructions correctly state the law. *St. L. & S. F. R. Co. v. Brown*, 43 Okl. 143, 144 Pac. 1075; *Big Jack Mining Co. v. Parkinson*, 41 Okl. 125, 187 Pac. 678.

The vice of refused charge No. 12 is that it singles out a part of the evidence as to the negligence of the defendant, instructs the jury that if the brake rod or staff attached to the car was bent in such manner as to endanger the safety of the deceased, or if they find that the running board on the car in question was split in such manner as to endanger safety, while the evidence discloses many other defects in the braking apparatus of the car, and this instruction authorized recovery by the defendant regardless of the fact that there were other defects in the braking apparatus, as shown by the evidence, than those enumerated in said instruction, which may have caused the death of defendant, and which tended to show that the defendant was guilty of negligence in not furnishing plaintiff's intestate a reasonably safe place to work and reasonably safe appliances with which to work, which negligence was averred to be the proximate cause of the death of plaintiff's intestate. Again, under the evidence in this case, the deceased did not assume the risk of the defendant's failing in its duty to furnish him a reasonably safe place in which to work and reasonably safe appliances with which to work. There is no evidence in the record that the defects in the braking apparatus were so obvious that an ordinarily careful man in the situation of the deceased would have observed such defects and appreciated the danger, and therefore the defendant was not entitled to an instruction that the deceased assumed such extraordinary hazard. In *Chesapeake & O. R. Co. v. John J. De Atley*, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016, it is held:

"There is no error in refusing to give a requested instruction upon the question of the assumption of risk which deals solely with the ordinary risks and hazards, and embodies no definition of such risks and hazards, nor any qualification appropriate to the particular facts of the case, which involves a question of extraordinary hazard."

In the body of the opinion it is said:

"According to our decisions, the settled rule is not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances, would observe and appreciate them." *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94,

34 Sup. Ct. 229, 58 L. Ed. 521; Seaboard Air Line Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

If the instruction be held to be a correct instruction as to contributory negligence, the same is, in effect, covered by the instructions given by the court. We are of opinion that the court did not err in refusing to give the jury said requested instruction No. 12.

[5-7] Each of the refused instructions 17 and 18 is predicated upon the assumption by the plaintiff's intestate of the risk and hazard, which resulted in the death of the plaintiff's intestate, and with this contention we cannot agree. The negligence complained of is the failure of the defendant to furnish a reasonably safe place in which to work and reasonably safe appliances with which to work, and the risk of such failure on the part of the defendant was not one of the ordinary risks of the employment which the servant assumed, and the court did not err in refusing to give said instructions 17 and 18.

In *Armour et al. v. Golkowska*, 202 Ill. 144, 66 N. E. 1087, it is held:

"The duty of the master to provide a reasonably safe place for the servant to work is a positive one, and his noncompliance therewith is not one of the ordinary risks assumed by the servant."

In *Nall, Adm'r, v. Louisville, etc., R. Co.*, 129 Ind. 260, 28 N. E. 183, 611, it is said:

"The master's duty to his employes to provide safe places for them to work is a continuing one, and requires him to use ordinary care to keep them safe; and if they become unsafe through his neglect, * * * he must answer in damages to a servant, who is injured thereby, who is himself free from contributory negligence."

In *C., R. I. & P. R. Co. v. Townes*, 43 Okl. 568, 143 Pac. 680, Judge Turner says:

"As the risk of negligence of the master in failing to use ordinary care to keep the place in which plaintiff had to work reasonably safe was not a risk assumed by the plaintiff, and, as there is no evidence of contributory negligence upon his part, we need not consider the charges of the court concerning those defenses, as they are not involved in this case."

—and cited with approval 20 Am. & Eng. Enc. of Law, 55, which says:

"In accordance with the rule that reasonable care must be taken to protect one's servants from injury, masters owe to their servants the duty of providing them a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the service required and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty which the master owes, and is not one of the perils or risks assumed by a servant in his contract of employment. * * *"

The record discloses that the plaintiff was and is a resident of this state; that the Ft. Smith & Western Railway Company was and is a nonresident corporation; that this cause was pending in the district court of Pitts-

burg county, which is a part of the Eastern judicial district of this state; that the sole ground of removal of said cause was the diversity of citizenship. That under the facts presented by the record for the removal of said cause a cause cannot be removed from a state to a federal court is not an open question in this jurisdiction. In the elaborate and well-considered opinion of Judge Sharpe, in *St. L. & S. F. R. Co. v. Hodge*, 157 Pac. 60, which is fortified by many opinions of the Supreme Court of the United States, it is held:

"An action brought in a state court outside of the federal court district of the plaintiff's residence is not, on objection by plaintiff, removable to the federal court on the petition of the defendant, who is a resident of another state, as sections 1 and 2 of Act Cong. March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Cong. Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. Stat. 1901, pp. 508, 509), provide that, where jurisdiction of the federal court is founded upon diversity of citizenship, suit shall be brought only in the district of the residence of either plaintiff or defendant, and that suits of a civil nature, at law or in equity, may be removed into the federal court for the proper district by the defendant or defendants therein, being non-residents of the state. To permit the removal would not take the cause to 'the proper district' within the meaning of the statute, but, instead, into a district of which neither plaintiff nor defendant was a resident."

The court did not err in refusing to transfer the cause from the district court of Pittsburg county to the United States Circuit Court for the Eastern District of Oklahoma.

There being evidence, though the evidence was in conflict and much of it circumstantial, to reasonably support the finding of the jury, this court will not disturb the verdict when the cause is submitted to the jury under proper instructions. *Dunn v. Carrier*, 40 Okl. 214, 135 Pac. 337; *Rumbaugh v. Rumbaugh*, 39 Okl. 445, 135 Pac. 937; *Elwell v. Purcell*, 42 Okl. 1, 140 Pac. 412.

There being no error in the record, this cause should be affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. HALL.
(No. 7062.)

(Supreme Court of Oklahoma. Aug. 8, 1916.
Rehearing Denied Sept. 13, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT — § 83—TERMINATION OF RELATION—SERVICE LETTER.

Any employe of a public service corporation doing business in this state, upon his discharge or the voluntary termination of his services, is entitled, under the provisions of section 3709, Rev. Laws 1910, and upon his request therefor, to have issued to him a service letter.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 89; Dec. Dig. —§ 33.]

2. MASTER AND SERVANT — § 83—TERMINATION OF RELATION—SERVICE LETTER.

Before a public service corporation will be guilty of any breach of duty in failing to issue a

service letter, the request for such service letter must be made by such employé, either orally or in writing, served personally or by mail, upon the superintendent, manager, or contractor of such corporation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 39; Dec. Dig. ¶ 33.]

Commissioners' Opinion, Division No. 4. Error from District Court, Pottawatomie County; Charles B. Wilson, Jr., Judge.

Action by Tom Hall against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. J. Roberts, C. O. Blake, and W. H. Moore, all of El Reno, K. W. Shartel, of Oklahoma City, and Edward Howell, of Shawnee, for plaintiff in error. Linebaugh & Pinson, of Atoka, for defendant in error.

EDWARDS, C. This is a suit by Tom Hall against the Chicago, Rock Island & Pacific Railway Company, upon three causes of action, the third of which only is involved in this appeal. That count of the petition setting up said third cause of action alleges the residence and employment of plaintiff as section foreman by the defendant railway company until August 7, 1912, at which time, it is alleged, he was discharged. It is then alleged:

"That although duly requested by plaintiff of some person in the offices of the defendant at McAlester, Okl., whose name is to this plaintiff unknown, on or about the 10th day of August, 1912, the said defendant company has failed and refused, and still fails and refuses, to issue to this plaintiff, its employé discharged as aforesaid, any letter, setting forth the nature of the said plaintiff's service to the said corporation, and the duration thereof, and truly stating the cause for which the plaintiff was discharged from the said employment, though in duty bound so to do, under the laws of the state of Oklahoma."

Then follow general allegations of damages and prayer for judgment. In answer to said count, the defendant pleads: First, a general denial; second, that a service letter was issued and delivered to plaintiff on August 7, 1913, and setting out a copy thereof. Upon the trial, the plaintiff testified in regard to the request for a service letter, as follows:

"Q. Well, did you resign from the service, or were you dismissed from the service? A. I resigned. Q. You resigned from the service? A. I resigned on the 2d day of August. Q. You may state whether after you terminated your services with the railroad you requested a letter from the railroad company known as a 'service letter.'"

"Mr. Roberts: Object to that, if the court please, as not being definite enough to bring it within the allegations of the petition; the allegations are specific in the petition, and would like to have it restricted to the allegations."

"The Court: Objection overruled."

"Mr. Roberts: To which ruling the defendant excepts."

"A. Yes, sir, I requested a service letter. Q. Did you get it? A. No, sir. Q. Did you ever

get a service letter? A. I received one one year after the time I requested it."

The plaintiff also testified, in substance, that after he had ceased to be in the employ of the plaintiff in error, he was unable to again get work at his occupation of section foreman, and was compelled to take up the work of coal mining. At the close of the trial, plaintiff in error requested an instruction in these words:

"(8) Requested by defendant. You are instructed that before a recovery can be had on the third cause of action as stated in plaintiff's petition as amended, he must show a demand on the superintendent, or some managing officer, for said service letter, furnishing a sheet of paper without water mark, or waiving such right to furnish such paper, and a failure to furnish such service letter within a reasonable time thereafter, and pecuniary damages resulting to him from such failure"

—which was refused, and, in lieu thereof, the court gave instruction No. 10, as follows:

"(10) If you find from a preponderance of the evidence in this case that, upon leaving the employment of the defendant company the plaintiff herein, Tom Hall, went to the office of defendant company in McAlester, Okl., and demanded of the superintendent or manager thereof, or some one in such office having the authority to issue such letter for the superintendent or manager, that he be given a letter, setting forth the nature of the services rendered (235) by such employé to the defendant company during his employment thereby and the duration thereof, and truly stating the occasion for which such employé was discharged from or quit such service, and that such superintendent or manager of said company at the offices of said company in the city of McAlester, or one of his subordinates having such authority willfully failed, refused, and neglected to give the plaintiff such letter, your verdict should be for the plaintiff, and you should assess his damages in such an amount as you find, from the evidence, will compensate him for all detriment proximately caused him by such refusal, whether it could have been anticipated or not, however, in excess of the sum of \$1,000, the amount sued for."

[1] The statute providing for the issuance of a service letter to employés is found in section 3769, Rev. Laws 1910, as follows:

"Whenever any employé of any public service corporation or of a contractor, who works for such corporation, doing business in this state, shall be discharged or voluntarily quits the service of such employer, it shall be the duty of the superintendent or manager, or contractor, upon request of such employé, to issue to such employé a letter setting forth the nature of the service rendered by such employé to such corporation or contractor and the duration thereof, and truly stating the cause for which such employé was discharged from or quit such service; and, if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employé, when so requested, or shall willfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not less than one month and not exceeding one year: Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employé. No printed blank shall be used, and if such letter be written upon a typewriter, it shall

be signed with pen and black ink and immediately beneath such signature shall be affixed the official stamp, or seal, of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used, upon such piece of paper, except such as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed."

The brief of plaintiff in error is directed mainly to the question of the constitutionality of section 3769, it being insisted that this section is in contravention of the Fourteenth Amendment to the federal Constitution, and also in contravention of section 22, art. 2, Constitution of this state. On principle, the argument against the constitutionality of this act does not appeal to us, but, as we view the record, a decision of this cause will not require a determination of that question.

[2] The testimony of the plaintiff, above quoted, is the only testimony in any manner touching upon a request for a service letter. The act requiring the issuance of such service letter, it will be observed, designates the particular officer by whom it shall be issued, and specifies that it shall be issued upon the request of the employé entitled thereto. The allegation of the petition as to the request is that a request was made upon some person in the office of the defendant, at McAlester, Okl., whose name is to the plaintiff unknown. The testimony of plaintiff below is that he demanded a service letter of the railroad company. There is no evidence as to the form of the request made nor the person upon whom it was made, nor the capacity, if any, in which such person was employed, and no evidence that such request was ever brought to the knowledge of the superintendent or manager or person authorized by the statute to issue such service letter. Under the evidence here relied upon the request might have been made upon any subordinate employé, an office boy, or janitor, and the fact that such request had been made never have been brought to the knowledge of the person authorized to issue a service letter. It is true that the court, in instruction No. 10, instructed the jury that they must find that the request was made upon the superintendent, manager, or some one in such office, having authority to issue such letter for the superintendent or manager, but there is no evidence whatever upon which the jury could have made such finding.

This statute is highly penal in its character, and, in order to fix a liability, should be strictly complied with by the person seeking its benefits. The duty laid upon the superintendent, manager, or contractor is not

to issue the service letter, but to issue the service letter upon the request of the employé. Unless requested, the duty to issue such service letter does not arise, and, since before such duty is incumbent upon the superintendent, manager, or contractor a request must be made, then, obviously, such request must be made upon the person or officer upon whom the duty devolves. The manner in which the request should be made not being specified by the statute, we believe the same might be made orally or in writing, served personally or by mail. As the petition alleges no request as contemplated by the law, and as the proof shows none such to have been made, such allegation and proof are insufficient to meet the requirements of the law.

The cause is reversed, with instructions to the lower court to proceed in accordance with this opinion.

PER CURIAM. Adopted in whole.

COLTER et al. v. MARTIN et al. (No. 7242.)
(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 8, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 564(4)—RECORD—CASE-MADE—TIME OF FILING.

Where a case-made shows it was not made and served within the time provided by law, and further fails to affirmatively show that the order extending the time within which to make and serve same was entered on the journals of the court pursuant to section 5317 or section 5324, Rev. Laws 1910, this court is without jurisdiction, and such appeal should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2504-2506; Dec. Dig. \S 564(4).]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; H. O. Thurman, Judge.

Action by R. T. Colter and others against T. H. Martin and others. There was a judgment for defendants, and plaintiffs bring error. Dismissed.

Stewart & Stewart, of Muskogee, for plaintiffs in error. Charles P. Gotwals and David A. Kline, both of Muskogee, for defendants in error.

DAY, C. Defendants in error filed their supplemental motion to dismiss appeal in this cause on May 24, 1916, service of which was duly acknowledged by attorneys for plaintiffs in error. It appears that no response has been filed to this motion.

The ground set out in the motion is: That the case-made fails to show the same was signed, settled, and served within the time provided by law or within any valid and lawful extension thereof.

The case-made discloses that the order extending the time in which to make, serve,

and settle same was made on the 5th day of February, 1915, and that said case-made was finally settled on the 3d day of March of the same year.

The case-made fails to affirmatively show that the order extending the time within which to make and serve said appeal was entered in the journals of the court pursuant to section 5317 or section 5324, R. L. 1910.

This court is therefore without jurisdiction of this appeal. *Midland Savings & Loan Co. v. Miller*, 155 Pac. 864.

It therefore follows that the motion to dismiss should be sustained.

PER CURIAM. Adopted in whole.

**CHAMPION et ux. v. OKLAHOMA CITY
LAND & DEVELOPMENT CO.***
(No. 6905.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 12, 1916.)

(*Syllabus by the Court.*)

**1. APPEAL AND ERROR — 773(5) — BRIEFS —
NECESSITY.**

Where plaintiff in error files his brief in accordance with the rules of this court, and defendant files no brief within the time allowed, this court is not required to search the record to sustain the judgment of the trial court, but, if the plaintiff's brief appears to fairly sustain his assignments of error, may reverse the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3110; Dec. Dig. ¶ 773(5).]

2. JUDGMENT — 251(1) — PLEADINGS — ISSUES.

The rendition of a judgment which is entirely outside of the issues as made by the pleadings constitutes reversible error.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 437; Dec. Dig. ¶ 251(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by T. F. Champion and wife against the Oklahoma City Land & Development Company. There was a judgment in part for plaintiffs and in part for defendant, from which judgment the plaintiffs appeal. Reversed and remanded, with directions.

See, also, 156 Pac. 342.

Ledbetter, Stuart & Bell, of Oklahoma City, for plaintiffs in error.

BURFORD, C. This was an action instituted in the district court of Oklahoma county by T. F. Champion and wife to cancel certain contracts for deeds, entered into between the plaintiff and one H. S. Hurst. During the course of the trial all of the defendants, except the Oklahoma City Land & Development Company were discharged for various reasons, and the cause proceeded between the plaintiffs and said company. The petition alleged that plaintiffs had entered into certain option contracts with the defendant

Hurst which afterwards became by assignment the property of the defendant company. The essence of these contracts was that the plaintiffs were to convey certain land to the company, provided the defendant constructed, operated, and maintained a standard electric railway to the lands in suit. It was alleged that the defendant had failed to construct, maintain, and operate said railroad, but that the option contracts had been recorded and constituted a cloud upon the title of the plaintiffs, and that their land had been damaged in the sum of \$5,000. The prayer was for cancellation of the contracts, removal of the cloud upon their title, and for the recovery of damages sustained. The defendant answered, alleging a complete compliance upon its part with the terms of the contract, and that it was entitled to a conveyance of the land, but that the plaintiffs had failed and refused to convey the same at the proper time, and that thereby the land had decreased in value in the sum of \$17,500. The prayer was for a specific performance of the contract and a conveyance of the land, and for a recovery of the damages sustained by failing to convey the land at the proper time. A reply in the form of a general denial was filed, and upon these pleadings the cause was tried. The court rendered a judgment in which the option contracts were canceled, and the cloud removed from plaintiff's title, upon the condition that the sum of \$1,000 be paid to the defendant, and said sum was made a lien upon the land in question.

[1] The plaintiff has filed his brief in accordance with the rules of this court, in which it fairly appears that the portion of the judgment rendered, which gave to defendant a recovery in the sum of \$1,000, and made the same a lien upon the land, was without the issues. The defendant has filed no brief. Under order of this court it was given 20 days after the decision on the motion to dismiss, heretofore pending in this cause, in which to brief the cause. That motion was decided on the 21st day of March, 1916, and the defendant has to this date failed to file any brief. Under such circumstances we are not required to search the record for some reason to sustain the judgment of the trial court.

[2] It fairly appears from the brief of the plaintiff in error that the plaintiff was entitled either to a cancellation of the deeds and a recovery of damages to his property, if any had been suffered, or that he was not entitled to any relief whatever, and that the defendant was entitled to a specific performance of the option contract, including a conveyance of the lands, and to recover its damages, if any, or it was not entitled to any relief whatever. The respective rights of the plaintiff and defendant depended upon whether or not there had been a compliance with the terms of the option contract. Upon

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
*Second petition for rehearing denied October 24, 1916.

what theory the trial court canceled the option contract, and yet rendered a judgment for the defendant for \$1,000, and made such judgment a lien upon the land, does not appear. It is to be noted that the defendant did not seek a recovery of the value of the land in controversy, as damages for the breach of the contract, but sought specific performance thereof, and damages for failure to carry out said contract at the proper time. If the defendant was not entitled to specific performance at all, it is indeed difficult to understand how it could be entitled to damages for failure to perform in time. The money judgment must therefore be entirely inconsistent with the judgment that the option contracts be canceled, or else it was rendered for some reason entirely without the issue.

It is therefore ordered that the cause be reversed and remanded to the trial court, with directions to grant a new trial, and take such further proceedings as may be proper and not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

LUSK et al. v. PUGH. (No. 7290.)
(Supreme Court of Oklahoma. June 18, 1916.
Rehearing Denied Sept. 8, 1916.)

(Syllabus by the Court.)

1. RAILROADS \Leftrightarrow 337(1)—CROSSING ACCIDENTS—INJURY.

In order to give a right of action to an individual for the violation of an ordinance of a city requiring a railroad company to constantly keep a flagman at a street crossing, a causal connection between the failure of the company to comply with such ordinance and the injury received must be shown.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1090, 1093; Dec. Dig. \Leftrightarrow 337(1).]

2. RAILROADS \Leftrightarrow 305(1)—CROSSING ACCIDENTS—NOISES.

The railroad company has the right to make all usual noises incident to the moving of its cars, and a person, in a buggy, at a public crossing, whose horse becomes frightened at the noise of the movement of the cars, runs away, and such person is injured, has no cause of action against the railway company, unless the acts of its servants who caused the noise which frightened the animal were unnecessarily made, under such circumstances as to constitute lack of ordinary care, or such noise was recklessly or wantonly made, or done to frighten the horse, and done in the discharge of such servants' business for the company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 968; Dec. Dig. \Leftrightarrow 305(1).]

3. RAILROADS \Leftrightarrow 849(1) — CROSSING ACCIDENTS—EVIDENCE—JURY QUESTION.

The evidence in this case carefully examined, and found not sufficient to sustain the verdict rendered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. \Leftrightarrow 848(1).]

(Additional Syllabus by Editorial Staff.)

4. NEGLIGENCE \Leftrightarrow 58—"PROXIMATE CAUSE."
The "proximate cause" of an event must be understood to be that which, in the natural and

continuous sequence, unbroken by any independent cause, produces that event, and without which that event would not have occurred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 71; Dec. Dig. \Leftrightarrow 58.

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

Commissioners' Opinion, Division No. 1. Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by George Pugh against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. F. Evans, of St. Louis, Mo., and R. A. Klienschmidt and J. H. Grant, both of Oklahoma City, for plaintiffs in error. Charles Mitschrich and J. A. Lenertz, both of Lawton, for defendant in error.

. COLLIER, C. This is an action brought by the defendant in error against the plaintiffs in error to recover for personal injuries sustained by the plaintiff at a crossing in the city of Lawton, Okl. Hereinafter the parties will be designated as they were in the trial court.

The negligence averred in the petition is that said defendants negligently and carelessly ran one of the locomotives used by them in operating said railroad at a high rate of speed into and against a string of cars on the left-hand side of plaintiff and on the west side of said highway, and with a great amount of noise, kicked, pushed, and bumped said cars up to, and upon, and across said highway at said crossing as aforesaid, and negligently and carelessly omitted, while approaching said crossing, to give any signal by ringing a bell or sounding the steam whistle, or otherwise; that said defendants had a flagman at said crossing, as provided for in the city ordinance as above set out, but said flagman was not at his post of duty, and was not in sight of plaintiff, and carelessly failed to give plaintiff any signal either to stop or proceed, or any warning or signal of the approach of said engine or cars, or of the danger of the horse becoming frightened that might be occasioned by the sudden bumping together of said engine and cars as aforesaid, by reason whereof plaintiff was unaware of the approach of said locomotive and string of cars as aforesaid; that solely by reason of defendants' said negligence and the negligence of said flagman in being absent from his post of duty and in failing to signal to plaintiff approaching danger, and in failing to signal him to stop, and by not remaining constantly on duty as required by the ordinance of the city of Lawton, as above set out, and without any fault or negligence on the part of the plaintiff, said violent and sudden kicking and bumping of the cars and locomotive as aforesaid

frightened and scared the plaintiff's horse. In short, the allegations of negligence consisted of the absence of the flagman from his post of duty and the noise incident to the switching of said cars.

The material evidence in the case shows that the tracks of the St. Louis & San Francisco Railway Company run practically east and west through the city of Lawton, and intersect Sixth street at right angles. In addition to the main track there are three additional tracks that intersect Sixth street, paralleling the main line and south of the main line. On the west side of the street there is no sidewalk, and it was usual and customary for cars to be stored on the side tracks up to the sidewalk line, and sometimes beyond that line. The main traveled portion of Sixth street at the crossing is about 40 feet wide. The defendants maintain gates and a watchman at this crossing.

On the date plaintiff was injured, he approached the crossing from the south, riding in a buggy drawn by one horse. A train crew was making up a freight train on the main line, and had placed one car east of Sixth street, with the west end of the car extending out across the sidewalk but not extending into any part of the traveled portion of Sixth street. Two other cars were standing west of the traveled portion of Sixth street, on the main line, with the east end of the cars about on a line with the sidewalk, if the same had extended across the railroad tracks. Another two cars were kicked down and coupled onto the two stationary cars west of Sixth street. Just before this coupling was made, plaintiff had reached a point 15 or 20 feet south of the south tracks, and had stopped his horse for the purpose of looking and listening for approaching trains. Just before the coupling of the last car was made, plaintiff started forward toward the tracks, and as the cars were coupled together, his horse became frightened at the noise and stopped suddenly, throwing plaintiff and his wife and child onto the dashboard, and throwing his wife out of the buggy. The horse then turned to the right, circled around and ran back down Sixth street in the direction from which they had come. As the buggy was being turned, plaintiff was thrown out, and sustained the injuries described in the petition.

The evidence further shows that by an ordinance of the city of Lawton the railroad company was required to at all times keep a flagman at said crossing. Just before and at the time said accident occurred, said flagman at the said Sixth street crossing was in the shelter house, which was located along defendants' north track and just east of the sidewalk on the east side of said crossing.

There was also evidence tending to support the averments of the petition as to the injuries sustained by the plaintiff. The evidence is in conflict as to the volume and character of

noise made by the defendant in coupling up said cars.

Upon the conclusion of plaintiff's testimony, defendants demurred to the evidence of plaintiff, which demurrer was overruled and duly excepted to.

Among other instructions, the court gave the following instruction No. 6:

"And you are instructed, gentlemen of the jury, that it is the duty of a railroad company to observe such provisions of the city ordinances providing for the presence of flagmen at its railroad crossings, and it is the duty of such flagmen to advise travelers approaching such crossing of trains about to cross such railroad crossing, or to advise travelers of any other such movement of trains which might reasonably and ordinarily be expected to frighten horses of travelers, and of conditions occasioned by the movement and direction of trains which reasonably and ordinarily would be expected to frighten the horses of such travelers, and a failure to do so would constitute an act of negligence for which said railway company would be liable, if injury resulted therefrom."

The case was tried to a jury, and resulted in a verdict for the plaintiff in the sum of \$1,350. Timely motion was made for a new trial, which was overruled, duly excepted to, and judgment rendered in accord with the verdict. To reverse said judgment the defendants bring error.

[1] The negligence complained of is a failure of the flagman to be in his place, and thereby violating the ordinance of said city, requiring the flagman to be constantly on duty at said crossing, and the noise made by the coupling of said cars. In order to give a right of action for the violation of an ordinance of a city, causal connection must be proved between the injuries received by the plaintiff and the act of the defendant in violating the ordinance. *Wilson v. Louisville & N. R. Co.*, 146 Ala. 285, 40 South. 941, 8 L. R. A. (N. S.) 988.

"This question has arisen with great frequency in Indiana, where it is generally held, in accordance with *Wilson v. Louisville & N. R. Co.*, that it is necessary to show the causal connection between the violation of the ordinance and the injury. Thus, in *Baltimore & O. S. W. R. Co. v. Conoyer*, 149 Ind. 524, 48 N. E. 355, 49 N. E. 452, it was held that a complaint must show that the failure to comply with the statutory requirements in running its train was the proximate cause of plaintiff's injury, in order to permit the latter to recover, and that the mere allegation that such violation was the proximate cause was not sufficient. And to the same effect was the decision in *Lake Erie & W. R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488." Note, 8 L. R. A. (N. S.) 988.

[4] The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any independent cause, produces that event, and without which that event would not have occurred. *Sherman and Redfield on Negligence*, § 25; *Western R. Co. v. Mutch*, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179; *Louisville & N. R. Co. v. Quick*, 125 Ala. 553, 28 South. 14; *Stanton v. Louisville & N. R. Co.*, 91 Ala. 382, 8 South. 798.

In *St. L. & S. F. R. Co. v. Lee*, 37 Okl. 545, 132 Pac. 1072, 46 L. R. A. (N. S.) 357, it is said:

"In every case involving actionable negligence there must have been a duty on the part of defendant, a failure to perform that duty, and an injury or damage resulting by reason of such failure."

In *St. L. & S. F. R. Co. v. Darnell*, 42 Okl. 394, 141 Pac. 785, it is held:

"* * * Although the defendant may be guilty of negligence, yet to make it liable to a person for injuries received, it must be further shown that the negligence had a causal connection with the injury; that is, that it was the proximate cause of the injury."

In *St. L. & S. F. R. Co. v. Hess*, 34 Okl. 615, 126 Pac. 760, Judge Brewer says:

"It is a well-established rule that in a suit for damages for personal injuries, although the defendant may be shown to have been negligent in some manner, yet, unless the negligence so shown was the proximate cause of the injury complained of, no recovery can be had on account of such negligence."

[2, 3] It is very clear from the evidence in this case that the frightening of the horse, whose action resulted in the injury received, was by reason of the noise made by the coupling of the cars, and that the failure of the flagman to be at his post of duty was not negligence which in any wise contributed to bringing about the injuries complained of. Under said instruction No. 6, hereinbefore set out the jury was authorized to find for the plaintiff by reason alone of the absence of said flagman from his post of duty, an instruction unauthorized in the instant case, and consequently reversible error. It therefore follows that the only possible act of negligence on the part of the defendant which would entitle the plaintiff to recover was the noise made by the coupling of said cars, provided the making of such noise can legally be determined to be actionable negligence.

The authorities are in conflict as to whether the making of unnecessary noises in the operation of a railroad train or cars, which frightens and causes a horse to run away, and thereby inflicts injuries upon a person, is actionable negligence, but the weight of authority is that such noise must not only be unnecessary, but be made under such circumstances as to constitute lack of ordinary care. *Omaha & R. Valley R. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Southern Ry. Co. v. Pool*, 108 Ga. 809, 34 S. E. 141; *Weller v. Lehigh Valley Ry. Co.*, 225 Pa. 110, 73 Atl. 1024, 24 L. R. A. (N. S.) 1202, 133 Am. St. Rep. 861; *Effinger v. Ft. Wayne Traction Co.*, 175 Ind. 175, 93 N. E. 855, 33 L. R. A. (N. S.) 123.

If the noise made by the operation of the railroad company in handling its cars or train, which causes a horse to become frightened and run away, and thereby inflict injuries upon one, is the act of the company's servants recklessly or wantonly done, or done for the purpose of frightening the horse,

and done in the discharge of such servants' business for the company, such acts of the servants constitute actionable negligence.

"The right of a railroad company to operate its road, includes the right to make all the noises incident to the movement and working of its engines, as the escape of steam, and to give the proper and usual admonitions of danger, by blowing the whistle, ringing the bell, etc.; and a person, whose horse, in a buggy, at a public crossing, becoming frightened at the noises or movements of the train, runs away and is injured, has no cause of action against the railroad company, unless the acts of its servants, which caused the fright of the animal, were wanton and malicious, and were done in the discharge of their business for the company." *Stanton v. Louisville & N. R. Co.*, 91 Ala. 882, 8 South. 798, and authorities cited.

In the instant case the damage resulted from the fright of the horse, and the fright of the horse was caused by the noise of handling the cars in switching. The railroad company had the right to make all the usual noises incident to the moving of its cars, and it was therefore incumbent upon the plaintiff, to entitle him to recover, to show that the making of the noise complained of was unnecessarily, made under such circumstances as to constitute lack of ordinary care, or was recklessly or wantonly done, or done with the intention of frightening the horse. There is no evidence of this character in the record.

We are of the opinion that the demurrer to the evidence of plaintiff should have been sustained.

Under the view we take of the case it is unnecessary to review any other of the errors assigned.

Inasmuch as the plaintiff may possibly be able to show liability under the views expressed in this opinion, this cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

STAMM v. SOUTHWESTERN PRESBYTERIAN SANATORIUM et al.

(No. 1874.)

(Supreme Court of New Mexico. July 27, 1916.
Rehearing Denied Sept. 9, 1916.)

(Syllabus by the Court.)

EQUITY § 29 — JURISDICTION — MUNICIPAL CORPORATIONS.

A chancery court cannot pass upon the right of a municipal corporation to acquire and hold lands outside of its territorial limits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 89-92; Dec. Dig. § 29.]

Appeal from District Court, Bernalillo County; Mechem, Judge.

Action by M. P. Stamm against the Southwestern Presbyterian Sanatorium, a corporation, and the City of Albuquerque. From a judgment dismissing the action, plaintiff appeals. Affirmed.

The plaintiff in the district court, who is appellant here, instituted this action in the district court of Bernalillo county against the appellees, seeking a mandatory injunction against the Southwestern Presbyterian Sanatorium, to restrain it from continuing the construction of a certain building alleged to be in the course of erection in a certain street known as Mulberry street, in the city of Albuquerque, and requiring the said sanatorium to remove the building as an obstruction in said street, and further seeking to enjoin the city of Albuquerque and its officers from issuing any permit or license to the sanatorium to use said Mulberry street for private purposes, or for the erection of any building or obstruction thereon. The facts upon which the injunction was sought are, briefly, as follows:

The plaintiff alleges that he is the owner of certain lots fronting on said Mulberry street, all of said lots being situate in the Terrace addition to the city of Albuquerque; that said Mulberry street had been by the owners of said addition dedicated as a public street; that at the time of the purchase by plaintiff of said lots, the said Mulberry street was open for public use and travel; that prior to August 21, 1901, the eastern boundary of the city of Albuquerque in this vicinity was the east line of Mulberry street; that the sanatorium had commenced at the time the complaint was filed, and was then engaged in, the construction of a building upon said Mulberry street between Gold and Central avenues, which building extended 48 feet into the street, by reason whereof the public was prevented from using said street for the purpose for which it was dedicated, and the construction of said building constituted a nuisance; that plaintiff had suffered special damages by reason of the obstruction of said street; and that his property will be permanently damaged and depreciated if the building or obstruction is permitted to remain.

The Southwestern Presbyterian Sanatorium answered the complaint, admitting that it was engaged in the construction of the building upon what had formerly been Mulberry street between Gold and Central avenues, but denying that the same was an obstruction, or that the public is prevented from using Mulberry street for the purpose for which it is dedicated, and further denying that the same would constitute a nuisance, and further set up that at the junction between Mulberry street and Central avenue there was a jog of 48 feet in said Mulberry street, so that, instead of crossing Central avenue on a straight line, said Mulberry street on the south side of Central avenue lay 48 feet to the west of the line of said street on the north side of said Central avenue; that this defendant owned the lots lying in the direct line of Mulberry street as the same had been planned, and in order to straighten said Mulberry street, this de-

fendant offered to exchange with the city of Albuquerque 48 feet of the lots lying just east of Mulberry street for 48 feet of Mulberry street, as platted, which exchange was duly made, the defendant entering into possession of that portion of Mulberry street conveyed to it by the city of Albuquerque, and subsequently making valuable improvements thereon, expending a large sum of money, to wit, the sum of \$12,000, in the erection of a brick building with stone foundations, which cannot be removed without tearing the same down. This defendant further alleged by its answer that Mulberry street had never been opened and worked as a street south of Central avenue, but existed only on paper and as platted as one of the streets of Terrace addition, and further denied that plaintiff had been injured or damaged by its action.

The cause was referred to a referee and considerable testimony was taken, upon which the court made certain findings of fact and conclusions of law, which, so far as we need to consider them, supported the allegations of the answer of the Southwestern Presbyterian Sanatorium.

An answer was also filed by the city of Albuquerque, which admitted the dedication of the street in question as a public street, and set up that the defendant is an incorporated city under the laws of New Mexico, and vested with power to lay out, establish, open, alter, widen, or extend its streets, and, finding it necessary for the convenience of the city to straighten said Mulberry street at the point in question for that purpose exchanged with the Southwestern Presbyterian Sanatorium 48 feet, formerly constituting Mulberry street, for 48 feet of adjoining property owned by the Southwestern Presbyterian Sanatorium lying just east of said street. The answer also alleged that the said street had never been opened and worked as a street between Gold and Central avenues, and could not be traveled as a public highway until the same had been leveled and worked as such, but that when so straightened by the said city of Albuquerque, and leveled and worked as a street the same will be, as this defendant believes, more convenient and answer all purposes of the public. This defendant further denied that plaintiff had been injured or damaged by the action of the city.

The court dismissed the case upon the ground that plaintiff had no cause of action in equity against the defendants, from which decree this appeal was prayed and granted.

H. C. Miller, of El Paso, Tex., and E. W. Dobson and Rodey & Rodey, all of Albuquerque, for appellant. McFie, Edwards & McFie, of Santa Fé, and A. B. McMillen, of Albuquerque, for appellees.

HANNA, J. (after stating the facts as above). There are numerous assignments of

error predicated upon alleged error in the trial court in refusing to grant a temporary injunction, a mandatory injunction, and in refusing to make numerous findings of fact and conclusions of law, which were tendered to the trial court and by it refused.

It is only necessary to determine whether the plaintiff was entitled to equitable relief against the defendants, the trial court holding against the right to such relief. Based upon the essential facts of the case, it would seem to be clear that plaintiff was not entitled to the relief sought, and the district court was not in error in denying the injunction applied for.

Aside from the question of damages or injury to plaintiff, concerning which the record is almost silent and which seems to be based only upon a conclusion of the plaintiff, it would seem clear that plaintiff could not have been materially damaged, in that it is undisputed and clearly borne out by the record that this street had never been opened in point of fact, but had existence only upon the plat of the Terrace addition. Neither is there any contention that the street was the only means of ingress and egress to and from the property of plaintiff, nor does it appear that the plaintiff would be irreparably injured, or that he could not be compensated by a money judgment, but, on the contrary, by his prayer for relief he asked that an account be taken in order that his damage might be ascertained.

The only pleadings in the record are the complaint and the two answers of the defendants, which answers contain certain material allegations which are undenied; no reply thereto having been filed.

The facts thus established are as follows: That Albuquerque is an incorporated city, possessed of the power to lay out, establish, open, alter, widen, and extend the streets of the city; that the city council found it necessary, in order to facilitate traffic, to straighten said Mulberry street from Central avenue to Gold avenue; that in order to straighten said street it exchanged, by proper deeds with the defendant sanatorium, the 48 feet of land immediately east thereof, which said deeds affecting said exchange were duly accepted by the respective parties thereto; that said exchange of lots was made in good faith; that the original Mulberry street had never been opened and worked as a street between Central and Gold avenues, and had existence only on paper, and had never been traveled by the public, and could not have been used as a highway until leveled, and as straightened the said Mulberry street, when leveled, will be more convenient to the public, serving the adjoining and abutting lot owners and the public as well as the original street location.

Bearing these uncontradicted facts in mind as established by the pleadings, we turn to the consideration of the action of the trial court in dismissing the complaint upon the ground that plaintiff was not entitled to eq-

uitable relief. In meeting this contention, the appellant first sets up that a municipal corporation has no authority to receive the conveyance of lands or real estate beyond its boundaries for the purpose of a street; an attempt to do so being ultra vires and void. Appellees, while not admitting the alleged ultra vires character of the action in question, contend that, even though the city did not have such power, the trial court as a court of equity could not properly pass upon the question in the present form of action, and the plaintiff was without standing in court. In this contention we are disposed to agree with appellees. In the case of *Board of Health v. Inhabitants of the City of Trenton*, 63 Atl. 897, the Court of Chancery (N. J.) said:

"The right of a municipality to hold the title to lands beyond its limits is cognizable at law, and involves no equitable principle"

—therefore holding that, in the absence of proof that the use of the proposed hospital would create a nuisance, the court cannot restrain its erection and use simply because the city of Trenton has exceeded its municipal powers in the purchase of the land, because redress for that wrong must be sought in another forum.

We understand appellant to contend that the case under consideration is to be distinguished from the New Jersey case because the building here sought to be enjoined would constitute a nuisance, in that it is erected in the street in question, and is therefore a nuisance per se which could not be licensed by any act of the city council. This contention, however, as we view it, presupposes either that the city was without authority to alter or change Mulberry street—and this fact appellant has admitted by failing to deny the alleged right said to be possessed by the city—or that, because the city has acquired property, said to be outside of the city limits, and the attempt so to acquire being an ultra vires act, it can be properly urged in this proceeding. The first contention not being available, we are left to the consideration of the second; and, as pointed out in the New Jersey case, whether or not the act be ultra vires is purely a question of law, and, being such, does not afford an adequate ground for equitable relief. In other words, as stated in the syllabi of the New Jersey case:

"A chancery court cannot pass upon the right of a municipal corporation to acquire and hold lands outside of its territorial limits."

We are not unmindful of the fact that the appellant argues that the question under consideration is not the right to acquire, but the right to alienate. We do not consider this contention material, however, by reason of the fact that in this particular case the right to alienate would seem to be dependent upon the right to acquire. If the city, in other words, can acquire the land for the purpose of straightening or altering the street in ques-

tion, it can properly alienate the tract which it has attempted to alienate, because in doing so it would preserve a street and would only be changing or altering the same, and therefore would not do violence to that well-established general principle that a municipal corporation cannot dispose of property of a public nature in violation of the trust upon which it is held, the trust in this case being to maintain the street as dedicated for public use; but so long as the street is maintained at this place for such uses, and, as the condition is only one of alteration or change, the attack would necessarily be limited, as is here admitted, to an ultra vires act in acquiring property outside the city limits for the purpose of a street, and which, being purely a question of law, must necessarily be solved as we have pointed out. Our disposition of the matter, as thus arrived at, would seem to make further discussion of the numerous questions considered by the briefs unnecessary.

The judgment of the district court is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

HALFORD DITCH CO. v. INDEPENDENT DITCH CO. (No. 1796.)

(Supreme Court of New Mexico. Aug. 10, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §931(6)—REVIEW — HARMLESS ERROR.

In trials before the court the erroneous admission of testimony will afford no ground for reversal unless it appears that the court considered such testimony in deciding the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8766; Dec. Dig. §931(6).]

2. WATERS AND WATER COURSES §238—IRRIGATION DITCHES—COMMON HEAD—ESTOPPEL.

Where two or more community ditches take water from a common ditch or head, and the lower ditch has enlarged the upper one either by reason of a contract with the upper ditch or by reason of the common consent and acquiescence of the water right owners in said upper ditch, the lower ditch becomes a tenant in common with the upper ditch in the common structure, and as such is entitled to the joint management and control of the same in so far as the joint maintenance of the ditch is concerned.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. §238.]

Error to District Court, San Juan County; E. C. Abbott, District Judge.

Bill by the Halford Ditch Company against the Independent Ditch Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Wm. A. Palmer, of Aztec, and E. P. Davies, of Santa Fé, for plaintiff in error. Palmer & Danburg, of Farmington, and McFie, Edwards & McFie, of Santa Fé, for defendant in error.

PARKER, J. The plaintiff below, a community ditch, plaintiff in error here, filed a bill in the district court for an injunction against the defendant, which is likewise a community ditch. It was alleged in the complaint that in 1897 the settlers and the then members of the plaintiff in error constructed an irrigation ditch or canal in San Juan county, N. M., the course of which is pointed out in the complaint; that during the course of the construction of said ditch the organizers of and settlers under defendant in error made and entered into a certain agreement with the plaintiff in error, a copy of which is attached to the complaint. This contract contained a provision that the defendant in error should enlarge the ditch of plaintiff in error to certain dimensions therein specified, and it was expressly provided that the plaintiff in error was to have complete control of the said ditch, as enlarged, as far down from the mouth as to a certain specified point. It was agreed that the defendant in error should do its part of the repairs to maintain the ditch. This contract is dated February 8, 1892. On September 14, 1896, the parties entered into a subsequent contract to the effect that each of the parties should clean and enlarge the sections of the ditch to eight feet wide on the bottom and nine feet wide two feet above the bottom grade from the head of the ditch to the first division box, and so on down the line of the ditch, decreasing the size of the ditch as the water was taken out by the water users. In this contract it was agreed that the two parties should select a man to take charge of the headgate at the river, whence the water is taken, and to walk the ditch down to a certain spillway as often as necessary to keep all trash from accumulating in the ditch, and do such other work as should be necessary to keep a full head of water in the ditch, and should have the right to such help as he needed to do the work. The expense of keeping such man was to be borne by the two parties in proportion to the amount of water each one owned in the ditch. Subsequently, on the 18th day of April, 1910, the said parties entered into another agreement, but the provisions of the same in no way modified the rights of the parties as to the management and control of the ditch. It was alleged in the bill that the defendant in error had refused, failed, and neglected to perform its proportionate part of the labor and pay its proportionate part of the assessments of the said ditch to the dividing line between the two ditches, and still fails to do so; that the defendant in error, notwithstanding the fact that the complete control and management of the said ditch was in the plaintiff in error, had, without authority or permission of the said plaintiff in error, and against its objections, plowed up and cut

into and destroyed portions of said ditch, lowering the grade thereof and damaging the flumes which are in the portion of said ditch owned by plaintiff in error, thereby seriously damaging the same and partially rendering the same unfit for use; that the defendant in error was continuing to interfere with said ditch, cutting and destroying portions thereof, and threatened to do other and further cutting and interfering of and in said ditch; that by reason of said acts of the defendant in error the plaintiff in error was seriously hindered and delayed in its efforts to place said ditch in its proper condition to deliver water to its members; that by reason of the said acts of the defendant in error the said ditch was rendered in a dangerous condition and not in a proper condition to carry water, to the great damage, difficulty, and annoyance of the plaintiff in error. The plaintiff in error prayed for an injunction against the defendant in error from doing any of the acts complained of save by and under the authority and permission and direction of the plaintiff in error; that defendant in error be enjoined from refusing to perform its proportionate amount of labor and pay its proportionate amount of assessment in said ditch; that the defendant in error pay plaintiff in error \$2,000 damages. The defendant in error answered admitting the existence of the two corporations, the construction of the said ditch by plaintiff in error, the execution of the first contract, above referred to, and alleged that in pursuance thereof the ditch of the plaintiff was enlarged and extended as proposed in said contract; that since about the year 1892 the date of the said first contract, and thereafter for a period of more than 20 years, and until a short time before the time of the beginning of said action, the defendant in error, through its commissioners, chosen from year to year, has had the sole and exclusive control and management of its interests in the common ditch from the joint heading in the Animas river to the end of the common ditch, and that therefrom the plaintiff in error has never claimed or exercised any control or jurisdiction whatever; that during all of said period the respective commissioners of said ditches have adjusted and determined the proportionate expense and labor involved in the maintenance of said ditch and have controlled and directed said work and maintenance without any interference or control whatever, the one of the other, and the same has been apportioned during all of said period according to the respective interests of said parties to this cause. The defendant in error denied all acts of injury to the said ditch, and averred that at all times it had performed its proportionate part of the labor and paid its proportionate part of the expense of the maintenance of the common ditch; denied that the plaintiff in error owned the common ditch to the exclusion of the defendant

in error; averred that the defendant in error had at all times exercised and had the right to exercise sole and exclusive control over its rights and interests in said ditch; denied that it had plowed up, cut into, or destroyed portions of said ditch or lowered the grade thereof, or damaged the flumes, or had in any way interfered with said common ditch so as to in any way damage the same or render it unfit partially or otherwise for the uses and purposes of the plaintiff in error; averred that during the then present season, as it had always heretofore done, it had done and performed, in due and proper season, its proportionate amount of work in cleaning and maintaining said ditch from its said heading throughout the same to the lower line thereof, and had paid out its proportionate share of the expense attached thereto, and that said ditch was in better condition for carrying the full appropriation of water to which the said parties were entitled than the said ditch had ever been before.

The reply was filed by plaintiff in error, denying the allegations of new matter in the answer. The court in its amended decree made the following findings and conclusions, viz.: That the plaintiff is a community ditch company; that the defendant is a community ditch company; that the plaintiff constructed its ditch as alleged in the complaint herein; that the defendant enlarged and extended said ditch of plaintiff as in the complaint alleged, by and under the terms of the original contract between said parties; that by said original contract the parties intended to and did leave the full control and management of said ditch, as enlarged to the lower line of the Coburn place, in the said plaintiff company; that under the laws applicable to community ditches and by reason of the evidence and the later contracts, defendant company became entitled to the joint control and management of said ditch of plaintiff company with plaintiff company. Wherefore it is ordered, adjudged, and decreed that the plaintiff and defendant companies are entitled to the joint control, management, and maintenance of the said joint ditch to the lower line of the Coburn place in proportion to their respective interests therein.

Plaintiff in error assigns ten errors.

[1] 1. The first eight referred to alleged erroneous action of the court in the admission and rejection of certain testimony. We do not deem it necessary to consider these assignments for the reason that the conclusion of the court was entirely justified by other evidence in the case without any testimony whatever on the subject. The erroneous admission of testimony will afford no ground for reversal unless it appears that the court consider such testimony in deciding the case. *Lynch v. Grayson*, 5 N. M. 487, 25 Pac. 992; *Id.*, 163 U. S. 468, 16 Sup.

Ct. 1064, 41 L. Ed. 230; *Radcliffe v. Chaves*, 15 N. M. 258, 110 Pac. 699.

[2] 2. Assignments Nos. 9 and 10 relate to an alleged erroneous holding by the court that the defendant in error became entitled to the joint control and management of said ditch with the plaintiff in error. We are at a loss to understand upon what theory such a contention can be made. The contract of September 14, 1896, expressly provided for the joint management and control of the said ditch under a ditch boss to be jointly selected and paid for by the respective parties and the keeping of the said ditch free from obstruction; and the cleaning and repairs of said ditch is expressly delegated to him. If it be argued that the jurisdiction of the ditch boss provided for in said contract is limited by the same to the irrigation season and does not apply to the annual cleaning of the ditch, it is nevertheless true that the defendant in error acquired an interest in the said common ditch under and in pursuance of the first contract hereinbefore mentioned. It was not acquired by condemnation proceedings; it was acquired by contract, and certainly became a property right in the ditch itself. We know of no law and no reason why a community ditch may not become the absolute owner as tenant in common of a ditch which, by contract with the first owner of the same, is enlarged to a capacity to carry water above the need of the first owner. The relation of the two parties in such a case would seem to be that of tenants in common, because the structure itself has been so changed by the enlargement of the ditch as to be a new and different structure from the original ditch. The defendant in error, having caused this change, became and was the owner, in common with the owners of the old ditch, of the entire structure. Section 5744, Code 1915, requires that, in cases like this one, where two or more community ditches take water from a common

ditch or head, they shall be maintained separately and under separate management. It would seem from this statute that, where a community ditch at the lower end of another ditch has either by contract or condemnation enlarged the upper ditch, the ownership along the line of the common ditch must be that of tenancy in common which would entitle the lower ditch to work, repair, and maintain the common ditch to the same extent as the owners of the upper ditch. It is argued by plaintiff in error that defendant in error can have no title to any interest in the common ditch for two reasons, viz.: (1) A ditch is real estate, and none of the contracts are sufficient in form to convey real estate; (2) even if the contracts amounted to a conveyance, they would be void, for the reason the community ditch does not own the structure, but it is owned by the water users thereunder as tenants in common (*Snow v. Abalos*, 18 N. M. 681, 140 Pac. 1044), and such tenants in common, nor a majority of them, had conveyed or authorized the conveyance. The argument is faulty. Assuming that the officers, acting for the plaintiff in error, were without power to bind the various water users under the old ditch, it nevertheless remains true that they stood by and allowed the defendant in error to enlarge their ditch, and thus change the entire form of the structure, and allowed, for years, the defendant in error to expend money and labor upon the maintenance of the common ditch, upon the understanding, as shown by the evidence, that it owned an interest in the same. Under such circumstances they are estopped to deny the right of defendant in error.

It follows that the judgment of the district court was correct and should be affirmed; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

BANK OF ITALY v. BURNS et al.
(No. 2208.)

(Supreme Court of Nevada. Aug. 1, 1916.)

1. PROPERTY ⇐9—POSSESSION AS EVIDENCE OF OWNERSHIP—BILL OF SALE.

The presumption of ownership which flows from possession merely can be overcome by showing that some person other than the possessor is the real owner; but the mere introduction in evidence of a bill of sale from the consignor of a car did not show that the purchaser had a stronger claim to the car than could have been asserted by the consignor as against the consignee in possession prior to the bill of sale.

[Ed. Note.—For other cases, see Property, Dec. Dig. ⇐9; Evidence, Cent. Dig. §§ 78, 151.]

2. JUDGMENT ⇐682(1) — CONCLUSIVENESS — PRIVACY—POSSESSION OF PROPERTY.

After possession of a car had passed from the consignor to the consignee, and had been attached in a suit against the consignee, and judgment rendered for the plaintiff therein, and after the consignor, who had not been a party to the attachment suit, executed its bill of sale, the purchaser was privy to the judgment, which was admissible in his replevin action against the plaintiff in the attachment suit to show title and right of possession in such plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. ⇐682(1).]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

On petition for rehearing. Denied.

For former opinion, see 156 Pac. 932.

Mack & Green, of Reno, for appellant.
Dodge & Barry, of Reno, for respondents.

COLEMAN, J. Appellant has filed a petition for a rehearing in this case, in which it is contended that our interpretation of the testimony is incorrect. We have again considered the evidence, and are convinced that no other conclusion than the one formerly reached by us can be sustained.

[1] It is also insisted that, since possession is only *prima facie* evidence of ownership, the presumption of ownership, which we found to have been in the Consolidated Motor Car Company at the time of the attachment by Burns, is overcome by the bill of sale of appellant. It is unquestionably true that the presumption of ownership which flows from possession merely can be overcome by showing that some person other than the one in possession is the real owner. But, while this is true as a general proposition of law, the mere introduction in evidence of the alleged bill of sale to appellant did not tend to give it a stronger claim to the car than could have been asserted by the Pope-Hartford Company of Connecticut, the consignor. If appellant had followed up the introduction of its bill of sale by showing affirmatively that the Bank of Italy improperly surrendered the possession of the car to the Consolidated Mo-

tor Car Company, there would be some foundation for the contention.

[2] Fault is also found with what we said in passing upon the action of the trial court in admitting in evidence the judgment roll in the attachment suit of Burns v. Consolidated Motor Car Co. We quote from the petition for rehearing:

"The court further in its decision says that the plaintiff is bound by the judgment which we claimed was erroneously admitted in evidence, because we are privy to that judgment. This is not the law and is not the fact. In order to be a privy to the judgment, the title of the party to the truck must have been in question and must have been passed upon by the court. The mere fact that the property was under attachment for the debt of the Consolidated Motor Car Company does not make the Bank of Italy the true owner of the property privy to that judgment."

Numerous authorities are quoted to sustain counsel's contention. We quote from two of them:

"Every person is privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing of the action." 24 Am. & Eng. Ency. of Law (2d Ed.) p. 746.

The converse is stated in another quotation:

"It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." Freeman on Judgments (4th Ed.) vol. 1, § 162.

From the authorities quoted, it appears that when one purchases property *after* a suit is brought, in which the title to it is involved, the purchaser is privy to the judgment; but, on the other hand, if he purchases *before* the suit is brought, he is not privy to the judgment. From the opinion in this case it appears that appellant did not obtain its bill of sale until nearly seven months after the suit was brought. The fact that the Pope-Hartford Company of Connecticut, from whom appellant got its bill of sale, was not a party to the attachment suit, matters not, for the reason that its title was cut off by reason of the possession of the car passing to the Consolidated Motor Car Company, and the subsequent proceedings.

Respondent makes a motion to dismiss the petition for rehearing for the reason that a copy of it was served by mail instead of in the manner provided in chapter 48, Revised Laws (sections 5367-5375), for the service of notices and other papers. Rule 15 (154 Pac. x) of this court does not provide in what manner a copy of such petition shall be served; and in view of the fact that we have concluded that the petition should be denied, for the reasons already stated, we do not find it necessary to pass upon the motion, but feel that it would not be out of place to call the

attention of the bar to the seriousness of the point suggested.

The petition for a rehearing is denied.

NORCROSS, C. J., and McCARRAN, J., concur.

In re HARTUNG'S ESTATE. (No. 2194.)
(Supreme Court of Nevada. March 31, 1916.)

1. COSTS \S 264 — RETAXATION OF COSTS ON APPEAL—JURISDICTION—RULE OF COURT.

Under Supreme Court rule 6, par. 3 (154 Pac. viii), providing for taxation of costs by the clerk, and for objections thereto and appeal from his decision, this court has no jurisdiction to consider an application for an order to retax the costs on appeal, except on appeal from a decision of the clerk.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 1004-1008; Dec. Dig. \S 264.]

2. APPEAL AND ERROR \S 175 — DETERMINATION—ISSUES NOT TRIED BELOW—AWARD OF ATTORNEY'S FEES.

The Supreme Court could not make an order in the matter of the distribution of an estate directing that the appellant pay the expenses of the proceedings theretofore had out of the funds coming to it from the estate, including its attorney's fees, where no issue had been made up and tried in the lower court, since the granting of such order would be equivalent to rendering a judgment against appellant in a proceeding in which it had not had its day in court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1137-1140; Dec. Dig. \S 175.]

On motions to retax costs and for attorney's fees. Motions denied.

For former opinion, see 155 Pac. 353.

Thomas E. Kepner and Mack & Green, all of Reno, for appellant. Cheney, Downer, Price & Hawkins, of Reno, for respondent.

COLEMAN, J. Since the filing of the opinion in this case, counsel for appellant have applied to the court for an order to retax the costs on appeal, and for an order awarding them attorney's fees.

[1] As to the first motion, we need simply say that the court is without jurisdiction to

consider it. Paragraph 3 of rule 6 of this court (154 Pac. viii) provides:

"If either party desires to object to the costs claimed by the opposite party, he shall, within ten days after the service upon him of a copy of the cost bill, file with the clerk and serve his objections. Said objections shall be heard and settled and the costs taxed by the clerk. An appeal may be taken from the decision of the clerk, either by written notice of five days, or orally and instant, to the justices of the court, and the decision of such justices shall be final. If there be no objections to the costs claimed by the party entitled thereto, they shall be taxed as claimed in the cost bill."

From even a casual reading of this rule it will be seen that this court cannot consider objections to a cost bill except on appeal from a decision of the clerk of the court. The matter is not before us on appeal from such a decision.

[2] In the matter of the motion for allowance of attorney's fees, it is asked that the court enter an order directing the Grand Lodge of the Independent Order of Odd Fellows to pay the expenses of the proceedings heretofore had, including the attorney's fees, "out of the funds coming to said Grand Lodge" from the Hartung estate.

In the first place, we do not see how we can make an order on this appeal which in legal effect would be a judgment in favor of the attorneys and against the appellant. No issue has been made up and tried in the lower court involving the question, and no such question was before us on appeal. To grant the order sought would be equivalent, in legal effect, to rendering a judgment against appellant in a proceeding in which it has not had its day in court.

If counsel for appellant are entitled to any compensation for their services out of the estate of decedent, we think it is entirely a matter within the province of the court below.

It is the order of the court that both motions be denied.

NORCROSS, C. J., and McCARRAN, J., concur.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SOUTHERN PAC. CO. et al. v. SPRING VALLEY WATER CO. et al. (S. F. 6846.)

(Supreme Court of California. Aug. 22, 1916.
Rehearing Denied Sept. 21, 1916.)

1. WATERS AND WATER COURSES — 191—WATER COMPANY—CONSTRUCTION OF CONTRACT.

In view of Civ. Code, § 1636, requiring a contract to be interpreted to give effect to the mutual intention of the parties, an instrument, whereby a railroad, in consideration of \$5 and the construction and maintenance of a hydrant at a station and the free use of water therefrom for fire and railroad purposes, granted a water company the right to lay and maintain a water conduit on its railroad line, passing through the station grounds at an unincorporated village where no water rate had been fixed, constituted an agreement by the water company to furnish water for the railroad from its main free of charge.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. —191.]

2. WATERS AND WATER COURSES — 191—WATER COMPANY—CONTRACT—RIGHTS OF PARTIES.

Under such instrument, the right granted to the water company to lay and maintain its pipe line in the railroad's land and to conduct water therein was a species of real property, incorporeal in nature, though the pipe and the water while passing through it were corporeal in character, and were real property belonging to the water company, and was in exchange for the railroad's right to take a part of the water which water right was a burden or servitude upon the water company's pipe line and system, which respective rights, upon the completion of the pipe line and the running of water therein, became executed and not executory, and which, though not limited as to time, were not perpetual, but continued while the conduit was used.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. —191.]

3. CONTRACTS — 108(2)—PUBLIC POLICY.

Such instrument or contract, in the absence of any regulation or any public authority forbidding it, and in the absence of any showing that the taking of water for railroad uses reduced the supply below the quantity necessary or convenient for the water company's consumers entitled to or applying for it, or that it would have been used but for such taking, was not void because opposed to public policy; as in such case the company, though its water was devoted to a public use, might freely contract with the railroad as a consumer regarding the price of service and the manner of payment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503, 505, 507-511; Dec. Dig. —108(2).]

4. WATERS AND WATER COURSES — 188(2) — WATER COMPANY — CONTRACTS — REVISION AND REFORM.

The persons in charge of property devoted to a public use are trustees in the execution of a public trust, and cannot burden such trust, or the property devoted to its purposes, by imposing obligations upon themselves or upon the property which destroy or impair the public use, and cannot convey it away absolutely to private uses, or contract for a preference to one consumer to the detriment of others; and any contract, purporting to give such preference or to transfer a part of the dedicated public supply to private use, is subject to revision by competent public authority, and to reformation to make them conform to the public interest, which power to revise and reform applies to a contract of a pub-

lic service water company, creating an easement in the water held for a public use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 287; Dec. Dig. —188(2).]

5. WATERS AND WATER COURSES — 197—WATER SUPPLY—CONTRACTS—REMEDY.

Under Const. art. 12, § 23, and Public Utilities Act (St. 1911, Sp. Sess. p. 18), vesting the power of revision and regulation of the acts, contracts, etc., of railroads in the Railroad Commission, and section 74 of the act, declaring that it shall not release or waive any right of action of any person for any right which shall accrue under the law of the state, a railroad, party to an instrument whereby a water company, in consideration of a grant of an easement for its pipe line, was to furnish it with water for railroad purposes, though it might apply to the Commission for Relief, might also resort to an ordinary action in the court for the enforcement of its rights under such instrument.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 271; Dec. Dig. —197.]

6. SALES — 96, 113 — PERSONAL PROPERTY — CONTRACT—TERMINATION.

A contract, properly classified as an agreement to buy and sell personal property, whereby one party agrees to supply a commodity to the other, as required, at a fixed price payable in advance, or on delivery, and silent as to its duration, is terminable by either party after a reasonable time and upon reasonable notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 261, 286, 287; Dec. Dig. —96, 113.]

7. WATERS AND WATER COURSES — 191—CONTRACTS—TERMINATION—EASEMENTS.

Such principle does not apply to a case where a contract creates an easement or servitude in real property, and the alleged buying and selling of the water of a water company consists merely in its continued enjoyment of an easement for its pipe line, in consideration of furnishing water to a railroad.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. —191.]

In Bank. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by the Southern Pacific Company and another against the Spring Valley Water Company and another, to have plaintiffs' right to receive water from defendants' main established, and to enjoin defendants from depriving plaintiffs of such water. Judgment for defendants, new trial denied, and plaintiffs appeal. Judgment and order reversed.

Frank Thunen, Stanley Moore, and Frank McGowan, all of San Francisco (A. A. Moore, of San Francisco, of counsel), for appellants. McCutchen, Olney & Willard, of San Francisco, for respondents.

SHAW, J. The object of this action was to have the right of the plaintiffs to receive water from the defendants' main to the water tank of the plaintiffs at Newark station in Alameda county declared and established, and to enjoin the defendants from cutting the connection between said main and the tank, or from depriving plaintiffs of said water. The court made findings and gave its judgment in favor of the defendants. From

this judgment and from an order denying a new trial the plaintiffs appeal.

The plaintiffs claim the right, to have the delivery of water into their tanks at Newark continued indefinitely and without further charge, under an instrument in writing executed on May 10, 1888, by the two plaintiffs and by the defendant Spring Valley Waterworks. The instrument of May 10, 1888, omitting the unimportant parts, is as follows:

"Know all men by these presents: That the South Pacific Coast Railway Company and the Southern Pacific Company, grantors, in consideration of five dollars to them in hand paid, and in consideration of the construction and maintenance of a hydrant at Newark station and the free use of water therefrom for fire and station and all other railroad purposes, have granted and by these presents do grant unto the Spring Valley Waterworks, grantee, the right to lay and maintain a line or lines of iron water pipe conduit for the waters of said grantee on and along the line situate, lying and being in the county of Alameda in the state of California, described as follows, to wit [here follows a description of the line of the conduit]."

"The said pipes to be laid so that the upper surface there shall be at least two and one half feet below the natural surface of the ground, and the ground to be restored and maintained by the said grantee, its successors and assigns, to the natural level and grade thereof;" "To have and to hold the said right of way unto the said grantee, its successors and assigns forever."

At the time this instrument was executed the Spring Valley Waterworks was constructing a water main to carry water from its source in Alameda county to San Francisco, for the use of the city and county of San Francisco and its inhabitants. The right of way granted by said instrument was to be used as a place along which to lay said water main. The South Pacific Coast Railway Company was the owner of a line of railroad running from Oakland through Newark Station to Santa Cruz. The Southern Pacific Company was operating said railroad under a lease from its coplaintiff. The right of way granted extended along the line of the railroad through the village of Newark, and was nearly four miles in length. It was parallel to the track, partly on one side thereof and partly on the other, passing under the track twice, and was situated from 32 to 36 feet therefrom. A main 3 feet in diameter was immediately laid by said waterworks along the line described, and for the purpose of supplying water to the plaintiffs' water tank it inserted, near the station at Newark, a 6-inch tap in the water main, which was reduced to a 3-inch pipe extending from the tap to the water tank. The plaintiffs thereafter regulated the flow through this connection, so as to keep the tank filled with water for use when wanted. On September 14, 1903, the Spring Valley Waterworks transferred its sources of supply and system of works, including the main through Newark, to the Spring Valley Water Company, and the latter has ever since continued to operate the system and to keep

water flowing in said main and to plaintiffs' water tank. The Southern Pacific Company has taken from said tank the water needed at that place for use in the operation of its railroad and for the other purposes mentioned.

Shortly before this action was begun the defendants threatened that unless the plaintiffs would thereafter pay a reasonable charge for the water taken for such railroad purposes, the defendants would, on March 10, 1913, cut off the connection to the tank and refuse to deliver water thereafter. The village of Newark is unincorporated. The supervisors of Alameda county have never fixed rates for the service of water devoted to public use within the county, and no public authority has ever fixed such rates or made any orders regarding the supply to the plaintiffs.

At the time of the sale or transfer of the water system from the Spring Valley Waterworks to the Spring Valley Water Company, in 1903, the latter company had full knowledge of the existence and contents of said agreement of May 10, 1888, above set forth. At the time of the execution of said instrument the plaintiffs did not take from said tank for their use more than 25,000 gallons of water per day. Since that time the railroad has been changed from narrow gauge to standard gauge, a branch line from Newark to Dunbarton point has been built, and more locomotives and trains have been run, so that at the present time the railroad takes and uses an average of 50,000 gallons daily.

The respondents, in support of the judgment, advance the following propositions: (1) That the language of the instrument of May 10, 1888, does not constitute an agreement by the Spring Valley Waterworks to furnish water to the railroad company. (2) That the defendants are corporations engaged in supplying water for public use of which the water in controversy constitutes a part, and that a contract by such public utility corporation to furnish water from its supply perpetually is opposed to public policy, and consequently invalid. (3) They also claim that the case is an action to enjoin the breach of a contract, which, under section 3423 of the Civil Code, cannot be maintained, unless the facts would support an action for its specific performance, and that it does not appear that the consideration was adequate, or that the contract was just and reasonable, or that there is not an ample remedy at law by an action for damages after the threatened breach occurs.

[1] 1. The claim that the instrument does not constitute an agreement by the Spring Valley Waterworks to furnish water to the plaintiffs is untenable. The railroad companies were the owners of the land through which the waterworks desired to lay a main in which to carry water. The grant by the railroad company to the waterworks consist-

ed of an easement in their land to lay and maintain, perpetually if desired, the said water main along the line described, which passed through Newark near the plaintiffs' station there, and to carry its water therein. It declares that this easement was granted—

"in consideration of the construction and maintenance of a hydrant at Newark Station and the free use of water therefrom for fire and station and all other railroad purposes."

This language necessarily implies that the hydrant was to be constructed and maintained by the waterworks, and that the free use of water therefrom was to be of the water which the waterworks was to have flowing through said main. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636. The intention that the waterworks was to furnish the water, of which the plaintiffs were to have the free use, is clearly ascertainable from the contract itself. To hold that the instrument does not express such agreement would not give effect to its obvious intention, but would defeat it.

[2] The nature of some of the elements of the right thus granted by the waterworks to the railroad companies is well established. The right granted to the waterworks to lay and maintain the pipe line in the land and to conduct water therein was a species of real property, incorporeal in nature. The pipe and the water while passing through it were corporeal in character and were real property belonging to the waterworks. *Stanislaus W. Co. v. Bachman*, 152 Cal. 725, 93 Pac. 858, 15 L. R. A. (N. S.) 359; *Copeland v. Fairview Land Co.*, 165 Cal. 154, 131 Pac. 119. The instrument was, in legal effect, in the nature of an exchange, a grant of a right of way for the water conduit by the railroad companies to the waterworks, and a grant by the waterworks to the railroad of a water right, consisting of a right to take a part of the water flowing in the conduit, by means of the connecting pipe, as needed. The water right was a burden or servitude upon the pipe line and water system of the waterworks, a right to a part of its water. *Washburn on Easements*, 3, 5, 305; Civ. Code § 801. As to the respective rights, upon the completion of the pipe and the running of water therein, the respective agreements became executed, not executory. The right of way and its use thereafter was accepted by the waterworks as payment in advance for the future use of the water by the railroad companies. These respective rights were indefinite and unlimited, as to time, but they were not necessarily perpetual. There was no covenant or agreement by the waterworks to lay the pipe line, or to carry water therein, or to maintain either the pipe line, or the flow of water therein, for any period of time, or at all. Its only agreement

was that, after it had laid the conduit and when it did carry water in it, the plaintiffs should have free use of that water for the purposes designated. The waterworks could, at any time, change the route of its main to other lands without violating the contract, and would thereafter have been relieved of the burden. The waterworks was authorized to own, sell, and distribute water to public use, and the water in question was a part of the water supply which it held, managed, and controlled for that purpose. It could at any time, by purchase, or, if necessary, by condemnation suit, acquire a new route for its main. But so long as it maintained the route given, the right of plaintiffs was a burden or servitude thereon which entitled them to take and use water from the main to the quantity necessary for the purposes specified.

[3] 2. We perceive no valid reason for holding the contract void because opposed to public policy. It is not claimed that it was not freely made, or that it was procured by fraud or undue influence. There is nothing inherently wrong in such a contract to give water service upon payment in advance. No regulation or rule of any public authority empowered to control or regulate public water service in Alameda county had or has forbidden it. There is no claim that the taking of this water by the plaintiff has reduced the supply remaining in control of the defendants below the quantity necessary or convenient for the other consumers entitled to it or applying for it, or that the supply to plaintiffs has not been from a surplus that would have been unused but for their taking. Where the rates for water devoted to public use have not been fixed by public authority, the person in charge of the use and the consumer may freely contract regarding the price of service and the manner of payment, and such contracts will be deemed valid by the courts, and may be enforced by any appropriate mode. *Fresno, etc., Co. v. Park*, 129 Cal. 437, 62 Pac. 87; *Stanislaus W. Co. v. Bachman*, supra, 152 Cal. 730, 93 Pac. 858, 15 L. R. A. (N. S.) 359; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 90, 106 Pac. 404, 29 L. R. A. (N. S.) 213.

[4] It is true, as said in the *Leavitt Case*, that the person in charge of the public use is a trustee in charge of a public trust, "the agent in the execution of this public trust," and that he cannot lawfully burden this trust, or the property devoted to and held for the purposes of that trust, by imposing obligations upon himself, or burdens upon the property, which destroy or impair the public use or the public interest therein. And so he cannot convey it away absolutely to private use, or contract for a preference to one consumer to the detriment of others in the public use. Any contract purporting to give such preference in the public use, or to transfer a part of the dedicated public supply to private

use, is subject to revision by competent public authority, to the end that the public service shall not be unjustly discriminatory, or unreasonable, and that the private use shall not interfere with the public use, and such contracts may, by such authority, be reformed accordingly, to make them conform to the public interest. *Turtle Creek Borough v. Pennsylvania W. Co.*, 243 Pa. 408, 90 Atl. 194; *Bellevue Borough v. Ohio V. W. Co.*, 245 Pa. 117, 91 Atl. 236. See, also, *Fresno, etc., Co. v. Park*, supra; *Stanislaus W. Co. v. Bachman*, supra. In the case first cited it is said that the power to fix rates and regulate public service of water devoted to public use "carries with it jurisdiction to determine the reasonableness of charges, irrespective of prior contracts; to that extent such contracts may be reformed." But until such public authority has intervened and modified such prior contract, it will be recognized as valid, and enforced in the courts, as declared in our decisions above cited. The power to revise and reform contracts of public service water companies, in the interest of the public, applies as well to a contract creating, or attempting to create, an easement in the water held for public use as to any other disposition thereof.

[5] In this state this power of revision and regulation is now, and was when this controversy arose, lodged in the Railroad Commission by the Public Utilities Act of 1911. Stats. 1911, Sp. Sess. p. 18; Const., art. 12, § 23. The act provides, however, that it shall not operate to release or waive any right of action of any person for any right "which may have arisen or accrued or may hereafter arise or accrue under any law of this state." Section 74. It follows that, although the parties may apply to the Commission for relief, they may also resort to ordinary actions or proceedings in the courts for the enforcement of rights arising under contracts allowed by the Commission to remain in force relating to the service of water. The result is that the plaintiffs are possessed of an easement or servitude upon the water system of the defendant Spring Valley Water Company, by virtue of which they are entitled to share in the water flowing in the main, to the extent required for the uses mentioned in the contract, that they had been in the enjoyment thereof for 25 years at the time the defendant first disputed their right, and that they still have the right to such use without charge.

A question may arise in the further prosecution of the case whether the plaintiffs are now entitled to more water than would have been necessary to supply the narrow gauge road owned and operated by the plaintiffs in 1888, when the contract was made, if it had not been changed to standard gauge, and whether they are entitled to water for the line crossing at Newark which was afterwards constructed. We cannot determine

these questions upon this appeal. The facts necessary for that purpose are not found.

[6, 7] In the oral argument respondents' counsel cited a number of cases, to the effect that a contract, whereby one party agrees to supply a commodity to the other, as required, at a fixed price, whether paid in advance or payable on delivery, and is silent as to its duration, may be terminated by either party after a reasonable time and upon reasonable notice. *McCullough, etc., v. Philadelphia Co.*, 223 Pa. 336, 72 Atl. 633; *Turtle Cr. Bor. v. Pennsylvania W. Co.*, supra; *Bellevue Borough v. Ohio Co.*, supra; *Echols v. New Orleans, etc., Co.*, 52 Miss. 614. The principle is well established and is applicable in all cases where the contract is properly classified as an agreement to buy and sell personal property. It does not apply to a case like the present, where, as we have seen, the contract creates an easement or servitude in real property and the supposed buying and selling of the water consists merely in the continued enjoyment of the easement. In the *McCullough* Case above cited the facts were similar to the case at bar, except that in return for the right to lay and maintain a pipe line for carrying natural gas, the other party was to have gas for fuel in its factory at certain fixed rates, but was silent as to the time it was to continue in force. The court in that case evidently considered the agreement to furnish gas as an agreement for the sale of personal property, and its decision was based wholly on cases of that character. It was not treated on the theory that the right to receive gas was an easement in the gas company's system. In the other Pennsylvania cases cited the contracts were made by a public service company with a municipality to furnish water to consumers at fixed rates. In that state, at that time, the courts had jurisdiction to regulate the water service and fix rates. The cases were decided partly upon the theory that the service of water by such companies was a matter of public concern; that the contracts were subject to revision in the public interest by competent public authority and were not enforceable against that interest. It was also said that, being indefinite as to time, the contracts were terminable by either party on reasonable notice. The personal property cases were referred to in support of this principle, and the case was obviously decided upon the hypothesis that they involved the sale and delivery of personal property, and not the mere enjoyment of an easement. In none of the cases was the right to receive the thing to be furnished understood to be a vested estate in realty of the nature of an easement. As we have said, the agreement is subject to revision in the public interest by the Railroad Commission. But the courts can only declare and enforce the rights as they exist. Until some order to the contrary is made by the Commission, the plaintiffs are entitled to the

use of the water as provided in the agreement without payment of anything other than the original consideration.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

BORDWELL v. WILLIAMS, County Clerk.
(L. A. 4892.)

(Supreme Court of California. Aug. 18, 1916.)

1. ELECTIONS §146—RIGHT TO SEEK OFFICE.

The right to seek election to any office is open to all persons possessing the constitutional or statutory qualifications, but a citizen is under no obligation to seek an election to any office, and may be a candidate or refuse to be such at his option.

[Ed. Note.—For other cases, see Elections, Dec. Dig. §146.]

2. ELECTIONS §126(1) — PRIMARY ELECTIONS — RIGHT OF CANDIDATE TO WITHDRAW — STATUTE.

Though all necessary steps have been taken to enable one to become a candidate for nomination for the office of United States Senator under the Direct Primary Law (St. 1913, p. 1379), and within the 35 days before election allowed by section 5, subd. 4, he has filed with the secretary of state his affidavit stating that, if nominated, he would accept and not withdraw, and would qualify if nominated and elected, and his name has been certified to county clerks, with directions to print it on the primary ballot as a candidate, and his name has been published as required by section 10, and put on sample ballots, he may withdraw as a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. §126(1).]

3. MANDAMUS §74(3)—PRIMARY ELECTIONS—WITHDRAWAL OF CANDIDATE—MANDAMUS TO COUNTY CLERK—STATUTE.

Under the Direct Primary Law, section 10 of which requires the county clerk to publish the names appearing upon the list certified to him by the secretary of state, section 12, providing that the names of all candidates for whom nomination papers have been filed shall be printed on the ballot, and section 27, authorizing an application to the Supreme Court in case of error, omission, or wrongful act in placing any name on an official primary election ballot or in printing such ballot, and authorizing the court to order the officer to correct the error, the county clerk acts ministerially in publishing the names certified to him, and, where a candidate withdraws after the secretary of state has made his certificate, the court, by mandamus, may compel the county clerk to omit such candidate's name from the ballot to be used in a forthcoming primary election.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 150; Dec. Dig. §74(3).]

Angellotti, C. J., and Lawlor, J., dissenting.

In Bank. Mandamus proceeding by Walter Bordwell against W. B. Williams, County Clerk of Orange County. Peremptory writ issued.

Samuel M. Shortridge and Catlin, Catlin & Friedman, all of San Francisco, Frank P. Doherty and G. E. Spencer, both of Los Angeles, and W. S. Woodworth, of Los Angeles, for petitioner. L. A. West, of Santa Ana, for respondent.

SLOSS, J. This is a proceeding in mandamus to compel the county clerk of Orange county to omit from the ballots to be prepared by him for use in the forthcoming primary election the name of the petitioner, Walter Bordwell, as a candidate for the Republican nomination for the office of United States Senator. The election is to be held on August 29, 1916. An alternative writ has issued, and the respondent has made return thereto. The material facts are not in controversy.

Pursuant to the provisions of the Direct Primary Law (Stats. 1913, p. 1379), a committee of five electors proposed the name of the petitioner as a candidate at the said primary election for the Republican nomination for the office of United States Senator. They duly appointed verification deputies in the several counties, and nomination papers signed by the requisite number of qualified electors were filed in the county of Los Angeles and other counties. The signatures were examined and the registrars or county clerks of the various counties duly certified to the secretary of state a sufficient number of qualified electors to entitle the petitioner to have his name placed upon the primary ballot. Within the time allowed by the statute—i. e., not less than 35 days before the election (section 5, subd. 4)—Mr. Bordwell filed with the secretary of state his affidavit stating, in addition to the other matters required, that if nominated he would accept such nomination and not withdraw, and that he would qualify as such officer if nominated and elected. The secretary of state thereupon certified the name of the petitioner to the respondent and to the county clerks and registrars in the several counties, directing said officers to print on the primary ballot the name of the petitioner as a candidate for the Republican nomination for the office of United States Senator.

After receiving such certificate, the respondent published, as required by section 10 of the act, the names and addresses of all persons, including the petitioner, for whom nomination papers had been filed in the office of the secretary of state. He also caused to be prepared sample ballots including, among other names, that of petitioner, and has directed the printing of official ballots in like form. On the 9th day of August, 1916, petitioner notified the secretary of state, the respondent herein, and all county clerks and registrars of voters that he had withdrawn as a candidate for said nomination, and directed each of said officials not to print or publish his name upon any primary ballot to be used in said election on August 29th. The respondent refuses to have the name of the petitioner removed from the ballot, and the purpose of this proceeding is to compel such removal.

[1] The right to seek election to any office

is open to all persons possessing the constitutional or statutory qualifications. A citizen is, however, under no obligation to seek election to an office. He may be a candidate, or refuse to be such, at his option, and, in the absence of statutory provision to the contrary, the mere fact that he has once announced his candidacy for an office does not prevent him from withdrawing as a candidate whenever he sees fit so to do.

[2] Does our statute change this rule? In other words, does the fact that Mr. Bordwell, and the committee acting on his behalf, had taken the necessary steps to enable him to become a candidate at the August primary election, constitute a bar to his withdrawing his candidacy for such nomination prior to the election? The act contains nothing which in direct terms bears upon the question of withdrawal at this stage. Before any elector may have his name placed upon the ballot as a candidate, he must sign an affidavit stating that, if nominated, he will accept such nomination and not withdraw. But this provision, obviously, has application only to the condition existing after the primary election, at which, if at all, he will be "nominated." We need not here inquire whether the provision for this affidavit carries with it an implied prohibition against withdrawal by a candidate who has been successful in obtaining a party nomination at the primary. The Court of Appeals of Kentucky has held, under a statute very similar to ours, that a withdrawal may be made after the election. *Elswick v. Ratliff*, 166 Ky. 149, 179 S. W. 11. The contrary view has been expressed by the Supreme Court of Nevada. *State v. Hamilton*, 33 Nev. 418, 111 Pac. 1026. But, without regard to this question, it is perfectly clear that the statute does not, either in terms or impliedly, prohibit a withdrawal before the election. On the contrary, the fact that the statute in terms requires an affidavit that the candidate will not withdraw *if nominated* gives persuasive indication that a withdrawal before nomination (i. e., before the primary election) was contemplated by the framers of the act as authorized. And such is the holding in a late Nevada case (*State v. Brodigan*, 37 Nev. 458, 142 Pac. 520), in which the earlier decision in *State v. Hamilton* is distinguished upon this very ground.

[3] If, then, the petitioner has the right to withdraw his candidacy for the nomination, the right should be made effectual and operative, unless some insuperable obstacle intervenes. We find no such obstacle in the statute. Much stress is laid upon the fact that under section 10 of the act the county clerk or registrar is required to publish the names which appear upon the certified list transmitted to him by the secretary of state, and that this list is to contain the names "of each person for whom nomination papers have been filed in the office of such secretary of state." So, too, section 12, defining the

form of ballots, provides "that the names of all candidates for the respective offices for whom nomination papers have been duly filed shall be printed thereon." Undoubtedly the county clerk acts ministerially, and the information upon which he so acts is that received by him from the secretary of state. But it does not follow that the certificate of the secretary of state must finally conclude every one with respect to the form and contents of the ballot. Section 27 of the act authorizes an application to this court, to a District Court of Appeal, or to a superior court, whenever it shall be made to appear "that an error or omission has occurred or is about to occur in the placing of any name on an official primary election ballot, that any error has been or is about to be committed in printing such ballot, or that any wrongful act has been or is about to be done by any * * * county clerk, registrar of voters * * * or other person charged with any duty concerning the primary election," and authorizes the court to order the officer or person charged with such error, wrong, or neglect to correct the error, desist from the wrongful act, or perform the duty. This is broad language, and we think it was designed to vest in the courts a broad control over all officers performing duties in connection with the primary elections. With respect to the names of the candidates to be placed upon the ballots, the remedy is not, under this section, limited to an application to compel the secretary of state to issue the proper certificate. The power of that officer to transmit certified lists of candidates expires 30 days before the primary election. After that date all duties connected with the preparation of the ballots are confided to the county clerks or registrars of voters. It cannot have been contemplated that an error or impropriety in a proposed ballot should be beyond correction after the secretary of state had once issued his certificate and the time within which he could issue a corrected certificate had expired. If he should, on the last day allowed by law, issue a certificate which omitted the name of a candidate whose name should be upon the ballot, the only possible remedy would be by application to a court for an order requiring the county clerk or registrar of voters to make the necessary correction. Just such an application is, we think, contemplated and authorized by section 27 of the act, and we think the situation is the same where, by reason of circumstances arising after the secretary of state has made his certificate, the correct form of ballot is not that indicated by his certificate.

This interpretation of the statute is in accord with the fundamental purpose of all election laws; i. e., to enable the voters to exercise a free, orderly, and intelligent choice. We can conceive of no good reason why a ballot should contain the name of a person who is not in fact a candidate for

nomination, even though he may once have taken the steps which entitle him to become such candidate. The presence of his name (like that of a candidate who has died) could operate only to deprive uninformed electors of their votes, to the injury of one or more of the actual candidates, and to the possible perversion of the true popular will. We are not prepared to hold that the law requires this result. To give to the certificate of the secretary of state the conclusive effect contended for by the respondent would be to elevate form above substance. We believe, on the contrary, that the statute contemplates a submission to the electors of a choice between persons who are candidates in fact, and that where, from any cause, the ballots do not present that choice, the courts are authorized, under section 27 of the act, to direct the officials having control of the preparation of the ballots to prepare them in proper form.

It need hardly be said that an application of this kind must be made sufficiently early to enable the officials to have the necessary alterations put into effect. In the present case it appears that the time to intervene before the date of the election will be sufficient for the respondent to obey the writ which is to issue. We assume that the officials of other counties will take action in harmony with the views here expressed. If, as suggested at the hearing, it will be impossible in some instances to alter the sample ballots, the spirit of the present ruling can be carried out, as far as possible, by changing the form of the official ballots to be furnished to the voters.

A peremptory writ will issue as prayed.

We concur: LORIGAN, J.; MELVIN, J.; HENSHAW, J.

SHAW, J., because of temporary absence, has not participated.

HENSHAW, J. I concur in everything that is said in the prevailing opinion. It certainly will not be questioned that an elector has the inherent right, under our system of government, of offering himself as a candidate for office, and, after having offered himself, to withdraw his name and retire from the political contest at any time that he sees fit. The sole limitation upon this unquestioned right is the limitation which may be fixed upon it by law. The only limitation which our law has seen fit to impose is that inferentially contained in the requirement of a candidate to make an affidavit that, "if nominated," he will continue his candidacy for and seek election to the office. The Legislature having seen fit thus to restrict the right of withdrawal after nomination, and having placed no restriction upon the right of withdrawal before nomination, under every canon of construction that right of with-

drawal before nomination still rests with every candidate for office. Such was the unanimous view of the Supreme Court of Nevada in the case cited in the prevailing opinion. Therefore no right to withdraw his name as a candidate from the primary ballot is expressly or impliedly given to any candidate, because it is not necessary that it should be expressly or impliedly given. The right is his, unless it is taken away by positive law, and there is no positive law so doing. Nor is it necessary that there should be any specific mode prescribed by which any withdrawal can be effected. It is a reflection upon our jurisprudence to say that its general remedies are not adequate, as they were found to be by the Supreme Court of Nevada under a statute in all particulars identical with our own.

But, conceding the right of withdrawal to exist, the dissentient view is that the Legislature designed that this right should have no effect, because the law also says that county clerks shall print the "names of all candidates for the respective offices for whom nomination papers have been duly filed." Such a construction is but the veriest sticking in the bark. To attribute such a meaning to the Legislature is deliberately and unnecessarily to charge it with the design of deluding and deceiving the electors of the state. For under that construction it is not denied that it means that the name of a candidate who has died may not, even though the fact be timely and officially brought to the notice of the county clerks, be omitted from the ballot to be printed; that if the sole candidate of a political party has been convicted of a felony, and thus disqualified from holding office the Legislature designed in both such and all like cases that the name of the dead man and that the name of the felon should remain upon the ballot, notwithstanding that, if they received a majority of the votes, neither could take office, and the result would be, either that a man whom the people by their votes had not selected would fill the office, or that the state must be subjected to the added and unnecessary expense of another election. I am unwilling myself to charge the Legislature in its enactment of the primary law with any such stupidity or evil design. Nor is it necessary that this should be done, whenever, as here, notification of withdrawal, of death, or of legal disqualification to hold the office, is under timely notice officially made known to the county clerk.

The provisions of the primary law calling upon the county clerks to print upon the primary ballot the names that have been certified to them by the secretary of state by every reasonable intendment mean only that those names shall be printed unless changes shall have occurred within the contemplation of the law, such changes as in fact are contemplated and provisions for which are made

by section 27 of the act quoted in the prevailing opinion, and the forced construction which unnecessarily is sought to be given to this, I repeat, convicts the Legislature, without any express language to that effect, of a design to make the primary election ridiculous, by compelling, to the deception of the voters, the retention of the name of a man who is dead or has been sent to the state prison.

ANGELLOTTI, C. J. I dissent. Desirable as may appear to be the result reached by the court in this proceeding, I am unable to concur therein in view of my understanding of the meaning of the provisions of the direct primary act.

In proposing to place the name of Mr. Bordwell on the primary ballot as a candidate for the Republican nomination for United States Senator, notwithstanding his attempted withdrawal as a candidate after having regularly qualified as such, and after his name had been regularly certified by the secretary of state to the various county clerks and registrars as a candidate, the county clerk of Orange county is, in my opinion, simply proposing to follow the plain mandate of the primary act. If this be the situation, of course, we have no authority to order him to do otherwise.

The clerk is simply proposing to print on the primary ballot, as candidates for the Republican nomination for United States Senator, the names of all persons "for whom nomination papers (including the affidavit of the candidate himself stating that he desires to be a candidate) have been duly filed" (subdivision 4, § 12, Primary Act), as such names have been correctly certified to him by the secretary of state (section 10, Primary Act), and all this the primary act expressly requires him to do.

No right to withdraw his name as a candidate from the primary ballot is expressly or impliedly given any such person by any provision of the Primary Act, no mode by which any withdrawal can be effected is even suggested by any provision of the act, and I cannot read the act otherwise than as clearly contemplating that there can be no such withdrawal, and that the certificate of the secretary of state, when made in full accord with the law, is absolutely conclusive on county clerks and registrars as to the names which shall be placed on the primary ballot.

I concur: LAWLOR, J.

CITY OF LOS ANGELES v. MOORE
et al. (Civ. 1976.)

(District Court of Appeal, Second District, California. July 6, 1916.)

1. QUIETING TITLE §52 - JUDGMENT-DESCRIPTION-VALIDITY.

In an action to quiet title against a city, where it was admitted in the pleadings that the

precise tract of land in dispute was included within lot 8 as shown on the recorded map, a judgment adjudicating the fee to be in the plaintiff therein and that the defendant city had no interest in the land, following the description of the land designated in the complaint as "lot 8 of the additional subdivision of the Hamilton tract, as per map thereof recorded in Book 28, at page 98, Miscellaneous Records of Los Angeles county," when by reference to the map it appeared that the northerly, easterly, and southerly boundary lines were distinctly marked by continuous black lines, but that the westerly side of the lot showed two dotted lines extending between the prolongation of the northerly and southerly lines inclosing a wedge-shaped parcel varying from about 50 feet at one end to about 30 or 35 feet at the other, was not so ambiguous as to be void.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 99, 102, 103; Dec. Dig. § 52.]

2. JUDGMENT §743(2)—ESTOPPEL—TITLE TO LAND.

Such judgment, from which no appeal was taken, estopped the city in its condemnation proceeding from claiming as against the successor of the plaintiff in the former action that it was the owner of the parcel.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1276, 1284; Dec. Dig. § 743(2).]

3. JUDGMENT §956(2) — ESTOPPEL — EVIDENCE—PLEADINGS AND ISSUES.

Under a plea of former adjudication of title to a parcel of land involved in a city's condemnation proceeding, the pleadings and findings in an action by defendant's predecessor to quiet title against the city were admissible to illustrate the issues presented in the former suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1823; Dec. Dig. § 956(2).]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Condemnation proceeding by the City of Los Angeles against Roscoe E. Moore, O. B. Carter, and others. Judgment determining title to one lot to be in defendant Carter, motion for new trial denied, and the City appeals. Judgment and order affirmed.

Albert Lee Stephens, City Atty., and C. D. Pillsbury and Myron Westover, Deputy City Attys., all of Los Angeles, for appellant. Carter, Kirby & Henderson, Charles Lantz, and Davis, Lantz & Wood, all of Los Angeles, for respondents.

JAMES, J. [1, 2] This action was brought by the city of Los Angeles to condemn two certain strips of land lying on either side of Avenue 20 for the purpose of widening that thoroughfare. The only question to be considered on this appeal concerns the matter of the ownership of one parcel of land affected by the condemnation. The city of Los Angeles, the plaintiff, claimed that it was the owner of this parcel; the trial court, however, determined that the title was in respondent Carter. Carter by his answer made to the complaint pleaded a former adjudication as to this precise parcel of land had in an action in which his predecessor in interest was the plaintiff and the city of Los

Angeles a defendant. Carter maintained, in which contention he was sustained by the trial judge, that by the judgment in the action last referred to the municipality was estopped from again litigating the question of title. In the action the judgment in which Carter pleaded in bar, and which we will hereafter refer to as the Fox Case, the plaintiff there sought to quiet his title to a lot which he designated as lot 8 of the additional subdivision of the Hamilton tract, as per map thereof recorded in Book 28, at page 96, Miscellaneous Records of Los Angeles county. The judgment followed the description of the land as contained in the complaint. By reference to the map mentioned, it is found that, while the northerly, easterly, and southerly boundary lines are distinctly marked by continuous black lines, the westerly side of the lot, instead of there being a boundary line marked in like manner as on the other sides, shows two dotted lines extending between the prolongation of the northerly and southerly boundary lines of the lot, and which dotted lines inclose a wedge-shaped parcel varying from about 50 feet at one end to about 30 or 35 feet at the other. It is this wedge-shaped piece of ground that the city claimed in this action to be the owner of. Precisely stated, the city's claim is that the judgment rendered in the Fox case, by referring to the map of the Hamilton tract for a description of the property affected, did not accurately describe any certain property, and that, because of such claimed ambiguity, the judgment could not be aided by any extraneous evidence, and could not be pleaded as a bar in estoppel of the right of the city to here again assert title. The city objected to evidence offered by Carter of the judgment roll in the Fox case, and also to the stenographic reporter's record of the testimony of a surveyor who was called upon to identify the small parcel in dispute in the Fox case. The judgment in the Fox case was not so ambiguous as to be void. It referred to the map of the tract as recorded, which map did, it is true, leave clouded in some uncertainty the exact location of the southerly boundary line of lot 8. Nevertheless, as between Fox and the city of Los Angeles, it was admitted in the pleadings in that case that the precise tract of land which is involved here was in dispute, and that it was included within lot 8 as shown on the recorded map. The city in the Fox case affirmatively alleged that the wedge-shaped tract of land was a part of lot 8, and the court found in that case that the plaintiff, Fox, was the owner of all of lot 8, and that the city was not the owner of that portion of it to which title was especially alleged as being in the city. The Fox suit brought directly in issue the matter of title to the small parcel of land, and the city, admitting in that action that the parcel was

contained within lot 8, should be estopped from afterwards asserting that the judgment in the Fox case adjudicating the fee title to be in Fox, and that the city had no interest in the land, did not settle that question. There was no appeal taken in the Fox case and no effort made, so far as appears, to have that judgment revised in any way.

[8] We think that the pleadings and findings in the Fox case were proper to be introduced in evidence in this action in order to illustrate the issues presented in that prior suit. *Graves v. Hebborn*, 125 Cal. 400, 58 Pac. 12. On the question of estoppel, the case of *People v. Holladay*, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186, is in point.

The appeal taken herein was both from the judgment and from an order denying a motion for a new trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

JOHNSTON v. CITY OF LOS ANGELES et al.

CITY OF LOS ANGELES v. MOORE et al.
(Civ. 1977.)

(District Court of Appeal, Second District, California. July 6, 1916.)

1. DEEDS §118—EXISTENCE—EVIDENCE.

In a city's condemnation proceeding, with cross-complaint by a defendant claiming an interest in part of the land sought to be condemned, where it was stipulated that title was in the city, unless divested by its deed to one under whose will the cross-complainant claimed as devisee, and where the cross-complainant assumed the burden of establishing that the land was included within a tract conveyed to such testator, and not conveyed by his deed, evidence held not to show that the city's title had been divested by its deed.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. §118.]

2. EVIDENCE §208(6)—ADMISSIONS—ABANDONED PLEADING.

A defendant who had affirmed in his answer that the land was included in the city's deed, but who expressly abandoned and disclaimed such contention at the trial, did not thereby admit that the land was included in such deed, but might contend that it was not included therein.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 718, 719; Dec. Dig. §208(6).]

3. EMINENT DOMAIN §158—IMPROVEMENTS—ASSESSMENTS—PAYMENT BY ONE NOT INTERESTED—RECOVERY.

Where land was sold on execution against one claiming as a remote grantee of a city, but having, in fact, no interest therein, and the execution purchaser thereafter paid sewer assessments, and had the amount thereof included in the redemption charge, such execution debtor, by redeeming and paying the assessment through his mortgagee, was not entitled to recover the amount thereof in condemnation proceedings by the city against the actual owner, such debtor; the latter, having no interest in the property not being required to redeem.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 426, 428-432; Dec. Dig. §158.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Condemnation proceeding by the City of Los Angeles against Roscoe E. Moore, John Griffin Johnston, O. B. Carter, and others, with cross-complaint by Johnston against the City of Los Angeles and Carter. Judgment against cross-complainant Johnston, and for cross-defendant Carter, motion for new trial denied, and cross-complainant appeals. Judgment and order affirmed.

Charles Lantz and Davis, Lantz & Wood, all of Los Angeles, for appellant. Albert Lee Stephens, City Atty., Myron Westover, Deputy City Atty., and Carter, Kirby & Henderson, all of Los Angeles, for respondents.

JAMES, J. This is an appeal taken by John Griffin Johnston, against whom judgment was entered and an order made denying his motion for a new trial. The appeal calls into question the correctness of the decision of the trial judge wherein it was determined that said appellant had no interest in an irregular plot of ground aligning Avenue 20 in the city of Los Angeles, which the city by condemnation seeks to take for the purpose of widening that thoroughfare. The trial judge determined title to be in defendant O. B. Carter. That determination on the separate appeal of the city of Los Angeles taken to this court, was affirmed in an opinion filed this day (Civil No. 1975, 159 Pac. 872).

[1] The land in question aligns a portion of the northwesterly boundary of lands patented to the city of Los Angeles. By deed made in 1863, the city of Los Angeles conveyed to John S. Griffin and J. C. Welsh a large tract of land embracing more than 2,000 acres. It was stipulated at the trial that the title to all of this land and the land in dispute was vested in the city of Los Angeles immediately prior to the making of the deed mentioned. Welsh subsequently conveyed to Griffin, and Griffin later to one Hamilton, who subdivided the land so obtained into "Hamilton's subdivision" and "Hamilton's additional subdivision." Appellant, Johnston, as the devisee under the will of John S. Griffin, claimed that the plot of land in dispute was included in the deed to Griffin and Welsh from the city, and was not included in the deed made by Griffin to Hamilton; hence that it was distributed to him under the will in the estate of Griffin. Under the stipulation made, in effect, that the title was in the city unless divested by the Griffin-Welsh deed, appellant at the trial assumed the burden of establishing that the land was located within the boundaries of the large tract conveyed to Griffin and Welsh. In order to establish the northwesterly boundaries of the plot so conveyed, it was necessary to locate the original patent boundary of the city. This boundary, as surveyed and described in the patent, starting from the northwest city patent corner,

pursued a meandering course southwesterly to a point made by the junction of the Los Angeles river with the Arroyo Seco. From this point, called station 35, the line proceeded in a northwesterly meandering course, following the bed of the Los Angeles river. Station 36, being the one immediately northwest of the point station 35, was described as being at the edge of the water of the river. The river for some distance in that locality is confined on the west by a chain of hills composed in the main of a shale or rock formation. In the Griffin-Welsh deed the southerly corner of the land described was located at a monument marked by a mound of stones, the location of which the testimony showed was well known to old residents, and its location was by the testimony accurately fixed at the trial. The testimony of the surveyors who attempted to trace the lines of the Griffin-Welsh land showed that the monument mentioned at the southerly corner of the property was disregarded. The testimony also showed that, had the location of this monument been taken as a starting point and the line run northerly, the land in dispute would have been thrown without the parcel conveyed to Griffin and Welsh. The inaccuracy of the lines of these surveyors was also illustrated in the testimony by showing that, assuming the points taken by them to correctly locate stations on the northwesterly city patent line, by turning the angle at the point station 35 at the south and starting northwesterly according to the angle and call of the patent description, station 36 would not have been located in the edge of the stream of the Los Angeles river, but would have been thrown on the hillside to an elevation of 73 feet above the present river bed. The testimony showed very conclusively that the bank of the river on the west was of rocky formation, and therefore could have been affected but little in the course of years by the current of the water. These inaccuracies appearing in the surveys of the engineers who gave testimony for appellant, the trial judge held that the burden of showing that the title of the city had been divested by the Griffin-Welsh deed had not been sustained. In this conclusion we agree.

[2] It is said that defendant Carter cannot raise the question that the land was not so included in the Griffin-Welsh deed, because he affirmed in his answer that the land was so included. It is true that in one of the defenses set out Carter did make that allegation, but he expressly abandoned and disclaimed that contention at the trial, and hence we think that allegation cannot be viewed as an admission of the fact contended for. The maps made by the city covering the lands of Griffin subdivision show recognition of the "Sepulveda corner"; that being the point marked by the mound of stones hereinbefore referred to at the south line of the Griffin tract. Defendant Carter

introduced in evidence, as declarations against interest, sworn statements made to the city assessor by John S. Griffin for eight different years, the first being for 1883, and the last for 1898, which statements purported to set forth all of the land owned by Griffin in the city of Los Angeles, and none of these statements described any of the land in dispute. It was not error to allow in evidence the decree in an action to quiet title brought by one Fox against the city of Los Angeles, which was introduced by Carter. That action is described in the opinion treating of the appeal of the city as against Carter. It was competent evidence against the city, and, if not relevant to the issues as between Johnston and Carter, could have no prejudicial effect, in view of the conclusion as indicated that Johnston did not sustain the burden of proof that the land in dispute was within the plot described in the Griffin-Welsh deed.

[3] Finally it is claimed on the part of appellant, Johnston, that a determination in favor of the title of Carter should only be made upon a condition for the repayment to Johnston of the sum of \$284.85 which amount, prior to the trial in the action, had been assessed against the property to cover municipal sewer improvements. The payment of the claim arose in this way: There was a judgment in the superior court in a separate matter against Johnston and others amounting to the sum of \$1,053.10, which Carter became the owner of by purchase. Carter caused an execution to be issued upon this judgment and a levy and sale made against any interest which Johnston might have in the land in dispute. At this sale Carter caused such interest to be struck off to the nominal party who was acting for him, for the sum of \$500, which was credited upon the judgment. The sewer assessments becoming payable, Carter caused these to be paid and notified the sheriff that, if Johnston made redemption under the execution sale, these sewer assessments should be included in the redemption charge. A mortgagee of Johnston redeemed, paying the \$500, and also the \$284.85 required for sewer improvements. It is the latter amount that Johnston claims the court should have required by its judgment to be repaid to him. We think this contention is without merit. If Johnston, as is here determined, had no interest in the property, he was not, nor was his mortgagee, required to redeem, and if they had refused to do so the result would have been that Johnston would have had a credit of \$500 on the judgment entered against him. Having chosen to redeem, speculating upon it being determined that he had some interest in the property which had been made the subject of the execution sale, he, in our view, was a voluntary actor, and a court of equity in such an action as this would not lend him any aid in the di-

rection of recovery for the sewer assessments paid. This was not a case where Carter, as the moving party, sought to have cleared away a cloud caused by a sale or assessment against his property; the title in him, as it is now determined, was clear of any such lien, real or apparent.

Our conclusion is that the evidence fully sustains the judgment as made by the trial court; that no errors appear which warrant a new trial being granted to appellant.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

PETERS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN BERNARDINO COUNTY et al. (Civ. 2122.)

(District Court of Appeal, Second District, California. July 14, 1916. Rehearing Denied by Supreme Court Sept. 11, 1916.)

1. APPEAL AND ERROR § 429 — NOTICE — WAIVER OF DEFECTS.

Parties who accept and act upon notices with regard to appeal and proceedings preliminary thereto cannot on the appeal raise any question as to sufficiency of the service.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2168-2172; Dec. Dig. § 429.]

2. JUSTICES OF THE PEACE § 159(6)—APPEAL — BOND — JUSTIFICATION OF SURETIES — NOTICE.

When it is demanded that sureties on an appeal bond justify, under Code Civ. Proc. § 978a, requiring justification on notice within five days after such demand, it is no excuse for total failure of notice that traffic is halted by a storm, no notice having been mailed, and there being nothing to show that the notice could not have been given in some manner.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. § 159(6).]

3. JUSTICES OF THE PEACE § 159(6)—APPEAL — BOND — JUSTIFICATION OF SURETIES — NOTICE.

Under Code Civ. Proc. § 978a, justification of sureties on appeal bond without notice to the adverse party is ineffective for any purpose, and the appeal must be considered as if no bond had ever been given.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. § 159(6).]

Petition by S. H. Peters for a writ of certiorari to the Superior Court for San Bernardino County and J. W. Curtis, Judge, to review order denying plaintiff's motion to dismiss defendant's appeal from a judgment for plaintiff in the justice's court. Order annulled.

W. T. Craig, H. R. Archbald, and A. Henderson Stockton, all of Los Angeles, for petitioner. A. S. Maloney, of San Bernardino, for respondents.

JAMES, J. Certiorari to review proceedings had on a motion made to dismiss an appeal taken to the superior court of the county

of San Bernardino from the justice's court of Colton township. In the justice's court action this petitioner was the plaintiff, and secured judgment against A. Crowell and H. C. Crowell. The defendants in that action appealed. The motion made by the petitioner in the superior court was to dismiss the appeal taken by the Crowells because the sureties on the undertaking on appeal had failed to justify upon notice to the plaintiff after exception had been taken to their sufficiency. The superior court denied the motion. We have before us the record of the proceedings and evidence heard by the superior court on which the motion was determined. It appears by the uncontradicted evidence that after the appeal was taken, and on the 10th day of January, 1916, the attorneys for the plaintiff in the justice's court action, whose offices were in the city of Los Angeles, received through the mails a copy of the notice of appeal and a copy of the bond given on appeal, with request that they acknowledge service on the notice of appeal and return the same to the justice. The attorneys for the plaintiff thereupon wrote to the attorney for the defendants-appellants, whose office was in the city of San Bernardino, acknowledging receipt of the notice of appeal and bond, and informing said attorney that they had accepted service of the notice of appeal, and returned the same to the justice of the peace, at the same time inclosing a notice of exception to the sureties on the undertaking. This letter, it was admitted, was received by the attorney addressed on January 12th. The notice of exception to sureties was filed with the justice on January 14th. In another letter received in San Bernardino on January 12th the plaintiff's attorneys stated to the opposing counsel:

"Kindly give me as much notice as possible of the date of justification of sureties."

To this letter a reply was made to the effect that the hearing of the justification of sureties would be taken up some time later in the month. On the 14th of January the San Bernardino counsel received from the plaintiff's counsel a letter in which he was advised that the plaintiff would insist upon the sureties justifying strictly in accordance with law; that is, within five days from the date of the exception.

No notice of any justification was given, but on the 18th of January the sureties appeared before the justice and justified. In excuse for not having given a notice to the plaintiff as to the time when the sureties would appear for justification, counsel for the defendants and for the respondent here set out in his affidavit made to the superior court:

"That from the 14th day of January, 1916, to the 19th day of January, 1916, a great amount of rain fell, causing floods and stopping traffic

on all railroads, so that affiant was unable to mail notice of date of justification of sureties to the plaintiff and his attorneys; that affiant sought to communicate by telephone with Los Angeles, where plaintiff and plaintiff's attorneys reside, but was unable to do so on account of the severity of the storm and rainfall; that the said sureties justified before J. B. Hanna, justice of the peace of Colton township, on the 18th day of January, 1916; said sureties residing in the city of San Bernardino, were compelled to go to Colton on a switch engine on said day, being the only manner in which they could reach Colton on account of the severity of the rainfall."

[1] It therefore appears that the justification of the sureties was made wholly without any notice being given to the opposite party. So far as the service of the various notices is to be considered, we think that the parties are not entitled to raise any question as to the sufficiency of such service now, as they at the time adopted that service as sufficient and proceeded to act upon it.

[2] If circumstances existed which would excuse the appealing parties for holding the justification after the time prescribed by law, such facts are not disclosed, for it appears that no notice was attempted to be given at all; that the sureties did not justify upon notice either within or after the expiration of five days from the date of receipt of the notice of exception. The statement that traffic was delayed by reason of storms, and telephone connection with Los Angeles (where the opposing counsel resided) cut off, would not excuse the appellants from at least depositing in the mails a notice of the date when the sureties would justify; and, further, it does not appear but that by some other means of communication, telegraph or messenger, such notice might have been given and in time.

[3] The justification of the sureties taking place without notice, of course it must be considered the same as though no justification at all was had. As we have pointed out, there was no attempt at all made to have the sureties justify upon notice at any time after the exception was taken to their sufficiency; in other words, plaintiff was never afforded an opportunity to be present, as he was entitled to, at the time the sureties appeared for justification.

The undertaking on appeal, upon failure of the sureties to justify upon notice to the adverse party, became ineffectual for any purpose, and the appeal must necessarily be considered as though no undertaking had been given. Such is the express provision of section 978a, Code of Civil Procedure.

The order of the superior court denying petitioner's motion to dismiss the appeal in the justice's court action herein in the certified record referred to is annulled; petitioner to have his costs.

We concur: CONREY, P. J.; SHAW, J.

WINSOR v. SILICA BRICK CO.
(Civ. 1514.)

(District Court of Appeal, Third District, California. July 14, 1916.)

1. MASTER AND SERVANT §39(1)—CONTRACT OF EMPLOYMENT—BREACH—PLEADING.

Allegation of complaint for breach of employment contract that defendant refused to perform and plaintiff was by such refusal, prevented from performing, is insufficient to charge a discharge or breach for which plaintiff could recover salary unearned for the term of the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 45; Dec. Dig. § 39(1).]

2. MASTER AND SERVANT §40(3)—BREACH OF CONTRACT—DISCHARGE—EVIDENCE.

Evidence held insufficient to show discharge of plaintiff by secretary of defendant corporation in breach of employment contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 49; Dec. Dig. § 40(3).]

3. MASTER AND SERVANT §36—BREACH OF CONTRACT—OFFER TO PERFORM.

Plaintiff, having an employment contract with defendant, but expressing himself as dissatisfied, on being told by defendant's secretary that defendant would release him, could not then sue as for discharge in breach of contract, without presenting himself as ready to perform and being refused by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 42; Dec. Dig. § 36.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by S. W. Winsor against the Silica Brick Company. Judgment for plaintiff, and from an order denying new trial, defendant appeals. Reversed.

A. L. Shinn and O. L. Shinn, both of Sacramento, for appellant. Charles O. Busick and O. G. Hopkins, both of Sacramento, for respondent.

HART, J. This action was brought by the plaintiff for the recovery of damages for the breach of a contract between him and the defendant. A trial by jury was had, verdict for plaintiff in the sum of \$7,300 returned, and judgment entered in accordance therewith. The defendant moved for a new trial. The court made an order denying the motion, and this appeal is from said order.

The contract, for the alleged breach of which the plaintiff seeks damages through this action, was made and entered into by and between the plaintiff and the defendant on the 26th day of July, 1910. It is set out in full in the complaint. It recites and covenants that the plaintiff, party of the first part, has agreed to assign, and has assigned, to the party of the second part, the defendant, all his right, title, etc., in and to certain leases and contracts for the removal of earth and clay materials to be used in the manufacture of brick and other articles, "and has agreed to give his entire time and attention to the business of the party of the sec-

ond part for a period of five years"; that in consideration therefor the defendant has given said plaintiff 30,000 shares of its capital stock, and agreed to employ the plaintiff for the term of five years at a monthly salary of \$200 as a minimum, "and an additional amount equal to five per cent. of the net profits of the party of the second part over and above the first twenty-eight thousand dollars of net profits each year." The plaintiff was not only to give his exclusive time and attention to the manufacture of brick and "such other articles as the defendant may elect," and in the performance of such service was to work at such place or places, as the defendant might direct, putting in such service the best of his ability and knowledge in brick manufacture, but he was also to deliver to the defendant "all formulæ known and used by him for the manufacture of such articles as the party of the second part may desire to manufacture, and that said formulæ shall be entered upon the books of the party of the second part and shall become the property of the party of the second part during said five years." Besides some other provisions of the contract which it is not necessary specifically to refer to here, it is further agreed by the plaintiff that "during said five years he will not engage in any other business in the state of California, nor advise or assist in any manner any person or corporation that manufactures or sells articles similar to any articles manufactured by the party of the second part."

The complaint is in two counts—the one for damages for the alleged violation of the terms of the contract by the wrongful dismissal of the plaintiff by the defendant from its service, and the other for damages for the alleged failure of the defendant to pay to the plaintiff the 5 per cent. on the net profits of the corporation over and above the first \$28,000 of the net profits of the concern, which profits, it is alleged, amounted in the aggregate, for the year ending with the discharge of the defendant, to the sum of \$8,000, the total amount for which judgment is asked being the sum of \$17,200. It may here be stated that no evidence was offered or received in support of the averments of the second count, and the same may therefore be dismissed without further notice.

The complaint avers that, upon the making of the contract, the plaintiff entered upon the performance of the terms thereof so far as it related to him, and "began the discharge of his duties thereunder, and thereafter continued such performance and to discharge said duties" until on or about the 20th day of September, 1911, when said defendant, without the consent and against the will of the plaintiff, "refused to perform said contract any longer or further in whole, or in part, to any extent, or at all, and still so refuses; that this plaintiff was then and there,

and has ever since been and still is, ready and willing to perform said contract fully and in all respects on his part, and ever since said 20th day of September, 1911, he has been prevented from performing said contract in any respect or at all, by reason of the aforesaid refusal and continued refusal of the defendant."

The defendant filed an answer and a cross-complaint. In the former, in addition to making specific denials of the averments of the complaint, after admitting, however, the making of the contract referred to, it set up a special defense, alleging that, after the plaintiff entered upon the discharge of his duties under said contract, it was ascertained by the defendant that the plaintiff was surreptitiously receiving commissions from persons upon sales by such persons of machinery and other supplies to the defendant for its use in its business, and that the plaintiff had not accounted to the defendant for the commissions so received; that thereupon negotiations were had between the plaintiff and the defendant looking to the cancellation of said contract, which negotiations led to an agreement between the parties on or about the 18th day of September, 1911, canceling and annulling said contract in consideration of the payment by the defendant to the plaintiff of the sum of \$125, the same to be in full satisfaction of all claims against said defendant; that of the sum so agreed to be paid the plaintiff, the defendant paid him the sum of \$88.90.

The cross-complaint charges that, solely by and through willful and fraudulent misrepresentations relative to the value of the leases transferred to the corporation and to the ability and experience of the plaintiff as a manufacturer of brick and other articles made out of clay, the defendant was induced to enter into the contract which is the basis of this action. As there is no evidence in the record bearing upon the charges so made, further consideration thereof is not necessary.

Although, as stated, the case was tried by a jury, the court nevertheless made specific findings against the defendant and in favor of the plaintiff upon all the vital matters presented by the pleadings. These findings, in view of the submission of the issues of fact to a jury, were manifestly unnecessary.

[1] We think the complaint fails to make out a case for damages for a breach of the contract upon the part of the defendant. It will be noted that in paragraph 4 of that pleading it is alleged that the defendant refused "to perform the contract any longer or further or in whole or in part or to any extent," and still so refuses, and that the plaintiff has been prevented from performing the contract in any respect or at all by reason of the "aforesaid refusal and continued refusal of said defendant." This is the only averment in the complaint which it may be

claimed charges that the plaintiff was discharged, and it is clear that it falls far short of being a direct allegation that the plaintiff was discharged from the employment of the defendant. It is not inconceivable or even improbable that an employer might, for reasons sufficient to himself, be of the opinion that it would be better for him or his business to refuse to allow an employé, under a contract with him (the employer) for personal services, to continue his labors, and still expect and intend to remain faithful to his obligation to pay such employé his compensation, as called for by the contract, as it became due. The most that can be said of the complaint is that, since the 20th day of September, 1911, the defendant had prevented the plaintiff from performing any work. This is not an averment that, at that time, or at any other time, the defendant discharged the plaintiff and refused any longer to be bound by its contract. It might, perhaps, be an averment that the corporation had refused to pay the plaintiff his monthly salary, but for this violation of the contract he would have an action for the salary due, and nothing else. He quite clearly cannot maintain an action for compensation unearned without a direct averment of discharge from employment.

The point thus considered, although necessarily raised by the demurrer, is not discussed or touched upon by counsel for the appellant in their briefs; and, while we believe it to be sufficient to warrant a reversal of the judgment, we shall, for the reason that respondent was given no opportunity to answer or discuss the point, and for the further reason that, in our opinion, the judgment cannot justly be upheld upon a consideration of the record, even upon the assumption that the complaint does state a cause of action for a breach of the contract, further consider the record and the points to which the counsel for both sides solely address their attention and the discussion in their respective briefs.

Two points are made by the defendant against the legal stability of the verdict, viz: (1) That the alleged discharge of the plaintiff from the service of the corporation, having been the act of the secretary of said corporation, and such act not appearing to have been authorized by the corporation itself, was the exercise of a power not within the scope of the authority of the secretary. It is hence argued that the attempted discharge was none at all either in law or in fact. (2) That the evidence does not support the implied finding of the jury that the secretary discharged the defendant.

[2] We are of the opinion that the last-stated point must be sustained, and it will not be necessary, therefore, to consider the point first above stated.

The plaintiff's version of the transaction which, he claims, resulted in his dismissal from the service of the corporation, is, in

substance, as follows: That, on the 17th day of September—about 14 months after he entered upon the performance of his part of the contract pleaded in the complaint—he received the following letter, signed by J. P. Dargitz, secretary of the corporation, said letter being dated at Sacramento, September 16, 1911:

"By request of the board of directors you will please report at this office before returning to the plant."

In obedience to the request so made, the plaintiff called at the office of the corporation, in the Oschner building, Sacramento, and there met Dargitz. What occurred between the plaintiff and Dargitz at that interview may best be told in the former's own language as a witness:

"I saw Mr. Dargitz. I came in and addressed him as I usually did, 'How do you do?' and I was in very much need of some money, I never had been paid up while I worked with them. I told him I had to have some money, my creditors were pressing me, I could not get any more credit, and he shook his head, he said, 'We have no money.' He took out a bank book; showed me a check book with a little red line on it; he claimed they had overdrawn their account in a Sacramento bank where they had deposited, where they had done their business, the Sacramento Valley Trust Company, I believe. He got up and motioned me to go out in the anteroom, and I followed him out there. He closed the door, he says, 'Winsor,' he says, 'I am very sorry, but we have no money any more, and we will have to let you go.' And I says, 'I am very sorry; I got to get my money; don't I get any money here?' He says, 'We have not got it, but I can give—I will give you some money if you will release that contract.' I said, 'Let's see your money.' He said, 'Well, I will have to get it from Mr. Pierce; excuse me a moment.' He opened the door, went into the room, came out with a typewritten sheet, and said, 'If you will sign that, I will get the money from Mr. Pierce.' I read the document over, and it was an agreement that I was to relinquish all claims and release the Silica Brick Company for the sum of \$125. I told Mr. Dargitz that I could not sign it. He said, 'I can get that amount through the courtesy of Mr. Pierce.' I said, 'I will think it over,' and walked out of the office and never went back. I never had any conversation with him concerning the cancellation or surrender of the contract at any time after that or before."

A few days thereafter, the plaintiff received from Dargitz the following letter, which was dated at Sacramento, September 20, 1911:

"As per your agreement with me, Monday, the 18th, I am now ready to hand you check and settle contract. The company hereby releases you from any further services in its behalf. This will enable you to seek employment elsewhere."

The plaintiff further testified that at one time he was a member of the defendant's board of directors; that he had received from the corporation 30,000 shares of its capital stock; that the plant was "shut down" for a while during the course of his directorship, but resumed operations thereafter; that again it stopped operations, and

at this time he was no longer a director; that when it "shut down" on the last occasion it seemed to him "that the plant was not going to reopen again." He testified:

"I have been willing and ready at all times since the execution of this contract to comply with the terms of the contract."

The plaintiff himself was the only witness who gave testimony in his own behalf, and the foregoing constitutes a fair résumé of the only testimony offered and received upon the question of his alleged discharge by the defendant.

As explanatory of the language of the letter last above presented herein, Dargitz testified that, in the conversation referred to by the plaintiff in his testimony, the important part of which is given above, the plaintiff said to the witness that:

He "was very anxious to know what was going to be done out there" (referring to the plant); that he (plaintiff) "had been laboring under uncertainties so long that he wanted to have some definite idea what was going to be done, and he wanted me to tell him what condition the company was in, and whether the thing was going ahead. I told him that it was very doubtful, that the company never had been financed, and was not financed then, and heavily indebted. He said that he had an opportunity to get a good position with N. Clark & Sons in Alameda, and if this thing was not going to go pretty quick, he wanted to take advantage of that position, and that he would like to quit if this was still uncertain. I replied that my candid and confidential advice to him would be to accept that position, as this was still very uncertain; and he wanted to know if the company would release him, and I said I thought they would."

The testimony so given by Dargitz was not in any manner or degree contradicted by the plaintiff, although he was recalled to the witness stand in rebuttal after Dargitz gave said testimony.

It is very apparent that the letter addressed by Dargitz to the plaintiff under date of September 20, 1911, is not so phrased as to constitute it a clear and an unequivocal act of dismissal. Upon its face it is capable of the construction that by it the defendant did not intend peremptorily to discharge the plaintiff, but intended it to mean simply this: That the company was willing to release the plaintiff from his obligations under the contract, and so afford him an opportunity to secure employment elsewhere, it being left to the plaintiff to elect whether he would or would not accept the release. This, we say, is a meaning which may reasonably be attached to the letter when construed according to its face or without reference to matters extrinsic thereto. But, when construed by the light of the testimony of Dargitz, and even that of the plaintiff himself, it becomes absolutely certain that the meaning and intent of the letter is as it is so given. The latter testified, it will be remembered, that, after Dargitz proposed to him that the company would pay him the sum of \$125 in consideration of the cancellation of the contract, he

finally replied, "I will think it over," and thereupon he left the company's office and did not return. This reply, together with the fact, to which the plaintiff himself testified, that the plant was closed down, and "seemed that it was not going to reopen again," was reasonably sufficient to justify Dargitz in at least believing that the proposition so made was not, or would not be, wholly unsatisfactory to the plaintiff, and that one of the objects which the latter was then seeking to accomplish was to secure release from the obligations of the contract.

If, however, there still remains some reason for doubting what the true intention of the company was in addressing said letter to the plaintiff, then a consideration of the testimony of Dargitz (and there is no substantial reason why in this connection that portion of his testimony explaining the language and the purpose of the letter should not be considered, since it was not contradicted), will well-nigh conclusively show that the letter was not intended as a peremptory dismissal of the plaintiff from the service of the company, but merely to release him from the burdens of the contract so that he might be given free and full opportunity to seek and accept other employment. Dargitz testified, as we have shown, that, in the conversation with the plaintiff on the 18th of September, or three or four days prior to the receipt of the letter in question by the plaintiff, the latter declared that he then had an opportunity to obtain employment with a firm in Alameda, and asked Dargitz if he (the latter) thought the company would release him (plaintiff) from the contract, and that Dargitz replied that he thought it would. Thus it is very clear that Dargitz had reason to say to the plaintiff that he was released from his contract with the company without being actuated by any motive or intention of discharging the plaintiff and so abandoning the contract. That Dargitz, when writing the letter, had in his mind the previous conversation with the plaintiff, regarding the question whether the company would be willing to release the latter from the obligations of the contract, is plainly evidenced by the suggestion in said letter, "This will enable you to seek employment elsewhere."

In considering Dargitz's testimony for the purpose of ascertaining the intent and scope of the letter, we have not been unmindful of the rule that it must be assumed, as a general proposition, that the evidence introduced by the vanquished party in opposition to that upon which the verdict has been founded was, for sufficient reasons, repudiated or disregarded by the jury. In this instance, however, there are several considerations which will justify an appellate court in taking into account, in passing upon the question whether the jury were warranted in reaching the verdict returned, the testimony

of the party by whom the issue has been lost. First among these is the fact, as before suggested, that the testimony of Dargitz or the verity thereof was not directly or expressly contradicted by the plaintiff. The second is that the testimony of Dargitz has every appearance of being probable, since it explains why he uses in the letter language indicating that the company was willing to release the plaintiff from and not itself abandon the contract or peremptorily discharge the plaintiff, regardless of its obligation to give him employment for the full term of five years at the stipulated salary. As seen, Dargitz, in explaining why he addressed the letter to the plaintiff in the language in which it was phrased, testified that the latter in effect stated to him in the conversation previously had between them that he could secure employment with N. Clark & Sons of Alameda, if the company would release him from any further obligation of proceeding with the performance of the contract on his part. The fact that Dargitz, in his testimony, named the firm by which the plaintiff declared to him that he had an opportunity to be employed is significant, inasmuch as the plaintiff, having been recalled to the witness stand after the defendant had rested its case, had absolutely nothing to say about N. Clark & Sons, not denying that he referred to said firm in his conversation with Dargitz, a denial which undoubtedly he would not have neglected to make had the fact been a mere figment of the latter's mind or without foundation. But, whatever might have been the intent and purpose of the letter, it must be readily apparent upon a reading of the letter that it was so vague and uncertain in that regard as not to have justified the plaintiff, without making further investigation to ascertain its real import, in treating it as an unconditional and peremptory dismissal.

[8] While the complaint alleges that the plaintiff was willing and ready to perform the contract in all respects, but that he was prevented from so doing by the acts and conduct of the defendant, there is absolutely no testimony in the record that he presented himself to the defendant and offered to perform his part of the contract after the receipt of the letter of September 20, 1911. On the contrary, he himself testified that he never had any conversation with Dargitz, "concerning the cancellation or surrender of the contract at any time" after the conversation, which was had just previously to the receipt of said letter. Nor is there any testimony, other than whatever in that direction may be extracted from the letter itself, that the defendant prevented the plaintiff from proceeding with the execution of the terms of the contract on his part. It is true that he testified, as he pleaded, that he was ready and willing at all times to carry out his part of

the agreement, but we think that he ought to have shown that he unequivocally manifested to the defendant such readiness and willingness. In other words, we think that, since the letter announcing his release from the contract did not involve a clear and an unequivocal act of dismissal, he should have shown that by some affirmative act on his part he manifested to the company that he did not acquiesce in the proposition contained in the letter, and did not desire to be released from the contract. This he could have done by presenting himself to the defendant as ready and willing to proceed with the performance of the contract. *Olmstead v. Bach*, 79 Md. 182, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273, 275. Of course, if, after so presenting himself and offering to go on with his work, the plaintiff had been prevented by the defendant from proceeding, with an intention in the latter not to pay him the stipulated salary, he then would have been entitled to bring his action for a breach of the contract, as it would be a useless and futile act to continue so to present himself and offer to proceed with the performance of the contract after the defendant had positively refused to permit him to do so. *De Camp v. Hewitt*, 11 Rob. (La.) 290, 43 Am. Dec. 204. Or, if the act of the defendant had constituted a clear, unequivocal, and unconditional and peremptory discharge of the plaintiff, then, perhaps, the latter need not have presented himself and offered to continue with the performance of the contract; such dismissal being itself a sufficient prevention of the performance of the contract by the defendant.

Our conclusion is, however, that, under the peculiar circumstances of this case, the plaintiff did not do all that was required of him to entitle him to institute and maintain an action for his compensation under the terms of the contract for the whole of the unexpired term thereof. Indeed, assuming that the complaint states a cause of action, we believe that the plaintiff has failed to sustain the allegations thereof, inasmuch as there is no substantial evidence, either express or constructive, or, to state it in the strict language of the law of evidence, either direct or inferential, to support the averment that the defendant prevented the plaintiff from proceeding with the performance of the contract on his part.

It is hardly necessary to suggest that, in the consideration of the points upon which we feel impelled to reverse the case, we have assumed without deciding that the secretary of the corporation, Dargitz, was duly vested with authority to discharge the plaintiff.

The order appealed from is reversed.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

S. E. SLADE LUMBER CO. v. DERBY et ux.
(Civ. 1482.)

(District Court of Appeal, Third District, California. July 28, 1916. Rehearing Denied by Supreme Court Sept. 21, 1916.)

1. FRAUDULENT CONVEYANCES — INTENT TO HINDER CREDITORS — EVIDENCE — SUFFICIENCY.

Evidence, together with legitimate inferences, held to justify finding that gift of corporation stock to owner's wife was made with intent to hinder and delay creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 834; Dec. Dig. ¶ 298(3).]

2. FRAUDULENT CONVEYANCES — INTENT TO HINDER CREDITORS — EVIDENCE — SUFFICIENCY — INSOLVENCY.

A solvent person may transfer property with intent to defraud creditors; so that it need not always be inquired whether the grantor is insolvent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 188-141, 163, 167, 158; Dec. Dig. ¶ 57(1).]

3. FRAUDULENT CONVEYANCES — SETTING ASIDE — EVIDENCE — ADMISSIBILITY.

A judgment creditor, suing to subject transferred property to his judgment, may introduce his judgment, writs, and execution as the basis for maintaining his suit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 835; Dec. Dig. ¶ 287.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Suit by the S. E. Slade Lumber Company against Oscoe E. Derby and wife. Froup judgment for plaintiff and order denying new trial, defendants appeal. Affirmed.

Oliver Ellsworth, of San Francisco, and Snook & Church, of Oakland, for appellants. Corbet & Selby, of San Francisco, and Fitzgerald & Abbott, of Oakland, for respondent.

ELLISON, Judge pro tem. The plaintiff, as a judgment creditor of the defendant Oscoe E. Derby, brought this suit in equity to have declared void a transfer of 90 shares of the capital stock of the Derby Estate Company (a corporation), made by said Oscoe E. Derby to his wife, the defendant Mary L. Derby. As grounds for the relief asked the plaintiff alleged that said transfer was made without consideration, at a time when the defendant Oscoe was indebted to the plaintiff in a large amount, and to others; that the gift of the shares of stock in said corporation was made by said defendant Oscoe to his wife for the purpose of and with the intent to hinder and defraud his creditors, and particularly this plaintiff, in contemplation of insolvency and while the said defendant was insolvent. The findings of the trial court were in accordance with the allegations of the complaint, and a decree was given and made declaring said transfer to be void as to the plaintiff creditor, and said 90 shares of the capital stock of the Derby Estate Company

subject to the payment of the plaintiff's judgment. The appeal is from the judgment, and also from an order denying a motion for a new trial. For brevity the defendant Oscoe E. Derby will be referred to as the defendant.

The principal point relied upon by appellants for a reversal is the claim made that the findings of the court are not supported by the evidence. The record is quite large, and it is impossible, in an opinion of reasonable length, to review all the testimony. The following salient facts may be stated in narrative form and give a general impression of the situation: In the year 1883 one E. M. Derby, the father of the defendant, died. After the settlement of his estate in the probate court and in the year 1890 his heirs formed the corporation Derby Estate Company, to take over and manage all the property of the estate of E. M. Derby except his interest in the lumber business. To it was transferred all the estate property, with the above exception, and the stock of the corporation, 600 shares, was issued as follows: 300 shares to Nancy M. Derby, widow of the deceased; 100 shares to the defendant, a son of the deceased; 100 shares to Augustus B. Derby, a son of deceased; 95 shares to Lizzie D. Harmon, a daughter of deceased; and 5 shares to her husband, A. K. P. Harmon.

At the time of his death E. M. Derby was engaged in the lumber business with one G. H. Payne, and the business was conducted after his death by his family and said Payne, until December 13, 1891, at which time the E. M. Derby & Co. corporation was formed, and all the property and assets connected with the lumber business transferred to it. The 600 shares capital stock of the last-named corporation were issued to the following persons: 200 shares to O. E. Derby; 201 shares to A. B. Derby; 197 shares to George H. Payne; one share to Nancy M. Derby; and one share to Lizzie D. Harmon—the stock having a par value of \$100 per share, and the capital stock being \$60,000. George H. Payne died at some date prior to January, 1909.

After the creation of the E. M. Derby & Co. corporation, it conducted a large lumber business in Alameda county. In the course of its business it bought much lumber from the plaintiff and from E. J. Dodge Company, a corporation. The purchases from the plaintiff from January 25, 1907, to January 13, 1909, amounted to \$96,196.02, and during the same period payments were made from time to time which left a balance due the plaintiff on the last-named date of about \$72,000, and after that date lumber was sold by the plaintiff to said corporation amounting to \$10,889.09. The defendant was legally liable as a stockholder for the payment of one-third of this indebtedness. He testified that he was aware of his stockholder's liability. The witness George T. Klink, an ac-

countant appointed by the court to investigate the condition of E. M. Derby & Co.'s affairs, presented an itemized statement which showed that the corporation in its business transactions had been losing, recently, large sums of money. His report showed that during the year 1908 there was an actual loss of at least as much as \$22,000, and in addition to this there was written off the books, uncollectable notes, \$10,914.79, and \$14,000 of accounts deemed worthless. These notes and accounts were the accumulations of several years. The result of this witness' investigations was that, on January 13, 1909, the E. M. Derby & Co. corporation had assets of the total value of \$187,781.76 and liabilities amounting to \$177,598.76, leaving a book excess of assets of only about \$11,000. Counsel, in trying to show on the one side that the corporation was solvent and on the other that it was insolvent, have presented other figures which it would be necessary to consider if we were at this point endeavoring to show solvency or insolvency. But as, for present purposes, we are only presenting figures to show that the corporation had a large indebtedness as compared with its assets, the above figures are sufficient for the purpose.

On January 13, 1909, the defendant made a gift to his wife, the other defendant, of his 99 shares of the corporate stock of the Derby Estate Company, being the shares of stock involved in this litigation. The evidence shows it had a value of about \$25,000. Prior to that time, and on the 16th day of November, 1908, the defendant gave to plaintiff a written option by which he offered to transfer to plaintiff all his stock in the E. M. Derby & Co. corporation in consideration that plaintiff would assume all of his liabilities entailed by the stock; "the idea of the above proposition being that myself and brother will be willing to release all claims to our holdings in E. M. Derby & Co. if you will assume all liabilities thereof." On May 24, 1909, the defendant transferred all his stock in the E. M. Derby & Co. to Miss G. V. Rose, a stenographer in the office of his attorney. This transfer was made without consideration—a gift.

January 15, 1909, the defendant deeded to his mother real estate worth \$8,000, and she, on the same day, conveyed it to the Derby Estate Company. By these two deeds and the previous transfer of defendant's stock in the Derby Estate Company to his wife she got the full benefit of the transfer of the real estate.

August 11, 1909, E. M. Derby & Co. transferred all its real and personal property to J. F. Carliston and Oliver Ellsworth in trust for its creditors. September 8, 1909, all the real estate of E. M. Derby & Co. and of the defendant was attached on claims held by Central Bank and Rogers, amounting to \$55,000, and sold under execution. The de-

fendant, in addition to his stockholder's liability in E. M. Derby & Co., had indorsed notes for said company amounting to \$55,000, and was individually liable thereon. He also owed his sister, Mrs. Harmon, \$12,000, secured by mortgage on certain real estate. He also owed one-third of an indebtedness of the E. M. Derby Co. to E. J. Dodge Co. of \$10,770.40; his proportion thereof being \$3,569.12. After the transfer of all of the assets of the E. M. Derby & Co. to J. F. Carlston and Oliver Ellsworth, trustees in trust for the creditors of the corporation made, as above stated, on August 11, 1909, the plaintiff received from said trustees different sums of money which were credited on the indebtedness of E. M. Derby & Co. to it. These payments, together with other money secured between January 13, 1909, and August 11, 1909, reduced the indebtedness of E. M. Derby & Co. to the plaintiff to \$36,187.21. On April 13, 1910, the plaintiff brought an action against the defendant to recover, upon his stockholder's liability, his proportion of the above indebtedness, and on July 29, 1910, secured a judgment therein against the defendant for the sum of \$12,358.40. On May 10, 1910, the plaintiff, having obtained an assignment to it of the claim of E. J. Dodge Co. against E. M. Derby & Co., brought an action against the defendant to recover judgment against him for his proportion thereof as a stockholder and on July 29, 1910, recovered a judgment against him for \$3,671.09. Upon these two judgments last mentioned the plaintiff brings this suit as a judgment creditor to set aside the transfer of the 99 shares of stock of E. M. Derby Estate Company by defendant to his wife. The figures hereinbefore given may not in all cases be wholly accurate, but they are sufficiently accurate for present purposes.

The foregoing statement does not contain a recital of all the facts proved tending to support plaintiff's case. In fairness to the defendant, it should be stated that on the trial he gave more or less plausible reasons and explanations for the various transfers of property made by him, but the trial judge was at liberty not to accept them at their face value, and evidently did not.

[1] We think this bare recital of the history of events, with the inferences that may legitimately and properly be drawn therefrom, show that the court had ample justification for its finding that the gift of the 99 shares of stock was made with intent to hinder and delay the creditors of defendant in collecting their debts. In fact, it is difficult to see what other conclusion could properly be reached.

The defendant owned one-third of the stock of a corporation engaged in the active business of buying and selling lumber. It was losing money rapidly, the year before the stock was transferred to his wife having lost \$20,000, or one-third of the amount for which it was capitalized. The defendant was fully

aware of the condition of the company. It was, as counsel express it, a "sinking ship," and defendant fully realized and appreciated the situation—so much so that, in November, 1908, he offered, in connection with his brother, to transfer to the plaintiff all his stock in the corporation if plaintiff would assume all of his liabilities entailed by the stock. One witness testified that, in addition to the transfer of all his stock to get released from his stockholder's liability, the defendant and his brother also offered to transfer to plaintiff their personal real estate holdings, valued at \$38,000. This was denied by defendant, but, for aught we know, the court may have believed the witness. This conduct shows exactly what the defendant believed to be the condition of the company, and gives an insight, and a clear one, into his state of mind and desires. Not having made the suggested deal with the plaintiff, in January, 1909, he gave to his wife the stock in dispute. Next he deeded to his mother certain real estate without consideration, and next made a stenographer in the office of his attorney a present of all of his stock in E. M. Derby & Co.; and all these things were being done when he was largely indebted as herein indicated. But one inference can be properly drawn from this conduct.

[2] We deem it unnecessary to go into a close mathematical calculation to figure out on a close margin whether the defendant at the time of the transfer might have had a small excess of assets above his liabilities. A solvent person may transfer property with intent to hinder his creditors, as well as one who is insolvent.

"It is obvious, therefore, that the question upon which the case must turn is whether the conveyance is in fraud of the rights of the plaintiff as a creditor. This, under our statute, is a question of fact (Civ. Code, § 3442); that is to say, a question of intent." *Knox v. Blanckenburg*, 28 Cal. App. 801, 152 Pac. 60.

It is not often that direct proof of fraud can be obtained. People do not in such cases proclaim their intent. It can only be referred in most cases from all the attending facts, circumstances, and conditions and by ascribing to the conduct of people those motives which would ordinarily be the motives of others doing like things under like circumstances.

[3] Appellant assigns as error the admission in evidence of judgment, writs, and execution in the suit brought by plaintiff to obtain the judgment, the foundation of the suit. To enable the plaintiff to maintain this suit, it was necessary for him to show that he was a judgment creditor, and that he had exhausted his legal remedies to obtain satisfaction of his judgment. Some other objections are raised as to the admission of testimony, but, as most of them had a bearing upon the question of insolvency, they need not be further considered. In this class of cases a wide latitude is permissible.

"In litigations of the class under consideration, great latitude should undoubtedly be allowed in regard to the admission of circumstantial evidence for the purpose of proving participation in manifest fraud. Objections to testimony as irrelevant are not favored in such cases, since the force of circumstances depends so much upon their number and connection. The evidence should be permitted to take a wide range, as in most cases fraud is predicated on circumstances, and not upon direct proof." *Bush & Mallett Co. v. Helbing*, 134 Cal. 676, 66 Pac. 967.

We are of the opinion that the finding of the court that said 99 shares of stock were transferred by the defendant to his wife in fraud of the rights of his creditors, and especially of the plaintiff, is sustained by the evidence.

Finding no reversible error, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

COX v. JEROME, County Auditor.
(Civ. 2068.)

(District Court of Appeal, Second District, California. July 20, 1916. Rehearing Denied by Supreme Court Sept. 18, 1916.)

OFFICERS §100(2) — COMPENSATION — INCREASE.

Under Const. art. 11, § 9, providing that the compensation of any county or town officer shall not be increased after his election or during his term of office, a township justice of the peace is an "officer," and where he assumed his office in January, 1915, he was not entitled to the greater compensation provided by the act effective August 8, 1915 (St. 1915, p. 1029).

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 154; Dec. Dig. §100(2).

For other definitions, see *Words and Phrases*, First and Second Series, *Officers*.]

Petition by John B. Cox for writ of mandate against William C. Jerome, as Auditor of the County of Orange, State of California. Prayer for peremptory writ denied.

N. D. Meyer, A. W. Rutan, and R. Y. Williams, all of Santa Ana, for petitioner. L. A. West, A. E. Koepsel, and Walter Eden, all of Santa Ana, for respondent.

JAMES, J. Petition for writ of mandate to require respondent, as auditor of the county of Orange, to issue to petitioner certain warrants upon the treasury of the county, in payment of money which it is alleged is due to petitioner for official services performed as justice of the peace of Santa Ana township. An answer was filed raising issues of law only, and the matter has been submitted for decision.

At the time petitioner assumed office in January, 1915, the law provided that justices of the peace should receive from the county for services rendered in criminal cases the

sum of \$75 per month. On the 8th day of August, 1915, an enactment of the Legislature (St. 1915, p. 1082) became of effect which provided that in counties of the fourteenth class and in townships having a population of 15,000 or over, the justices of the peace should receive for services rendered in criminal cases the sum of \$100 per month. The township in which petitioner was acting was found by the census taken to contain over 15,000 inhabitants, and his claim was thereafter made for compensation at the increased rate. The vital question presented is as to whether, under the constitutional prohibition against increase of compensation during the term of office of certain officials, petitioner shall have the benefit of the larger amount for his services in criminal cases. Section 9 of article 11 of the Constitution provides as follows:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office. * * *

It is argued that a township justice of the peace is neither a county, city, town, nor municipal officer, and that therefore there is no constitutional restraint placed upon the Legislature to increase the compensation of such justice at any time. The Legislature is required, under the direction of section 4 of article 11 of the Constitution, to establish a system of county governments which shall be uniform throughout the state. It is in that section also provided that the Legislature may provide for township organization. But no township organization, within the meaning of the section referred to, has been established. While the Legislature has from time to time, by various general laws and statutes known as county government acts, provided for a uniform government of the counties and subdivisions therein, it has been held that the townships mentioned in such acts have no governmental machinery or officers so distinct from the county as to identify such townships as being possessed of functions designed to be possessed by "township organization," referred to in section 4 of article 11, above cited. In *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425, it was held that the Legislature did not, when they divided the county into townships, create "town governments." It was there said:

"The townships have neither been given personality nor any other of the attributes of a corporation; no official has been named empowered to call the inhabitants or voters together for the purposes of consultation and joint action; no act has been passed providing for any presiding officer, or regulating the mode of conducting business, or of declaring the result of the action of the inhabitants or voters when assembled. * * *

It would then appear that in the classification of township justices of the peace these officials either must be referred to as officers of the county, or become some species

of state officers. Under the Constitution as it is now written justices of the peace are not specifically mentioned as belonging to the judicial department of the state; such judicial power is declared to consist of the Senate, the Supreme Court, district courts of appeal, superior courts, "and such inferior courts as the Legislature may establish in any incorporated city or town, township, county, or city and county." In the case of *People v. Cobb*, 133 Cal. 74, 85 Pac. 325, the question as to whether a city justice of the peace was a city or a county officer was discussed, and while not given precise definition in the decision, the court there said:

"It may be admitted that city justices of the peace do not come, or at least do not altogether come, within the category of county or township officers; but it is equally clear that they do not come altogether within that of city officers. They cannot, therefore, strictly speaking, be said to be either county officers or city officers, for that would imply that they were exclusively such; but without much impropriety they may be said to be either. * * * More accurately speaking, they, as well as county justices, form part of the judicial system of the state. * * * It does not follow, however, from the peculiar nature of their offices, that justices of the peace or other judicial officers do not constitute part of county or city governments."

This decision also affirms the propriety of including provisions affecting justices of the peace in the county government acts. In reason at least there would seem to be no sound basis for declaring that township justices of the peace were not intended to be affected by the provisions of section 9, art. 11, of the Constitution in the matter of increasing their compensation during their terms of office. The Legislature has not seen fit to provide for separate township government. The court intimates in the *Cobb* Case, supra, that a city justice of the peace possesses in some measure qualities of a county officer. In cases in which the question as to the right to increase the compensation of justices or constables was involved, and there have been several, it has never been denied that the provisions of section 9 of article 11 affect these officers, and the Supreme Court has so assumed, without any suggestion that the subject was open for debate. We refer to *Smith v. Mathews*, 155 Cal. 752, 103 Pac. 199, and *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575.

We are not disposed to discuss other questions presented by counsel for respondent in opposition to the prayer of the petition. Our conclusion is that petitioner, as justice of the peace of Santa Ana township, is one of the officers mentioned in the constitutional provision cited, which forbids an increase in the compensation paid to him during his term of office.

The prayer for a peremptory writ is denied.

We concur: CONREY, P. J.; SHAW, J.

GLEASON et ux. v. PROUD. (Civ. 1986.)

(District Court of Appeal, Second District, California. July 22, 1916. Rehearing Denied by Supreme Court Sept. 18, 1916.)

1. FRAUD \S 22(1) — REPRESENTATION — RELIANCE.

A contracting party is entitled to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement, and is under no obligation to investigate and verify the statements which the other party, with full means of knowledge, has deliberately made.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. \S 19, 20, 22, 23; Dec. Dig. \S 22(1).]

2. EXCHANGE OF PROPERTY \S 10—REPRESENTATIONS—FALSITY—LIABILITY.

Where there was no express statement of alleged untrue facts by defendant's agent, who negotiated an exchange of property between plaintiff and defendant, and where letters of certain parties from whom the defendant had received certain bonds shown by his agent to the plaintiff contained statements as to their value for which defendant did not vouch, there was no relationship between such parties and the defendant as to make him responsible for their alleged misrepresentations as to the value of such bonds taken by the plaintiff.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. \S 11; Dec. Dig. \S 10.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by I. W. Gleason and wife against C. J. Proud. Judgment for defendant, motion for new trial denied, and plaintiffs appeal. Judgment and order affirmed.

Harold A. Gilman, Tanner, Taft & Odell, and Tanner, Odell, Odell & Taft, all of Los Angeles, for appellants. Victor T. Watkins, Thorpe & Hanna, Joseph Musgrove, and Charles W. Lyon, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to enforce an alleged right of rescission of a contract and exchange of property between plaintiffs and defendant. The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The alleged misrepresentations relate to bonds of the Bisbee Light & Power Company, an Arizona corporation, which were transferred by defendant to plaintiff I. W. Gleason as the principal part of the consideration given by Proud for the property conveyed to him by Gleason. The transaction took place in September and October, 1908. Respondent, Proud, had acquired these bonds a few weeks before that time by transfer from A. W. McPherson and W. F. Nordholt in consideration of real property conveyed to them by Proud. In that transaction one H. A. Landwehr had acted as an agent for Proud, and in that way had acquired some knowledge concerning the Bisbee bonds and Proud's ownership thereof.

In the original complaint filed in this action it was alleged that the defendant made certain representations of fact upon which

the plaintiffs relied, and that such representations were false; also that the defendant concealed certain material facts which, if they had been known to plaintiffs, would have caused the plaintiffs to refuse to enter into the contract. At the trial the evidence wholly failed to establish any intentional misrepresentations or concealments of fact made by the defendant or his agent. Without abandoning their claim that the representations complained of were known by the defendant and his agents to be false, the plaintiffs at the trial further amended their complaint by alleging that the defendant was not, nor were his agents, warranted in making said assertions or statements by the information they possessed when the same were made, although they may have believed them to be true. Presumably this amendment was made to bring the case within the terms of the definition of actual fraud contained in section 1572 of the Civil Code; whereby actual fraud consists of certain acts and circumstances, one of which is "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

The plaintiffs do not base their action upon any representations made personally by the defendant. Their claim is that Landwehr was Proud's agent, and that Landwehr made or caused to be made the representations upon which they relied. On this appeal it is contended that the court erred in sustaining objections to questions asked of the witness Landwehr designed to show the fact of his agency by proving declarations made by him as to the person for whom he was acting; also that the court erred in holding that there was not sufficient evidence to show that Landwehr was the agent of Proud, and in refusing to permit evidence to be introduced relating to the untruthfulness of the representations which he made or caused to be made.

In view of our conclusion upon another phase of the case, hereafter to be stated, it will not be necessary to discuss these alleged errors; and for the purposes of the argument we shall assume, without deciding, that Landwehr was the agent of Proud, and that the facts which the plaintiffs sought to prove to be untrue were, in fact, untrue. For if Landwehr, acting on behalf of the defendant, did not make the representations complained of, or did not cause the plaintiffs to rely upon any representations as coming from him or vouched for by him, then plaintiffs cannot maintain this action. There is no substantial conflict in the evidence in this case. The defendant was content to submit the case upon the testimony of the plaintiffs and their witnesses.

When respondent was negotiating the exchange by which he acquired the Bisbee bonds, the parties with whom he was trans-

acting that business furnished him two letters purporting to state facts concerning the Bisbee bonds and their value. These letters were dated August 27, 1908, were addressed to H. A. Landwehr, one of them was signed by A. W. McPherson, and the other by Bank of Santa Monica, per H. J. Englebrecht, cashier. In the course of the negotiations leading to the transactions involved in the present action, Landwehr delivered these letters to Mr. Gleason, and Mr. Gleason, besides reading those letters, had personal interviews with Mr. Englebrecht, and also with Mr. Nordholt. These letters contained all of the information that Landwehr or the defendant Proud had concerning the bonds, and it is upon the falsity of the statement of facts therein contained that the plaintiffs rely. To ascertain the circumstances under which these letters were received by Gleason, we will take his own testimony:

"At the time when Mr. Landwehr gave those letters, he said that they were the letters that had been delivered to him in connection with this deal between Mr. Proud and McPherson and Nordholt, describing the bonds in that deal. He asked me to go down and have a talk with Mr. Englebrecht. * * * These letters were written to Mr. Landwehr in connection with that deal, less than a month before. The letters themselves show that that was the purpose."

Again he testified, referring to Landwehr, as follows:

"I don't think he said anything about knowing anything about the bonds himself. I don't remember that he said that this was the information he had on it; he said this was the information he did have. I don't think he said that was all the information he had. He did not profess to know anything about it himself; as a matter of fact, he did not tell me to investigate for myself. He told me to investigate these men."

Again he said:

"Mr. Proud made no representations except through his agents, the persons that I have spoken of, Mr. Landwehr, and the other parties that made the representations that induced me to make a trade of my property. The letters and the statements of McPherson and Nordholt induced me to part with my property to Mr. Proud. If it had not been for those letters, I would never have parted with the property."

And again:

"He did not profess to know anything superior to the evidence that he had put up to me. That was far superior to anything he might have. I did not consider any opinion that he might have. He had an opinion. He said he thought that it was all right. He did not say that he based his information upon anything other than the representations that he had from these men who wrote the letters. I believe he gave me all the information he had."

It will be noted that Landwehr did not make any positive assertions with respect to the facts contained in those letters, and did not even vouch for the writers of the letters. He advised appellants to investigate the men who wrote the letters, and appellants acted upon that advice. Being acquainted with Mr. Bittinger, an officer in the First National Bank of Los Angeles, appellant I. W. Gleason inquired of Mr. Bittinger, asking if he knew Mr. Englebrecht and if he could rely upon a

letter of that kind; to which Mr. Bittinger replied that he did know Englebrecht and he was a good fellow, and Bittinger did not think he would write a letter of that kind unless he knew the facts contained in it to be true. It was after receiving that assurance that appellant went to see Mr. Englebrecht, and in conversation with him obtained further statements favorable to the bonds.

[1, 2] We entirely agree with counsel for appellants in their contention that a contracting party is entitled to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement, and that he is under no obligation to investigate and verify the statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. *Spreckels v. Gorrill*, 152 Cal. 395, 92 Pac. 1011. But the facts of this case are not such as to make those principles applicable here. There is a total absence of express statement or positive assertion of the alleged untrue facts by Landwehr. There is a further total absence of relationship between respondent and the writers of those letters, or of any voucher for the reliability of those persons either by the respondent or his agent, such as would be necessary before making the respondent responsible for their statements.

Without regard to other questions discussed in the briefs, it thus clearly appears upon the record that plaintiffs are not entitled to recover.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

HAMILTON v. MIHILLS. (No. 13017.)

(Supreme Court of Washington. Aug. 30, 1916.)

1. FRAUD § 9—ELEMENTS—IN GENERAL.

To constitute fraud, whether as a defense or as a cause of action, representations must have been made as to a material matter; must have been false; must have been known to the maker to be false, or have been made recklessly as facts without knowledge of their truth; must have been made with intent to be acted on; and must have been acted on in reliance thereupon, to another's injury.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8; Dec. Dig. § 9.]

2. BILLS AND NOTES § 520 — DEFENSES — FRAUD—SUFFICIENCY OF EVIDENCE.

In an action on a note, evidence held to show that the giving of the note and the renewal thereof were induced by deceitful representations.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.]

3. FRAUD § 13(2) — MISREPRESENTATIONS — FACT—KNOWLEDGE.

That one who represented that a certain instrument had been executed by a responsible party, which was a material and inducing fact susceptible of knowledge, as of his own knowl-

edge, believed such to be a fact, but did not know it, is no excuse in law.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 4; Dec. Dig. § 13(2).]

4. BILLS AND NOTES § 518(1) — ACTIONS — EVIDENCE—CONSIDERATION.

In an action on a note given for the stock of a corporation, evidence held to show that there was practically a total failure of consideration.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1816, 1817, 1819, 1820; Dec. Dig. § 518(1).]

5. BILLS AND NOTES § 452(3) — CONSIDERATION—PARTIAL FAILURE.

In an action on a note, a partial failure of consideration is pro tanto a valid defense.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1367-1376; Dec. Dig. § 452(3).]

6. BILLS AND NOTES § 343 — BONA FIDE HOLDER—CONSIDERATION—KNOWLEDGE.

The president of a corporation who knew that its stocks were practically valueless and that a note, indorsed to him as collateral, had been given for such stocks, even if he took it before maturity, was chargeable with knowledge of the failure of consideration.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 853-855, 864, 865; Dec. Dig. § 343.]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Keenan, Judge.

Action by Boyd Hamilton against Dorlon Mihills. Judgment for defendant, with a surrender and cancellation of the note sued upon, and plaintiff appeals. Affirmed.

F. R. Monfort, of Spokane, for appellant. A. E. Barnes and Hamblen & Gilbert, all of Spokane, for respondent.

ELLIS, J. Action on a promissory note made by defendant to the Orofino Portland Cement Company, a corporation, and transferred by indorsement to plaintiff. Defendant by answer admits the making of the note, denies that plaintiff was a bona fide holder, and sets up as affirmative defenses: (1) That the note was procured through fraudulent representations made by the general manager of the corporation; (2) that it was given for bonds and stock of the corporation which were issued without authority, in that the stock of the corporation was never subscribed.

Prior to April 20, 1912, one Reid had an option on certain lands containing limestone deposits at Orofino, Idaho, suitable for the manufacture of Portland cement. The option price was \$46,000, on which Reid had paid \$1,200. About that time the Orofino Portland Cement Company was organized, with a capital stock of \$2,000,000, consisting of 20,000 shares of a par value of \$100 each. Eight shares of this stock were subscribed by Reid. The remaining shares were turned over to him with the repayment of the \$1,200 which he had paid for the option and \$2,500 in bonds of the company, for which he turned over to the company the option on the lime-

stone lands, Reid agreeing to turn back into the treasury of the corporation, or to a trustee for the corporation, \$1,000,000 in par value of the stock, to be used as a bonus in the sale of the bonds of the corporation or otherwise in financing the improvement of the property and in the construction and operation of a cement mill thereon.

On April 20, 1912, one Dunnett, secretary and manager of the corporation and also a stockholder, seeking to interest defendant in the enterprise, represented to him that the bonds of the corporation were a good investment, would pay dividends, and that the stock of the corporation was fully paid up and nonassessable. It fairly appears that he also represented that the company had already raised \$850,000 to construct a three-unit cement manufacturing plant, that \$150,000 more were required to put the plant in operation, and that the bonds were being offered for sale for the purpose of raising the latter sum. Relying on these representations, defendant finally purchased \$5,000 worth of the bonds at par, and received as a bonus the same amount of stock. He paid \$100 down, and gave his note for \$4,900 for the balance, depositing with the company certain timber company stock as collateral. This note became due February 1, 1913. At that time it had developed that the \$850,000 for the construction of the plant had not, in fact, been raised, and no effort was made to collect the note. Dunnett again represented that the company had arranged for the advancement of \$350,000 by one Kastle, a Nebraska banker, to construct a one-unit plant, and that Kastle was a personal friend of Dunnett, with whom he had promoted successfully other cement plants less promising in their inception than this one. Relying on this representation, defendant, on September 28, 1913, gave a new note to the Orofino Company for \$4,900, and soon after paid \$500 thereon in consideration of the release of the timber company stock. This note became due February 1, 1914. Meanwhile, in July, 1913, plaintiff had become president of the Orofino Company, and had taken over its management. He continued in that position until the trial of this action. At some time after January 1, 1914, this second note was transferred by indorsement to plaintiff, together with a number of similar notes as collateral security for a loan of \$10,000 from the plaintiff to the company. It does not appear just when this transfer was made. Plaintiff's testimony on the subject is conflicting. He first stated that he thought it was in April, 1914, and subsequently that he thought it was prior to February 1, 1914, the date of the maturity of the note. Soon after his election as president in July, 1913, plaintiff assumed full management of the financial affairs of the company. Though he denies any knowledge of the representations made to defendant by

Dunnett, it is at least certain that he knew what the note was given for. Defendant testified that Hamilton personally assured him that he intended to sue Kastle and make him "come through" on his agreement to finance the building of the mill, and that this was before the note was transferred to Hamilton. Defendant participated in a stockholders' meeting on January 7, 1913, and possibly in an earlier meeting. While it is asserted that at this meeting of January 7, 1913, a report of the financial condition of the company was read, this report is not in evidence nor anything to show that it mentioned or threw any light on the supposed contract with Kastle. It is undisputed that the plant was never built, and that Kastle never advanced the money for that purpose. Defendant testified that he did not learn how the stock of the company had been paid for, or the manner in which the company had been launched, until shortly before this action, and that he then learned these things through disclosures made in a suit on a note given by another purchaser of stock and bonds. Many of these things were disputed or qualified by plaintiff's witnesses, but a close scrutiny of the record convinces us that the foregoing facts were established by a fair preponderance of the evidence.

The trial was to the court without a jury. The court found that the note was given in payment for bonds and stock of the company upon representations in regard to the financial condition of the company which were not true, that there was an entire failure of consideration, and that plaintiff was not an innocent holder. The court concluded as a matter of law that plaintiff was not entitled to any recovery, and that defendant was entitled to a surrender and cancellation of the note and to a judgment for costs and disbursements. Judgment was entered accordingly. Plaintiff appeals.

The several assignments of error present three questions: (1) Was the giving of the note induced by fraudulent representations? (2) Was there a failure of consideration? (3) Was appellant a bona fide holder? We shall consider these in their order.

[1] 1. The essential elements of representations to constitute fraud, whether as a defense or as a cause of action, are undoubtedly the same. They are these: The representations must have been made as to a material matter; they must be false; it must appear that the maker knew them to be false, or made them recklessly as facts without knowledge of their truth; they must have been made with the intention that they should be acted upon by the other party; the other party must have acted in reliance upon them, and he must have thereby suffered injury. *Raser v. Moomaw*, 78 Wash. 653, 139 Pac. 622, 51 L. R. A. (N. S.) 707; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; 20 Cyc. 13.

[2, 3] Applying these principles, we are convinced that the giving of both the first note and the renewal was induced by deceitful representations. There can be no question that the stock was not fully paid up as Dunnett represented. There is no evidence that appellant discovered this fact until, as he testified, shortly before the bringing of this action. This was a vitally material matter. Had appellant known, as there is no evidence he did, that the only asset of the company was the limestone land, he did not know that its only title to that land was an option thereon which had never been taken up. Though respondent was advised prior to giving the renewal note that the \$850,000 first represented as available to build the three-unit plant was not forthcoming, Dunnett then represented that an agreement had been effected with his friend and former associate, Kastle, for the advancement of \$350,000 to build the one-unit plant. There can be little doubt that he represented this agreement as an accomplished fact, led appellant to believe that he, as secretary and manager of the company, knew it to be a fact, and convinced appellant of Kastle's ability to carry it out. It is manifest that no such contract, nor any enforceable agreement with Kastle, had ever been made. The building of at least a one-unit plant was also a vital and material factor in the enterprise. Without it neither bonds nor stock would have any value. It is no answer to say that Dunnett merely stated his belief as to future intentions. On the evidence the court would have been justified in making a specific finding that he represented that this agreement had been made by a person thoroughly responsible financially, and so represented as of his own knowledge. The fact that he so believed, but did not know, is no excuse in law. As we said in *Grant v. Huschke*, supra:

"Representations, as of his own knowledge, of material and inducing facts susceptible of knowledge, made by a vendor in ignorance of the facts, but with the knowledge that the vendee is relying upon the representations as true, and under circumstances reasonably excusing the vendee from investigating for himself, are actionable on the part of a vendee so relying to his injury. In such a case, the fraud of the vendor consists in representing as true, with knowledge that it is being relied upon as true, that which he did not know to be true."

[4, 5] 2. It is equally clear that there was a practically total failure of consideration. Of all the stock which had been handed out by the original promoter to the various incorporators and officers, not a cent had been paid for any of it, save a few shares paid for at \$1 apiece. For the original issue to Reid of the entire stock he gave nothing but options on land which, so far as the record shows, have never been exercised and may have lapsed. Certain it is that they have never passed beyond the stage of mere options. This is all there is, or ever was, be-

hind the \$2,000,000 of stock and the issue of \$1,250,000 of bonds of the corporation. Ten of these bonds of \$500 face value each and 50 shares of this stock respondent was induced to take at par as the sole consideration for \$100 in money and his note for \$4,000, upon which he has paid \$500. It would tax the optimism of the most sanguine to believe that these bonds and this stock are, or ever were, worth more than the \$600 which he has already paid for them. Partial failure of consideration is pro tanto a valid defense. As said by this court in a similar case prosecuted by this same appellant:

"It seems plain to us that whatever difficulty there might be in computing with exactness the proportionate extent of the failure of consideration in this case, such failure, in any event, exceeds any amount which would be due upon the note here sued upon." *Hamilton v. Ramage*, 89 Wash. 649, 652, 155 Pac. 151, 152.

[6] 3. Was the appellant a bona fide holder? At the time he took these notes as collateral security he was, and for some time prior thereto had been, president of the company and in active management of its affairs. He must have known that the only assets of the company were merely options on the limestone land. It is conceded that he knew the note was given for the bonds and stock. It cannot be doubted that he knew both bonds and stock were practically valueless. Though there is some evidence from which it might reasonably be inferred that he had learned, prior to acquiring this note, that respondent had been led to believe that the company had a certain and enforceable agreement with Kastle to finance the building of a plant, we find it unnecessary to hold that he had full knowledge of Dunnett's representations. In any event he is charged with knowledge of the failure of consideration. Even assuming therefore, that he purchased this note before its maturity, he took it charged with knowledge of the infirmity of its consideration.

Judgment affirmed.

MORRIS, O. J., and MOUNT and OHADWICK, JJ., concur.

STATE ex rel. WILLIS v. MONFORT, County Auditor. (No. 13632.)

(Supreme Court of Washington. Sept. 5, 1918.)

1. CONSTITUTIONAL LAW § 13 — CONSTRUCTION.

While a constitutional provision should be strictly construed, especially when its terms are clear, the reason and intention control the strict letter when it would lead to palpable injustice, contradiction, and absurdity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 9, 10; Dec. Dig. § 13.]

2. JUDGES § 4 — ELIGIBILITY — SUSPENSION FROM BAR.

Const. art. 4, § 17, providing that no person shall be eligible to the office of judge of the Su-

preme or superior court unless he shall have been admitted to practice in the state courts, makes ineligible an attorney suspended from the bar for one year; suspension during its operation being in effect disbarment.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 16-20; Dec. Dig. 4.]

Department 1. Appeal from Superior Court, Lewis County; D. F. Wright, Judge.

Mandamus by the State, on the relation of J. E. Willis, against D. W. Monfort, Auditor of Lewis County. From an order dismissing the petition, relator appeals. Affirmed.

J. E. Willis, of Chehalis, for appellant. Forney & Ponder, of Chehalis, and C. D. Cunningham, of Centralia, for respondent.

MOUNT, J. This is an appeal from an order of the lower court, dismissing the petition of the relator for a writ of mandamus to compel the auditor of Lewis county to print the name of the relator upon the ballot as a candidate for the nomination of superior judge. It appears from the petition that the relator is a citizen of the United States and of this state and a qualified voter in Lewis county; that he is and was at all times stated in the application duly admitted to practice law in the courts of record of this state; that in the month of July he filed his declaration of candidacy and tendered to the auditor the fees provided by law therefor, but after the filing of such declaration the county auditor notified relator that he would not print relator's name upon the ballot to be used at the primary election in September. The petition also shows that on the 14th day of July, 1916, after a trial in an action wherein the state of Washington, upon the relation of the Lewis County Bar Association, was petitioner and the relator was the respondent, a judgment was entered in that case suspending the relator from the practice of law in this state for a period of one year from the date of that decree. On these facts the lower court was of the opinion that the relator was not eligible to be a candidate for the office of judge of the superior court, and for that reason sustained the demurrer.

[1] This involves the construction of section 17 of article 4 of the Constitution, which reads:

"Sec. 17. *Eligibility of Judges.* No person shall be eligible to the office of judge of the Supreme Court or judge of a superior court unless he shall have been admitted to practice in the courts of record of this state or of the territory of Washington."

It is insisted by the appellant that this section of the Constitution should be given a strict construction, as was done in the case of *State ex rel. Reynolds v. Howell*, 70 Wash. 467, 126 Pac. 954, 41 L. R. A. (N. S.) 1119. It is, no doubt, correct to say that a constitutional provision should be given a strict construction, especially where its terms are clear; but the rule is that the reason and intention of the lawgiver will control the

strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity. 1 Kent's Commentaries, 462; *Heydenfeldt v. Daney, etc., Min. Co.*, 93 U. S. 634, 23 L. Ed. 996.

[2] It is argued by the appellant that, because the constitutional provision uses the words, "No person shall be eligible to the office of * * * judge of a superior court unless he shall have been admitted to practice in the courts of record of this state," it means that every person who has heretofore been admitted to practice law in the courts of record of this state is eligible to the office of judge of the superior court no matter what may occur thereafter. We think it would be absurd to say that this provision of the Constitution means that, when a person has been admitted to practice in the courts of record of this state, and subsequently he has been disbarred for cause or his admission vacated, he is still eligible to the office of superior judge by reason of his original status. The construction of this constitutional provision contended for by the appellant leads to that absurdity. When the Constitution was framed and when it was adopted, it was clearly not the intention of the people in adopting it to authorize a person to be elected judge who was not, at the time of his election, entitled to practice as an attorney in the courts of record in the state. This provision of the Constitution, in our opinion, defines a personal status which must continue, and when the status ceases to continue the person is ineligible. We think no other reasonable construction can be placed upon this provision.

No authorities directly in point have been called to our attention. The case of *Brown v. Woods*, 2 Okl. 601, 39 Pac. 473, comes nearer to the point than any other to which we have been referred. That was a case where there was a statute providing—

"that no person shall be eligible to the office of county attorney who is not duly admitted to practice as an attorney in some court of record in this territory."

A disbarment proceeding had been instituted against the petitioner, Woods, in that case, and he was suspended from practice. Before the trial was had he was elected county attorney, and the court in that case, in passing upon his eligibility to hold the office, said:

"The evident purpose and intention of the legislative act, with reference to the eligibility of a person to the office of county attorney, was not only that he should possess qualifications to perform the duties of the office of county attorney, but that there should be a judgment and determination of a court that he does possess the moral and mental qualifications of an attorney; that there should be a determination of a court that he is a person of good moral character, and learned and skilled in the legal profession. It requires that he 'shall have been duly admitted to practice,' and then specifies the particular duties that he is required to perform. The statute, it is true, does not say in terms that he must not have been disbarred from practice in the very court in which the law requires him to per-

form certain professional duties, but the terms of the act show that this was within the reason and intention of the Legislature. It was within the purpose and spirit of the act, and that which is within the reason, purpose, and intention of the language used is as much within the act as though it were a part of the language itself."

That reasoning is applicable to this case. We think it is clear that the Constitution meant to say that no person is eligible to the office of judge of the superior court unless he shall have been admitted to practice in the courts of record in this state, which means that he not only shall have been, but that he is, at the time he becomes a candidate or is required to qualify as such judge, entitled to practice in the courts of this state. The fact that the petitioner is suspended rather than disbarred for all time is of no special importance, because under his suspension he is disbarred during that time from practice in the courts and from being eligible to any office or employment by reason of the fact that he had, at one time, been admitted to practice. When he was suspended from exercising the rights of an attorney at law, that suspension was as effective during the time thereof as a removal.

In view of the conceded fact that the relator is suspended, it follows that he is not eligible to hold office at the time he is required to qualify, and that he is not eligible to become a candidate upon the ticket. *State ex rel. Reynolds v. Howell*, supra. The respondent was therefore justified in refusing to print his name upon the ballot.

The judgment appealed from is affirmed.

MORRIS, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

VAN BUREN et al. v. TRUMBULL et al.
(No. 13333.)

(Supreme Court of Washington. Aug. 30, 1916.)

1. EASEMENTS ¶17(4) — RIGHT TO INGRESS AND EGRESS—SALE BY PLAT.

One who plats property upon which streets have been laid out, and who sells property with reference thereto, cannot, by any act of his own, defeat the right of his vendee to use the platted streets for the purposes intended.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 47, 48; Dec. Dig. ¶17(4).]

2. EASEMENTS ¶17(4) — RIGHT TO INGRESS AND EGRESS—SALE BY REFERENCE TO PLAT.

As between grantees of common grantor who plats and sells land with streets laid out thereon, the rights of the parties are determinable by reference to the grantor's rights.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 47, 48; Dec. Dig. ¶17(4).]

3. EASEMENTS ¶26(1)—SALE BY PLAT—VACATION OF STREET.

Ballinger's Ann. Codes & St. § 3808, vacating county roads unopened within five years of the order to open, does not apply to private rights acquired by conveyance or grant from a

common grantor who sells land under a plat showing streets which are not opened.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 72½-74; Dec. Dig. ¶26(1).]

4. EASEMENTS ¶26(1) — EXTINGUISHMENT — PRIVATE AND PUBLIC RIGHTS.

A right of private easement may exist although the public right has been extinguished by nonuser under statute vacating highways not opened within five years from the opening order.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 72½-74; Dec. Dig. ¶26(1).]

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by J. D. Van Buren and others against E. C. Trumbull and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Williamson & Luhman of North Yakima, for appellants. H. J. Snively, of North Yakima, for respondents.

CHADWICK, J. Many years ago A. laid out an addition to the city of North Yakima known as the St. Paul acre lots. The plat was filed in May, 1888, and shows a street through the center of the tract known as Clark street. Appellants and their predecessors in interest bought on one side of Clark street. Respondents bought on the other side of the street. All parties bought with reference to the plat. At the time respondents bought their land and went into possession, plaintiffs or their predecessors had fenced all that part of Clark street abutting their property. Since respondents settled upon their land, the question of title to Clark street had been the subject of some negotiation among the parties. For a time respondents found a way out to the established streets over the property now owned by one of the appellants. Differences arose. Feeling finally became so acute that it led to open warfare. Appellants, on whose land respondents had been accustomed to travel, closed and locked the gate, and finally brought this action to quiet title to the land abutting their lots, and lying within the bounds of Clark street as extended on the plat. They rely upon the statute of limitations, contending that Clark street was never opened or improved by the public and became, in virtue of the act of 1890, which this court held to apply to city streets (*Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115), as against the public, subject to the private right of any party who may have taken possession of it and held it for the statutory period.

Appellants rely primarily upon *Smith v. King County*, 80 Wash. 273, 141 Pac. 695, and *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444. They insist the reasoning of the latter case was adopted in the former. In our own cases the sole question considered was whether the public had any interest in

streets that had been theretofore dedicated, but not opened or worked by the public for a period of five years. The question of rights between abutting owners or those who had purchased with reference to the plat was not passed upon. Indeed, it would seem that the writer of the opinion in the Smith Case had the question in mind, and by apt expression, reserved it. It is said:

"* * * The purchasers are not parties to this litigation, and their rights cannot be affected by the result. Their rights, if any, depend upon the doctrine of estoppel. Moreover, they or their successors in title may have since compromised or lost the right so acquired. These questions we are not called upon to consider or decide. The estoppel, if any, operates only in favor of those who have been misled to their injury, and they alone can set it up"

—citing the Virginia case:

"The purchasers of lots are not parties to this litigation, and their rights can in no respect be affected by its results. It may be that the dedication was complete as to those who purchased lots prior to the public sale on the 21st of September, 1870, or as to those who purchased on that day before the announcement was made by the auctioneer, to which we have referred. It may be that the owners of lots so purchased, though they acquired a complete right to the use of the streets as designated upon the maps at the time their respective purchases were made, have since compromised or lost the right so acquired. We are not called upon to consider or to decide any of these questions. We are only concerned with the rights of the parties before us."

With the right of the public eliminated, we have the reserved question squarely before us.

[1] No cases going to the exact state of facts with which we have to deal has been cited by counsel, nor have we, after considerable search, been able to find any. Resort must be had to fundamental principles. One who plats property upon which streets have been laid out, and who sells property with reference thereto, cannot, by an act of his own, defeat the right of his vendee to use the platted streets for the purposes intended. He is estopped to deny or impeach rights thus acquired. *Elliott on Roads & Streets*, § 1191; *Herman on Estoppel*, §§ 1145, 1146, 1147; *City of Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452; *Welsbrod v. Railway Co.*, 18 Wls. 40, 86 Am. Dec. 743; *Boise v. Hon*, 14 Idaho, 272, 94 Pac. 187.

"The doctrine has for its object the suppression of fraud and the enforcement of honesty and fair dealing. Where, therefore, lots have been offered for sale, and have been purchased in accordance with a map or plat upon which streets are made to appear, it is presumed that the purchase was induced, and the price of the lots enhanced thereby, and the seller is estopped to deny the right which has been thus acquired. To permit him to sell the lots under such circumstances, and then to close the streets, would be to permit him to perpetrate a fraud upon his vendees." *Norfolk v. Nottingham*, supra.

The court continues; and this is the expression upon which appellants hang their hopes:

"Such an estoppel, however, operates only in favor of him who has been misled to his injury,

and he alone can set it up. This proposition would seem to flow as a logical sequence from the principle upon which estoppel rests, and is abundantly sustained by authority. See *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868."

This we shall consider later in this opinion.

[2] Now it would seem, if the vendor, or dedicator of land could not, by any act of his own, deny to his vendee a right to at least an easement in the property theretofore dedicated as a street, that one claiming by, through, or under him could not do so. As between the grantees of a common grantor who had platted and sold land, rights are to be primarily determined by reference to the right of the grantor. That is to say, if the common grantor could not deny the full effect of his deed and the right of ingress and egress, his grantee could not do so.

[3] The statute vacating streets that had not been opened to the public reads as follows:

"Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time." Bal. Code, § 3803.

It makes no mention of private rights, and cannot be held to, in any way, affect them. Having failed to take account of situations where lots had been, or might thereafter be, sold in platted additions, the logical assumption must be that the Legislature intended no more than to waive the interest of the public in so far as it was represented by the municipality. This belief finds some support when we consider that, at the time the statute vacating unopened highways was passed, we had upon the statute books, and have now, a law making the vacation of platted property a matter entirely discretionary with the county commissioners, to be granted only upon such conditions and restrictions as they might deem reasonable and for the public good, and, we may add, the statute implies, without doing violence to private rights. Rem. & Bal. Code, §§ 7844-7846.

[4] It may be seriously questioned whether it was within the power of the Legislature to so legislate as to take away a right of easement acquired by deed from the owner of platted property. A right of private easement may exist although the public right of easement be destroyed or extinguished. Without resorting to the constitutional question, but keeping close to the statute, having in mind its letter and its spirit, we may, however, hold that private rights of easement were not affected by the act, and that they remain as if the act had not been passed. Such is the fair implication of the act, and it is not inconsistent with its letter to so hold. The rule govern-

ing before the adoption of the statute of 1890 is clearly stated in *Angell on Highways*, § 326, note:

"Until the time arrives when a street is required for actual public use and when the public authorities may properly be called upon to open it for such use, no mere nonuser, however long continued, will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public."

If we eliminate the public right, the rule would read, Subject to the mutual rights of the various grantees who trace their title to the common grantor, who is ever restrained by the bar of estoppel from denying the right of easement to his grantees.

The rights of parties owning land abutting a vacated highway or street are well stated in *Holloway v. Southmayd*, 139 N. Y. 390-404, 34 N. E. 1047, 1049. The court, in discussing a case where no formal dedication had been made (the principle is the same as where a street has been vacated), said:

"The fact in that case was that the owner of the tract made conveyances of portions, bounding them upon intended streets not yet laid out by legal authority, but treating them as located by the map of the public authorities had been extended. The decision of the referee was upheld, as being supported by the authorities, that these conveyances, although not amounting to a dedication of the lands embraced in the supposed streets to the use of the public, or constituting them public highways, created an easement in favor of the grantees of the lots abutting thereon; which, as between them and their grantor, and those deriving title under him, entitled them to have the lands described in the conveyances as streets and avenues left open as such for the benefit of their lots"

—and, in discussion of the particular case:

"If, by act of law, the public right, or easement in the highway, has ceased, there is no reason for saying that, as against the grantor of the abutting land, any right to the continuance of private easements has been lost to the grantee. At least, the principal argument for the other view is that the possible discontinuance of the highway was a contingency which the parties must, or should, have considered. But is that quite just? Had the grantee not the right to assume that, with the fee of the highway in the grantor, in conveying lands with boundaries given upon the highway, together with all the appurtenances, easements, advantages, and privileges he intended to and did, impliedly if not in express terms, warrant to his grantee, as far as he was concerned, the continuance of the open space in front of the land for all the beneficial purposes which it could subserve, even if the public easement should cease? When it is said that the land of a highway, which has been discontinued, reverts to primary conditions of ownership, obviously, it is to be understood that such ownership is not thereby relieved of burdens created by the original owner."

So in *Portland v. Whittle*, 3 Or. 126-128, it is said:

"When a man or company of men own land, and lay it off into blocks and streets, and sell lots abutting on a street so laid off, so that the street is a convenience to the purchasers of the

lots, those acts amount to a dedication of the land so laid off into streets, and the persons so laying it off cannot recall it or in any manner prevent its being used as streets. Such persons are barred or estopped by their acts, and all persons or corporations subsequently claiming under them are equally bound."

Referring again to the *Smith Case*, counsel say that respondents cannot claim an estoppel as against appellants unless they have been misled to their injury. This argument presupposes a right in the appellants that, as we view the case, does not exist, but if there be a technical right as against the public, it vanishes under the peculiar facts in this case. Respondents and their grantors were misled to their injury. They bought with reference to the plat. They no doubt paid more for their lots than they would have paid but for the platted street—if indeed they would have bought at all. In *Bayard v. Hargrove*, 45 Ga. 342, 350, 353, will be found a complete argument against the contention of the appellants:

"But there is a clear distinction by the authorities, and in the nature of the case, between a mere right of way seized by the public or dedicated to the public and the case made by this record. Here is a contract. The owner of the land proposes to lay out a town. He makes up a map, with the lots, streets, lanes, etc., marked upon it and he not only agrees to dedicate the streets to the public but he sells the lots abutting upon the streets. The public accepts the streets the lot owners buy the lots under these representations, and the owner of the soil gets a consideration for his dedication in the increased price of his lots.

"In this case there are three parties to the transaction, the owner of the land, the public, and the purchasers of the lots. And the whole affair is a matter of contract, for a valuable consideration. Especially is it true that there are more parties at interest than the public and the dedicant. The purchasers of the lots acquired a contract right in the street. They acquired the right to use it themselves and the right to have the street open to all others whom they may desire to use it. This title is gone from the owner, except with the consent of the public and the lot owners. If the public were to forfeit or abandon it, this would not affect the rights of the lot owners. The owner of the land has parted with his right ever to assert his right to the soil to the injury of the easement. * * * In cases like this, of a sale of lots upon a street dedicated by the vendor of the lots, there is an element that does not exist in the cases referred to by the counsel for the defendant, in error. * * * That element is that this street was one of the inducements of the vendees to buy. The price of the land to the vendor was increased by his dedication of the street. Its precise width and the precise uses to which it shall be put are material to the owner of the abutting lands, and not to the original proprietor."

We find no error, and the judgment is affirmed.

MORRIS, C. J., and MOUNT, FULLERTON, and ELLIS, JJ., concur.

PETERSON v. CHESS. (No. 13244.)

(Supreme Court of Washington. Aug. 30, 1918.)

1. SALES §481—CONDITIONAL SALES—INJURY TO PROPERTY—RIGHT OF RECOVERY.

Where, while an article was held under a conditional bill of sale, it was injured by a third person, the buyer cannot recover of him for the injury or the amount he had paid on the purchase price, the sellers having after the accident taken possession of the article under a broken condition of payment, so that the loss of the article was their loss, and the loss of such amount paid being chargeable to the hazard of the contract, and not to the person injuring the article.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1449-1455; Dec. Dig. §481.]

2. APPEAL AND ERROR §1151(2) — DISPOSITION OF CAUSE—REMISSION OF DAMAGES.

The appellate court cannot, instead of ordering a new trial, order a remission of damages because of submission of an improper element of damages; it having no means of ascertaining the amount, if any, allowed on such item.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4499, 4500, 4503-4505; Dec. Dig. §1151(2).]

3. APPEAL AND ERROR §995 — REVIEW — WEIGHT OF TESTIMONY.

The Supreme Court cannot interfere with the jury's disposition of the question of weight of testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. §995.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by John Peterson against S. W. Chess. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

McCaferly & Robinson, of Seattle, for appellant. Carl J. Smith and Milo A. Root, both of Seattle, for respondent.

CHADWICK, J. This action was brought to recover damages for personal injuries sustained by respondent as the result of a collision between respondent's motorcycle and appellant's automobile. From a verdict and judgment in the sum of \$1,500, this appeal is prosecuted.

[1] Among the items of damage claimed by respondent, and which was submitted to the jury, was the sum of \$350 for damages to the motorcycle. The testimony discloses that plaintiff held the motorcycle under a conditional bill of sale; that he had agreed to pay the sum of \$300, and had actually paid the sum of \$132. The question whether respondent could recover upon this item arose at the trial. The court reserved its judgment until the time for instructing the jury.

From the arguments of counsel and the comments of the court, which are a part of the statement of fact, we understand the theory upon which a recovery was permitted to be that respondent being bound by his promise to pay, and, there being no direct evidence that the vendors had declared the contract to be in default or had released respondent, he was entitled to re-

cover as an owner of the property. We have consistently held that one who takes property under a conditional bill of sale is not an owner and has no element of title; that title passes only upon full performance of the conditions precedent to which he has subscribed. *Winton Motorcar Co. v. Broadway Auto Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Duarte v. Minnick*, 85 Wash. 539, 148 Pac. 600.

There is no direct testimony that the vendors had forfeited the contract, but it is abundantly shown that respondent had no interest in the motorcycle at the time the suit was begun, or at the time of the trial. He did not claim to have possession, or to have been called upon to meet payments deferred, or delinquent, at the time of the accident. The contract was subject to forfeiture, and one of the vendors testified that after the accident the owners took possession of the motorcycle, and sold parts from it. Under the testimony, the loss of the motorcycle is the loss of the vendors, and not of the vendee.

Neither can we agree with counsel that respondent is entitled to recover, in any event, the \$132 paid on the purchase price. With the payment of the purchase price appellant had nothing to do. That sum was lost to respondent when the owners took possession of the machine and treated it as their own. It may be charged to the hazard of his contract, but not to appellant. Respondent relies upon *Messenger v. Murphy*, 83 Wash. 353, 74 Pac. 480, where it was held that the purchaser of goods on the installment plan, the title remaining in the vendor, may recover the full value for their conversion when the contract contains an unqualified agreement to pay the price. That case involved a controversy between the vendee and a third party, with no evidence of the assertion of the vendor's right to the property. The agreement was still enforceable by the vendor. It was upon this ground that the decision of the court was put. It is not so here. When the vendors, having ownership, reasserted the right of possession under a broken condition for payment, they waived all right to proceed against respondent or to hold him on the contract. *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Thompson Co. v. Murphine*, 79 Wash. 672, 140 Pac. 1073.

[2] Where an improper element of damage is submitted to the jury, the vice may be cured by ordering a remission if the amount of such damage can be readily calculated with reasonable certainty.

Nickelson v. Cameron Lumber Co., 39 Wash. 569, 81 Pac. 1059, and *Hoyt v. Independent Asphalt Paving Co.*, 52 Wash. 672, 101 Pac. 367, are cases where we ordered a remission under penalty of a new trial. In the one case the amount was determined by a special verdict; in the other by undisput-

ed testimony. In the case at bar the testimony as to the value of the motorcycle and the amount of the damage to it is conflicting. We have no means of ascertaining the amount allowed upon this charge, if any. In such cases the better practice is to call for a retrial.

Other errors are assigned. We find no merit in the assignments going to instructions given or refused.

[3] It will not be necessary to consider the several charges that the court commented on the testimony. Nor do we find that respondent was guilty of contributory negligence as a matter of law. While it may seem to us that contributory negligence was proven by the greater weight of the testimony, there was some testimony which, if believed by the jury, would sustain a verdict. The weight of the testimony is for the jury to determine. To quarrel with it over the weight or preponderance of the evidence would be to usurp its function.

Reversed and remanded for a new trial.

MORRIS, C. J., and PARKER and HOLCOMB, JJ., concur.

GRANT et al. v. MONTEREY GOLD MINING CO. et al. (No. 13494.)

(Supreme Court of Washington. Aug. 30, 1916.)

1. CORPORATIONS \S 592½ — DISSOLUTION — DISPOSITION OF ASSETS — STATUTES.

Rem. & Bal. Code, \S 3715d, providing that after a corporation's name has been stricken by the secretary of state for nonpayment of license fees, and dissolved, the directors shall hold its property for the benefit of its stockholders and creditors, to be disposed of under appropriate court proceedings, is modified by section 3715a, as amended by Laws 1911, p. 135, \S 1, providing that a corporation thus stricken and dissolved may at any time thereafter hold a meeting of stockholders and pass necessary resolutions to close out its affairs and wind up its business.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. \S 592½.]

2. CORPORATIONS \S 619 — DISSOLUTION — DISPOSITION OF ASSETS — STATUTES.

Rem. & Bal. Code, \S 3715a, as amended by Laws 1911, p. 135, \S 1, authorizing a corporation which has been stricken and dissolved by the secretary of state for nonpayment of license fees, to hold a meeting of stockholders to pass necessary resolutions to close out its affairs and wind up its business, does not restrict the meeting to proceedings for a drastic sale of assets, but permits it to close the corporation's affairs in some other way.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2459, 2460; Dec. Dig. \S 619.]

3. CORPORATIONS \S 573(3) — DISSOLUTION — EXCHANGE OF STOCK — ASSENT OF MINORITY HOLDERS.

Where the majority stockholders of the M. corporation, stricken and dissolved by the secretary of state for nonpayment of license fees, by resolution accept proposition of the B. corporation to take over M.'s assets, assume M.'s debts, and exchange its shares for those of M.,

not only M.'s minority stockholders who agree thereto by actual exchange, but those who by assent agree to exchange, cannot be heard to object, having waited for two years after conveyance, and till proceedings by the B. corporation to sell some of the exchanged shares for unpaid assessments.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2296; Dec. Dig. \S 573(3).]

Department 2. Appeal from Superior Court, Spokane County; W. H. Jackson, Judge.

Action by James S. Grant and others against the Monterey Gold Mining Company and others. From an adverse judgment, plaintiffs appeal. Affirmed.

O. C. Moore, of Spokane, for appellants. Burcham & Blair, of Spokane, for respondents.

BAUSMAN, J. The Monterey Company, having a capital of \$1,000,000 paid and non-assessable shares, owned certain mines mortgaged for advances from some of its directors. The security being overdue in March, 1911, the company much in other debts, and a foreclosure being threatened, the shareholders were called to meet in April. The call proposed final action upon the company's affairs, and the shareholders resolved to accept the proposal of a new company, the Bolster Mining Company, organized by some of the Monterey shareholders, to buy the Monterey Company's mines, assuming the latter's indebtedness, and exchanging its own shares on a certain basis with the retiring shares of Monterey. The Bolster stock, however, was to be assessable to the extent of a twentieth. The Monterey Company conveyed to the Bolster Company as early as August of 1911 and has no remaining assets.

[1] Before all this the company's license fees had been delinquent more than two years; so, under Rem. Code, \S 3715d, its name had been stricken by the secretary of state. According to that section the directors must thereafter hold the property of the delinquent company "for the benefit of its stockholders and creditors, to be disposed of under appropriate court proceedings." That was an enactment of 1909, which, however, must be read to-day with one of 1911 (page 135, \S 1, the present Rem. Code, \S 3715a), providing that, though the corporation be thus stricken and dissolved, it may—"at any time thereafter hold a meeting of stockholders, in the same manner as provided during its corporate existence, and pass such resolutions as may be necessary to close out its affairs and wind up the business of such corporation and where such stricken and dissolved corporation has heretofore held such meetings of stockholders for the purpose of passing resolutions to wind up their affairs, such method of procedure is hereby validated and approved."

[2] A meeting being clearly authorized by this law, the only contention left is whether the statute restricts it to proceedings for a drastic sale of assets or whether the meeting

may close the company's affairs in some other way also. The latter option we unhesitatingly pronounce. This statute has frequently been interpreted as a revenue measure (State ex rel. Preston Mill Co. v. Howell, 67 Wash. 377, 121 Pac. 861), and the delinquent is sufficiently penalized under it by the expense and inconvenience of new organization.

The complaining minority shareholders, accordingly, can allege here no violation of the statute, but must maintain their case for a receivership and a restoration of the Monterey Company's assets on some violation of general corporation law.

[3] The majority plan of reorganization through a new company was apparently based on *Pitcher v. Lone Pine, etc., Min. Co.*, 39 Wash. 608, 81 Pac. 1047, but it is unnecessary to say whether that plan shall be again approved by this court, because there is here decisive acquiescence. That a minority shareholder cannot be compelled even in corporate distress to accept shares in a new company may be conceded (*Mason v. Pewabic Mining Co.*, 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524), but he has a right to agree to do so, and this record is convincing that all the plaintiffs did agree, some by assent and others by actual exchange. The latter are manifestly silenced, while, as to the former, they will not be heard to object now; for, though the Monterey Company conveyed in August, 1911, this suit was not begun until March, 1913, not, indeed, until proceedings by the Bolster Company to sell some of the exchanged shares for unpaid assessments.

The lower court properly found such delay fatal to all these plaintiffs, who, it may be added, did not bring their suit in behalf of all other shareholders that might join and contribute to the expense but only for themselves.

Judgment affirmed.

MORRIS, C. J., and MAIN, FULLERTON, and PARKER, JJ., concur.

VIOLETTE v. INSURANCE CO. OF THE STATE OF PENNSYLVANIA. (No. 13275.)

(Supreme Court of Washington. Aug. 30, 1916.)

1. INSURANCE §76—ACTIONS—BURDEN OF PROOF—POWERS OF AGENT.

Where the insurer denies the power of one assuming to write a policy as agent, the party so dealing with him must prove either that such person was the actual agent, or that the insurer is estopped to deny the agency.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 101; Dec. Dig. §76.]

2. INSURANCE §77—POWERS OF AGENT—ESTOPPEL TO DENY AGENCY—"OSTENSIBLE AGENCY."

The insurer having appointed M. F. H., a woman, its agent, and its manager dealt with

C. E. H., her husband, who conducted the business of the agency and wrote policies in the name of M. F. H. and held himself out as the agent, and was supposed by the insurer to be M. F. H., he became the ostensible agent, and as against one dealing with him as such, the insurer was estopped to deny his authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 102; Dec. Dig. §77.]

For other definitions, see Words and Phrases, First and Second Series, Ostensible Agency.]

3. INSURANCE §138(1)—REGULATION—ISSUANCE OF POLICIES.

3 Rem. & Bal. Code, § 6059—36, making it unlawful for an insurance company to write a policy unless countersigned by its duly authorized agent, does not make a policy void, if signed by one assuming to act as agent, though he was not its licensed agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246—249; Dec. Dig. §138(1).]

4. INSURANCE §229(1)—CANCELLATION OF POLICY—WAIVER OF NOTICE.

Provision of policy requiring five days' written notice of cancellation may be waived by the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 501; Dec. Dig. §229(1).]

5. INSURANCE §229(2)—CANCELLATION OF POLICY—WAIVER OF NOTICE.

Where insurer ordered cancellation of policy containing requirement of five days' written notice of cancellation, and, when the agent verbally notified the insured, he requested that the risk be written in another company, the first policy was canceled when the new policy issued, though no other notice was given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500—502; Dec. Dig. §229(2).]

Department 2. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by J. B. Violette against the Insurance Company of the State of Pennsylvania. From a judgment of nonsuit, plaintiff appeals. Reversed, and judgment ordered for plaintiff.

C. B. Hughes and Hughes & Adams, all of Wenatchee, for appellant. Granger & Clarke, of Seattle, for respondent.

HOLCOMB, J. This action was to recover on a fire insurance policy for the loss of a certain stock of liquor. Appellant, having been nonsuited below, prosecutes this appeal.

There is no serious conflict in the evidence, which shows that C. E. and M. F. Hamilton, husband and wife, respectively, were each the authorized agent of several insurance companies. Appellant was experiencing trouble in keeping his stock of liquor insured, and was notified by C. E. Hamilton on December 28, 1914, that a former policy of the Prussian National Insurance Company on the liquor had been ordered canceled, but that he would write the risk in another company, to which appellant assented. C. E. Hamilton then wrote a policy in respondent company covering the stock of liquor and countersigned the same as agent on December 29, 1914. The loss occurred by fire on the next

day, and the policy was not delivered to appellant until after the loss, as he was away on a business trip. After this suit was commenced it was discovered that M. F. Hamilton, and not C. E. Hamilton, was the duly licensed agent of respondent, and that after she had taken out the license she turned over the entire business to her husband and delegated to him all the powers as agent that she possessed, including the power to countersign policies without any express authority to do so from her principal.

[1] Respondent's first defense to the action was that C. E. Hamilton was not its agent, and that M. F. Hamilton had no authority to delegate the entire agency itself to a third person without the principal's knowledge or consent, and therefore that C. E. Hamilton could not bind respondent by his acts. It therefore becomes incumbent on appellant to prove C. E. Hamilton respondent's agent, and to do so he must prove either that C. E. Hamilton was an actual agent of respondent or that respondent was estopped to deny the existence of such agency.

[2] There is no contention that C. E. Hamilton was actually appointed by respondent as its agent, and, if appellant is to prevail, it must be upon the theory of a sort of estoppel. C. E. Hamilton was known generally in Leavenworth as "Gene," and was so known to the appellant. Other policies were issued by respondent company in Leavenworth, and, as M. F. Hamilton said she never had anything to do with the business, such policies must have been written by "Gene" Hamilton. Strout, the general manager of respondent in Washington located in Seattle, had known "Gene" (C. E.) Hamilton for about six years prior to the trial of this case, frequently meeting and doing his company's business with him, but did not know his initials, although he supposed they were M. F. It was simply a case of mistaken identity, as he knew "Gene" Hamilton well and personally, thought he was respondent's agent, and knew the agent's initials were M. F., but thought those were Gene's initials. All the correspondence carried on between the Hamiltons and Strout was done by C. E. Hamilton, although he signed the letters as M. F. Hamilton and attended to the entire business of the agency. During the time appellant was procuring the insurance from C. E. Hamilton he supposed, as did Strout, that Gene (C. E.) Hamilton was the agent, since he attended to all the transactions; and never during any of his visits to the office did he see M. F. Hamilton, nor did he know that she was interested in the business in any manner, or that any other than C. E. Hamilton was the agent; nor did he see anything that would put him on inquiry.

It is evident that C. E. Hamilton had at least ostensible authority to act as respondent's agent, and appellant, relying upon this ostensible authority, dealt with C. E. Hamilton as such agent. "Ostensible agency," as

defined by Mechem in his work on Agency, vol. 1 (2d Ed.) § 57, is where the principal intentionally or from want of ordinary care leads a third person to believe another to be his agent who has never really been employed or authorized by him. The rule is well stated in *Phoenix Ins. Co. v. Walter*, 51 Neb. 182, 70 N. W. 938, wherein the court held that:

"Ostensible authority to act as agent may be conferred if the party to be charged as principal, affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." Syllabus.

See, also, *Thomson v. Shelton*, 49 Neb. 644, 68 N. W. 1055; *Blanke Tea & Coffee Co. v. Trade Exhibit Co.*, 5 Neb. (Unof.) 358, 98 N. W. 714.

This rule is based on the ground that by reason of this lack of care the principal is estopped to deny the agent's authority. It is evident that respondent company was guilty of lack of care under the facts in this case, for its duly licensed agent was a woman whose license was secured by Strout, and for quite a period of time it thought its agent in Leavenworth was a man, "Gene" Hamilton, whom Strout well knew, and with whom Strout did business as the agent of the company, thus holding him out to the public as such agent. Under the rule announced above, ostensible authority to act as agent was conferred upon C. E. Hamilton by reason of this lack of care on the part of respondent, and respondent is therefore estopped to deny such agency.

[3] Nor does 3 Rem. & Bal. Code, § 6059—36, which provides that it shall be unlawful for an insurance company to write a policy unless countersigned by the duly authorized agent, necessarily make a policy void if not signed by the duly licensed agent, as it does not make the policy void by its express terms, and is for the purpose of placing restrictions on insurance companies.

[4] In conclusion, respondent maintains that the policy in question was intended as a substitution for the Prussian National policy when the latter was canceled, that the Prussian National policy was never canceled, and that the policy of respondent company was therefore never in effect. We think respondent in error, however, in assuming that the Prussian National policy was never canceled. It is true there was no five-day written notice of the cancellation served on appellant as provided by statute, but this may be waived by the insured, as it is made for his benefit alone. *Tacoma L. & S. Co. v. Firemen's Fund Ins. Co.*, 87 Wash. 79, 151 Pac. 91.

[5] The evidence shows that, when C. E. Hamilton received word from the head office to cancel the Prussian National policy, he proceeded to appellant's place of business and notified him that the policy would be canceled by the company. To this appellant assented, provided the risk was written in

some other company. He was very anxious to have his stock kept insured at all times; it was immaterial to him what company his goods were insured in as long as they were insured. We think the facts show clearly that respondent waived, as he assuredly could, the five-day notice of the cancellation, and that such cancellation took effect at the time the risk was written in some other company. Respondent makes some contention that there never was any cancellation; as appellant did not surrender the Prussian National policy at the time he received the oral notice of cancellation. It was shown that he was just about to leave the town on business, and did not have the policy with him, and said he would surrender it on his return. The immediate physical surrender of the policy we deem immaterial, as it is the intention of the parties that governs, and we think the minds of the parties met that cancellation should take effect upon the risk being written in some other company. The policy in controversy was written on December 29, 1914, the day before the fire, and at that time the Prussian National policy became canceled and the new policy effective.

Judgment reversed, and judgment ordered for appellant, with costs.

MORRIS, C. J., and MAIN and PARKER, JJ., concur.

MUSKOGEE CO. v. YAHOLA SAND CO. (No. 6474.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

1. DAMAGES — BREACH OF CONTRACT — PROSPECTIVE PROFITS.

Prospective profits, proximately resulting from the breach of a contract, are recoverable in an action for damages, where the amount thereof is not contingent and speculative, but can be measured with reasonable certainty.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 69, 70; Dec. Dig. —28.]

2. DAMAGES — BREACH OF CONTRACT — MEASURE.

Where a construction company, holding a contract to construct and equip a line of railway, enters into a contract with a sand company, whereby it agrees to construct and equip a switch for the use of the sand company, and to furnish a stipulated number of cars per annum, and to handle the same at competitive freight rates, and to credit the sand company 50 per cent. of the amount of the freight charged on each bill until the total equals the sum of \$3,000, which the sand company had advanced on the cost of the construction of the switch, and the construction company defaulted in its contract, and by agreement with the railway company the latter takes over the completion of the construction work, but refused to assume the obligation of the contract with the sand company, and the sand company, in order to get the switch, entered into a new contract with the railway company for its construction, and the switch is constructed, but the railway company

refused to account for the \$3,000 advanced to the construction company, and also refused to furnish any stipulated number of cars for the use of the sand company, held, that in an action for damages by the sand company the construction company was liable to it in damages, and the measure of its damages was the \$3,000 advanced, and interest thereon, at 6 per cent. per annum from the date of payment.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 291, 303-305; Dec. Dig. —120(1).]

Commissioners' Opinion, Division No. 2. Error from District Court, Muskogee County; R. P. De Graffenreid, Judge.

Action by the Yahola Sand Company against the Muskogee Company. There was judgment for the plaintiff; the defendant brings error. Affirmed upon condition.

Thomas H. Owen, Jos. C. Stone, and Walter S. Moore, all of Muskogee, for plaintiff in error. Wm. T. Hutchings and Wm. P. Z. German, both of Muskogee, for defendant in error.

GALBRAITH, C. The Muskogee Company, the plaintiff in error, was a construction company, and was under contract with the People's Electric Railway Company to construct and equip a line of railway from the city of Muskogee to the town of Ft. Gibson, a distance of 40 miles. This action was commenced in the trial court by the defendant in error against the plaintiff in error, to recover damages for a breach of the following contract:

"Muskogee, Oklahoma, November 2, 1911.

"Muskogee Company, owning and operating the People's Electric Railway Company, first party, and the Yahola Sand Company, second party, agrees as follows:

"That the first party will construct a spur track from a connection with the People's Electric Railway track from a point between Rogers Villa and the Arkansas river southward onto the sand and gravel bar in the Arkansas river in the southwest part of section twenty-seven, township fifteen north, range nineteen east, Muskogee county, state of Oklahoma, and provide upon said bar sufficient switch tracks from said main spur to conduct the sand and gravel business from said bar, a total of not exceeding one mile and a half of main spur and switches and up to a full mile and a half if such amount is required, and will handle and transport the gravel and sand product of the second party to all markets accessible by People's Electric Railway and any connecting line of railroad charging at all times a competitive rate, the said first party agrees to assume switching charges where it is necessary for second party to make a west side delivery, and furnish ample cars for the business of said second party. Said track to be in place and equipment ready for transportation of sand and gravel by the fifteenth day of December, nineteen hundred and eleven.

"And in consideration of the foregoing the second party agrees as follows:

"First: It will now advance to the first party the sum of three thousand dollars in cash to apply upon the cost of track material, and further agrees to load and ship not less than 1800 cars of sand or gravel, either or both, annually, including ballast furnished party of the first part.

"Second party further agrees to furnish f. o. b. cars at said gravel bar from time to time such screened gravel suited for ballasting purposes as

first party may require not to exceed one hundred yards per day for its own use at a cost of twenty cents per cubic yard paid for by first party to the second party in cash, excepting only that the first two thousand dollars' worth of such ballasting material shall be added to the three-thousand dollar track material fund above mentioned, making a sum total of five thousand dollars, and second party agrees that the five thousand dollars shall be repaid by the first party unto second party by the crediting to the second party of one-half of each and every freight bill due thereafter from second party to first party until the total of such credits shall fully reimburse said five thousand dollars.

"And second party agrees that within not later than ten days after such spur track and switches is in place ready for operation that second party shall be prepared and equipped to load and ship sand and gravel from said bar and will ship not less than 1800 cars annually.

"The first party agrees to do and perform all the things to be done and performed by it as hereinbefore stated, and to maintain and operate said track so long as second party or its assigns shall furnish throughout the year said 1800 cars of sand or gravel for shipment annually.

"Witness our hands and seals this second day of November, A. D. nineteen hundred and eleven. Muskogee Company, by C. N. Haskell, President. Attest: Wm. Murdock, Secretary. [Muskogee Company Seal.] Yahola Sand Company, by T. J. Sidener, President. Attest: A. H. White, Secretary. [Yahola Sand Company Seal.]"

It was alleged in the petition that the plaintiff had paid the \$3,000 and was ready and willing to comply with the terms and conditions of said contract by it to be performed, and that the Muskogee Company had breached said contract in this, that it failed to build and equip the switch and to furnish cars and equipment that it had agreed to do, and that in February, 1912, it surrendered its construction contract to the People's Electric Railway Company, and that neither the Muskogee Company nor the People's Electric Railway Company would perform said contract, after demand and request to do so, and that on March 30th it was compelled to enter into a new contract for the construction and equipment of said switch, and that the People's Electric Railway Company refused to account for the \$3,000 which it had paid the Muskogee Company, and also refused to agree to furnish cars as the Muskogee Company had agreed to do; that thereby the plaintiff was damaged in the sum of \$3,000 cash paid the Muskogee Company, and interest thereon, and was further damaged in the sum of \$2,000, loss of profits, which it would have made on sand and gravel if the switch had been constructed by December 15, 1911, as the Muskogee Company agreed to do. The Muskogee Company answered, admitting the execution of the contract, but alleged that it had no power under its charter to make the contract for itself, as it was simply a construction company and not an operating company, and that it did not make said contract as principal but made the same as agent for the People's Electric Railway Company, and that not it, but its principal, if any one, was liable for the breach of said con-

tract, and, further, that the Sand Company knew that it was contracting with the Muskogee Company, as agent of the People's Electric Railway Company, who had assumed all of the burdens of the contract with the Sand Company, and that afterwards the Sand Company had entered into a new contract with the People's Electric Railway Company, covering the same subject-matter as the contract in suit, and the Muskogee Company was thereby relieved from all liability on account of such contract. There was a reply in the nature of a general denial to the new matter set up in the answer. On the issues thus formed the cause was submitted to a jury, and a verdict returned for the plaintiff in the sum of \$4,645. Judgment was rendered upon this verdict, and after the overruling of the motion for new trial the cause was regularly appealed to this court.

The assignments of error are under four heads: (1) That the contract in suit was ultra vires; (2) that the contract was entered into by the Muskogee Company as agent for and on behalf of the People's Electric Railway Company, and the Muskogee Company is not liable as principal contracting party; (3) error in permitting the Yahola Sand Company to prove as part of its damages loss of profits; (4) error of the court in refusing instructions Nos. 1 and 2, requested in behalf of the Muskogee Company.

As to the first assignment of error it is sufficient to say that if it be assumed that the contract in suit is ultra vires and beyond the power of the Muskogee Company to make, this plea is not available to the Muskogee Company in this action, for the reason that it received the benefits of said contract and cannot relieve itself of its burdens by this plea. *Crowder State Bank v. Aetna Powder Co.*, 41 Okl. 394, 138 Pac. 392, and the line of cases cited therein. In the case of *Zabriske v. Cleveland, Col. & Clin. R. R. Co.*, 23 How. 381, 16 L. Ed. 488, next to the last sentence, the court, in speaking of the ultra vires contention made by the appellee, said:

"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

The refusal to give instruction No. 1, requested by the Muskogee Company, and which is assigned as error, reads:

"You are instructed that if you believe from a fair preponderance of the evidence that the managing officers of the plaintiff, Yahola Sand Company, entered into a contract on November 2, 1911, with the Muskogee Company, believing that they were dealing solely with the Muskogee Company and without the knowledge that the contract was made for the use and benefit of the People's Electric Company, and that the defendant, Muskogee Company, breached said contract by failing to expend the \$3,000 for track material for the spur track, as required by the terms of said contract, and if you further believe that the plaintiff, Sand Company, was dam-

aged by such breach, then your verdict should be for the plaintiff, and the measure of damages in that event would be \$3,000, the amount paid to the Muskogee Company, together with 6 per cent. interest from the dates of the various payments which made up the \$3,000."

The instructions given by the court to the jury governing the measure of damages were as follows:

"You are further instructed that if you find by a preponderance of the evidence that said contract was violated and broken by the defendant without any fault on the part of the plaintiff, in estimating the damages that the plaintiff would be entitled to, you may take into consideration the \$3,000 paid by the plaintiff to the defendant, with 6 per cent. interest thereon from the time of the various payments to this time."

"You are instructed that if you further believe that the defendant failed to comply with the contract sued on in this case, the plaintiff is entitled to recover of the defendant, in addition to the \$3,000 paid to it by the plaintiff, together with the legal interest thereon, the damage it has suffered, if any, by reason of the failure of the defendant to comply with its contract to furnish cars and transport the sand and gravel of the plaintiff; and, in arriving at this, you may take into consideration the profits which a preponderance of the evidence shows the plaintiff would have received had it been able to supply said sand and gravel to its customers who sought to purchase it at the market or fixed price, and in amounts ascertainable from the evidence, not to exceed \$2,000."

It will be observed that the court in its instructions followed the rule for the measure of damages embraced in requested instruction No. 1. However, the court did not limit the measure of damages to the \$3,000 and the interest thereon, as in the requested instruction, but extended the measure of damages to include profits that may have been reasonably contemplated to accrue to the Sand Company if the contract had been completed according to its terms.

The rule for the measure of damages for breach of contract prescribed by section 2852, Rev. Laws 1910, is as follows:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin."

This court, in *First National Building Co. v. Vandenberg*, 29 Okl. 583, 119 Pac. 224, recognizes the rule that anticipated profits may be recoverable in an action for damages for breach of a building contract, and quotes with approval from the opinion of the Supreme Court in *United States v. Behan*, 110 U. S. 389, 4 Sup. Ct. 81, 28 L. Ed. 168, as follows:

"The two heads of damages are distinct, though closely related. When profits are sought, a recovery for outlay is included and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits. When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the con-

tract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed."

Again in *Ft. S. & W. R. Co. v. Williams*, 30 Okl. 728, at 731, 121 Pac. 275, 277 (40 L. R. A. [N. S.] 494), the court, in discussing this character of damage, said:

"Where it reasonably appears that a party has been damaged, and that such damage is the direct result of the breach, then a recovery is justified. The next step is to ascertain how much will reasonably compensate the injured party. This should be computed by the plainest, easiest, and most accurate measure which will do justice in the premises, and if from the conditions in the contract, and the nature of the breach, it reasonably appears that the extent or amount of damages may be more readily, easily, correctly, and justly ascertained by applying the loss of profits as a measure, if it is evident that profits were lost and the amount thereof can be calculated with reasonable accuracy, then such profits are the true measure [of damages] to be applied. In such cases, however, it should appear evident that profits were lost. The amount may be estimated with only reasonable accuracy; but the fact that profits were lost should require stricter proof."

The statute above quoted forbids the recovery of damages "which are not clearly ascertainable in both their nature and origin."

[1,2] These decisions recognize the doctrine that contemplated profits are proper elements of damage in an action for breach of the character of contract involved in this action, but the decisions, as well as the statute, require that the nature and amount of such profits must be reasonably ascertainable, and it must be made to appear that they are the natural and proximate consequence of the original breach of the contract, and not speculative and contingent. Now what was the nature of the profits for loss of which the Sand Company was permitted to recover, as evidenced by the verdict of the jury, on account of the failure to construct the switch by the 15th of December, 1911, as stipulated in the contract? It is admitted in the evidence that the Sand Company was ready to ship and deliver sand and gravel, and that there was demand for this product at Muskogee, and that certain contractors were using certain quantities of sand and gravel in work under construction, and that some of these made inquiry of the Sand Company for its product between December 15, 1911, and February 24, 1912, but it does not appear that the Sand Company had a contract to deliver any quantity of sand or gravel to any one of these contractors, and was prevented from filling such contract by reason of the default in construction of the switch. The amount of sand and gravel that would have

been sold, and the amount of profit that would have been realized therefrom if the switch had been completed, as provided in the original contract, was entirely speculative and contingent. What amount any one of these contractors would have purchased and paid for, under the testimony, is altogether uncertain. Therefore it does not appear that the element of damage accruing from the contemplated profits, in the instant case, can be reasonably ascertained. It cannot be said with any degree of certainty what amount of profits were proximately lost on account of the breach of the contract. The amount of damage due to loss of profits included in the verdict must have been estimated by guess on the part of the jury. The amount of the verdict in excess of \$3,000 and interest was damage for loss of profits. This amount can be easily ascertained by deducting the \$3,000 and interest from the date of its payment from the amount of the verdict. The testimony as to the date of payment of the sums making up the \$3,000 is not contradicted. It is that \$1,000 was paid November 4, 1911, \$400 on November 7, \$600 November 9, and \$1,000 on December 22, 1911.

It is argued that the Sand Company paid the \$3,000 to the Muskogee Company for the construction of the switch and that the People's Electric Company constructed the switch and charged the cost thereof to the Muskogee Company; that the \$3,000 paid by the Sand Company was used for the very purpose for which it was paid, and therefore the Muskogee Company is not liable in this action. This argument overlooks the fact that under the terms of the contract between the Sand Company and the Muskogee Company the \$3,000 was paid as an advance, and was to be returned to the Sand Company by credits on its freight bills, and that under the new contract, which it was compelled to enter into with the People's Electric Railway Company in order to get the switch, that company refused to account to the Sand Company for this \$3,000, for the reason, presumably, that it had accounted for it in its deal with the Muskogee Company in taking over the construction contract. While it is true that the Sand Company finally got the switch by virtue of its new contract with the People's Electric Railway Company, the \$3,000 was not returned to it, as the Muskogee Company agreed should be done. Clearly the Sand Company was proximately and directly injured by the breach of the contract by the Muskogee Company to the extent of this \$3,000 and interest thereon. This amount of damage is recognized by the Muskogee Company in its requested instruction No. 1, set out above. Having asked the trial court to charge the jury that it was liable in this sum, it cannot now be heard to deny its liability in this amount.

We are constrained to hold that the other elements of damage, those for anticipated profits, are too uncertain, contingent, and speculative to be included in the damages for the breach of the contract, under the testimony given in this case, and that these ought to be eliminated from the verdict, and, when so eliminated, the verdict ought to stand. This conclusion obviates the necessity of the consideration of the other assignments of error, since it might be admitted that those assignments were well taken, and the conclusion announced above would be in no way affected thereby.

If, within 30 days from this date, the defendant in error file a remittitur in this court for the sum that the verdict exceeds the \$3,000 and interest at 6 per cent. per annum from the date of its payment, then the judgment of the trial court should be affirmed; otherwise it should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

GERLACH BANK OF WOODWARD v. HERD. (No. 7408.)

(Supreme Court of Oklahoma. June 27, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

CHattel Mortgages — 173(6) — Possession of Property—Actions.

In an action in replevin the right to the possession of "one light brown or bay mare mule 5 or 6 years old, weight about 800 pounds, and one brown mare mule 5 or 6 years old, weight about 800 pounds," the plaintiff basing its right under a chattel mortgage wherein the property was described as follows: "25 head of mules, described as follows: '5 head of work mules, ranging up to 10 years old, 18 head of mules one year old and over, and 2 male colts, season of 1911'" — and the defendant denied that the mules in controversy were covered by the mortgage, held, that it was not error for the trial court to submit to the jury, as a question of fact under all the evidence, whether or not the mules involved in the action were among those described in the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 309, 326; Dec. Dig. §§ 173(6).]

Commissioners' Opinion, Division No. 2. Error from District Court, Woodward County; Jas. B. Cullison, Judge.

Action by the Gerlach Bank of Woodward against D. C. Herd. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Chas. Swindall, of Woodward, for plaintiff in error. W. A. Briggs, of Woodward, and Chas. L. Moore, of Oklahoma City, for defendant in error.

GALBRAITH, C. Plaintiff in error commenced this action in the trial court to recover the possession of two mules; its claim

being based upon a chattel mortgage. The mules were taken from the possession of the defendant, D. C. Herd, by a writ of replevin. The mortgage of the bank was originally given the 2d day of May, 1911, by one Geo. W. Carr and wife, to secure an indebtedness of \$5,500, and the description of the property which it is claimed included the mules involved in this suit was as follows: "25 head of mules, described as follows: 5 head of work mules ranging up to 10 years, 18 head of mules one year old and over, and 2 mule colts, season 1911." It was alleged in the petition that the mules in controversy, described as "one light brown or bay mare mule five or six years old, weight about 800 pounds, and one brown bay mare mule five or six years old, weight 800 pounds," were included in the mortgage, and that the mortgage and note which it secured had been renewed on five subsequent occasions, and that the indebtedness secured by the mortgage had not been paid, and that there had been a breach in the conditions of the mortgage, in this, that the mules involved in the action had been sold and taken from the possession of the mortgagor without the consent of the mortgagee, and that demand had been made for their return. The defendant answered by a general denial.

The evidence showed that one Geo. W. Carr, joined by his wife, residents of Ellis county, Okla., executed a mortgage to the Gerlach Bank in May, 1911, covering a number of horses and mules and other personal property, located in Ellis county, and that the mortgage was renewed sundry different times, the last being October 13, 1913, and the indebtedness secured by the mortgage was extended for 8 months from that date; that the mules in controversy in this action were purchased by Carr prior to the time of the execution of the mortgage on May 2, 1911, and that he sold the mules to one Roberts in March, 1911, taking a note for the purchase price, and delivered the note to the Gerlach Bank as a credit on his mortgage indebtedness; that Roberts sold these mules to one Daggett, who in turn traded them to Carr, the mortgagee, in July, 1911, exchanging therefor a pair of mares covered by the bank's mortgage; that after having the mules in his possession for two weeks Carr then sold them to Wayne Loudermilk, who kept them for some 18 months, and used them in the community where these parties resided, when he sold them to Herd, the defendant in error.

The cause was tried to the court and a jury, and a verdict returned for the defendant. From the judgment rendered upon this verdict, the plaintiff has appealed to this court.

Errors are assigned in overruling the motion for a new trial; that the verdict is not sustained by sufficient evidence; that the verdict is contrary to law; and that the

court erred in certain instructions to the jury.

There is no controversy in this case about Carr executing the original mortgage and its several renewals to the bank, and that the indebtedness secured by the mortgage had not been paid, and that this mortgage had been regularly filed for record in Ellis county, where the property was located. But there is sharp conflict in the testimony as to whether or not the mules involved in this suit were included in the property described in the mortgage, and as to whether or not Carr, the mortgagor, owned the mules at the time of the execution of the mortgage in May, 1911, and at the time of its renewal in October, 1913. These disputed matters were all questions of fact for the jury to determine. It is clear that, if the mules in controversy were not included in the property mortgaged by Carr to the bank, or that Carr did not own the mules at the time of the execution of the mortgage in May, 1911, or at the time of its renewal in October, 1913, then the bank did not have the right to the possession of the mules at the commencement of the action. The jury found by its verdict that the bank did not have the right to the possession of the mules. This finding is supported by the evidence, and is therefore conclusive on this appeal.

The instructions complained of in the brief as No. 4 and No. 6 are as follows:

"Instruction No. 4. You are further instructed that the description in a chattel mortgage should be so explicit as to enable third persons, aided by inquiry, which the instrument itself suggests, to identify the property covered thereby, and that said description should be so specific as to give notice of prior lien to such third persons and sufficiently specific to put a reasonably prudent man upon inquiry. A description of personal property mortgaged which describes the property enough to lead to its identification is sufficient."

(Given. Excepted to by plaintiff at the time.)

Instruction No. 6, above referred to, is as follows:

"You are further instructed that the description in a chattel mortgage, to be good, should not only contain a specific description of the property intended to be mortgaged, but should contain either some hint which would direct the attention of those reading it to some source of information beyond the words of the parties in it or something which will enable third persons to identify the property aided by inquiries which the mortgage indicates and directs, or else it should contain such a specific description as will distinguish the property from other similar articles."

The criticism made of these instructions is that by them the court submitted to the jury a question of law, as a question of fact, i. e., the sufficiency of the description in the mortgage to include the mules involved in this action. When considered with the other instructions given by the court to the jury, as they must be, these instructions are not properly subject to this criticism.

In instruction No. 1 the court told the jury that the bank had obtained possession of the mules from Herd under a writ of replevin,

and in order for it to prevail in this action, it must establish by a preponderance of the evidence that they were the same mules which were originally mortgaged by Geo. W. Carr to the bank, and which mortgage was kept alive by the several renewals up to the time of the commencement of the action, and that on this issue it was the duty of the bank to prove these facts by a preponderance of the evidence, and if it did not do so their verdict should be for the defendant. And in instruction No. 2 the court defines what it means by "a preponderance of the evidence."

In instruction No. 5 the court directs the jury as follows:

"The court further instructs the jury that the description in a chattel mortgage is conclusive as to what it is; that outside evidence is only admissible to apply the description to the proper articles; that the mortgage itself is the only competent evidence of the contract between the mortgagor and the mortgagee, and it shows what particular property is covered by it."

Instructions 4 and 6 were evidently given to enable the jury to pass upon the controverted fact as to whether or not the mules involved in this action were included in the description of the mortgaged property set out in the mortgage, upon which the bank relied, under all the evidence. This was a question of fact to be determined by the jury upon all the evidence. The jury by the verdict found either that these mules were not included in the description, or that Carr did not own them at the time of executing the mortgage May 2, 1911, or at the time of its renewal in October, 1918.

There is evidence to support this finding, and, no prejudicial error of law appearing, the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

ARDMORE STATE BANK v. LEE.*
(No. 6688.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

1. USURY — ACTIONS — LIMITATIONS — "USURIOUS CONTRACT."

Section 1005, Rev. Laws 1910, provides that an action to recover usurious interest shall be brought within two years after the maturity of the usurious contract. In case usurious interest is exacted upon a loan evidenced by a note, the note itself constitutes the "usurious contract," and the time in which suits can be instituted for usurious interest dates from the maturity of the note.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 267-269; Dec. Dig. ¶109.]

For other definitions, see Words and Phrases, First and Second Series, Usurious.]

2. USURY — ACTIONS — LIMITATION.

Where a note, bearing a usurious rate of interest, matures and becomes due and payable on a certain date, but the holder of the note, for a valuable consideration, agrees to extend the

time of payment, the statute of limitation does not begin to run as specified in section 1005, Rev. Laws 1910, until the expiration of said extension.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 267-269; Dec. Dig. ¶109.]

3. BILLS AND NOTES — MATURITY — EXTENSION.

Where a creditor, without inadvertence or mistake, receives a payment of interest in advance on the note of a debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which the interest is paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 336; Dec. Dig. ¶137(2).]

4. USURY — RECOVERY — DEMAND.

The second proviso in section 1005, Rev. Laws 1910, is to the effect that before a suit can be brought to recover usurious interest, the party bringing such suit must make written demand for a return of the same. When a party makes a written demand for a sum greater than is due, it then becomes the duty of the party upon whom demand is made to return the actual amount that is due. The notice is not defective merely because a greater sum was demanded than was due.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 197, 241; Dec. Dig. ¶102(1).]

(Additional Syllabus by Editorial Staff.)

5. BILLS AND NOTES — MATURITY — "MATURITY."

"Maturity," when applied to commercial paper, means the time when the paper becomes due and demandable; that is, the time when an action can be maintained thereon to enforce payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283, 284, 286-291; Dec. Dig. ¶129(1).]

For other definitions, see Words and Phrases, First and Second Series, Maturity.]

Commissioners' Opinion, Division No. 4. Error from County Court, Carter County; W. F. Freeman, Judge.

Action by Albert J. Lee against the Ardmore State Bank. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Johnson & McGill, of Ardmore, for plaintiff in error. Fred C. Ryburn, of Ardmore, and Kelly Brown, of Muskogee, for defendant in error.

MATHEWS, C. The parties will be designated as in the trial court. This was an action to recover usury paid defendant for a loan, evidenced by a note. On the 18th day of June, 1909, the defendant loaned the plaintiff the sum of \$500 upon a note due in 90 days, bearing interest at the rate of 10 per cent. per annum after maturity. This note shows the following notations on its back:

"Jan. 11th, 1910, Int. paid to 2-1-10.
June 22nd, 1910, Int. paid to 7-1-10.
July 20, 1910, Int. paid to 8-1-10.
1-7 Int. paid to 3-1, 1911."

[1, 2] The note was paid on the 30th day of January, 1911. On the 23d day of December, 1912, plaintiff filed this action, where-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Second petition for rehearing denied October 31, 1916.

in he alleged that he had paid the sum of \$184 interest upon said \$500 note, which was at a usurious rate, and prayed for judgment for the sum of \$368, being twice the interest alleged to have been paid. Defendant demurred to the petition, which was overruled, and then answered by general denial, and also pleaded the statute of limitation in bar of said action. The cause was tried to a jury, which returned a verdict in favor of plaintiff for \$158. The motion of defendant for a new trial having been overruled, this appeal followed, and the first proposition presented here is:

"Defendant in error's cause of action was barred by the statute of limitation, and his pleading so shows on its face."

Section 1005, Rev. Laws 1910, being the usury statute of the state, reads as follows:

"1005. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section shall be deemed a forfeiture of twice the amount of interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm or corporation taking or receiving same, in an action in the nature of an action of debt, twice the amount of the interest so paid: Provided, such action shall be brought within two years after the maturity of such usurious contract; provided, further, that before any suit can be brought to recover such usurious interest, the party bringing such suit must make written demand for return of such usury."

It will be noted that the above statute requires suits to recover usurious interest to be brought "within two years after the maturity of such usurious contract." In the case at bar the note was made payable in 90 days after date, which was September 16, 1909. On January 11, 1910, the plaintiff made a payment to cover the interest, and there was indorsed on the back of the note a statement that the interest was paid to February 1, 1910. On June 22, 1910, there was indorsed the statement that the interest was paid to July 1, 1910. On July 20, 1910, there was indorsed the statement that the interest was paid to August 1, 1910. On the 7th day of January, 1911, there was indorsed the statement that the interest was paid to March 1, 1911. On the 30th day of January, 1911, the note was paid in full.

Defendant's plea of limitation hinges upon when the contract matured. It is defendant's contention that either the \$500 note was the usurious contract, and that it matured on September 17, 1909, or else each payment of interest constituted a separate and distinct usurious contract, and in that case the statute of limitation began to run against each payment on the date of that particular payment. It is plaintiff's contention that the reception of the interest at various times by the defendant and the indorsing on the note the fact that the interest had been paid to some stated date in the future had the

effect, per se, nothing else appearing, of extending the note, and that the usurious contract did not mature until the final payment of the note, on January 30, 1911, and that the statute of limitation began to run from and after that date.

[3, 4] The question here presented is not without difficulty, and no cases directly in point have been brought to our attention, nor have we been able to discover any ourselves. So far as our investigation has led us, the statute of no other state is worded like ours in regard to the limitation proviso. Our usury statute, in the main, follows the federal statute but the limitation in the federal statute is "two years from the time the usurious transaction occurred," and is therefore radically different from ours on that point. In the case of *Lynch v. Bank*, 22 W. Va. 554, 46 Am. Rep. 520, it was held that an action for the recovery of the penalty prescribed by section 5198 of the federal statute (U. S. Comp. St. 1913, § 9759), being the federal usury statute, must be commenced within two years from the time the usurious transaction occurred, and that each separate payment of interest constituted a "transaction" within the meaning of said section, and the prescribed limitation commences to run from the time of each interest payment, although the note itself remains unpaid. The limitation clause of our statute being so dissimilar to the federal statute, the construction placed on the federal statute can be of no assistance in construing our statute. However, upon another phase of the case, under the federal statute, in case of a series of renewal notes given for the continuance of the same original loan, a taint of usury in the first transaction follows down through all later transactions, limiting the recovery to the face value of the note, less all items of interest included therein during any stage of the transaction if the forfeiture clause is relied on. *Brown v. National Bank*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801; *Farmers', etc., Bank v. Hoagland* (C. C.) 7 Fed. 159. In the case of *Walley v. Deseret National Bank*, 14 Utah, 305, 47 Pac. 147, it is said:

"The decided weight of authority and, it seems, the better reason, is that the payment of interest in advance on a debt by the principal to the creditor is of itself, without more, sufficient prima facie evidence of an agreement to extend the time of payment for the period for which the interest is paid. The payment in advance presupposes that delay of the payment of the principal is to be given for that time. The consideration for an agreement for delay in payment is implied from the transaction, if not sufficiently expressed."

We find the following in the case of *Skelly v. Bristol Savings Bank*, 63 Conn. 83, 28 Atl. 474, 19 L. R. A. 599, 88 Am. St. Rep. 340:

"The taking of interest in advance on a note is, in the absence of any contrary agreement, prima facie evidence of an agreement to forbear col-

lecting the note during the period for which interest is paid."

To the same effect is the case of *Bank of British Columbia v. Jeffs*, 18 Wash. 135, 51 Pac. 348, 63 Am. St. Rep. 875:

"Where a creditor, without inadvertence or mistake, receives a payment of interest in advance on the note of a debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which the interest is paid."

We take this excerpt from *Hubbard v. Ogden*, 22 Kan. 363:

"When a debtor owing money pays his creditor interest on the same in advance, for the use of the same for a period of time over, above, and beyond the time originally agreed upon for the money to become due, and at the time of the payment of the interest no express contract is made as to when the money shall become due or be paid, such prepayment of the interest, and its reception by the creditor, constitute an implied contract between the parties, extending the time for the payment of the money up to the close of the time for which such interest was paid and received." *Daniel on Negotiable Instruments*, § 1317 (6th Ed.); 3 R. L. C. § 437; *English v. Landon*, 181 Ill. 614, 54 N. E. 911.

[5] "Maturity," when applied to commercial paper, means the time when the paper becomes due and demandable; that is, the time when an action can be maintained thereon to enforce payment. *Gilbert v. Sprague*, 88 Ill. App. 508.

It is evident that the "contract" mentioned in our usury statute in the limitation proviso has reference to the note. Had it been the intention that the limitation should begin to run from the time the usurious interest was actually paid, suitable and definite language could have been used to convey that intent. In fact, many states have statutes to that effect, as is the case with the federal statute, and it is reasonable to suppose that our Legislature, in adopting the very wording of the federal statute in the main, saw fit to depart so radically from the wording thereof in the limitation clause certainly indicates that it was their intention that the time for instituting suits for usury forfeitures should begin to run from some occurrence other than the payment of the interest. Now the defendant contends that the note matured within 90 days from the date it was made. In a sense, that is correct, and the limitation would have started from that time if the defendant had not agreed to its extension by accepting interest payments in advance, which undoubtedly extended the time of its maturity. In the case of *Adams v. Ferguson*, 147 Pac. 772, it has been held that an agreement even to pay the interest to a certain stated time in the future is a sufficient consideration to support a contract for an extension. That being true, then the actual payment of the interest in advance makes out a much stronger case and the case at bar goes even further than that, and shows the

purpose for which the several payments were made and the date to which the note was extended. We, therefore, hold that the time in which the action began to run dated from the payment of the note. If the note had not been paid before its maturity, the limitation would have set in from the date of the expiration of the last extension.

Defendant's next contention is stated in its brief as follows:

"The defendant in error did not comply with the conditions precedent to his right to maintain his action, in that he failed to make the demand for the return of the usury as required by law, and his evidence fails to establish a cause of action."

On December 10, 1912, the plaintiff served defendant with a written demand for the return of the usurious interest claimed to have been paid by him in the sum of \$184. The defendant urges that this notice was insufficient, for the reason that the evidence did not show, at the most, more than \$148 in interest to have been paid on the note. We think the point raised too technical. If the defendant demanded more than he was entitled to, it was notice that he was claiming a return of the usury paid, and it was incumbent upon the plaintiff, upon receipt of the notice, to return the correct amount, in order to purge the transaction.

The evidence in the case, while conflicting, amply supports the verdict, and we recommend that it be affirmed.

PER CURIAM. Adopted in whole.

PECK et al. v. CURLEE CLOTHING CO.
(No. 7620.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

ATTORNEY AND CLIENT — 17 — ACTING AS SURETY—VALIDITY OF BOND.

A bond given in any civil action in any of the courts of this state, signed, as surety, by any licensed attorney of this state employed as counselor in the case in which such bond is given, is absolutely void; but before such bond will be held void it must be alleged in the pleadings and proven at the trial that the attorney so signing as surety was, at the time, a licensed attorney of this state and employed in the case.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 25; *Dep. Dig.* — 17.]

Commissioners' Opinion, Division No. 4. Error from County Court, Stephens County; W. H. Admire, Judge.

Action by the Curlee Clothing Company against P. H. Peck and the Comanche Mercantile Company. Judgment for plaintiff, and defendants bring error. Affirmed.

H. B. Lockett, of Comanche, for plaintiffs in error. Nicholas & Lyle, of Oklahoma City, and J. B. Wilkinson, of Duncan, for defendant in error.

EDWARDS, C. The Curlee Clothing Company in 1911 sued the Comanche Mercantile Company in the county court of Stephens county and recovered judgment. The defendant appealed to the Supreme Court, and to stay execution gave a supersedeas bond. The appeal was dismissed in the Supreme Court, and, after the issuance and return unsatisfied of execution upon said judgment in the county court, suit was instituted upon the supersedeas bond in the county court of Stephens county by the Curlee Clothing Company against the Comanche Mercantile Company and P. H. Peck, surety. The petition is in the usual form, setting out a copy of the bond and alleging the issuance of execution and inability to collect the judgment. The defendants, for answer, say that there was no consideration for the execution of said bond, that no liability accrued thereon, that the bond never became operative, and further allege that the surety, P. H. Peck, signed said bond upon the express condition that H. B. Lockett would also sign said bond as surety, and that the same was signed by the said H. B. Lockett, who was at that time a licensed attorney, and the attorney for the defendant in the action wherein the bond was given. The reply is a general denial. Upon the trial the plaintiff offered evidence of the prior proceeding and the issuance and return of execution, and the defendant, in open court, admitted that the Comanche Mercantile Company did not have any property in Stephens county at the date of the execution. The evidence of H. B. Lockett, the only witness testifying for the defendant is: That he asked Mr. Peck if he would sign the bond as surety. That Peck said he would. That the bond was prepared in blank, and then signed, "Comanche Mercantile Company, by H. B. Lockett President," and was then presented to Mr. Peck to sign, who, after looking it over, said he would not sign as surety unless it was signed also by Lockett, as surety. That Lockett said he would take it up with the court, and if he approved it, all right, and if he did not, he would have to make a new bond. He (Peck) was sitting at the desk when the bond was handed to him, and he signed it, and Lockett then signed his name. It was then taken to the court, who approved it. That Lockett was attorney for the Comanche Mercantile Company at the time of the execution of the bond. Upon cross-examination Lockett testified that he first signed, "Comanche Mercantile Company, by H. B. Lockett, as President," and then signed as an individual, above Mr. Peck. A photographic copy of the bond is in the record, the signatures appearing in this manner:

By Comanche Mercantile Company
By H. B. Lockett

H. B. Lockett Pres.
P. H. Peck Surety.

In the body of the bond the wording appears. "Comanche Mercantile Co., principal

obligor, and P. H. Peck, as surety"; the name of H. B. Lockett not appearing in the body of the bond.

The Court in instruction No. 5 submitted to the jury the issue as to whether or not the bond was signed by the attorney. Instruction No. 5 is as follows:

"(5) Under the law in this state, license attorneys are prohibited from signing bonds as surety in any civil or criminal action in which they may be employed as attorneys of record or counselors pending or about to be commenced in any of the courts of this state. The law provides that all such bonds shall be absolutely void, and no penalty can be recovered from the attorney signing the same. And if you find by a fair preponderance of the evidence that H. B. Lockett represented the Comanche Mercantile Company in the case No. 276 as an attorney for said Comanche Mercantile Company, and while acting as such attorney signed the bond sued on in this case as surety, then in that event the bond would be void, and you should so say by your verdict. However, if you find that such bond was signed by H. B. Lockett as an official of the Comanche Mercantile Company, and not as surety, then your verdict should be for the plaintiff for the sum sued for, to wit, \$914.70, with interest at the rate of 6 per cent. from the 23d day of October 1914."

This instruction is more liberal toward defendant than is warranted by the law, as they are not required to find that H. B. Lockett was a licensed attorney of the state, but only that he signed it as surety. But no sufficient exception was made at the time of the giving of the instruction, nor error properly assigned in the motion for new trial nor petition in error.

The jury returned a unanimous verdict for the plaintiff, as follows:

"We, the jury impaneled and sworn in the above-entitled cause, do upon our oaths find for the plaintiff, on his contention that H. B. Lockett signed the bond as an official of the Comanche Mercantile Company, and fix the amount of plaintiff's recovery against P. H. Peck at \$914.70, with 6 per cent. interest from October 23, 1914. John T. O. Guin, Foreman."

The statute prohibiting the signing of bonds by licensed attorneys is section 256, Revised Laws 1910, and is as follows:

"Licensed attorneys of this state are prohibited from signing any bonds as surety in any civil or criminal action in which they may be employed as counselors, pending or about to be commenced in any of the courts of this State, or before any justice of the peace. All such bonds shall be absolutely void, and no penalty can be recovered of the attorney signing the same."

This statute has been construed by this court in the case of Schaffer v. Troutwein, 36 Okl. 653, 129 Pac. 696, wherein it is held that a bond signed by a licensed attorney who was employed in the trial of the case is absolutely void. But, in order for the defendant to bring himself within the rule of that case, it is necessary that all the conditions imposed by the statute be met. The answer in this regard pleads an affirmative defense, and in order to establish this defense it must affirmatively appear that the attorney signing was a licensed attorney of this state, and that he was employed in the case then pending or about to be brought. Here,

according to the theory of the defendant, it is proven only that he was an attorney and employed in the case. There is no evidence whatever that he was a licensed attorney of this state.

One might be an attorney, employed in the case, and yet not be a "licensed attorney of this state." It is not uncommon for attorneys of other states, under certain conditions, to appear for clients in this state, without being licensed in this state, nor for attorneys of this state to represent clients in other states without being licensed therein. Attorneys come into the state at intervals between the meetings of the state bar commission, and are permitted to practice until an opportunity to procure license arrives. At one time the state bar commission held no meeting for about one year. We think this statute should be strictly construed, and that defendants have not brought themselves within its terms.

There is in this case also the further question of fact as to whether or not the bond was signed by any person as surety, other than P. H. Peck. The testimony of H. B. Lockett was offered, on the one hand, and the bond with the signature thereon and the surrounding circumstances, on the other hand. From an examination of the bond and the position of the signatures thereon, and the testimony of H. B. Lockett that he signed, "H. B. Lockett, president" first, and later signed as surety above the name of P. H. Peck, and the fact that there is no recital in the body of the bond of his being surety thereon, the jury was, we think, justified in finding that his name thereon was not as a surety.

Other matters are discussed in the brief, but no material error appears in the record. The judgment is affirmed.

PER CURIAM. Adopted in whole.

WHITE v. DOUGAL (No. 7427.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL \S 70—SUFFICIENCY OF EVIDENCE.

It is the duty of the trial court, upon a motion for a new trial, which challenges the verdict, upon the ground that it is contrary to the evidence, to weigh the evidence and to approve or disapprove the verdict, and if the verdict is such that in the opinion of the trial court it should not be permitted to stand, and it is such that he cannot conscientiously approve it, and he believes it should have been for the opposite party, it is his duty to set it aside and grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 142, 143; Dec. Dig. \S 70.]

2. NEW TRIAL \S 72—MOTION—WEIGHT OF EVIDENCE.

In passing on a motion for a new trial, it is the court, and not the jury, that must weigh

and determine for itself the effect of the evidence. It cannot be said that a court approves a verdict when its reason and judgment rebel against the conclusions it expresses.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 146-148; Dec. Dig. \S 72.]

3. NEW TRIAL \S 70—SUFFICIENCY OF EVIDENCE—VERDICT.

Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but, unless that conclusion meets the affirmative, considerate approval of the mind and conscience of the court, it should not, where challenged, be permitted to stand.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 142, 143; Dec. Dig. \S 70.]

Commissioners' Opinion, Division No. 2.
Error from District Court, Oklahoma County;
Geo. W. Clark, Judge.

Action by Bessie Dougal against Ewers White. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. R. Hastings and Paul Van Winkle, both of Oklahoma City, for plaintiff in error. E. J. Giddings, G. H. Giddings, and J. T. Dortch, all of Oklahoma City, for defendant in error.

BRUNSON, C. For the sake of convenience the parties will be designated here as they were in the trial court.

The plaintiff filed her petition in the superior court of Oklahoma county on the 27th day of January, A. D. 1913. It was thereafter transferred to the district court of the same county and there filed on the 22d day of December, A. D. 1913. The petition asked that the defendant be required to respond in damages to the plaintiff in the sum of \$15,000, for libel; \$7,500 of that amount being for alleged injuries to her reputation and the remainder for exemplary damages. The alleged libelous statement in writing is set out in full in the petition, and it is charged, in part, in the amended petition that during the year 1911 said defendant wrote said statement of and concerning the plaintiff, who was then and is now a female of good character and reputation; that it is a false, malicious, and unprivileged statement in writing; that it was intended and calculated to expose her to public contempt, obloquy, and disgrace, and that it purported to be a statement made by one Gertie Wood, a female child under the age of 14 years; that said alleged libelous statement was not signed by any one; that it was prepared by the defendant in his office at McLoud, Okl., in the year 1911; and that thereafter and on the 10th day of November, 1912, said defendant did deliver and publish said alleged libelous statement to one Bill Grace, a resident of Pottawatomie county, state of Oklahoma, and permitted and directed him to see and read it, with libelous, false, and malicious intent on his part to injure and blast the character of the plaintiff. It is also alleged that said libelous statements are false and untrue, and that the de-

fendant knew that they were false and untrue both before and at the time of executing the same and at the time of the publication thereof. (1) To the petition defendant answered and denied each and every allegation and averment therein contained; (2) that the matters contained in the writing were true; that if said libelous matter was published, it was done with good motives and justifiable ends, and for the enforcement of the laws, and without any improper or malicious purpose, intent, or motive, and under the direction of and in the course of an investigation then being made by the county attorney of Pottawatomie county, Okla., and his assistants and deputies, to ascertain whether or not Bessie Dougal and others had violated the criminal laws of the state in connection with any of the matters and things alleged in said libelous statement; (3) that the same was a proceeding authorized by law, and that it is and was a privileged statement; (4) that said alleged cause of action did not accrue to the plaintiff within 1 year next before and prior to the commencement of this action; and that said alleged cause of action was and is barred by the statute of limitations. To this answer the plaintiff filed a reply, in which she denied each and every affirmative allegation therein contained. In overruling the motion for a new trial the court used the following language:

"The court was impressed with the idea, at the trial, that the defendant was doing what he would desire any friend of his, or any one who was interested in his welfare or that of his family would do for him under like circumstances. Now, that was the question that was submitted to this jury—as to whether or not he was prompted by proper motives in his connection with this affair. The publication here, upon which reliance is made, is the direction to deliver this document to Bill Grace and its subsequent delivery to him. The only evidence bearing upon that question that is really material, as the court looks at it, is the testimony of Bill Grace, who swears positively to these allegations of fact, fixing, it is true, I think, the 10th day of November, 1912, as the first time that he ever saw the paper, when he got it from Mr. Myers. The defendant testified as positively that he never mentioned the matter and never had any talk with him at all that day, or any other, as I remember the evidence about the matter. If the recitals in that document were prompted by the motives which it is claimed here by the plaintiff—if they were untrue, if they were prepared—if the document was prepared at the instance of the defendant for the purpose of injuring the plaintiff, then there isn't any doubt but what the defendant ought to respond in damages in some amount, which would depend upon the character and reputation that was alleged to have been injured by these acts. Now those are the questions here.

"The only witnesses, it is true, that the plaintiff brought here to substantiate her reputation were witnesses, it seems to me, who did not know anything at all about her reputation. Their own testimony showed that they knew nothing about it. They lived four or five or six miles in the country; saw her once a month, or such a matter, when they would come to town. That sort of evidence don't establish a reputation in the community where people live and who would be likely to know what people do say, or whether they would say anything.

But that was the character of the evidence upon the one side. Upon the other side was the testimony of some 15 or 20 witnesses, I think, who were examined here before the jury, in all different walks of life, official, business, social, who testified—I think I am mistaken as to the number, possibly; I know I am as to the number who testified regarding the reputation of this plaintiff as to her chastity; but there was quite a number of evidently very respectable people, business men, living in the community, and who had known her for 15 or 18 years, who said her reputation was bad in that respect. If that is true, if that was the sort of reputation she had, her reputation could not have been injured, it don't seem, very much by this publication. That is the question for the jury. That is the question for the jury, now, to say as to whether or not her reputation was such, in the community there as the defendant claims it was. It is presumed to be good to start with. The jury passed on that question.

"All of the evidence practically for the plaintiff upon the publication here is the evidence given by Bill Grace, who the jury learned had twice served as sheriff of that county, years ago, and that at that time his reputation for truth was good, but that for the last 5 or 6 years it had deteriorated to the extent that it was very bad; and I think the jury might have had reason to believe, from the testimony of these witnesses, that no reliance whatever ought to be placed in his testimony. But that was a question for this jury to pass on, as to what interest he had in the result of this litigation. What difference did it make to him? He wasn't being prosecuted for publishing it himself; he had no financial interest in it that anybody could see, at least, nothing that was brought out here. So there was the testimony of Bill Grace upon one side, whose reputation for truth and honesty was very bad, as shown by the testimony of 15 or 20 of the best business men, apparently, and professional men and officers in that community in which he lived, without a single word from the other side, and the jury had a right to consider the fact that he apparently had no interest in the matter, except that his deposition was taken; it had to be taken; he didn't come over here to testify, but his evidence was taken by deposition there. And as against that was the testimony of the defendant alone, who, from the number of witnesses who were here, came here from an adjoining county to testify in his behalf—men of standing—the jury had a right to conclude that the defendant himself was a man of high standing in that community, and he was charged here with the publication of a most vicious attack upon the plaintiff, and, if the jury believed the claims of the plaintiff, would probably have to respond in damages for a considerable sum. He was interested in it in order to maintain his standing in that community, among the people where he lived, as well as to avoid financial liability here. That was the question for this jury to pass upon.

"Now, the duty of the court in passing upon the motion for new trial is, I think, reasonably clear. I think the court has, not only the right to grant a new trial under certain circumstances, but I think it is its duty to do it. But here the plaintiff in seeking to recover damages upon a mere act of the defendant, and the defendant evidently relied to defeat that recovery upon the fact that the witness who would be brought here to establish that fact was one that no one on earth would believe as against him, and the defendant took that chance with that jury. He put in, as I now remember, about two hours to get this jury, and they passed on that question, and it was the peculiar province of the jury to do that. I don't believe, in a cause of that kind, the court has any right to say that those men knew nothing as to the standing of these witnesses—I don't believe that the court ought to put its judgment in a matter of that kind against the jury in determining the credibility of the

witnesses. It is the peculiar province of the jury to do that, and that, I think, is true, also, with reference to the reputation of the plaintiff in the case, upon the question of damages.

"I am frank to say that, if I had been hearing this case myself—if it had been before the court—I don't think that I would have reached the same conclusions that this jury reached upon the question, now, of the reputation of the witnesses, or what weight ought to be given to it; and yet I don't feel that I ought to, as I say, put that up against the other party, and say that because the jury took a different view from that which the court might have taken, the verdict ought to be set aside and this entire matter again threshed out.

"The court don't think, under the circumstances, for the reasons that I have given here, that the verdict ought to be disturbed."

There was judgment for the plaintiff for \$10,000, and from said judgment the defendant prosecuted an appeal to this court.

The first assignment of error we will consider is the reasons given by the trial court for refusing to grant a new trial, and this we think is error.

[1-3] It is urged that the trial court committed error and abuse of discretion in failing to sustain the defendant's motion for a new trial and in support of this assignment it is made to appear that the court, in passing upon the motion for a new trial, declined to weigh the evidence and either approve or disapprove the verdict of the jury, on the theory that in passing on the motion for a new trial it was not his duty to weigh the evidence, but that since the jury had passed upon the facts, it was the court's duty to let the verdict stand, notwithstanding that if the case had been heard by the court without a jury, it would have reached a different conclusion from the one reached by the jury. The duty of the trial court in passing upon the questions presented by the motion for new trial has been several times passed upon by this court. The first case since statehood is the case of *Hogan et al. v. Bailey*, 27 Okl. 15, 110 Pac. 890. In that case Mr. Justice Dunn cites with approval a case rendered by the Supreme Court of the territory of Oklahoma on the same subject and also the Kansas case, where Justice Valentine takes the same point of view as he does with reference to the duty of the trial court. Mr. Justice Dunn, says:

"The trial court has a higher function under our jurisprudence than to act merely as a moderator or umpire between contending adversaries before a jury. Not only is it charged with the duty of seeing that the course and conduct of the trial gives to each of the litigants a fair opportunity to present his cause and to have the facts weighed in the light of proper instructions declaring the law relative thereto, but it is the imperative, abiding duty of the court, after the jury has returned its verdict and awarded to one or the other success in the controversy, where the justness of the same is challenged as in this case, to carefully weigh the entire matter, and, unless it is satisfied that the verdict is responsive to the demands of justice, to set the verdict aside and grant a new trial. Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but, unless that conclusion meets the affirmative * * * approval of the mind and conscience of the court, it

should not, where challenged, be permitted to stand. *Yarnell v. Kilgore*, 15 Okl. 591, 82 Pac. 990; *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113; *Ten Cate v. Sharp*, 8 Okl. 300, 57 Pac. 645; *City of Sedan v. Church*, 29 Kan. 190; *Citizens' State Bank v. Chattanooga State Bank*, 23 Okl. 767, 101 Pac. 1118."

In the case of *Yarnell v. Kilgore*, supra, in passing upon the same subject Mr. Justice Burwell said:

"The approval of a verdict does not mean that formal approval which is inferred from the act of rendering judgment on it, but it means the assent and approval of the mind, after due consideration; and when the mind of the court refuses to concur in the correctness of a verdict, and its honest convictions lead it to believe that it ought to have been for the other party, then the verdict is not supported by the evidence so as to merit its approval, for in passing on a motion for a new trial, it is the court, and not the jury, that must weigh and determine the effects of the evidence. It cannot be said that a court approves a verdict when its reason and judgment rebel against the conclusion it expresses. The rule requiring a juror to be satisfied with a verdict is no stronger than the rule which makes it the duty of the trial court to approve or disapprove a verdict, as dictated by its own conscience and judgment. * * * The law here imposes a duty, the faithful and conscientious performance of which neither the press of business nor any other embarrassing conditions, will excuse."

And speaking to the same subject Mr. Justice Valentine in the case of *City of Sedan v. Church*, supra, said:

"* * * Trial courts are invested with a very large and extended discretion in the granting of new trials; and new trials ought to be granted whenever in the opinion of the trial court the party asking for the new trial has not in all probability had a reasonably fair trial, and has not in all probability obtained or received substantial justice, although it might be difficult for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them."

And in the case of *Rison v. Harris*, 151 Pac. 584, Commissioner Devereux said:

"It is plain from the language used by the trial judge in the case at bar that he has not followed the rule laid down in the above cases. It is equally clear that he was not satisfied with the verdict, because he says, in effect, that it was his opinion that where the issue of fact was submitted to the jury, and they passed on it, it was his duty to permit the verdict to stand although he was not satisfied with its justness. The cases above cited clearly indicate that he took a wrong view of his duty in the premises."

In *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657, it is said:

"This is one of the most important duties which the trial judge has to perform, and, since no efficient review of his action can be had, it is peculiarly incumbent upon the judge to weigh the evidence with care, and grant a new trial when, in his opinion, the interests of justice require it."

In the case of *Kansas P. Ry. Co. v. Kunzel*, 17 Kan. 145, Mr. Justice Brewer says:

"But when his judgment tells him that it is wrong, that whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury."

It is plain from the language used by the trial judge in the case at bar that he has not followed the rule laid down in the above cases. It is equally clear that he was not satisfied with the verdict, because he says, in effect, that it was his opinion that where the issues of fact are submitted to the jury and they pass on them, he should not put his judgment up against the judgment of the jury; that the jury passed on the facts, and it was his duty to permit the verdict to stand, although he is frank to admit that if he had been hearing the case himself, he did not think that he would have reached the same conclusion that the jury did.

It is seriously contended that the trial court erred and abused its discretion in failing and refusing to set aside the judgment and verdict of the jury for the reason that it did not meet the affirmative approval of the court and because the court did not feel that the verdict was responsive to the demands of justice in said cause. In the case of the C., R. I. & P. Ry. Co. v. Warren, 161 Pac. —1 (not yet officially reported), Mr. Justice Hardy, in considering a like question here under consideration, said:

"It was the duty of the trial court, when the correctness of the verdict was challenged on the ground that the evidence was insufficient to support it, to carefully weigh the evidence and determine whether the verdict in his judgment was right and substantial justice had been done between the parties. This the court declined to do, upon the erroneous view of the law that it was not his duty, and that he was without authority so to do."

In the case of Sam Horton v. Prague National Bank, 159 Pac. 930 (not yet officially reported), Commissioner Burford said in the syllabus:

"2. It is the duty of the trial judge in courts of record to either approve the verdict of the jury or to grant a new trial, and unless the trial judge believes that the verdict is just and is sustained by the weight of the evidence, he should set the same aside and grant a new trial.

"3. A motion for new trial which assigns as grounds therefor 'that said verdict is not supported by the evidence; that said verdict is contrary to the weight of the evidence,'—authorizes the trial court to set aside a verdict which he believes to be contrary to the weight of the evidence."

The reason for the rule as announced by the above authorities is that the Supreme Court, when a verdict is reasonably supported by the evidence, and it has been approved by the trial court, will not weigh the conflicting evidence to determine whether the verdict is right or not; that duty is imposed upon the trial court. All we have before us is the record of the case made in the trial court. We do not see the witnesses, and have no opportunity to observe their actions and demeanor while they testify, and are not in a position to judge their credibility and interests in the result of the trial, as is the trial judge; and, in passing on a motion for a new trial, where the verdict is challenged

because it is not supported by the evidence and is contrary to the evidence and because it is not responsive to the demands of justice, it is the duty of the trial court to carefully weigh the entire matter, and, unless it is satisfied that the verdict is responsive to the demands of justice and is supported by the evidence, it is his duty to set it aside and grant a new trial.

It is clear to our minds that the trial court was of the opinion that he was without authority to weigh the evidence upon the motion for a new trial, and that the verdict in this case did not have his positive affirmative approval, and that the court should have granted a new trial. The judgment below is therefore reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

EVEREST v. GAULT LUMBER CO. et al.
(No. 5539.)

(Supreme Court of Oklahoma. May 2, 1916.
Rehearing Denied Sept. 8, 1916.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER ⇐250—VENDOR'S LIEN—RESERVATION.

One who, having a parol agreement with the owner for the conveyance of a tract of land, enters into a written contract with another for a sale and conveyance of said land, under which contract said other enters into possession of said land, has no such legal or equitable estate therein, and by such written contract conveys to the other no such legal or equitable estate, as will support a vendor's lien thereon.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 618-623; Dec. Dig. ⇐250.]

2. MECHANICS' LIENS ⇐198 — CREATION — TITLE.

One in open, undisputed possession of a tract of land, who afterwards receives a conveyance of the legal title thereto, may create mechanics' liens thereon as against his mortgagees and grantees.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 348-355; Dec. Dig. ⇐198.]

3. MORTGAGES ⇐151(8) — VALIDITY — PRIORITY.

E., being a stockholder of L. Co., by parol agreement between the directors and some of the stockholders of said company agreed to take a lot in an addition owned by said company and build a house thereon, or sell the same to another and cause a house to be built thereon, such lot to be conveyed by L. Co. without other consideration. Thereafter E. entered into a written contract with P., by the terms of which P. obligated himself to tear down a house owned by him, remove the materials to the lot aforesaid, and erect thereon a two-story residence, and agreed to execute notes and mortgage for \$3,000, payable to E., \$2,000 to be the purchase price of said lot, and \$1,000 to be lent P. by E., and E. thereby agreed to lend P. \$1,000 to erect said house, and to cause said lot to be conveyed to him by good and sufficient warranty deed. P. entered into possession of said lot and commenced the erection of a dwelling house thereon. Thereafter, by oral agreement between E. and

P., it was agreed that E. should lend P. \$3,000 additional to construct said house. About two months after the building was commenced, E. caused a deed to said lot to P. from L. Co. to be delivered to P., and at the same time P. and wife executed notes and mortgages to E. for \$6,000. At the time building operations upon said house ceased there remained claims for material furnished and labor performed in the erection thereof for which mechanics' liens were filed. In an action to foreclose such mechanics' liens by the holders thereof, and by E. to foreclose the mortgages given by P. for the purchase price of said lot and the money lent by E., held, that the building of a house upon said lot constituted the consideration for which L. Co. conveyed the legal title to P.; that the contract between E. and P. delegated this obligation from E. to P., and constituted P. the agent of E. to construct said house; that, the erection of the house on said lot being necessary in order for E. to carry out his contract with P. to cause the same to be conveyed, E. took his mortgages for the price of the lot and the money lent by him subject to liens for material and labor incurred in the construction of said house, both before and after the execution and recording of said mortgages.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 332-336; Dec. Dig. ¶151(3).]

Commissioners' Opinion. Division No. 1. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by the Gault Lumber Company, a corporation, against J. H. Everest and others, to foreclose a mechanic's lien. From a judgment in favor of plaintiff and other defendant lienholders, the defendant J. H. Everest brings error. Affirmed.

This action was commenced by the defendant in error the Gault Lumber Company against Austin F. Pettit and others to foreclose a mechanic's lien upon lot 10, block 33, Linwood Place addition to Oklahoma City. The plaintiff and all of the defendants, except Austin F. Pettit, Della Pettit, his wife, and J. H. Everest, claim mechanics' liens upon said real estate for materials furnished and labor performed in the erection of a dwelling house thereon by the defendant Pettit. The defendant Everest filed an answer and cross-petition, alleging the execution and delivery to him by the Pettits of two mortgages upon said real estate—one securing the payment of a note for \$2,500, payable to defendant Everest; the other securing the payment of seven notes, each for the sum of \$500, payable to said defendant—and that said mortgages were prior to the mechanics' liens of plaintiff and the other defendants. He alleged breaches of the conditions of each of said mortgages, and prayed a foreclosure thereof. The cause was tried to the court, without the intervention of a jury, resulting in a judgment decreeing the plaintiff and the other mechanics' lien defendants to be entitled to liens aggregating the sum of \$2,045.16, and adjudging such liens to be superior to the mortgages of the defendant Everest. The court decreed a foreclosure of the mechanics' liens and the mortgages, and ordered a sale of said real estate to satisfy the amounts decreed to be due the plaintiff and the various defendants in the order of

priority above named. From this decree the defendant Everest brings this proceeding in error.

The record discloses that in the year 1910 the defendant Everest was one of the stockholders of the Linwood Place Development Company, a corporation, owning one-eighth of the capital stock of said corporation. The Linwood Place Development Company was the owner and held the legal title to Linwood Place addition to Oklahoma City, including the parcel of land in controversy herein. Some time in the year 1910 it was orally agreed between the directors of the Linwood Place Development Company and 10 of the principal stockholders that each of said stockholders should select a lot in said addition and build a house thereon. The defendant Everest agreed to take the lot here in controversy, and either build thereon himself or sell the same to some one who would build. It seems from the record that these 10 stockholders were to receive these lots free, in consideration of their building thereon, or causing buildings to be erected. This agreement rested wholly in parol. Thereafter, and on October 14, 1910, the defendant Everest and the defendant Austin F. Pettit entered into an agreement in writing of which the following is a copy:

"Memorandum of Agreement.

"This agreement, made at Oklahoma City, Oklahoma, this 14th day of October, A. D. 1910, by and between Austin F. Pettit, party of the first part and J. H. Everest, party of the second part, witnesseth:

"Party of the first part agrees to take down and to remove from block twenty-one (21) Edwards' addition to the town of Cleveland, Texas, the dwelling house and other buildings thereon, and to ship the same to Oklahoma City, preserving said material in as good shape as possible, and to erect same on lot ten (10), block thirty-three (33), Linwood Place addition to Oklahoma City, Oklahoma county, Oklahoma, putting a suitable stone or brick foundation under same of sufficient height, raising said house two stories, finishing said house inside and out, and painting the same with a good quality of paint, enlarging the front porch, the same when finished and completed to look like a new residence. All labor and material used in said house to be fully paid for by the first party.

"Party to the first part to execute to the party of the second part three notes for one thousand dollars (\$1,000) each, due in one (1), two (2), and three (3) years from date, drawing eight per cent. (8 per cent.) interest, and mortgage securing the same upon the real estate above described, in the usual form providing for insurance, attorney's fees, etc.

"Party of the second part agrees to loan to the party of the first part the sum of one thousand dollars (\$1,000) to assist in the construction of said house on the lot aforesaid, and to cause said real estate to be conveyed to the first party by a good and sufficient warranty deed, the purchase price of said real estate to be two thousand dollars (\$2,000).

"In witness whereof, the parties hereto have set their hands at Oklahoma City, Oklahoma, the day and year first above written."

Pursuant to this contract Mr. Pettit tore down the building at Cleveland, Tex., and shipped the material to Oklahoma City, de-

posited the same upon the lot in controversy, and in the month of January, 1911, commenced the work of erecting the building thereon, out of which this controversy arises. As the building progressed it became apparent that the sum of \$1,000, which Mr. Everest had agreed to lend Mr. Pettit, would be insufficient to complete the building contemplated by the parties. Thereafter by parol agreement Mr. Everest agreed to advance Mr. Pettit \$3,000 more to defray the cost of construction of the building, making a total of \$4,000 to be lent to Mr. Pettit by Mr. Everest. As the building progressed, in February, 1911, Mr. Everest procured the execution of a deed by the Linwood Place Development Company to Mr. Pettit, conveying said parcel of land. This deed was delivered to Mr. Everest, and retained in his possession until March 6, 1911, at which time it was delivered to Mr. Pettit. At the same time Mr. Pettit, joined by his wife, executed to Mr. Everest a first mortgage upon the real estate in question securing a note for \$2,500, and a second mortgage securing seven notes, each for the sum of \$500. These mortgages covered the \$4,000 agreed to be lent by Mr. Everest, and the purchase price of said lot of \$2,000, as agreed upon in the written contract herein set out. It seems that the deed and these mortgages were placed of record upon the same day.

Work continued upon the building until some time in the month of June, when it seems the building was nearly, although not quite, completed. All of the material furnished and labor performed in the construction of said building not having been paid for, the plaintiff and other defendants duly filed verified statements claiming mechanics' liens upon said real estate for the amounts respectively due them. There seems to be no controversy as to the furnishing of the material, the performing of the work, and as to the amounts respectively due the parties to this litigation.

R. M. Campbell, of Oklahoma City, for plaintiff in error. Warren K. Snyder and R. H. Towne, both of Oklahoma City, for defendants in error.

RUMMONS, C. (after stating the facts as above). [1-3] Counsel for defendant Everest makes several assignments of error in his brief, but they all seem to be embraced in his contention that the court erred in decreeing priority to the mechanics' lien claimants over the mortgages of the defendant Everest. It is contended by the defendant Everest that at the time of the commencement of the work, out of which the mechanics' lien claims arose, he held a vendor's lien upon the real estate in controversy to the amount of \$2,000, the unpaid purchase price thereof, and the amount of money advanced by him under his contract, with Mr. Pettit, and that, the mechanics' lien claim-

ants being charged with notice of the fact that the legal title to this land was in the Linwood Place Development Company, and not in Mr. Pettit, with whom they contracted, they were also chargeable with constructive notice of his rights and interests in the premises, which they could have ascertained by inquiry. He therefore contends that the mechanics' lien claimants furnished the material and performed the labor in the erection of said building with imputed notice of his prior claims thereon. He further contends that, as Mr. Pettit had, at best, only an equitable estate in the land, the mechanics' liens could only attach to such interest as he had therein, and would therefore be inferior and subsequent to the lien of his mortgagees. On the other hand, it is contended by counsel for mechanics' lien claimants that they can only be charged with constructive notice of the rights of the Linwood Place Development Company, and that they had no actual notice of any facts which would put them on inquiry as to the rights of the defendant Everest. They further contend that, because the contract between Mr. Everest and Mr. Pettit obligated Mr. Pettit to construct a dwelling house as therein specified as a part of the consideration for the conveyance to him of the land in controversy, any claim of Mr. Everest for unpaid purchase money and advances is thereby postponed until the mechanics' lien claims are satisfied.

Both sides of this controversy have assisted the court with very able briefs, bristling with authorities, in support of their respective contentions. No case, however, has been cited by counsel for the respective parties in which the same state of facts existed as exists in the instant case. In this case, at the time the written contract between Mr. Everest and Mr. Pettit was entered into, Mr. Everest had no estate whatever in the real estate in controversy. The parol agreement among the stockholders gave him no legal or equitable interest in the lot to be selected by him; so that at the time the contract between him and Mr. Pettit was made he had no estate to transfer to Mr. Pettit, and Mr. Pettit received no estate by such contract to which a vendor's lien could attach.

It is true that, if Mr. Everest had taken possession of this lot and erected thereon a building in accordance with his parol agreement with the directors of the Development Company, he would have acquired an equitable estate in said lot, and would have been entitled to demand the conveyance of the legal title by the Development Company. In our view of the case the contract between Mr. Pettit and Mr. Everest simply in effect delegated to Mr. Pettit the obligation, which Mr. Everest had orally undertaken, to erect a dwelling house upon said lot, and in order for either Mr. Everest or Mr. Pettit to acquire an equitable estate in said lot it was necessary that the building be erected.

So that it is apparent that neither Mr. Pettit nor Mr. Everest had any enforceable interest in said real estate prior to the delivery of the deed thereto on March 8, 1911. At that time the work upon the building had been in progress nearly two months, and most, if not all, of the mechanics' liens claimed herein had attached. So that when Everest, on the date of the execution of the mortgages to him, acquired an interest in said real estate, he took it subject to the liens then attached; for Mr. Pettit being in possession, without objection on the part of the holder of legal title, and afterwards receiving conveyance of the legal title, the rights of the lien claimants became vested as soon as his possession was merged into the legal title. The conveyance was a recognition that Mr. Pettit had an equitable title under which the improvements were being made, and related back to the commencement of the work, so as to give Mr. Pettit an interest and estate in the land to which the mechanics' liens attached from the time of the commencement of the work. *Chicago Lumber Co. v. Fretz*, 51 Kan. 134, 32 Pac. 908.

In the view we take of the peculiar facts of this case, we do not deem it necessary to consider the question, ably argued in the briefs of the parties to this controversy, whether or not the contract which obligated Mr. Pettit as a part of the consideration of the conveyance of the lot to him to erect a dwelling house thereon postponed the lien of the vendor to the mechanics' liens for labor and material used in the erection of such dwelling. As we have said above, we do not consider that Mr. Everest ever had a vendor's lien upon this real estate; so that the cases cited involving that question are not pertinent to the issue here.

In the case of *Botsford v. New Haven, Middletown & Willimantic Ry. Co.*, 41 Conn. 454, the Supreme Court of Connecticut had under consideration a case very similar to the one at bar. There one Blakeslee had agreed with the Railroad Company to give a tract of land to the company if they would locate a depot upon it. The company agreed to the terms, erected the depot, and employed Botsford to build the chimneys and plaster the building. He did the work, and filed his lien. The lien was given priority over prior mortgages executed by the Railroad Company, upon the theory that the work thus done was necessary to perfect the equitable title of the company to the land, being in fact a part of the purchase price. Until it was done the company had no claim to have the legal title conveyed to them, and so, when it came, that title could only come charged with the lien. The legal title, at the time the lien was sought to be foreclosed, still remained in Blakeslee; but he made no resistance to the foreclosure of the lien. In

the instant case the Development Company has no interest in the controversy. They gave the lot free of charge for the purpose of having a building erected thereon. Mr. Everest could only put himself in a position to be able to carry out his contract with Mr. Pettit by having the building erected on said lot. Until this was done he had no shadow of a claim to demand a conveyance from the Development Company. We therefore conclude that he authorized Mr. Pettit to act for him in erecting this building and thus constituted Mr. Pettit his agent. *Eberle v. Drennan*, 40 Okl. 59, 136 Pac. 162, 51 L. R. A. (N. S.) 68.

Having reached this conclusion, it makes no difference whether or not the various lien claims attached before or after the execution of the mortgages under which Mr. Everest claims. It was necessary, in order that he might reap the benefit of his arrangement with the Development Company, secure a conveyance, and collect the purchase price of the lot, that a building be not only commenced, but that it be completed; and having contracted to transfer his obligation to build to the shoulders of Mr. Pettit, he took his mortgages for the price of the lot and the money lent subject to the liens which might attach to the building in the course of construction.

The judgment of the trial court should therefore be affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. SHADID.
(No. 7604.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

1. CARRIERS §244 — CARRIAGE OF PASSENGERS—RULES OF CARRIERS.

One who is on a freight train with the knowledge and consent of the agents having charge of it cannot be said to be there wrongfully, and the company owes him a duty although he is there against its rules.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1115, 1116; Dec. Dig. §244.]

2. CARRIERS §320(2)—CARRIAGE OF PASSENGERS—EVIDENCE—JURY QUESTION.

A person paying less than full fare, who has ridden in a freight car with the consent of the brakeman and conductor in charge of the train, upon reaching a station is informed by the brakeman that he cannot be carried further, but must get a ticket, and is directed to the depot for that purpose, and in following such direction is injured, held that whether or not such person is a trespasser is a question to be left to the jury under proper instructions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1118; Dec. Dig. §320(2).]

Commissioners' Opinion, Division No. 4. Error from District Court, Canadian County; John W. Hayson, Judge.

Action by Ed Shadid, a minor, by his next friend, against the Chicago, Rock Island &

Pacific Railway Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Roberts, C. O. Blake, W. H. Moore, all of El Reno, and K. W. Shartel, of Oklahoma City, for plaintiff in error. Geo. H. Giddings, E. J. Giddings, and J. T. Dortch, all of Oklahoma City, for defendant in error.

EDWARDS, C. For convenience, the parties will be referred to as plaintiff and defendant, according to their position in the lower court. At the time of bringing his suit, the plaintiff was a minor of about the age of 19 years, a native of Syria, having been in this country about 4 years. The suit is for the recovery of damages for personal injuries. From the evidence on the part of the plaintiff, it appears: That the plaintiff was seeking employment, and for that purpose was traveling through the country from Memphis towards the harvest fields of Oklahoma, and while in a restaurant at Halleyville talked with a brakeman of the defendant company, concerning transportation from that point to Shawnee. The brakeman agreed to take him to that point for 50 cents, and later came back and took the plaintiff to a freight train which had a caboose attached, in which were people. There the conductor of the train asked the brakeman where he was taking plaintiff, and was informed by the brakeman that he was going to put plaintiff in a car, whereupon the conductor told the brakeman to take the plaintiff down there and come back at once. That plaintiff was placed in a freight car with about ten other persons, after which the train proceeded upon its way. At Stuart, a distance of about 34 miles, the freight train upon which the plaintiff was riding was sidetracked to permit a passenger train to pass, and while there the same brakeman told plaintiff he could not carry him any farther, and that plaintiff would have to get a ticket. Plaintiff thereupon got off, and the brakeman told him to walk down the main line a little piece and then go down to the depot. That plaintiff started to walk down the main line as directed by the brakeman, walked a little piece and saw a light, but thought it was the headlight of the train upon which he had been riding, and, after walking a short distance, and while from 1,200 to 1,500 feet from the depot, was struck by the passenger train of the defendant, coming from the opposite direction, and seriously injured. There was no crossing or usually traveled way at the point where the plaintiff was injured, and the right of way on each side was fenced, and just west of that point some 40 or 50 feet was a curve in the track, around which the passenger train came before striking the plaintiff. That the plaintiff heard no bell ringing or whistle blowing before being struck by defendant's passenger train. That he acted in good faith, and thought the

brakeman had a right to carry him. There is a sharp conflict between the evidence of plaintiff and the brakeman of the freight train and the engineer of the passenger train on many points, and also a sharp conflict between the evidence of the plaintiff and that of one Sanders, a traveling companion of the plaintiff, who, according to his own testimony, was with him during all the time he was upon the train of defendant and at the time of the injury. The defendant contends that the plaintiff was a trespasser at the time of his injury, and that as such the defendant owed to him only the ordinary care and duty not to willfully and wantonly injure him, or that, if he be classed as a licensee, he could only be such by invitation and the defendant would owe him the duty only of using ordinary care for his safety, and that no want of ordinary care is shown on the part of the defendant railway company. That the doctrine of last clear chance is inapplicable. The theory upon which the plaintiff proceeds is not entirely clear, but the contention is that the status of the plaintiff, as passenger, trespasser, or licensee, was a question for the jury, and was submitted under proper instructions, and that the verdict, being supported by sufficient evidence, should not be disturbed.

[1, 2] The determination of the question whether or not the relation of passenger and carrier existed between the plaintiff and defendant in this case is a very close and difficult one, and is, to some extent, at least, a question of fact. This question the court submitted to the jury under the following instructions:

"(10) You are further instructed that if after a fair and impartial consideration of all of the testimony in this case you believe that the plaintiff has established, by a preponderance of the testimony, that he secured his passage upon the freight train, paying the brakeman therefor by and with the consent of the conductor, and that this transaction was in the utmost good faith upon his part, the plaintiff in that event would not be a trespasser within the meaning of the law.

"(11) But, upon the other hand, if after a fair and impartial consideration of all of the testimony in this case you find that the plaintiff was seeking to ride on the defendant's freight train, or was riding on said freight train without paying therefor, or that he paid the brakeman for riding on said freight train knowing that the said freight train did not carry passengers, or that he knew or had reason to believe the method which he was employing to ride said train was not the usual, ordinary, and proper method of securing passage, or was not permitted by the defendant, then and in that event you are instructed he would be a trespasser under the law."

The question of contributory negligence was also submitted to the jury under proper instructions.

The Supreme Court of the Territory of Oklahoma, in the case of A., T. & S. F. R. Co. v. Johnson, 3 Okl. 41, 41 Pac. 641, says:

"The jury have found as facts that the fare paid by the defendant in error was not the regular passenger fare from Purcell to Guthrie \$1.94, but \$1, and that this dollar was paid to

Harry Hill, a brakeman on the train, who had no authority to collect it from the plaintiff. If the brakeman had no authority to collect the fare from the plaintiff he had no authority to bind the company or make any contract on its behalf. There are certain facts in railroad passenger and freight traffic of which the public is required to take notice. One is that a passenger train is for the purpose of carrying passengers; another is that a freight train is for the purpose of carrying freight. One proposing to be carried as a passenger upon a freight train must advise himself upon what terms the company will contract to carry him as a passenger, and with whom he may make the contract. The courts will require that the traveling public shall take notice that freight cars are not intended for the carriage of passengers; that when passengers are accepted upon freight trains, the caboose attached to the train is the car in which passengers must place themselves unless otherwise directed by a person having charge of the train; that the railroad company places a conductor in charge of each train, who has charge of its management in all respects, and with whom persons proposing to be carried as passengers must contract, and under whose direction they must act, subject to the rules of the company; that in order to the manipulation of the mechanical movement of the train, it is necessary that the railroad company should employ an engineer, whose duty it is to manage the engine, a fireman, whose duty it is to attend to the fires, and a brakeman whose employment and duty it is to attend to the brakes upon the train. A person proposing to become a passenger must deal with the conductor who has charge of the train, and not with the subordinate employees of the train. It is not within the scope or authority of the engineer, fireman, or brakeman to collect fare or bind the company, and the defendant in error had no right to suppose that the brakeman, Harry Hill, could bind the company by the agreement by which the defendant in error undertook to make the payment which he did. Upon his having undertaken to procure transportation upon the freight train of the plaintiff in error, as a passenger, it was the duty of the defendant in error to have informed himself of the rules and regulations of freight trains, intended primarily for the carriage of freight, and to have informed himself, by applying to the conductor who had charge of the train, and so ascertain upon what conditions he would be accepted and permitted to ride upon the train as a passenger. He failed to do this, and failed to become a passenger entitled to that high degree of care which railroad companies are held to owe to those who are accepted as, and whom it agrees to carry as, passengers."

Again, in the case of *St. L. & S. F. R. Co. v. Nichols*, 39 Okl. 522, 136 Pac. 159, Mr. Commissioner Brewer states the law, as follows:

"After securing the shipping contract referred to, the plaintiff loaded his horse into a car and put his feed and water bucket therein so as to give the horse care and attention. He then presented himself in the caboose for passage on the same train, and exhibited his contract to the conductor in charge of the train. He had no notice from the company, its station agent or the conductor, that the train did not carry passengers, nor that he was not entitled to be carried thereon free. He was not asked for fare, but his presence and right to passage were acquiesced in. No objection was raised, and the conductor in charge of defendant's train very likely supposed, as plaintiff did, that he had a right to go on the train. But it is vehemently urged that the train did not carry passengers, and that the rules of the company did not allow persons to ride on it, and that the conductor had no authority to permit it, and his acquiescence amounted to nothing. This argument is based

on the fact that the freight charged was for the weight of the horse at so much per hundred-weight. It is admitted that, if the charge had been at a carload rate, plaintiff would have been entitled to free transportation and to passage on that train. It is probably true that under the rules of the company the plaintiff was not entitled to free passage, but it is not shown that he knew, or that a word was said to him by any one, about such rules or regulations. And the excerpts from the shipping contract, and much else that has been said on this point, is not for the purpose of showing that he was entitled to free passage, or in fact to passage at all, but to show that from the contract and the conduct of the company's agents he had a reasonable and well-grounded right to believe that he was entitled to passage on that particular train; that he acted in good faith; and that under the circumstances, if he did not in fact have such right, it was the duty of the company to so inform him, which was not done. We think that, assuming that the contract did not entitle plaintiff to free passage, this train did not ordinarily carry passengers, and that the conductor was without authority to agree to his passage, yet that under the circumstances the plaintiff had the right to, and it was perfectly reasonable for him to suppose that the conductor was acting within his powers and within the general scope of his employment. In other words, that it was within the apparent authority of the conductor of the train to allow plaintiff to ride thereon, and thereby to create the relation of passenger and carrier between him and the company. This case rests on the apparent or implied authority of defendant's agent in accepting him as a passenger and the good faith of the plaintiff in becoming such. Of course an intruder or trespasser, or one who surreptitiously, fraudulently, or deceitfully gains his presence on a train, cannot thereby become a passenger. Nor can he become such through collusion or illegal contrivance with the train crew, but none of these things are even claimed here."

In the *Nichols Case*, just quoted, the question as to whether or not plaintiff was a passenger was one to be submitted to the jury was not mentioned, but the courts of other states have held that such question should be left to the jury. In the case of *Bugge v. Seattle Electric Co.*, 54 Wash. 483, 103 Pac. 824, it is held:

"Whether a passenger on a street car, which reached a trestle that it could not cross by reason of a washout, was a trespasser in walking across the trestle, depending on whether she was invited there by the conductor, or told to wait for a car, and not go on the trestle, as to which the evidence was conflicting, was a question for the jury"

—the court further saying:

"The court was requested to instruct the jury that the respondent was a trespasser upon the trestle and that appellant owed the duty of reasonable care only to avoid injuring her after she was discovered. Whether she was a trespasser or not depended upon the fact whether she was invited there by the conductor, as she testified, or whether she was notified to await a car and not go upon the trestle. This question was therefore for the jury, and they were properly instructed upon it."

In the case of *Chicago Terminal Trans. Co. v. Kotowski*, 199 Ill. 383, 65 N. E. 350, the court says:

"The appellant asked the court to instruct the jury that 'the plaintiff, while upon the trestle, bridge, or viaduct of the defendant, was a trespasser thereon,' which it refused and it is in-

sisted that such refusal was error. We do not think so. Whether he was a trespasser or not was a question of fact for the jury under proper instructions and the court, at the instance of the defendant, told the jury 'that a trespasser is one who goes upon the property of another without the consent of the owner thereof,' and, further, that 'if the jury believe from the evidence that the plaintiff went upon the trestle bridge, or viaduct of the defendant without the consent of the defendant, then the plaintiff was a trespasser thereon'; 'that if the defendant was the owner of a trestle, bridge, or viaduct, and if the plaintiff went upon such trestle, bridge, or viaduct without the consent of the defendant, then the plaintiff was a trespasser thereon'; and that, 'as a matter of law, conductors and brakemen in charge of a train of a railroad company are not presumed to have authority to license or permit any person to go upon the private property of the railroad company outside of its station or station ground; and, if the jury believe from the evidence that any conductor or brakeman in the employ of the defendant told the plaintiff that he might use the right of way, bridge, viaduct, or trestle of the defendant for his convenience in reaching a pleasure resort more than one mile distant from the railroad station, such statement of the conductor or brakeman gave no authority to the plaintiff to go thereon, unless it be shown that such conductor or brakeman had authority to give such permission.' What more could it ask on the question of the plaintiff being a trespasser, and what more could the court have fairly told the jury on that subject?"

In the case of *Alabama G. S. Ry. Co. v. Coggins*, 88 Fed. 455, 32 C. C. A. 1, by the Circuit Court of Appeals, before Taft and Lurton, Circuit Judges, the opinion by Taft, it is held:

"Plaintiff, an employe of a telegraph company, whose line extended along the railroad, was traveling in the caboose of a freight train to a point where repairs were to be made. Near an intermediate station the train stopped at the usual place for the alighting of passengers, which was some 1,500 feet from the station proper. Plaintiff alighted, and, according to the testimony in his behalf, started to walk to the station, to see if there was any telegram for him from his employer, going by the only practicable way, which lay between the train track and a side track. The evidence for defendant was that plaintiff had no business at the station, and was merely loitering between the tracks. He was struck while on a cut-off track by a car which the trainmen were switching to the side track. Held, that the question whether, at the time, he was entitled to the degree of care due a passenger, or merely to that due a stranger on the tracks, was properly left to the jury, under proper instructions."

In other cases, nothing is said about submitting the question as to the status of the injured person to the jury, but it is held that where he acts in good faith in taking passage and with the knowledge and consent of the conductor, although without right on the part of the conductor to give such consent, he is not the trespasser.

In the case of *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461, the authorities are reviewed at some length and under the facts of that case, the court said:

"It is contended that Frank Wheeler was an intruder upon the train, for whose injury no liability could arise against the company for two reasons: First, that the conductor had instruc-

tions not to carry passengers on the construction train; and, second, that from the nature of the business which was being done with the train, and also its equipment, it was apparent that the company did not permit passengers to be carried thereon. Neither of these circumstances will defeat a recovery in this case. It is true, the conductor had been instructed not to allow persons to ride upon his train as passengers, but Frank Wheeler had no knowledge of such instruction. He had asked and obtained permission to ride upon the train. It was within the range of the employment of the conductor to grant such permission. He had entire charge of the train, and was the general agent of the company in the operation of the train. As he was the representative of the company, his act, and the permission given by him, may properly be regarded as the act of the company. If Wheeler had furtively entered upon the train, or had ridden, after being informed that the rules of the company forbade it, or had obtained permission only from the engineer, brakeman, or some other subordinate employe, the argument made by counsel might apply."

In the case of *Simmons v. Oregon R. Co.*, 41 Or. 151, 69 Pac. 440, 1022, it is held:

"A passenger is sometimes defined to be a person whom a railway company, in the performance of its duty as a common carrier, has contracted to carry from one place to another, for a valuable consideration, and whom the company, in the performance of the contract, has received at its station, or in its car, or under its care. *Patt. Ry. Acc. Law* par. 210. But the payment of fare or of a consideration for the carriage is not necessary to create that relationship, so far as it is involved in an action for a personal injury received while on the train. Where a person goes aboard a railway train in good faith for the purpose of being carried from one place to another, and is permitted by the conductor to ride, the company is liable, in the absence of a special contract, for an injury arising from the carrier's negligence, if the conductor was expressly or impliedly authorized to bind the company by such permission, even though such person was traveling gratuitously, and the conductor had violated his instructions by allowing him to remain on the train. 2 *Shear. & R. Neg.* (4th Ed.) par. 491; *Beach, Cont. Neg.* (3d Ed.) par. 165; 2 *Wood, R. R.* (Minor's Ed.) 1207; *Washburn v. Railroad Co.* [3 Head, 638] 75 Am. Dec. 784; *Wilton v. Railroad Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Edgerton v. Railroad Co.*, 39 N. Y. 227; *Brennan v. Railroad Co.*, 45 Conn. 284, 29 Am. Rep. 679; *Railroad Co. v. Scott's Adm'r* [108 Ky. 392], 56 S. W. 674, 50 L. R. A. 351; *Waterbury v. Railroad Co.* (C. C.) 17 Fed. 675, note. The fact, therefore, that the plaintiff was being carried gratuitously is immaterial, if the company accepted him as a passenger, and expressly or impliedly agreed to transport him as such."

In the case of *Whitehead v. St. L., I. M. & S. Ry. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409, it is held:

"Now, in this case the conductor had entire charge of the train. In its management he acted for and represented the defendant. It was a part of his duties to see that persons did not ride upon it, either with or without the payment of fare. How, therefore, can it be said his act in allowing the boy to ride upon the train was beyond or outside the scope of his employment? It was an act directly within the line of his duty. He made breach of his duty towards his master, but that is a matter of no consequence here. To all outward appearance, as well as in point of fact, he was master of the train. The defendant, therefore, cannot escape liability in this case on the ground that the conductor had no authority

to permit the boy to ride on the train. It also follows from what has been said, as well as from the authorities cited, that the defendant did owe a duty to the boy. It owed a duty to him even on the theory that he was not in the full sense of the term a passenger. The instruction given goes no further than to require of defendant ordinary care, and of this defendant ought not to complain. The authorities cited go far to show that the case might have been submitted to the jury on the theory that the boy was entitled to all the care of a passenger; but, as instructions were not given on that theory, we need say no more upon this question."

In the instant case the court by his instructions required that in seeking passage, plaintiff acted in the utmost good faith, and that, having the consent of the conductor as a condition precedent to his right to recover, and the jury were further told that if plaintiff was upon the train without paying fare, or that he had paid the brakeman, knowing or having reason to believe that the method employed was not usual, ordinary, and proper, or was not permitted by defendant, then plaintiff would be a trespasser under the law, and that if plaintiff was a trespasser, he could not recover unless seen in a place of danger by defendant's engineer before he was struck without such engineer doing all in his power to avoid striking him. To our mind, the instructions fairly submit the issue to the jury, and we must presume that the jury made their findings and returned their verdict honestly.

Under the facts in this case, the plaintiff, with others in the freight car with him, were informed by the brakeman that he could not carry him any farther, and that he would have to get off and get a ticket, and was by the brakeman directed to go down the track to the depot. This was in the nighttime, about the hour of 4:30 a. m., and about 1,400 feet from defendant's depot. The plaintiff was not warned of any danger in going down the track toward the depot, or that any train was about to pass and the plaintiff, in following the instructions of the brakeman, sustained the injuries complained of. Upon a consideration of all the authorities and the peculiar facts and circumstances developed in this case, and taking into consideration the age of the plaintiff and the fact that he had been in America but a comparatively short time, we believe that the expulsion of the plaintiff from the train of the defendant, in the nighttime, in strange surroundings, and in a place of danger, with directions from one in apparent authority to pursue a certain course to its depot, without any warning that a train was about to pass, was such negligence on the part of the employees of the defendant railway company as will make it liable regardless of whether or not he was, in the full sense of the term, a "passenger."

The judgment will be affirmed.

PER CURIAM. Adopted in whole.

SEVERNS v. ENGLISH.

SAME v. BROE et al. (No. 6498.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

1. CONTRACTS \S 170(1)—CONSTRUCTION.

Where S., H. and B. enter into a contract for the payment to B. of the "proceeds" of an earlier contract between S. and H. alone, and the term "proceeds" is not defined in the contract of S., H. and B., it is proper to turn to the contract between S. and H. with knowledge of the terms of which all parties contracted, to ascertain the true definition of the "proceeds" agreed to be paid to B.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 753; Dec. Dig. \S 170(1).]

2. APPEAL AND ERROR \S 1099(3) — LAW OF CASE.

Where, upon a former appeal, the right of a receiver under the pleadings as filed to the possession of certain property is sustained, upon a final hearing, under the same pleadings, such decision is the law of the case, and, if the proof reasonably tends to support the allegations of the petition, a judgment of the trial court adjudging possession of such property to the receiver will not be disturbed, since it is not subject to attack upon questions of law involved in the former appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4372; Dec. Dig. \S 1099(3).]

3. JUDGMENT \S 251(1)—CONFORMITY TO ISSUES—ANCILLARY SUITS.

That part of a judgment in an ancillary suit brought by a receiver solely to obtain possession of certain property, which appoints the receiver permanent custodian of the property, is beyond the issue and will be set aside, the extent of the power of the receiver being properly justiciable in the main action in which he was appointed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 437; Dec. Dig. \S 251(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Comanche County; James R. Tolbert, Judge.

Action by Armeline F. Broe, administratrix, and Arnold F. Broe, administrator, of the estate of George W. Broe, deceased, against J. O. Severns, consolidated with an action by F. M. English, receiver. From a judgment for plaintiffs, defendant appeals. Sustained in part and in part reversed.

See, also, 19 Okl. 567, 101 Pac. 750.

W. C. Stevens, of Lawton, and H. B. Hopps, of Oklahoma City, for plaintiff in error. B. M. Parmenter, of Lawton, for defendants in error.

BURFORD, C. The cases before us for consideration are the result of a long-continued and varied litigation. It appears that J. O. Severns, the plaintiff in error, bid for and received from the Secretary of the Interior a certain contract for the installing of a sewer system in the city of Lawton. The digging of the ditches therefor was sublet by Severns to one John R. Hale, under a written contract between Hale as first party and Severns as second party, which was dated August 29, 1904. This contract provided

that Hale was to dig and backfill the necessary ditches, amounting to 42,005 feet, for a flat price of 26 cents per lineal foot, to be paid 80 per cent. as the work was completed weekly by Hale, and the remaining 20 per cent. when the whole work was accepted and approved. The contract further provided:

"It is also hereby mutually agreed that if the said party of the first part shall delay said work unnecessarily and without the cause or excuse as herein defined, for five days, the said second party is and shall be at liberty to take charge of and complete, or engage others to take charge of and complete, said work, and in such case the said party of the first part obligates himself to pay the said party of the second part, on demand, all costs of doing and completing said work, which shall be in excess of the price at which it is hereby agreed that said first party shall do and perform and complete said work; and said first party further agrees to pay the said party of the second part, on demand, all costs and damages which shall be incurred and sustained by said second party on account of his doing and completing the work so as aforesaid not done and completed by the said party of the first part."

Before the commencement of the work it appears that both Severns and Hale were desirous that Hale should obtain an excavating machine known as a "Buckeye Ditcher" for use in the work. Hale, however, not being of sufficient financial responsibility to purchase the machine, which cost \$5,000 and freight, procured Geo. W. Broe, a merchant of Lawton, to guarantee his notes for the purchase price. Before this was done, however, a certain written contract was entered into. Severns denied signing this contract, as hereinafter set out, but the finding of the trial court was against him on this point, and, there being evidence reasonably tending to support the finding, we are bound by it.

The material parts of the contract are as follows:

"Lawton, Okla., September 24, 1904.

"Articles of Agreement.

"This article of agreement made and entered into this 24 day of September, 1904, by and between George W. Broe, party of the first part, and John R. Hale and J. O. Severns, party of the second part, witnesseth:

"That whereas, the said John R. Hale has secured a contract from J. O. Severns to excavate 42,005 feet, more or less, and back fill in the same of all sewers, ditches and trenches of the sanitary sewer system to be erected in the city of Lawton, by the said J. O. Severns, in accordance with the plans and specifications of the United States geological survey, said excavating and filling in to be performed by said John R. Hale in accordance with a certain agreement entered into by and between the said John R. Hale and J. O. Severns on the 29th day of August, 1904; and whereas, the said John R. Hale is desirous of purchasing one Buckeye Ditcher of the value of five thousand (5,000) dollars: Now, therefore, Geo. W. Broe, party of the first part, for and in consideration of one-half interest in and to the said ditcher, hereby agrees to guarantee the payment of said ditcher in the sum of five thousand (5,000) dollars to the company or person from whom said ditcher is purchased by the said John R. Hale. It is hereby agreed that in consideration of the said Geo. W. Broe guaranteeing the payment of said ditch-

er as aforesaid, that the said John R. Hale, party of the second part, agrees to turn over all proceeds of the said Lawton sewer contract above referred to until said machine is paid for in the sum above set forth; and that it is hereby agreed that all the proceeds of said contract is to be retained by the said Geo. W. Broe until said machine is paid for. The said Geo. W. Broe agrees to pay to the said John R. Hale one-half of the net proceeds derived from said contract above mentioned, and the said Geo. W. Broe is to retain the other one-half of the net proceeds as part of the consideration for the services hereto mentioned. And the said J. O. Severns agrees to give and deliver over unto the party of the first part, all of the proceeds had, derived, and acquired under the contract entered into on the 29th day of August, 1904, by and between said John R. Hale and the said J. O. Severns.

"The said J. O. Severns is hereby directed and authorized by the said John R. Hale to deliver to the said Geo. W. Broe all the proceeds derived and growing out of said contract entered into by the said John R. Hale and J. O. Severns on the 29th day of August, 1904. And the said J. O. Severns hereby agrees to deliver to said Broe the proceeds of said contract as above set forth; and it is hereby further agreed that the said Geo. W. Broe is to remain and have an undivided one-half interest in and to said machine after the same is paid for as aforesaid. * * *

"In witness whereof the parties hereunto have set their hands and seals the day and year above set forth.

G. W. Broe.

J. R. Hale.

J. O. Severns."

After the execution of this contract the ditcher was purchased, Broe guaranteeing the payment of Hale's note therefor. The ditcher was placed upon the work, and the proceeds of the contract, amounting to \$613.50, were paid by Severns to Broe. This amount was expended by Broe for freight and expenses. Then trouble arose between Hale and Broe, and each sought possession or control of the ditcher. Severns ceased to pay anything to Broe, and Hale defaulted upon his contract with Severns. On January 14, 1905, Hale turned over the ditcher to Severns, against the wishes of Broe, and Severns used it to complete the contract. The expenditures by Severns to carry out the Hale contract from this time on were largely in excess of the 26 cents per unequal foot specified in the Severns-Hale contract. At the date the machine and other tools were turned over to Severns a written contract was entered into between Hale and Severns reciting the delivery of the machine, and that Severns was to complete Hale's work and keep account of expenditures thereon and account to Hale for any excess of the contract price over the actual cost to Severns of completing the agreed work.

[1-3] Broe now brought a suit against Hale known as No. 1010, in which he sought the appointment of a receiver for the machine and any accounting between Hale and himself. In this suit F. M. English was appointed and qualified as receiver. He thereupon instituted suit against Severns for the possession of the machine. This suit is known as No. 1046. The trial court ordered Severns to deliver the machine to the receiver or give

a bond to retain it, and enjoined Severns from interfering with the possession of the receiver. Severns delivered the machine, but shortly gave the bond and took back the ditcher. From the order of the trial court just recited an appeal was taken to the Supreme Court of the territory, resulting in an affirmance of the order of the trial court. *Severns v. English*, 19 Okl. 567, 101 Pac. 750. Meanwhile, Case No. 1010 was tried, resulting in a judgment for Broe against Hale, which, for some reason not appearing in the record, was remitted to \$10. The judgment of the court, however, ordered the receivership continued until the further order of the court. This judgment became final. Broe now brought a suit called No. 1155 against Severns for a recovery of the amounts alleged to be due under the Hale-Broe-Severns contract. This suit and No. 1046—the receiver's suit for possession of the machine—were tried together before the court without a jury and the judgments in these cases are now before us for review. The trial court found judgment for Broe against Severns for \$5,000, and for the receiver for possession of the ditcher, and ordered him continued as permanent receiver thereof.

It is contended that the money judgment in No. 1155 is not supported by any evidence. The rights of Broe are fixed under the Broe-Hale-Severns contract. By its terms Broe was to receive all the "proceeds" of the Hale-Severns contract of August 29, 1904. For a definition of these proceeds we must necessarily turn to the Hale-Severns contract with reference to and with knowledge of which all parties contracted in the Broe-Hale-Severns agreement. Under the Hale-Severns contract the "proceeds" were 26 cents per lineal foot, payable as therein specified, unless and except Hale should default for five days in the performance of the work, and Severns should take it over, in which case the "proceeds" would, as specified by the contract, be only the difference between the actual cost to Severns of doing Hale's work and 26 cents per lineal foot. We are of the opinion therefore that Severns was obligated to pay to Broe 26 cents per lineal foot in the installments provided in the contract up to January 14, 1905; but, it clearly appearing that Hale was delaying the work, we are of the opinion that Severns had the right on that date to take over the work, and thereafter to account to Broe only for the difference in the cost and the agreed price as above set out. This qualification, however, must be made: All that Severns paid prior to January 14, 1905, under the Hale-Severns contract—and there is no evidence that he ever paid anything upon any obligations to Hale not arising out of the construction of these sewer ditches—should have been paid to Broe. In other words, if Severns overpaid his obligation, still he was bound to pay all the proceeds of the contract,

prior to January 14th, to Broe and not to Hale. It clearly appearing that the cost exceeded the contract price after January 14, 1905, we are limited to the period prior to that time to ascertain Broe's recovery, if any. It does not appear in the record how much ditch was dug prior to January 14, 1905. It does appear by Exhibit "O," that Severns paid Hale and Broe prior to that date \$3,874.28. Of this amount but \$613.53 was paid to Broe. Severns, therefore, diverted to Hale \$3,060.70 which he had contracted to pay to Broe. It does not appear that any further recovery is justified by the record. We have carefully considered all the contentions of counsel in regard to the testimony and these contracts, though such contentions are not specifically noticed. The true result seems to us to be that above reached. It is strongly urged that Severns continued to pay Hale money after January 14, 1905, and that there was testimony to show that these payments were made under the original contract. We think the record fairly shows without contradiction that the checks were made in Hale's name, the proceeds went to the workmen and for expenses on the ditch, and that Hale had no beneficial use of the money, it being disbursed under Severns' direction. If this were true, Severns, under our construction of the contracts, could lawfully pay, after January 14th, under the original contract, the debts for labor and material accrued in doing the work which Hale had agreed to do.

As to the receivership matter, we conceive ourselves to be bound by the decision of this court in *Severns v. English*, 19 Okl. 567, 101 Pac. 750, supra, as the law of this case. It was there held, upon the very pleadings now before us, that the order of the trial court ordering the delivery of this machine to the receiver was lawful; as the testimony upon the trial reasonably supported the allegations of the petition, and the judgment of the trial court was for the receiver, we do not feel at liberty, if we so desired, to disturb it. That part of the judgment continuing the receivership permanently, however, was beyond the power of the court in this case. This was an ancillary proceeding for possession of this machine only. The continuance of the receivership was not involved. The receiver's further duties must be determined in cause No. 1010 and not in this proceeding. In cause No. 1155 in the trial court, if the plaintiff shall, within 30 days, enter a remittitur in the trial court of his judgment to the sum of \$3,060.70, with interest at 6 per cent. from January 14, 1905, and costs, and evidence the same by filing a certified copy thereof with the clerk of this court, this cause is affirmed, otherwise to be reversed and a new trial granted. In cause No. 1046 in the trial court the judgment for possession of the machine is affirmed. That part

of the judgment fixing the further duties of the receiver and declaring a permanent receivership of the ditcher is set aside and reversed. The costs of the appeal to be equally divided.

PER CURIAM. Adopted in whole.

SOVEREIGN CAMP OF WOODMEN OF THE WORLD v. HUTCHINS. (No. 7514.)

(Supreme Court of Oklahoma. June 27, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 757(3) — **ASSIGNMENTS OF ERROR—SUFFICIENCY.**

The second paragraph of syllabus in *Collier et al. v. Gannon*, 40 Okl. 275, 137 Pac. 1179, is adopted herein.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3092; Dec. Dig. \S 757(3).]

2. INSURANCE \S 817(2) — **FRATERNAL INSURANCE—BURDEN OF PROOF.**

Where, in an action on a benefit certificate, liability is denied on the ground that a false statement was made by the assured in the application for the certificate, which by its terms voided the same, and it was denied that the assured executed the application or made the false statement, *held*, that it was not error for the court to instruct the jury that the burden was on the defendant to prove the execution of the application and the alleged false statement therein.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. \S 2001; Dec. Dig. \S 817(2).]

Commissioners' Opinion, Division No. 2. Error from District Court, Carter County; A. Eddleman, Judge.

Action by Laura E. Hutchins against Sovereign Camp of the Woodmen of the World. There was judgment for plaintiff, defendant appeals. Affirmed.

See, also, 39 Okl. 267, 134 Pac. 1116.

N. B. Maxey and Kelly Brown, both of Muskogee, for plaintiff in error. Potterf & Walker, of Ardmore, for defendant in error.

GALBRAITH, C. This action was commenced by the defendant in error, as plaintiff in the trial court, against the Sovereign Camp of the Woodmen of the World, to recover on a benefit certificate issued to her deceased husband, John F. Hutchins, on October 28, 1909, in the sum of \$1,000. The certificate provided that if the insured died within a year of the date of its issuance the beneficiary should receive \$500 in full satisfaction thereof. It was alleged that the beneficiary died within the year, to wit, on the 3d day of August, 1910. Liability was denied on the ground (1) that the insured made false statements in his written application for the policy, which, under the terms thereof, voided it; (2) that the deceased indulged in the excessive use of intoxicating liquors after the issuance of the certificate

to the extent that it produced delirium tremens, which caused his death, and therefore the policy under its terms was voided. These grounds of defense were specifically denied in the reply, and it was also denied that the assured signed the written application for the certificate. On the issues thus formed the cause was submitted to the court and a jury and a verdict returned for the plaintiff in the sum of \$500, from which an appeal has been presented to this court. This is the second appeal in this cause. In the first appeal the judgment recovered against the plaintiff in error was reversed because of error of the trial court in the instructions to the jury. See *Sovereign Camp Woodmen of the World v. Hutchins*, 39 Okl. 267, 134 Pac. 1116.

[1] Upon this appeal the first, second, and third assignments of error are to the admission of testimony over the objection of the plaintiff in error. The argument in the brief in support of these assignments fails to set out the full substance of the testimony objected to, "stating specifically his objections thereto," "so that no examination of the record itself need be made in this court," as required by rule 25 (95 Pac. viii).

In *Collier et al. v. Gannon*, 40 Okl. 275, at 278, 137 Pac. 1179, 1181, it is said:

"The evidence raised by this assignment is not set out in accordance with rule 25 of this court (38 Okl. x, 95 Pac. viii). * * * Under the uniform holdings of this court, where such is not done, such question will not be considered on review here. *Scoville et ux. v. Powell et al.*, 33 Okl. 446, 128 Pac. 730."

These assignments are therefore not presented for review.

The other assignments of error relate to certain instructions given the jury by the court. Objection is made to instruction No. 4, which reads as follows:

"Therefore, if you believe from a preponderance of the evidence that the insured, John F. Hutchins, after the issuance of the beneficiary certificate in question, became so intemperate from the use of intoxicating liquors as to produce delirium tremens, or that he died from the direct result of the drinking of intoxicating liquors, or died from a disease, resulting from his own vicious, intemperate, or immoral habits, act or acts, then, in that event, the plaintiff cannot recover in this case, and you should return your verdict for the defendant."

[2] It is admitted that this instruction "contains a correct statement of the law governing the case," but it is insisted that it contains "some irrelevant matter that destroys its usefulness." Just what such "irrelevant matter" consisted of does not clearly appear, although an intimation is given that there is no evidence in the record that the death of the insured was due to "disease resulting from his own vicious, intemperate, or immoral habits, act or acts," and therefore the jury were misled by including this phrase in the instruction. If there was no evidence in support of this part of the charge, it does not appear that the plaintiff in er-

ror was injured by it, and therefore has any just ground for complaint on account thereof.

Again, it is complained that the court erred in instructing the jury that, inasmuch as it was denied that the assured signed or executed the application for the certificate, the burden of proof was on the defendant to prove by a preponderance of the evidence that he did execute it in order to support the defense of a false statement made therein. This was not error. One of the grounds upon which the defendant denied liability was that the assured had made a false statement in the written application which voided the certificate. The plaintiff denied that the assured signed the application and made the statement claimed to be false.

At the trial the plaintiff offered the certificate, proof of death, and the making proof of death and demand for payment, and rested. Thus a prima facie case of the liability was made out. The defendant offered the application with proof of its execution by the assured and the alleged false statement therein. Proof in rebuttal was admitted to the effect that the signature to the application was not that of the assured. The law cast upon the defendant the burden of establishing this ground of its defense, and it was not error for the court to so instruct the jury.

Other instructions are complained of, but a careful consideration of them constrains us to hold that the issues were fully stated to the jury by the court in the instructions, and the law applicable thereto, and that none of these assignments are well taken.

The issuance of the policy was admitted, but it was contended by the plaintiff in error that it was not liable for the reason set out in its answer. The plaintiff in error assumed the burden of proof in establishing the defenses set out. The evidence was conflicting. The jury by the verdict found that the defenses relied upon had not been sustained. There was evidence to sustain this verdict.

Therefore the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

WALTERS v. STATE. (No. A-2730.)

(Criminal Court of Appeals of Oklahoma. Sept. 23, 1916.)

Appeal from Superior Court, Pottawatomie County; Leander G. Pitman, Judge.

Steve Walters was convicted of violation of the prohibitory law, and he appeals. Affirmed.

Mark Goode, of Shawnee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the state.

PER CURIAM. Plaintiff in error, Steve Walters, was convicted in the superior court

of Pottawatomie county on a charge of unlawfully transporting intoxicating liquor, and in accordance with the verdict of the jury was by the judgment of the court sentenced to be confined in the county jail for 30 days and to pay a fine of \$50 and all costs. From the judgment he appealed, by filing in this court on January 11, 1916, a petition in error with case-made.

From our examination of the record we find that the charge of the court fairly presented the law of the case, and that the evidence is sufficient to support the verdict. No prejudicial error being apparent, the judgment of the court below is affirmed.

SHOEMAKER v. STATE. (No. A-2615.) (Criminal Court of Appeals of Oklahoma. Oct. 21, 1916.)

Appeal from District Court, Nowata County; W. J. Campbell, Judge.

George Shoemaker was convicted of violating the prohibitory law, and appeals. Affirmed.

H. O. Bland, of Tulsa, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, George Shoemaker, was convicted at the October, 1915, term of the Nowata district court, charged with maintaining a place wherein intoxicating liquors were kept and sold, and his punishment fixed at a fine of \$300 and imprisonment in the county jail for 9 months. Judgment was pronounced in the trial court on the 3d day of November, 1915.

The appeal was filed in this court on December 29, 1915. No briefs have been filed on behalf of the plaintiff in error, and when the cause was assigned for oral argument in this court no appearance was made or argument offered. It appears that the appeal has been abandoned. The Attorney General, in open court, moved the affirmation of the judgment upon the ground that the appeal had not been prosecuted as by law provided and had been abandoned.

The motion is sustained, and the judgment affirmed. Mandate ordered forthwith.

McMINN v. JOHNSON COUNTY SAVINGS BANK. (No. 7399.)

(Supreme Court of Oklahoma. June 27, 1916. Rehearing Denied Sept. 19, 1916.)

(Syllabus by the Court.)

BILLS AND NOTES § 517—ACTIONS—SIGNATURE—EVIDENCE—SUFFICIENCY.

Where in an action upon a promissory note its execution is denied under oath, and upon the trial such note is admitted in evidence without objection, and other signatures of the alleged maker, admittedly genuine, are also in evidence, and upon comparison of the genuine signatures with the alleged forged note, the court to whom the cause is being tried, without a jury, finds the

signature to the note to be genuine, there is evidence reasonably sustaining the plaintiff's cause of action, and a demurrer to the plaintiff's evidence is properly overruled.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1807-1815; Dec. Dig. ☞ 517.]

Commissioners' Opinion, Division No. 2. Appeal from County Court, Greer County; Wylie Snow, Special Judge.

Action by the Johnson County Savings Bank against L. J. McMinn to recover upon a promissory note. Judgment for plaintiff, defendant appeals. Affirmed.

H. D. Henry, of Mangum, and Gray & McVay, of Oklahoma City, for plaintiff in error. B. F. Van Dyke, of Granite, for defendant in error.

BURFORD, C. This was an action by the Johnson County Savings Bank against L. J. McMinn to recover upon a promissory note. Defendant denied the execution of the note under oath. Upon the trial the note in question was admitted in evidence without objection. Whatever may have been the effect, under the decisions of this court in *Archer et al. v. United States*, 9 Okl. 569, 60 Pac. 268, and *Miller v. Thompson*, 151 Pac. 192, had there been an objection made, clearly the plaintiff in error cannot maintain error upon the introduction of the note to which he did not object. After the note was introduced in evidence certain letters of the defendant to the assignor of the plaintiff corporation, the signature to which the defendant admitted, were introduced in evidence. There was no other proof of the genuineness of the signature of the defendant to the note in suit. A demurrer to the evidence was interposed and overruled by the trial court.

It appears from the record that the trial court had before him both the disputed note and the genuine signatures, which for purposes of comparison he might regard as "standard writings." If upon comparing these various signatures he believed, as his judgment imparts he believed, that the signature to the note was genuine and was that of the defendant, it was proper to overrule the demurrer to the evidence; the cause being tried to the court without the intervention of the jury.

It was not necessary that witnesses should have been introduced to prove that the signatures to the note were made by the same person who signed the letters used as "standard writings," as it is now almost universally held that the court or jury may themselves make such comparisons.

Mr. Chamberlayne, in his work on Evidence (section 2229), collects a large number of the American decisions sustaining the text, which is as follows:

"Even without the aid of an enabling statute, American courts have conceded exceptional privileges to both court and jury in the use of com-

parison of hands. Genuine documents already in the case for some other purpose might freely be compared by judge or jury with the disputed writing for the purpose of determining the identity of the writer. The practice on this point, therefore, is substantially the same in the United States as in England. The rule, as was to be expected, continues to apply where the judge sits as a jury."

The trial court was therefore justified in overruling a demurrer to the evidence upon the comparisons alone even in the absence of any evidence of handwriting experts, or witnesses to the actual signing of the note.

This conclusion also disposes of the contention of the plaintiff in error that the judgment is not supported by any evidence. We have consistently held that the findings of the trial court in an action at law, where the court tries the cases without the intervention of a jury, will be given the same weight and effect as those of a jury, and that, as such, if there is any evidence reasonably tending to support the judgment, it will not be set aside. If there was evidence upon which a demurrer to the petition should be overruled, as we have concluded, there was likewise evidence reasonably tending to support a judgment for plaintiff.

We find no error in the record, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

DIXON v. STATE MUT. INS. CO.
(No. 5027.)

(Supreme Court of Oklahoma. June 27, 1916.
Rehearing Denied Sept. 19, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ☞1195(3)—REVIEW—FORMER DECISION—LAW OF THE CASE.

Where the trial court sustains a general demurrer to a petition upon the grounds that the petition fails to state facts sufficient to constitute a cause of action, and upon appeal the questions presented were that the insurance policy upon which suit was brought was void for the reason that notice of loss had not been given within 48 hours after the loss, and for the further reason that the suit was brought within 60 days after proof of loss was furnished, and therefore prematurely brought, and the Supreme Court, upon a hearing, holds that the policy was not void, but that the suit was prematurely brought, and sustains the trial court for that specific reason, and thereafter a new suit is filed upon substantially the same state of facts, but after the expiration of 60 days after proof of loss furnished, and a general demurrer sustained to this petition upon the ground that the former judgment of the court is *res adjudicata*, *held*, the decision of the Supreme Court is binding upon the lower court, the first cause of action having been prematurely brought, and the demurrer should have been overruled in the second cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4663-4665; Dec. Dig. ☞ 1195(3).]

2. APPEAL AND ERROR ☞1195(2)—REVIEW—FORMER DECISION—LAW OF THE CASE.

It is the general rule that a decision upon a general demurrer to a petition, when the

party elects to stand upon the petition, is a ruling upon the merits and is res adjudicata as between the parties upon the same state of facts, but in a case where the Supreme Court sustains the trial court solely upon the ground that the petition was prematurely filed, such holding is binding upon the trial court, and it is immaterial that the Supreme Court has since held that the same state of facts constitutes a good cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4662; Dec. Dig. § 1195(2).]

Commissioners' Opinion, Division No. 5. Error from District Court, Oklahoma County; George J. Clark, Judge.

Action by George Dixon, administrator of the estate of Theodore F. Dixon, deceased, against the State Mutual Insurance Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

See, also, 34 Okl. 624, 126 Pac. 794, L. R. A. 1915F, 1210.

Everest & Campbell, of Oklahoma City, for plaintiff in error. Keaton, Well & Johnston, of Oklahoma City, for defendant in error.

CLAY, C. [1] Plaintiff in error, as plaintiff, brought suit against the defendant in error, as defendant, in the district court of Oklahoma county, to recover on an insurance policy issued for \$1,500 to Theodore Dixon, dated October 14, 1909, insuring a certain barn against loss by fire, alleging the total destruction of said barn by fire on the 26th day of April, 1909, that proof of loss and notice were given on the 14th day of September, 1909, according to and in compliance with the provisions of the policy, and attaching a copy of the policy sued on as an exhibit to the petition.

Plaintiff further alleges that Theodore Dixon brought suit on said policy in the same court on October 22, 1909, which suit was numbered 8798 on the docket of said court, for the loss sustained by said fire in the amount of said policy, and by leave of court filed, on the 26th day of February, 1910, his second amended petition; that the defendant demurred to said petition on the 2d day of March, 1910, upon the grounds that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained on the 7th day of May, 1910; that plaintiff excepted, elected to stand on his petition, and his action was dismissed, from which judgment he appealed to the Supreme Court; that upon a hearing in the Supreme Court on the 19th day of September, 1910, the judgment of the trial court was sustained for the reason and upon the ground that said suit was brought within 60 days after notice and proof of loss was given, and said action was prematurely brought and could not be maintained.

Defendant filed a general demurrer to this petition, which was sustained, the cause was dismissed, and plaintiff excepted and appeal-

ed from the judgment sustaining the demurrer and dismissing the case.

The only question for determination presented by the plaintiff is the alleged error of the trial court in sustaining the demurrer and dismissing the action.

Plaintiff admits this to be a suit upon the same policy, against the same defendant, and for the same loss as the one heretofore prosecuted by the beneficiary, but contends that, as the demurrer was presented and argued upon two propositions of law only, one that the policy was forfeited because notice was not given within 48 hours, and that proof of loss was not made within 60 days after the loss, and the other that the action was brought within 60 days after the loss, the decision of the Supreme Court holding that the first ground was not a forfeiture, but that the action of the trial court should be sustained because the action was prematurely brought, made the action of the trial court in sustaining the general demurrer in the former action amount to a dismissal of the action because the suit was prematurely brought, and therefore left the matter open for a new cause of action.

[2] The defendant contends that the former case was decided upon a general demurrer and held by the trial court not to state a cause of action, and that the decision upon the general demurrer was upon the merits, and therefore a bar to a future action upon the same state of facts, and cites a large number of cases, many from our own court, in support of this contention, and that the facts set up by the plaintiff in this case are substantially the same as those set up in the former case. The rule of law laid down by the cases cited by the defendant is undoubtedly correct in respect to the facts in the cases cited, that the sustaining of a general demurrer to a petition for the reason that the facts do not state a cause of action, where the Supreme Court for the same reason sustains the action of the trial court upon appeal, is a bar to all future litigation between the same parties upon the same state of facts. In the case of the Corrugated Culvert Company v. Simpson Township, 151 Pac. 854, Mr. McKeown, C., says:

"It is a well-settled doctrine that a judgment or decree rendered on demurrer to a material pleading, on the ground that the facts therein stated are insufficient in law, is as conclusive of the matters and things confessed by the demurrer as a verdict finding the same facts to be true. This is true because the matters in controversy in each case are settled by the record. It follows that facts thus established can never thereafter be contested between the same parties or those in privity with them. Ann. Cas. 1913A, note page 541, and authorities cited."

But here we have a different state of facts. In the former case, which was No. 8789 in the trial court, a general demurrer to the petition was sustained for the reason that it did not state facts sufficient to constitute a cause of action. The plaintiff elected to

stand upon his petition and appealed to the Supreme Court (34 Okl. 624, 126 Pac. 794, L. R. A. 1915F, 1210) where Mr. Rosser, C., in a carefully and well considered opinion, held that the policy sued on was not void by reason of the failure to give notice of the loss within 48 hours, and further held that the action of the trial court in sustaining the demurrer should be affirmed for the reason that the suit was brought before the expiration of the 60 days after the proof of loss had been furnished the company, and therefore was premature.

The holding of the Supreme Court that the action was premature therefore becomes the law of the case and binding both upon the trial court and this court. *Harding v. Gillett et al.*, 25 Okl. 199, 107 Pac. 665; *Willson v. Binford*, 81 Ind. 588; *Terre Haute & I. R. Co. v. Baker*, 4 Ind. App. 66, 30 N. E. 431; *Sewing Machine Co. v. Leslie*, 118 Fed. 557, 55 C. C. A. 323.

In the latter case it is held that the decision of the appellate court upon a question arising in the case is not only binding upon the trial court, but is the law of the case in the appellate court itself upon a subsequent writ of error or appeal.

It does not matter for what other reason the trial court may have sustained the demurrer. In fact, he may have sustained it upon the theory that the policy was void because notice had not been given within 48 hours after the loss, as required by the provisions of the policy, but the Supreme Court said that the suit was prematurely brought. We think it but fair to presume that the trial court may have sustained it for the same reason, as, from an examination of the petition as it now exists, we are clearly of the opinion that the same states a cause of action and is not subject to demurrer. It is conceded that the present petition is substantially the same as the petition in the former case; therefore it would not be fair to presume that the trial court erred in the former case, and we will indulge the reasonable presumption that the trial court held correctly; that is, that the action was prematurely brought, and, if the former action was a premature action, it would be no bar to a new action.

Defendant further urges that this petition was amended more than 60 days after proof of loss was furnished, and that therefore, under the rule laid down in *Western Reciprocal Underwriter's Exchange v. Coon*, 38 Okl. 453, 134 Pac. 22, which holds that the filing of an amended petition after 60 days from the time of the furnishing of proof of loss cured the defective bringing of the action, and that the party is bound by such adjudication, in that it was a matter that might have been litigated in the former suit. But we are confronted in this case with the rule that the decision of the Supreme Court in

the former case is binding upon the trial court and upon this court, and therefore conclusively settles the question that the action was prematurely brought. In 23 Cyc. 1221, it is said:

"The decision of an appellate court is binding and conclusive upon the parties, as to the matter or point adjudged, in subsequent litigation between them in the same or any other court, and this is true even though the appellate court has since decided differently in other cases."

To the same effect are 3 Cyc. 397, and note; *City of Hastings v. Forworthy*, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321, and note.

Defendant further urges that it is not the reasoning of the Supreme Court that constitutes *res adjudicata*, but the judgment of the trial court, and that, when the judgment of the trial court becomes final, it is a complete bar to future actions between the same parties where a general demurrer has been sustained, and cites in support of its contention *Holderman v. Hood et al.*, 78 Kan. 46, 96 Pac. 71, which holds that not the reasoning of the Supreme Court, but the judgment of the lower court, constitutes the bar.

We concede this to be the law. It is not the reasoning of the Supreme Court that constitutes the bar to a cause of action, but it is the question of law that was settled in that case which is binding upon both parties. It is a part of the record of the case, and it is as much an estoppel or bar as a judgment of the trial court upon the merits as far as asserting that the things there determined were not as stated in the opinion, and is binding upon the same state of facts.

In *Heddt v. Minor*, 113 Cal. 385, 45 Pac. 700, it is said:

"The 'law of the case' consists, not in the reasoning of the court, or in the illustrations given, but in the propositions of law actually decided, and applicable to the facts in judgment."

It is well settled that a suit prematurely brought is no bar to future action between the same parties. *Waterhouse v. Levine*, 182 Mass. 407, 85 N. E. 822; *Slocum v. Wilbour*, 23 R. I. 97, 49 Atl. 489; *Gragg v. N. W. Ins. Co.*, 140 Mo. App. 685, 126 S. W. 766; *McNees v. Insurance Co.*, 69 Mo. App. 232; *Moloney v. Nelson*, 158 N. Y. 851, 53 N. E. 31; *Nevills v. Shortridge*, 146 Cal. 277, 79 Pac. 972.

We have examined the petition in this case, and do not believe that the same is subject to a general demurrer. We think it states a good cause of action; and, as we have held that the first suit was brought prematurely, we believe the court was incorrect in sustaining a general demurrer to this petition.

We therefore recommend that the judgment of the trial court sustaining the demurrer and dismissing this case be reversed, and the cause reinstated for trial upon its merits.

PER CURIAM. Adopted in whole.

STATE NAT. BANK et al. v. SCALES.
(No. 5562.)

(Supreme Court of Oklahoma. May 9, 1916.
Rehearing Denied July 11, 1916. Motion for
Leave to File Second Petition for Rehearing
Denied Sept. 19, 1916.)

(Syllabus by the Court.)

1. WITNESSES \S 56(2)—HUSBAND AND WIFE
—PROOF OF AGENCY—EVIDENCE.

An agency resting in parol can generally be proved by the testimony of either the principal or the person who claims to act as agent, and the same rule applies when the purported agent is either the husband or wife of the principal.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 154; Dec. Dig. \S 56(2).]

2. REPLEVIN \S 69(5)—PROOF—VARIANCE.

A variance between the petition and the proof is not fatal, where upon either, the theory of the case set out in the petition or the proof offered in support thereof the plaintiff would be entitled to recover.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 278, 279; Dec. Dig. \S 69(5).]

3. CORPORATIONS \S 123(11)—STOCK—PLEDGES—“CERTIFICATE OF CORPORATE STOCK.”

A pre-existing indebtedness is not a sufficient consideration, as against the real owner, to support an unauthorized or wrongful pledge of a certificate of stock in a corporation, as such certificate is not a negotiable instrument, but stands upon the same footing as other personal property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 539-546; Dec. Dig. \S 123(11).]

4. CORPORATIONS \S 123(11)—STOCK—WRONGFUL PLEDGES—RIGHT OF PLEDGEE.

Where shares of stock in a corporation have been wrongfully pledged to a bank, if, on the faith thereof, the bank permits the pledgor to overdraw his account, and such overdraft is thereafter paid by a deposit of the pledgor, the bank is not entitled to hold such stock as against the real owner.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 539-546; Dec. Dig. \S 123(11).]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by Lily W. Scales against the State National Bank, a corporation and others. There was a judgment for plaintiff, and certain defendants bring error. Affirmed.

Willson & Tomerlin, of Oklahoma City, for plaintiffs in error. Giddings & Dortch, of Oklahoma City, for defendant in error.

RUMMONS, C. The defendant in error, plaintiff below, commenced this action in the district court of Oklahoma County to recover a certificate representing 66 shares of the capital stock of the Oklahoma Portland Cement Company, of the value of \$25 per share, of which plaintiff claimed to be the owner. The parties will be referred to herein as they appeared in the trial court. Plaintiff alleged that the stock sought to be recovered belonged to her, but for her convenience the stock was in the name of her husband, Henry M. Scales, who in all the transactions connected with this case acted

as her agent; that in the year 1912 plaintiff, acting through her husband, caused said certificate of stock to be indorsed to one Herber P. Harter to be used as collateral in procuring a loan from the State Exchange Bank, of Oklahoma City, for the benefit of plaintiff; that said Harter, in violation of his trust, indorsed the said certificate of stock and delivered it to the defendant W. F. Wilson, as attorney and agent for the defendant State National Bank, but that said defendants Wilson and State National Bank paid no valuable consideration to the said Harter for the transfer of said certificate of stock; that the defendants Wilson and State National Bank knew at the time that they took said certificate of stock that neither the plaintiff nor her husband received any consideration whatever from the transfer thereof. The defendants State National Bank and Oklahoma Portland Cement Company answered, denying generally the allegations of the petition and specifically denying the allegation of the agency of Henry M. Scales for the plaintiff. These answers were at the trial verified. At the trial the court sustained a demurrer to the evidence of the plaintiff as to the defendant W. F. Wilson, and he appears no further in this cause. The cause was tried to the court without the intervention of a jury, resulting in a judgment for plaintiff against the defendants State National Bank and Oklahoma Portland Cement Company for a return of said certificate of stock or its value in cash, if a return could not be had, which value the court found to be the sum of \$1,485. The defendants State National Bank and Oklahoma Portland Cement Company bring this proceeding in error to reverse this judgment of the court.

The record discloses plaintiff was the owner of two bonds of the Louisville & Nashville Railroad Company which were paying a small rate of interest, and that, desiring to invest the money represented by said bonds more profitably, she caused the same to be sold, and caused her husband, who was a stockholder in the Oklahoma Portland Cement Company, to purchase the 66 shares of stock represented by the certificate in controversy herein; that for the convenience of plaintiff the certificate was taken in the name of her husband, Henry M. Scales, who acted as her agent in managing this stock. Some time in the year 1911 the plaintiff wished to borrow some money, and wished to use this certificate of stock as collateral for the loan. At that time Herber P. Harter, who occupied the same office with her husband, was doing business with the State Exchange Bank, of Oklahoma City, and advised the husband of plaintiff that he could procure the loan from said bank. On April 1, 1911, Henry M. Scales indorsed the certificate of stock to Herber P. Harter, and delivered the same to him to deposit as collateral for the loan desired

to be procured by plaintiff. The president of the State Exchange Bank was at this time absent from the city, and the loan was not effected. Henry M. Scales testified that Harter returned him the stock as soon as he learned that the president of the State Exchange Bank was absent, and that he (Scales) placed the same in his drawer in a safe in the office, which safe was used jointly by Scales and Harter, but in which each had a separate box or compartment for his private papers. On May 19, 1911, Harter indorsed this certificate in blank and delivered the same to the Oklahoma City National Bank as collateral. He was at that time indebted to the Oklahoma City National Bank in the sum of about \$9,000, for which said bank held various items of collateral. Shortly thereafter the State National Bank purchased the assets of the Oklahoma City National Bank and took over its business, and thus acquired the collateral and the indebtedness of Harter. Henry M. Scales testified that he first learned where this certificate of stock was some time in the year 1912, being notified by an attorney of the Oklahoma Portland Cement Company that this certificate of stock had been sent to the company for transfer upon its books. It does not appear from the evidence that at the time Harter pledged this stock he received any money therefor, nor was the time of payment of his indebtedness to the bank extended. At the time of his pledge of this stock his account with the bank was overdrawn \$994.38. This overdraft was liquidated on May 25, 1911, by deposit of \$1,400. Thereafter, on June 5, 1911, Harter created an overdraft which subsequently, in July, amounted to \$1,033. On August 9, 1911, this was liquidated by deposit of \$1,033. On August 9th another overdraft was created of \$8.90, which was liquidated on August 11th by deposit of a like amount. On July 22, 1911, the State National Bank, by its attorney, posted notice of sale of pledged chattels in which it advertised the sale of this certificate of stock, together with other certificates of stock, to satisfy all indebtedness of Herber P. Harter, represented by four notes and an overdraft. The notes and overdraft were described as follows: One note dated April 15, 1911, due May 14, 1911, for \$1,000, upon which there was due, including interest and attorney's fees, \$1,127.32; one note in the sum of \$2,500, dated April 13, 1911, due 60 days after date, upon which there was due, including interest and attorney's fees, \$2,783; one note for the sum of \$4,000, dated April 21, 1911, due June 20, 1911, upon which there was due, including interest and attorney's fees, \$4,436.66; one note for the sum of \$500, dated May 3, 1911, due 30 days after date, upon which there was due, including interest and attorney's fees, \$578.32; also an overdraft in the sum of \$1,038.50. The collateral was not sold under this notice. Harter came in and paid

something on the debt, and on three or four different occasions paid something on the indebtedness until it was reduced to about \$5,000. On September 4, 1912, another notice of sale of the pledged collateral was posted by the State National Bank advertising for sale this certificate of stock, and two others, one for 53 shares and one for 86 shares of the capital stock of the Oklahoma Portland Cement Company to satisfy the indebtedness of Herber P. Harter, consisting of three promissory notes: One for \$5,000, dated November 27, 1911, due December 20, 1911; one for \$825, dated and maturing as above; another for \$264.41, bearing the same date and maturing at the same time—aggregating, including interest and attorney's fees, the sum of \$6,515.97. Under this notice this certificate of stock was sold on October 1, 1912, together with the other collateral for the sum of \$100 to Rebecca Lynn. She was a clerk in the employ of the attorney for the State National Bank, and later transferred this certificate of stock to said bank.

Counsel for defendants make three assignments of error: First, error in permitting Henry M. Scales, the husband of plaintiff, to testify to the transaction by which the plaintiff, Lily W. Scales, claimed to have purchased the shares of stock in the Oklahoma Portland Cement Company; second, that there was a variance between the allegations of the plaintiff's petition and the proof offered in support thereof in this, and that the plaintiff alleged the stock in controversy had been hypothecated with the bank in violation of a trust imposed in Harter to hypothecate the same to the State Exchange Bank to secure a loan for plaintiff, while the evidence disclosed that the stock came into the hands of Harter at the time it was hypothecated with the Oklahoma City National Bank by a larceny from the private drawer of the husband of plaintiff; third, the court erred in holding plaintiff was entitled to recover possession of said stock or its value, there being no sufficient competent evidence to support such judgment of the court.

[1] We have carefully examined the testimony of the plaintiff and her husband, Henry M. Scales, as to the transaction by which Mrs. Scales claimed to become the owner of this certificate of stock, and we find no prejudicial error in the admission of such testimony. It has been held by this court that agency resting in parol can generally be proved by the testimony of either the principal or the person who claims to be the agent, and the foregoing rule is not changed when the purported agent is either the husband or wife of the principal. *Armstrong, Byrd & Co. v. Crump*, 25 Okl. 452, 106 Pac. 855; *Lowman v. Blaine County Bank*, 40 Okl. 519, 139 Pac. 952. The court therefore did not err in admitting the testimony of plaintiff and her husband that he was acting as her agent in the transaction. As her agent

in the purchase and management of these shares of stock, he was a competent witness to testify as to what he did in buying said stock and in disposing of it.

[2-4] In the view we take of the principal question in this case, we do not think that the question of variance raised by the second assignment of error is material to a determination thereof; for, unless the bank gave a consideration for the transfer of this stock to it as collateral, it could not be injured by the variance complained of; for, unless plaintiff might be estopped from reclaiming her property, it was immaterial whether the pledging of the stock was wrongful or criminal.

We come then to the principal question involved in this cause, whether or not the defendant State National Bank, or its predecessor in interest, the Oklahoma City National Bank, was a bona fide pledgee of this certificate of stock for value. The plaintiff having established her ownership of this certificate of stock, and there is in the record no attempt on the part of the defendants to dispute her ownership, she could only be deprived of her ownership therein by the tortious or criminal act of another because of an estoppel, and the burden was upon the defendants to show such estoppel. The principal element of estoppel by conduct is that the party claiming the estoppel has been led by such conduct to act to his prejudice. However negligent plaintiff and her husband may have been in this matter, unless the defendant bank or its predecessor parted with something of value or acted to its prejudice in consideration of the pledge of this stock, they cannot hold it against the rightful owner. *Walls v. Farrington*, 27 Okl. 754, 116 Pac. 428, 35 L. R. A. (N. S.) 1174; *First Nat. Bank v. Strauss*, 66 Miss. 479, 6 South. 232, 14 Am. St. Rep. 579; *Goodwin v. Mass. Loan, etc., Co.*, 152 Mass. 189, 25 N. E. 100.

A certificate of stock, while transferable by indorsement and delivery, is not invested with the sanctity of commercial paper, and stands upon the same footing as any other personal property. *Weaver v. Barden*, 49 N. Y. 286; *Cook on Stock and Stockholders* (3d Ed.) § 412.

The defendants in this case have not shown upon what consideration this certificate of stock was received from Harter, except that it was to be collateral to whatever indebtedness he might then or thereafter owe the bank. The cashier of the pledgee bank testified that "he must have received some money," but no evidence was offered to show that he received any amount of money. There is no evidence in the record to show that at the time this stock was pledged any extension in the date of maturity of the indebtedness of Harter was agreed upon. In fact, the contrary seems to appear from the evidence; for in July thereafter notice was given of a

sale of this and other collateral to satisfy the indebtedness of Harter, all of which, except the overdraft, antedated the pledging of this stock; and the time of payment of none of this indebtedness seems to have been extended. The testimony of the attorney for the defendant bank is that the sale was not made because Harter made a payment upon his indebtedness, and thereafter made several other payments, and that the indebtedness was thereafter extended from time to time; but nowhere does the record disclose that any such extensions were in consideration of the pledging of this certificate of stock, or that there was any other consideration for such extension than the periodical payments upon the indebtedness made by Harter. *Fenouille v. Hamilton*, 35 Ala. 319.

But defendants in their brief only argue that they gave a valuable consideration for the pledge of this stock, for the reason that thereafter Harter was permitted to overdraw his account in the bank in the sum of \$1,033. This overdraft and the small overdraft of \$8.90, which was also repaid, were the only indebtedness incurred by him after this stock was pledged. There is no evidence in the record that at the time this collateral was pledged the bank agreed to permit any overdraft, or that this overdraft arose in any different manner than the overdraft which stood upon the books of the bank against Harter at the time this stock was pledged. But this overdraft cannot avail the defendants as a consideration for the transfer of this stock, for the reason that the record discloses that the same was paid by deposit in full about 60 days after the same first began to be permitted. The bank, having been repaid the consideration which it claims to have parted with for this stock, cannot claim to hold the same as an innocent purchaser for value against the real owner thereof, because, having been repaid, it has suffered no injury, and the principal element of estoppel upon which it must rely falls.

We therefore conclude that the defendants have failed to show any valuable consideration for the transfer to it, by way of pledge, of the certificate of stock here in controversy, and that the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

INGRAM et al. v. DUNNING. (No. 4852.)
(Supreme Court of Oklahoma. June 6, 1916.
Rehearing Denied Sept. 19, 1916.)

(Syllabus by the Court.)

1. EVIDENCE \Leftrightarrow 597—SUFFICIENCY TO SUPPORT VERDICT.

The verdict of the jury must reasonably be supported by the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449; Dec. Dig. \Leftrightarrow 597.]

2. EVIDENCE ~~¶~~597 — NEW TRIAL ~~¶~~70 — SUFFICIENCY OF EVIDENCE—CONJECTURE.

Where the verdict of the jury is not sustained by sufficient evidence, or is based upon conjecture, it is the imperative duty of the court, upon timely motion, to set it aside and grant a new trial.

(a) A verdict based upon mere conjecture is not sustained by sufficient evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2449; Dec. Dig. ~~¶~~597; *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. ~~¶~~70.]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by J. J. Dunning against C. C. Ingram and another. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiffs in error. Everest & Campbell and Warren K. Snyder, all of Oklahoma City, for defendant in error.

COLLIER, C. This is an action brought by the defendant in error against the plaintiffs in error to recover the sum of \$25,000, with interest thereon at 8 per cent. per annum, for the breach of a contract to manufacture and market a remedy for tuberculosis, and for the wrongful appropriation of the formula for compounding said remedy. Hereinafter the parties will be designated as they were in the trial court.

The petition, in substance, alleges as follows: That defendants induced this plaintiff to enter into a written contract with said defendants on said 1st day of February, 1908, whereby this plaintiff, J. J. Dunning, furnished to said defendants, C. C. Ingram and F. M. Weaver, the formula of said composition known as Coltranoline, for the purpose of permitting said defendants, C. C. Ingram and F. M. Weaver, to test said composition and to determine its force and effect when properly administered, with the further agreement that, in event said defendants, C. C. Ingram and F. M. Weaver, should be satisfied with the same and of its desirability as a medicine, to sell it to the public, the said plaintiff, J. J. Dunning, and defendants, C. C. Ingram and F. M. Weaver, would organize a corporation in the manner and form provided by said contract; that the said Ingram and Weaver, immediately after procuring said formula, proceeded to test the same and place it upon the market, and failed and refused to recognize Mr. Dunning in the transaction, or to account to him for the sales and to pay him the sum of \$50 per month for the period of 60 days during which time tests were to be made; that the said plaintiffs in error, in furtherance of said conspiracy, converted the said formula to their own use and proceeded to compound and manufacture a medicine under the name

of Stramolline, to the damage of plaintiff in the sum of \$25,000.

The said contract, a copy of which is attached to plaintiff's petition, in part provides:

"That said first party is the owner of a certain compound or medical mixture, the ingredients and component parts of which are known only to party of the first part, and which are a valuable asset and property right of said party of the first part, known as Coltranoline, same being a medicine or compound used for the cure of tuberculosis, commonly called consumption, and said second parties are desirous of procuring an interest in said compound, mixture, and the profits which might arise or grow out of the compounding, dispensing, administering, selling, and vending of said Coltranoline as a medicine and curative, but the said second parties are at this time not convinced thoroughly as to the force and effect of said medicine when properly administered, and desire to see the same experimented with for a period of sixty days from this date, and if the same shall come up to the representations and prove a success during said sixty days' period, said first party and second parties are to cause to be created and are to organize a corporation under the laws of the state of Oklahoma, with an authorized capital stock of fifty thousand dollars, the organizers to be the parties hereto and none others, and said first party is to be designated and elected president during his pleasure during all of the time said corporation is in existence and doing business. Said corporation is to be organized under the name of the Coltranoline Company, with its principal place of business at Oklahoma City, state of Oklahoma, and for the business and purpose of mixing, preparing, compounding, administering, selling, and vending said compound and medicine for profit, and each of the parties hereto are to have a one-third interest in and to said corporation and stock company, if incorporated. Said second parties jointly agree to pay to said first party the sum of fifty dollars per month, payable on the first day of each month, for said period of sixty days of the experimental stage herein provided for, which said sum shall be and remain the sole property of said first party, and in addition thereto all profits which may arise or result from the selling, compounding, or administering of said compound for said period of sixty days is to be the sole and individual property and profit of the said first party."

A general demurrer was filed to the petition, overruled, and excepted to.

Thereafter the defendants filed an amended answer consisting: First, of a general denial; and, second, admitting the execution of the contract, a copy of which is attached to plaintiff's petition, wherein it was agreed that defendant below should have 60 days in which to experiment with said formula to determine its merits, and that thereafter a corporation was to be organized as provided by said contract for the purpose of furthering the sale of Coltranoline; and that at the time of making the contract plaintiff in error had no knowledge of the said formula, and that they did not know the nature of said formula, and that they did not know the nature of the component parts thereof until after the execution of the contract; that when the formula was delivered to them defendants advised the plaintiff that the formula was unsafe to administer to patients, and that same did

not have the merits and properties claimed therefor, and that the plaintiffs tested and experimented with the compound or mixture, and found same not to be a success, and thereupon abandoned the contract.

The evidence in this case is very voluminous, but no data is thereby offered by which the jury could possibly ascertain the damage sustained by the plaintiff, if any, by the wrongful appropriation of said formula of the plaintiff by the defendants; the entire evidence as to the value of said formula being entirely speculative.

There is no evidence as to the quantity of Coltranoline sold or the profits arising from the sales thereof during the 60 days provided for the investigation. There was undisputed evidence that the formula for the compounding of Coltranoline provided for four grains of morphine in each 12 ounces of said mixture, and that the defendants advised plaintiff that the effect of the use of said compound for any length of time would make morphine fiends, and the sale of it would be in violation of law, and that they declined to carry out said contract as to the formation of a corporation and the manufacture and sale of said compound.

The case was tried to a jury, and at the close of the evidence the defendant moved for a directed verdict, which challenged the attention of the court to the sufficiency of the evidence. The jury returned a verdict for plaintiff in the sum of \$2,000. Timely motion was made for a new trial, overruled, and excepted to, and judgment rendered in accord with the verdict. To reverse said judgment, this appeal is prosecuted.

There are many errors assigned, but in the view we take of the case we deem it unnecessary to review other than the assignments: (1) That the court erred in overruling the demurrer to the petition; (2) that the verdict rendered is not sustained by sufficient evidence; and (3) that the court erred in overruling the motion for a new trial.

We think that the petition states a good cause of action, and that the demurrer thereto was properly overruled.

As it is stipulated by the contract pleaded in this cause, admitted by the defendants to have been executed by them, that the defendants were to pay to the plaintiff the sum of \$50 per month for 60 days pending the investigation of the formula of Coltranoline, \$25 of which plaintiff admits to have been paid to him, it therefore clearly appears that the plaintiff was entitled to recover of the defendants the sum of \$75, together with interest thereon from the time stipulated in said contract that said \$50 per month for 60 days was to be paid, pending the said investigation.

As the evidence does not show the quantity of Coltranoline sold, or the profits arising from such sales during the 60 days provided for the investigation, the plaintiff is

not entitled to recover for such sales and profits, if any.

As it is averred in the petition that the formation of the corporation as provided in said contract, and the manufacture and marketing of Coltranoline, was conditioned upon C. E. Ingram and F. M. Weaver testing said composition and determining its force and effect when properly administered, with the further agreement that in the event said defendants, Ingram and Weaver, should be satisfied with the same and of its desirability as a medicine, we are of the opinion that defendants had a right upon fairly determining that the investigation provided to be made by said contract did not prove that the formula for the manufacture of Coltranoline was of the merit claimed for it, and was an unsafe remedy to be administered, to decline to carry out the provisions of the contract as to the creation of a corporation and the manufacture and sale of Coltranoline, without incurring any liability to the plaintiff for failure to form a corporation and to manufacture and market Coltranoline. In short, as admitted by the pleading, the provision of the contract as to the formation of the corporation and the manufacture and sale of Coltranoline was conditioned that the investigation provided for by said contract satisfied defendants as to the value of Coltranoline as a remedy for tuberculosis.

[1, 2] Inasmuch as the formation of the corporation and the marketing of Coltranoline was by the contract conditioned that the investigation provided for by the contract was satisfactory to the defendants as to the value of Coltranoline as a remedy for tuberculosis, and the unquestioned evidence being that the formula for compounding Coltranoline was not approved by defendants, and they notified plaintiff of their nonapproval of the same and their refusal to form a corporation and market Coltranoline, under the view we take of the contract, the plaintiff was only entitled to recover the \$50 per month provided to be paid him during the 60 days' time provided for investigation of said formula and the profits, if any, arising from the sale of Coltranoline during said 60 days contracted for investigation, and the damages resulting from the wrongful appropriation of said formula for Coltranoline, if the same was appropriated by them. If it be admitted that there is evidence reasonably tending to show defendant appropriated plaintiff's formula for compounding Coltranoline, that is, that the formula of Coltranoline is substantially the same as Stramoline, which we do not hold, the defendants would be liable to plaintiff for the value of said formula, but to entitle plaintiff to recover therefor the value of the formula must be sustained by sufficient evidence reasonably tending to support the same, as it is an elementary principle of law that the findings of a jury must be reasonably sustained by the evidence.

In *The Mayor, Aldermen, and Commonalty of the City of New York v. Franklin Ransom and Uzziah Wenman*, 23 How. (U. S.) 487, 16 L. Ed. 515, it is held:

"In an action for damages for the infringement of a patent right, the plaintiff must furnish some data by which the jury may estimate the actual damage."

In the body of the opinion it is said:

"But, if he fails to furnish any evidence of the proper data for a calculation of his damage, he should not expect that a jury should work out a result for him by inferences or presumptions founded on such subtle theories."

The evidence as to the value of the formula alleged to have been wrongfully appropriated by the defendants is entirely speculative, and we are unable to see that the plaintiff has furnished evidence to entitle him to recover for the wrongful appropriation of plaintiff's formula, even if such wrongful appropriation was made by defendants, and did not afford any basis whatever for the jury to predicate the verdict rendered. It therefore clearly appears that the verdict for \$2,000 is not reasonably supported by the evidence. In short, the verdict for \$2,000, is founded upon conjecture, a mere guess, and the court committed prejudicial error in overruling the motion for a new trial.

Section 5033, R. L. 1910, provides:

"* * * The former verdict, report or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party: * * *

"6. That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law."

"A verdict based upon conjecture * * * should be set aside." *Spaulding Mfg. Co. v. Holiday*, 32 Okl. 823, 124 Pac. 35.

"Where there is no evidence reasonably tending to establish a material issue submitted to the jury under the instructions of the court, which the jury must have found in favor of the prevailing party in order to have returned the verdict returned, the verdict will be set aside." *Terry v. Creed*, 28 Okl. 857, 115 Pac. 1022.

"Where, on inspection of the record, it is apparent that the evidence does not reasonably sustain the verdict of the jury, the verdict will be set aside by this court." *Hassel v. Morgan et al.*, 27 Okl. 453, 112 Pac. 969.

"Where there is an entire lack of evidence to sustain a material issue found by * * * the jury, this court will set aside the verdict and grant a new trial." *Puls v. Robt. Casey*, 18 Okl. 142, 92 Pac. 388.

We therefore recommend that, if the plaintiff remits the judgment rendered to the sum of \$75, with interest thereon at 6 per cent. per annum from the 8th day of March, 1908, this cause be affirmed, and, if the plaintiff fails to so remit said judgment, that this cause be reversed and remanded, with instructions to grant a new trial.

PER CURIAM. Adopted in whole.

HORTON v. PRAGUE NAT. BANK. (No. 7510.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 19, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL ⇐2 — APPEAL FROM JUSTICE COURT—AUTHORITY OF COUNTY COURT.

A county court, upon a trial de novo of a cause appealed from a justice court, has power for proper causes to grant a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 4, 5; Dec. Dig. ⇐2.]

2. NEW TRIAL ⇐72—RIGHT TO—VERDICT.

It is the duty of the trial judge in courts of record to either approve the verdict of the jury or to grant a new trial; and, unless the trial judge believes that the verdict is just and is sustained by the weight of the evidence, he should set the same aside and grant a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 146-148; Dec. Dig. ⇐72.]

3. NEW TRIAL ⇐128(5) — MOTIONS FOR — RIGHT TO EVIDENCE.

A motion for new trial which assigns as grounds therefor "that said verdict is not supported by the evidence; that said verdict is contrary to the weight of the evidence"—authorizes the trial court to set aside a verdict which he believes to be contrary to the weight of the evidence.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 261; Dec. Dig. ⇐128(5).]

4. NEW TRIAL ⇐155 — MOTIONS — JURISDICTION.

A motion for new trial was filed within three days after the rendition of judgment, and at the term at which the cause was tried, but said motion was not determined by the trial court until the succeeding term. *Held*, that the trial court was not divested of jurisdiction to determine said motion.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 315; Dec. Dig. ⇐155.]

Commissioners' Opinion, Division No. 2. Appeal from County Court, Lincoln County; H. M. Jarrett, Judge.

Action by the Prague National Bank, a corporation, against Sam Horton. There was judgment for defendant, and from an order granting a new trial, the defendant appeals. Affirmed.

Erwin & Erwin, of Wellston, for plaintiff in error. J. L. McKamy, of Sparks, and E. A. Foster, of Chandler, for defendant in error.

BURFORD, C. This was an action originally instituted in a justice court of Lincoln county by the Prague National Bank, a corporation, against Sam Horton. A trial was had to a justice of the peace, and judgment rendered for defendant. From such judgment the plaintiff appealed to the county court of Lincoln county, where a trial was had to a jury and a verdict found for the defendant, upon which verdict on the same day it was returned, a judgment for defendant was entered. Within three days thereafter, and at the same term at which the trial was had, a motion for new trial was filed;

at a subsequent term the county court granted a new trial, from which order the defendant appeals.

[1] It is urged that the county court of Lincoln county had no power to grant a new trial by reason of the provisions of chapter 53, Sess. Laws 1913, which provide as follows:

"Justices of the peace shall not grant new trials for any cause after a verdict by a jury."

It is insisted that, inasmuch as this was a cause appealed from a justice of the peace, the county court exercised only jurisdiction of a justice of the peace, and is therefore bound by the limitations of the statute above quoted. It is true that this court has held (*Vowell v. Taylor*, 8 Okl. 625, 58 Pac. 944; *Hesser et al. v. Johnson*, 13 Okl. 53, 74 Pac. 320) that in an action appealed from a justice of the peace the appellate court takes only appellate jurisdiction, and can hear and determine the case only as one within the jurisdiction of the lower court, but this doctrine is applicable only in so far as it involves no loss of constitutional rights. The Constitution of the state guarantees the right of trial by jury (section 19, art. 2), and this trial so guaranteed is a trial according to the course of the common law, and the same in substance as that in use when the Constitution was formed, except in so far as such right is modified by the Constitution itself. The modifications provided by the Constitution of this state are that in county courts and courts not of record a jury shall consist of six men, and in all civil cases and criminal cases less than felonies three-fourths of the whole number of jurors should have power to return a verdict. *Baker v. Newton*, 27 Okl. 436, 446, 112 Pac. 1034. Embraced within the right of trial by jury according to the common law, and remaining unchanged by the Constitution, is the right of the trial judge to instruct the jury as to the law and to set aside their verdict if, in his opinion, it is against the evidence. *Baker v. Newton*, supra; *American Pub. Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079; *Capitol Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. Trials in a justice court where the jury are the judges of the law and the fact, and where, as at the present in this state, the justice may not grant a new trial, are sustained upon the theory that a trial de nova is granted in the appellate court, and that there the party obtains the jury trial guaranteed to him by the Constitution, but if we should hold that the act of the Legislature, as insisted by the plaintiff in error, applies to the trial in the county court, then the act must necessarily be void, as it would deny the litigant at all stages of the proceeding the trial by jury as guaranteed by the Constitution. It is our duty to construe the act so as to render it constitutional if possible. As such we are constrained to hold that it applies only to justices of the peace, and

does not apply to county courts upon appeal.

The principles sustaining these views are not new in this jurisdiction. In *Baker v. Newton*, supra, Mr. Justice Hayes, speaking for the court in an elaborate discussion of the questions involved, held that in causes of action instituted in the county court, but within the jurisdiction of the justice of the peace (Sess. 1872-1873, *Wilson's Rev. & Ann. Stats.*), providing that in the former probate court in all cases which are within the jurisdiction of a justice court, the practice, proceeding, and pleadings, both before and after judgment, provided for justice procedure should be applicable, was not in force as to the county court for the reason that the trial by jury granted by the Constitution was thereby denied, and that the party was entitled to a trial at which the judge was empowered to instruct the jury, and to set aside their verdict if, in his opinion it was against the evidence of the law. It is true that the exact point in issue in that case was the right to instruct the jury, but the right to set aside their verdict is coincident with the right to instruct them; and, if the one is granted by the Constitution, so is the other. In *Tate v. Stone*, 35 Okl. 369, 373, 130 Pac. 296, this court applied the doctrine laid down in *Baker v. Newton*, supra, to a case originating in a justice court but appealed to the county court. The doctrine of those cases is conclusive of the question raised, and constrains us to the holding above announced, which we conceive to be sound, not only upon authority but upon principle.

[2-4] It is next contended that the motion for new trial sets out no sufficient grounds to authorize the trial court to grant such new trial. Without considering in detail the various grounds alleged in the motion, it sets out, among other things, the following grounds:

"That the verdict is not supported by the evidence, and that the verdict is contrary to the weight of the evidence."

These grounds alone would be sufficient to authorize the trial court to grant a new trial if he found them to be true. As the judgment on the motion is general, we are not advised upon what ground it was sustained, and therefore, if the motion sets out any ground upon which the action of the trial court may have been proper, we will not reverse it. This court has frequently held that it was the duty of the trial court to either approve the verdict of the jury or to grant a new trial; that if in his conscience he does not believe the verdict to be just and in accordance with the weight of the evidence, he should set it aside; that he must sit as a thirteenth juror. *Yarnell v. Kilgore*, 15 Okl. 591, 82 Pac. 990; *Hogan v. Bailey*, 27 Okl. 15, 110 Pac. 890; *Rison v. Harris*, 151 Pac. 584. The grounds alleged in the motion for a new trial as above quoted are sufficient to challenge the attention of the trial court to his duty in this regard, and

if he felt that the verdict was not according to the weight of the evidence and was unjust, it was not only his right but his duty to grant a new trial.

It is finally urged that the court had no jurisdiction to grant the motion for a new trial after the expiration of the term at which the cause was tried and the motion filed. Section 5035, Rev. Laws 1910, provides, with certain exceptions "that the application for a new trial must be made at the term the verdict, report, or decision is rendered," and within three days after such verdict or decision. Section 5267, Rev. Laws 1910, provides, in part, as follows:

"The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made: First. By granting a new trial for the cause, within the time and in the manner prescribed in section 5035."

Construing these two sections, it has been held by the Supreme Court of Kansas that if the motion be filed within proper time, it may be acted upon at a subsequent term. *Brenner v. Bigelow*, 8 Kan. 496; *Mounds City Ins. Co. v. Twining*, 19 Kan. 349. The court has in effect announced the same doctrine in *School District No. 38 v. School District No. 92*, 42 Okl. 228, 140 Pac. 1144; *Burcham v. Edwards*, 37 Okl. 194, 131 Pac. 528. Under these holdings the act of the trial court in granting the motion for new trial at a subsequent term was within his power.

We find no error in the record, and the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

SCOTT et al. v. POTTS et al. (No. 4637.)
(Supreme Court of Oklahoma. May 9, 1916.
Rehearing Denied Sept. 19, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §165—EJECTMENT—
DEMAND FOR TRIAL—ESTOPPEL TO APPEAL.

No estoppel to contest by appeal the judgment of ouster in an action of ejectment arises by reason of the mere filing after judgment of a demand for a trial of defendants' rights as occupying claimants.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 995-1001; Dec. Dig. § 165.]

2. EJECTMENT §148—ACTIONS—ISSUES.

A determination of the rights of an occupying claimant has no proper place in the trial of the main issue in an action of ejectment, even though the parties consent to submit such issue upon the main trial.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 509; Dec. Dig. § 148.]

3. STATES §9—RIGHT TO PLEAD USURY —
CONSTITUTION.

The right to plead the defense of usury to a contract executed under the laws of the Indian Territory is preserved by virtue of the Schedule to the Constitution of Oklahoma, even though the action in which such plea is offered

was not instituted until after the admission of the state.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 4; Dec. Dig. § 9.]

4. USURY §99—PLEA—RETURN.

The plea of usury to a contract executed under the laws of the Indian Territory, offered in an action of ejectment, no affirmative equitable relief being sought, does not impose upon the party making such plea any return of the original loan.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 214-218; Dec. Dig. § 99.]

Commissioners' Opinion, Division No. 2. Appeal from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by James P. Potts and others against Alex Scott and others. From a judgment for plaintiffs, defendants appeal. Reversed in part and remanded in part.

J. B. Campbell, of Muskogee, for plaintiffs error. Bailey, Wyand & Moon, of Muskogee, for defendants in error.

BURFORD, C. The parties will be designated as in the court below. The essential facts are that the plaintiffs sued for the recovery of certain real property in the city of Muskogee, in the possession of defendants, and for the rents and profits thereof while held by the defendants. Defendants, answering, first pleaded a general denial, and for a second defense alleged the execution of a certain deed of trust by James P. Potts to A. C. Trumbo, trustee, to secure certain sums due the Iowa Land & Trust Company, a private corporation of the Indian Territory, a sale under said deed of trust to said Iowa Land & Trust Company, and a subsequent conveyance to defendant Alex Scott, and that the premises were taken under said conveyance, and many valuable improvements made in good faith. The material clauses of the deed of trust are:

"This deed of trust is given to secure the payment of a debt evidenced by certain promissory notes executed by the said James P. Potts and Eliza Potts, husband and wife, of the first part, and payable to the said third party or order, and bearing the same date as this deed of trust, and described further as follows: One principal note for the sum of five hundred dollars (and being for the principal sum loaned), payable two years, with interest therein specified at the rate of eight per centum per annum after maturity; also eight interest notes of \$25.00 each payable every three months respectively."

The plaintiffs replied that the deed of trust was given to secure a usurious consideration, and was void upon its face and in fact, and that same was of record, and that the defendants had actual and constructive notice of its validity prior to the time any improvements were made. All the transactions referred to took place in the Indian Territory prior to statehood. The present action was commenced after the creation of the state

of Oklahoma. At the trial the parties "consented" to the trial court determining the question as to whether plaintiffs were entitled to the value of any improvements; the amount to be determined at some later date. The court, a jury being waived, rendered judgment against the defendants for the possession and for rents and profits, and that defendants were not entitled to the value of any improvements. Defendants filed a motion for new trial, and on the same day a demand for a trial of their rights as occupying claimants. The motion for new trial was overruled, but, so far as the record shows, the demand for a trial under the occupying claimant's act is still pending. Upon the order overruling the motion for new trial the defendants bring the cause here for review.

[1, 2] We are met at the outset by the contention that no errors in the judgment for possession or mesne profits can be reviewed upon the theory that by asserting their rights as occupying claimants defendants waived any right to review the main judgment, and *Bradley v. Rogers*, 33 Kan. 120, 5 Pac. 374, and *Ruchanan v. Dorsey*, 11 Neb. 373, 9 N. W. 546, are cited in support. In those cases it was held that where, after judgment was rendered, the unsuccessful defendant demanded and had a jury trial upon the value of his improvements, he was therefore estopped to raise questions of error in the original judgment upon the ground that he had caused trouble and expense in asserting rights as an occupying claimant, which could only be based upon title in plaintiff in the original action. But in the Kansas Case Judge Valentine, writing the opinion, expressly reserved the question of the effect where the demand was made, but no trial had, and in *Mack v. Price*, 35 Kan. 184, 10 Pac. 521, (6), the Supreme Court of Kansas expressly refused to extend the doctrine of estoppel to such a case. Under our practice the question of the rights of an occupying claimant has no place in the trial of an action in the nature of ejectment. *Wolcott v. Smith*, 33 Okl. 249, 124 Pac. 970; *Provens v. Ryan*, 156 Pac. 351. It is an express statutory right arising, by the very terms of the statute creating it, only after a better title than that of the defendant has been "set up and proved," and only after judgment has been rendered against such defendant. Rev. Laws 1910, §§ 4933, 4934. Being such under our practice, we think the "consent" of parties to try that question in the main action, where it had no place, was without force, could not prejudice either, and that, the subsequent proceedings consisting only in a "demand" for the trial of such rights which was not even acted upon, the rule laid down in *Mack v. Price*, supra, may be properly applied and the contention of an estoppel here denied.

[3, 4] The defendants insist, first, that inasmuch as this action was not brought until

after statehood, the plaintiffs could predicate no right upon the laws in force in the Indian Territory at the time the deed of trust was executed, and later foreclosed upon the theory that the repeal of a usury statute takes away the right to plead usury even as to a contract executed while such law was in force, and that, inasmuch as there is not, and never has been, a statute of Oklahoma making conveyances securing usurious contracts void, any statute to that effect in the Indian Territory was repealed at the formation of the state. This contention must be denied by reason of section 1 of the Schedule of the Constitution, which provides, in part, as follows:

"No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place."

In *International Bank of Coalgate v. Mullen et al.*, 30 Okl. 547, 551, 120 Pac. 257, 258 (Ann. Cas. 1913C, 180), a case started before statehood, but tried afterwards, it was contended that:

Defendants "are estopped from setting up the defense of usury, for the reason that they did not plead the same prior to statehood, and after statehood they failed to plead or prove the law that was in force in the Indian Territory at the time the note was made, and, in the absence of such pleading and proof, it must be presumed that the law is the same as that of Oklahoma."

But this contention was by this court denied and it was held that the right to plead usury was a right or claim preserved to the defendant by the Schedule.

It is true that the *Mullen Case*, supra, was one started before statehood, but the plea of usury was not interposed until after statehood, and the decision is upon the effect of the constitutional provision aside from any question of a pending suit.

It is next contended that the plaintiffs could not recover without returning the consideration actually received by them. Mansfield's Dig. of the Laws of Arkansas, in force in the Indian Territory at the time of these transactions, provides:

"Sec. 4732. All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest, and the General Assembly shall prohibit the same by law (a); but when no rate of interest is agreed upon, the rate shall be six per centum per annum." Article XIX, § 13, Const. of Arkansas 1874.

"Sec. 4735. All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater sum or greater value for the loan or forbearance of any money, goods, things in action, or any other valuable thing, than is prescribed in this act shall be void."

It is true, as contended, that in equity the Arkansas court has held that under these and similar provisions parties seeking the aid of equity must do equity, and return the

consideration received. *Ruddell v. Ambler*, 18 Ark. 369; *Tillar v. Cleveland*, 47 Ark. 287, 1 S. W. 516; *Anthony v. Lawson*, 34 Ark. 628; *Griider v. Driver*, 46 Ark. 50. But it was only in equity, and not at law, that such a condition was imposed. *Smith v. Finley*, 52 Ark. 373, 12 S. W. 782, and see *International Bank v. Mullen*, supra.

Granting that the plaintiffs' right under the laws of the Indian Territory came over under the Constitution charged with all the burdens and limitations of that right under the Indian Territory law, still it seems that the contention made cannot here prevail. This was an action in the nature of ejectment. The plaintiffs in their reply setting up the invalidity of the trust deed to Trumbo pleaded that it was void upon its face and did not ask any affirmative relief. They did not ask the aid of equity, but stood upon his action at law. After a careful examination of the cases bearing upon the Arkansas practice, we are of the opinion that under that practice plaintiffs, in an action of ejectment, could plead usury to avoid an instrument in the defendants' chain of title without seeking a transfer to the equity docket. *Ward v. Sturdivant*, 81 Ark. 73, 98 S. W. 690, seems to govern in principle the decision here. In that case the plaintiff sued in ejectment. Defendant deraigned his title, and plaintiff replied that the deed under which the defendant claimed was void because executed in fraud of creditors. The Supreme Court of Arkansas held that these matters might be tried in the law in the ejectment action, and that a motion to transfer to the equity docket was properly denied. In *Meadors v. Johnson*, 27 Okl. 544, 112 Pac. 1121, this court held that under the Indian Territory practice usury might be pleaded in an action of ejectment without, however, passing upon any question of return of consideration.

Passing then to the merits of the case, it suffices to say that we agree with the trial court in his conclusion that the trust deed was given to secure a usurious consideration, and was therefore void. The considerations referred to earlier in this opinion, however, constrain us to hold that the judgment of the trial court as to the defendants' right to the value of their improvements was beyond their power to make at that time, and was therefore of no effect.

That part of the judgment of the trial court, therefore, denying defendants' asserted right to any part of the improvements upon the land in question is set aside and reversed, with directions to the trial court to set a day to determine defendants' rights under the occupying claimant's act upon their demand therefor heretofore filed, and to suspend the writ of ouster until that question has been finally determined. The

remainder of the judgment of the trial court is affirmed. The costs in this court will be equally divided.

PER CURIAM. Adopted in whole.

ANTHONY v. STATE. (No. A-2639.)
(Criminal Court of Appeals of Oklahoma. Sept. 18, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⇨1048—APPEAL—REVIEW.

In reviewing a capital conviction, this court not only acts in the capacity of an ordinary appellate tribunal, reviewing errors of law raised by exceptions duly taken, but it is the duty of the court to consider the entire record, including the evidence, for the purpose of determining whether any "error complained of has probably resulted in a miscarriage of justice." If, upon such examination, the court is satisfied that the verdict is contrary to the evidence and the law, or if considerations of justice require a new trial, it is the duty of the court to grant it, whether any exception shall have been taken or not in the court below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656, 2657, 2670; Dec. Dig. ⇨1048.]

2. CRIMINAL LAW ⇨1183—APPEAL—MODIFICATION OF SENTENCE.

Under section 6003, Rev. Laws 1910, this court, exercising its revisory jurisdiction, has the power to modify any judgment and sentence appealed from, in the furtherance of justice, by reducing the sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195-3198; Dec. Dig. ⇨1183.]

3. CRIMINAL LAW ⇨1183—APPEAL—MODIFICATION OF SENTENCE.

The power of this court to modify a judgment inflicting the death penalty for murder to imprisonment for life at hard labor, when deemed proper in the furtherance of justice, is not the power to commute by the chief executive of the state. The judicial power to modify a judgment and the executive power to pardon or commute are wholly distinct in their nature. The one is an award of justice. The other is an act of grace.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195-3198; Dec. Dig. ⇨1183.]

4. HOMICIDE ⇨347—PUNISHMENT—EVIDENCE—SUFFICIENCY.

Evidence reviewed, in a prosecution for murder, and held sufficient to justify conviction for murder, but insufficient, under the facts and circumstances of the case, to warrant imposing the death penalty, and for this reason the judgment and sentence is modified to imprisonment in the penitentiary for life at hard labor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 725; Dec. Dig. ⇨347.]

Appeal from District Court, Muskogee County; R. P. De Graffenried, Judge.

Jack Anthony was convicted of murder, his punishment being assessed at death, and he appeals. Judgment and sentence modified to life imprisonment, and, as modified, affirmed.

P. A. Gavin, of Muskogee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Jack Anthony, herein referred to as the defendant, was convicted of wife murder, and his punishment assessed at death on an information filed in the district court of Muskogee county on the 14th day of September, 1915, wherein it was charged that the said Jack Anthony, in said county, on the 12th day of June, 1912, did kill and murder one Nancy Anthony, by shooting her with a pistol. In pursuance of the verdict of the jury he was sentenced to suffer death by electrocution, as provided by law. The judgment was rendered on the 17th day of November, 1915. The appeal is from the judgment and sentence.

No brief has been filed on behalf of the plaintiff in error, and we have not been favored with an oral argument in his behalf. The grounds of the motion for a new trial are that:

"The verdict is not sustained by sufficient evidence and is contrary to law, that the court erred in its rulings on the admission and rejection of evidence, to which rulings of the court the defendant then and there excepted; errors of law occurring at the trial and excepted to by defendant, and which are manifest by inspection of the record."

The assignments of error are the same, with the additional assignment that the court erred in overruling the motion for a new trial.

Upon a careful examination of the record we find that no exceptions were taken on the trial to any ruling of the court on the admission or rejection of evidence, and no objections were made or exceptions taken to the instructions given by the court; and the charge upon the material points was as favorable to the defendant as he could properly request. No objection was made to the sufficiency of the amended information. It properly charges the crime of murder, and is sufficient.

[1, 2] In reviewing a capital conviction this court acts, not only in the capacity of an ordinary appellate court reviewing questions of law raised by exceptions duly taken, but under the provisions of our procedure criminal it is the duty of this court to consider the entire record, for the purpose of determining whether any "error complained of has probably resulted in a miscarriage of justice." Section 6005, Rev. Laws. If after an examination of the whole record the court is of the opinion that the verdict is contrary to the evidence and the law, or that justice requires a new trial, it is the duty of the court to grant it, whether any exception shall have been taken or not in the court below. Our Code further provides that this court has the power to modify any judgment appealed from, when deemed proper in the furtherance of justice. Section 6003, Rev. Laws.

[3, 4] We have given this case that careful consideration which its importance to the public and its solemn consequences to

the defendant demand. From our examination of the record we are brought to the conclusion that the verdict, in so far as it responds to the issue of guilty or not guilty of the crime of murder, is sustained by the evidence. While the jury might have had a reasonable doubt, they might also, with propriety, regard the evidence as sufficient to exclude every reasonable doubt of the defendant's guilt. The only other question presented by this appeal is the sufficiency of the evidence to warrant the extreme penalty of the law. In the case of Fritz v. State, 8 Okl. Cr. 342, 128 Pac. 170, it is said:

"The power of this court to modify a judgment inflicting the death penalty for murder to imprisonment for life at hard labor, when deemed proper in the furtherance of justice, is in no sense the power of commutation of the sentence of the lower court. Commutation can be granted only by the chief executive of the state, and is granted as a matter of clemency. The judicial power to modify a judgment and sentence and the executive power to pardon, parole, or commute are wholly distinct in their nature. The one is an award of justice, and the other is an act of grace. Commutation is a matter of discretion, and may be refused. Justice is imperative, and must not be denied. The fact that the Governor has the power to commute does not abridge the defendant's right to appeal to this court for relief. In other words the provision of our Criminal Procedure Act makes it the duty of this court to review the record, and in a proper case, if necessary in the furtherance of justice, modify the judgment so as to prevent the imposition of punishment which the evidence will not warrant."

It appears that all the parties concerned in the tragedy were negroes; that between sundown and dark the defendant, in attempting to prevent his wife from leaving their home, shot her through the body with a pistol, and the next evening she died as the result of the gunshot wound. Two eyewitnesses of the tragedy testified for the state.

The first, Jim Martin, testified: That he lived near the corner of Third and Kalamazoo streets in Muskogee, and the defendant and his family lived in the next house. That on the morning of the tragedy, about 4 o'clock, the deceased came to his house, saying that she had just returned on the train from Dallas, Tex. That Mary Anthony, the 14 year old daughter of the Anthonys, was staying at his house at the time. That the defendant visited his house once or twice that afternoon, and the last time said to him, "My wife is here, and I want you to put her out," and he told the defendant, "If you want your wife, she is in the house; come in and get her and take her out," and then witness went and sat on the back porch. That shortly after the deceased rushed to the back porch where he was sitting, and the defendant came around from the front, and they met in the yard and between the houses. The deceased said, "I thought when I come back home you were not going to bother me any more," and the defendant laughed and said, "I am not going to bother you; come on home," and she said, "I am not go-

ing to go home with you," That her daughter was following her, and the girl said, "Papa, don't shoot mama," and he said, "Come on and go home." That they "tussled" there a little while, and he said, "Get out of the way, Mary," and shoved the revolver around and shot his wife. That at the time a cab was standing in front of the house.

The second, Mary Anthony, testified: That she was 17 years old, daughter of the defendant and the deceased. That her mother had been to Dallas and arrived in Muskogee 4 o'clock Monday morning and went to Jim Martin's. That afternoon her father came to Martin's and went into the room where her mother was, and they sat down together and were talking. That he then went off, and her mother telephoned for a cab. That there were other girls there, and one was playing the piano. When the cab arrived her father returned and stood outside the screen door and would not let her out, and he told the cab driver to leave. Then her mother ran through the house and out the back door, and she followed her, and her father ran around the house and ran up to them, and she threw her arms around her mother, and her father grabbed her and pulled her back and shot her mother. That her father then ran away.

Thomas Ransom, a witness for the state, testified that about 3 o'clock on the second or third night after the shooting the defendant came to his place in Muskogee, and asked him if his wife had died, and he told him she was dead; that he left a loaded pistol there with one empty cartridge shell in it, and another cartridge was snapped; that he said he was hungry, and the witness gave him a quarter, and, after staying about 10 minutes he left.

Two or three witnesses testified to previous threats made by the defendant.

A deputy sheriff testified that he had a warrant for the defendant, and had been unable to locate him from June, 1912, until September, 1915, at which time he arrested the defendant at St. Joe, Mo.

As a witness in his own behalf the defendant testified: That he was 43 years old, and had been married to his wife 21 years at the time of her death, and they had three children. That they had been living in Muskogee about 2 years when his wife left him, and was gone about 2 months and then returned, and in the month of June she went to Dallas. That he bought her the ticket to go to Dallas and went to the depot with her. That she said she would be back in 4 or 5 days, and he went to the station to meet her, but she did not come back on that train. That he was working that day on a sewer, and quit work at 3 o'clock. That his little son met him, and said, "Papa, mama is here, and she is at Martin's." That he called on her

there, and then went home and cooked his supper. That his daughter Mary brought him a note from his wife, telling him to come over there where she was, and he went to Martin's and talked to her, and tried to get her to come home. That they went out on the porch, and were sitting there when a cab drove up and the cabman asked if Mrs. Anthony was there, and he answered that she was, but that she was not going anywhere. About that time his wife, who had gone into the house, came to the screen door, and he said, "You are not going off to-night," she said the cab came for her, and he said: "Why do you want to act like this; you cannot be running around town that way. I have tried to tell you about how people talk about you running around town, and I don't want that to occur any more; you ought not to do that; you are raising a little girl here, and after you might be dead, they will all look back and say what the mother was." And she said, "You know they talked about Jesus Christ when he was on earth;" and she picked up a hand satchel and hung it on her arm and went out the back door. That he went around and met her between his house and the Martin house, and she said, "I am going North, and you leave me alone," and she ran her hand into her grip and pulled out a pistol, and he grabbed the gun barrel and then her wrists, and she said "Turn it loose; turn it loose!" and the gun went off. That his left hand was burned by the shot. That if his wife had filed a suit for a divorce he did not know it.

The foregoing is a substantial statement of the evidence in the case.

While this court is satisfied by the evidence of the defendant's guilt, however, after a patient consideration of the evidence, we are convinced that it is insufficient to warrant the extreme penalty of the law. It is a fair inference from the facts and circumstances in evidence in this case that the defendant was provoked by the conduct of his wife, the probable effect of which conduct would be to cause their daughter to lead an immoral life, as the defendant believed. While the provocation was not sufficient to reduce the homicide from murder to manslaughter in the first degree, yet, considering the state of the defendant's mind at the time the homicide was committed, and it appearing that the testimony of the two eyewitnesses involved inconsistencies and contradictions, which it is needless to point out, we are of the opinion that the jury abused its discretion in assessing the death penalty, and that for this reason the judgment and sentence should be modified to imprisonment in the penitentiary for life at hard labor. The judgment of the district court of Muskogee county, as thus modified, is affirmed.

ARMSTRONG and BRETT, JJ., concur.

PERRYMAN v. STATE. (No. A-2125.)
(Criminal Court of Appeals of Oklahoma. Sept.
18, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §56—DEFENSES—"VOLUNTARY INTOXICATION."

The fact that one person gives another intoxicating liquor, which he voluntarily drinks, does not render his intoxication involuntary. Involuntary intoxication never exists where the person intoxicated knows what he is drinking, and drinks the intoxicant voluntarily, and without being made to do so by force or coercion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 68; Dec. Dig. §56.]

2. HOMICIDE §180—DEFENSES—INTOXICATION.

Involuntary intoxication is no defense or excuse for the commission of crime, but in a prosecution for murder may be considered by the jury, only for the purpose of determining whether or not the accused, at the time of the homicide, was capable of forming and entertaining a premeditated design to effect death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 381; Dec. Dig. §180.]

3. CRIMINAL LAW §814(3)—TRIAL—INSTRUCTIONS.

A court is not required to instruct the jury upon the defendant's theory of a case, unless there is some competent evidence tending reasonably to substantiate such theory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1985; Dec. Dig. §814(3).]

4. HOMICIDE §28—OFFENSES—INTOXICATION.

Though one be voluntarily intoxicated, if he was so drunk that he did not have power, at the time of the homicide, to form and entertain a premeditated design to effect the death of the deceased, and there is no evidence of malice and premeditation prior to the intoxication, then in such a case the accused is guilty of manslaughter in the first degree, and not murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 44, 45, 46, 133; Dec. Dig. §28.]

5. HOMICIDE §28—DEFENSES—INTOXICATION.

Alcoholic insanity, or mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the commission of the homicide, is no excuse or defense in a prosecution therefor. Drunkenness is one thing, and the disease of the mind to which drunkenness leads is a different thing. Temporary insanity, occasioned immediately by drunkenness, does not destroy responsibility for crime. But to constitute insanity, caused by intoxication, a defense to an indictment or information for murder, it must be insanity caused by chronic alcoholism, and not a mere temporary mental condition.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 44, 45, 46, 133; Dec. Dig. §28.]

Error from Superior Court, Tulsa County; M. A. Breckenridge, Judge.

Ralph Perryman was convicted of manslaughter in the first degree, and he brings error. Affirmed.

Davidson & Williams, of Tulsa, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. [1] The plaintiff in error in this case, who will be referred to as defend-

ant, killed one Charles Smith in the town of Jenks, Tulsa county, on the night of April 29, 1912, and was found guilty of manslaughter in the first degree, and sentenced to 12 years in the penitentiary. The defendant killed deceased in a bootleg and gambling joint run by one O. C. Upton. The defendant was not quite 17 years old when he committed the crime, but at that age seems to have been addicted to the habit of drinking and gambling. The evidence is that he drank some at another place before entering the Upton joint, and that when he went in there, Upton engaged him in a game of "twenty-one," and during the progress of the game gave him a number of drinks of whisky, and played with him at this game until he won all the money the defendant had on his person. Defendant then left the joint, and was gone some time, but came back again, and tried to sell a Winchester rifle he had with him. While Upton was counting his money, preparatory to closing, defendant remarked that he believed he would hold him up. No one took the remark seriously. But a few minutes later, with his rifle in hand, he ordered Upton and the three or four men remaining in the joint to line up against the wall. All lined up except Smith, the deceased. Defendant turned to Smith saying: "Didn't I tell you to line up?" Smith replied that he refused to do so. Thereupon the defendant shot Smith, killing him instantly. He then shot Upton, inflicting a flesh wound; also shot at one Dr. Norwood, the bullet passing through the clothing, but missing the body.

Defendant testified that Upton gave him the whisky that made him drunk, and that he was so drunk that he had no recollection of returning to the joint, or of anything that transpired after his return; that he had no recollection of having ever seen Smith, or of ordering the "line up," or of firing the fatal shot. And the theory of the defense is based upon this testimony. It is insisted here, and was also insisted in the lower court: First, that because Upton gave defendant the whisky that made him drunk, for the purpose of robbing him in the gambling game, his intoxication was involuntary; and, second, that he was so drunk that his intoxication produced a state of temporary insanity; and that for these reasons, he should not be held responsible for the crime committed, and should go unpunished. The defendant requested the trial court to instruct the jury to that effect; but the court properly refused to give the requested instructions.

The theory of the defendant is based upon an entirely erroneous assumption. In the first place, the fact that one person gives another intoxicating liquor, which he voluntarily drinks, and upon which he becomes drunk, does by no means render his intoxication involuntary. In fact, involuntary intoxication is a very rare thing, and can never

exist where the person intoxicated knows what he is drinking, and drinks the intoxicant voluntarily, and without being made to do so by force or coercion.

[2] Besides, involuntary intoxication is no defense or excuse for the commission of crime, but may be considered in a prosecution for murder only for the purpose of enabling the jury to determine whether or not the accused, at the time of the homicide, was capable of forming and entertaining a premeditated design to effect death. Wharton on Homicide (3d Ed.) p. 811, lays down the correct rule, and the one adopted by this court, as follows:

"Intoxication, though involuntary, is to be considered by the jury in a prosecution for murder in the first degree, in which a premeditated design to effect death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such a design, not because, per se, it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear."

If the jury should find that malice and premeditation existed prior to the involuntary intoxication, in that event it would not ever reduce the crime from murder to manslaughter in the first degree. But, if no malice or premeditation is shown to have existed prior to the homicide, then it is a question for the jury to determine whether or not such intoxication rendered the accused, at the time of the homicide, incapable of forming and entertaining a premeditated design to effect death.

[3] 2. The defendant complains of the instructions given by the court; but we have examined the instructions given, and find that the errors in the instructions are favorable to the defendant; hence he cannot complain. The court instructed the jury, in part, to the effect that, if they found the homicide was committed by defendant while in a state of involuntary intoxication, they should acquit him. There are two errors in the giving of this instruction: First, there was no evidence upon which to base an instruction with reference to involuntary intoxication. Neither the defendant nor any other witness testified that the defendant did not voluntarily drink the whisky furnished him, or that it was drugged, or that the intoxication was produced by reason of anything except the unusual quantity he drank. Hence his intoxication could not have been involuntary. And it is the rule of this court, and the law generally, that the court is not required to instruct upon the defendant's theory of the case, unless there is some competent evidence tending reasonably to substantiate such theory. *Gransden v. State* (on rehearing) 158 Pac. 162, not yet officially reported.

[4, 5] And again, as stated above, involuntary intoxication does not, as it was erroneously charged by the court in this instruction, excuse the commission of crime. But

the court very clearly and properly instructed the jury that, if they found that the defendant was voluntarily drunk, and so intoxicated that he did not have power to form or entertain a premeditated design to effect the death of the deceased, at the time of the homicide, then he would not be guilty of murder, but of manslaughter in the first degree. There was no evidence that defendant had ever seen deceased before; hence the question of malice and premeditation prior to the time the act was committed did not enter into this case. And this instruction was correct. And the verdict of the jury finding the defendant guilty of manslaughter in the first degree is fully sustained by the law and the evidence.

8. The position of the defendant that he was so drunk that his intoxication produced a state of temporary insanity and therefore he was not responsible for the crime committed, is fully answered in *Cheadle v. State*, 11 Okl. Cr. 566, 149 Pac. 919, L. R. A. 1915E, 1031. Judge Doyle in that opinion says:

"Alcoholic insanity or mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the commission of the homicide, is no excuse or defense in a prosecution therefor. Drunkenness is one thing, and the disease of the mind to which drunkenness leads is a different thing. Temporary insanity occasioned immediately by drunkenness does not destroy responsibility for crime, where the defendant, when sane and responsible, voluntarily makes himself drunk. To constitute insanity caused by intoxication a defense to an indictment or information for murder, it must be insanity caused by chronic alcoholism, and not a mere temporary mental condition."

And the opinion supports this position by quotations from a long list of authorities, which it is unnecessary for us to here repeat. This doctrine is almost universal, and the one to which this court is committed.

The judgment is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

O'HERN v. STATE. (No. A-2195.)

(Criminal Court of Appeals of Oklahoma. Sept. 19, 1916.)

(Syllabus by the Court.)

1. BASTARDS § 3—PRESUMPTION OF LEGITIMACY.

The presumption in law is that where the husband had access to the wife, a child born in wedlock is legitimate. And the presumption of nature is, that no able-bodied husband will sleep with a stout, buxom young wife for five months, and during all that time "waive" intercourse.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.]

2. ADULTERY § 7 — INDICTMENT — SUFFICIENCY.

An information which attempts to charge adultery, but wholly fails to allege in any way that the intercourse was voluntary, is fatally defective. That ingredient in the statutory definition of adultery is not accidental, but is

one of the essential ingredients which distinguishes that offense from other sexual crimes, and cannot be supplied by presumption or intentment, for the presumption is greater that a woman will resist illicit sexual intercourse than it is that she will voluntarily submit.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 12-16; Dec. Dig. ¶¶ 7.]

Error from District Court, Beaver County; R. H. Loofbourrow, Judge.

Mike R. O'Hern was convicted of crime, and he brings error. Reversed.

C. B. Leedy, of Arnett, Charles Swindall, of Woodward, and J. W. Culwell, of Beaver, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. [1] In this case the plaintiff in error, defendant below, was convicted of adultery, and sentenced to pay a fine of \$250. The facts in this case are very remarkable, and the record, instead of lending color to a prosecution begun in good faith, and for the purpose of vindicating the law, and exalting the dignity of the home and the sanctity of the marital relation, bears the earmarks of a shameless scheme to disgrace the home, to bastardize a defenseless child, and to sacrifice all that is sacred and holy, to enhance the prospect of obtaining a few dollars. The record shows that the husband, the prosecuting witness in this case, before filing this action commenced a \$10,000 damage suit against the defendant for alienating his wife's affections. And yet this injured husband and this estranged wife were still living and cohabiting together, and conjointly swear that one of their defenseless children is a bastard, the offspring of an illicit intercourse between the defendant and the prosecuting witness' wife. This poor child was begotten in May, 1910. The husband slept with the wife, and had access to her, not only in May, 1910, but at all other times. She was a young, buxom, 180-pound woman; he an able-bodied farm hand. Yet they swear that because of a derangement of the stomach, he scrupulously "refrained" from and "waived" intercourse from February to July, 1910, and thus attempt to fasten the stigma of illegitimacy upon their defenseless offspring. The presumption in law is that where the husband had access to his wife, the child is legitimate; and this defenseless child is entitled to the benefit of this presumption. Besides, the presumption of nature is that no man that has sufficient stomach to enable him to do the work of a farm hand will sleep with a stout, buxom young wife for five months and during all that time "waive" sexual intercourse. And in the eyes of every man this child will also have the benefit of this presumption as to its legitimacy.

Besides, the husband, the prosecuting witness in this case, seems to regard intercourse with his wife as a commodity, which created a debt in his favor, which he had a right to collect, as a butcher would an ordinary meat bill. And before beginning any action, in an

attempt to collect this debt, he wrote a long letter to the defendant, which is in part as follows:

"Tvanhoe, Okla. Sept. 25-11.
"Mr. M. R. O'Hern. We received your letter a few days ago and will say in reply to your threats & your witnesses you have no witness nor can you get any that is a made up lie & you know it & so do i know it. Do you think that your lies, bluffs & undermining work will pay that det that you justly owe if you do your mistaken there is only one way to settle it & that is to come up & see me & i think we can settle it all right, but if you think your bluffs will pay the det all right, but i have set my determination on this matter & shall carry it to the end & will watch for my chance to fight for my rights as long as i may live & i will see that you pay this det. * * *

And when he failed to collect the debt, which he assumed O'Hern owed him by reason of his alleged intercourse with his wife, he filed his \$10,000 damage suit, and later filed this action.

[2] 2. There are a number of errors assigned, but it will not be necessary to consider them all. The first is lodged against the sufficiency of the information, and, we think, is well taken. The charging part of the information is that Mike R. O'Hern—"did unlawfully and feloniously commit the crime of adultery with one Jeanette Culbertson, who was then and there the lawful wife of Casner N. Culbertson, by then and there having carnal knowledge of the body of the said Jeanette Culbertson, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Oklahoma."

Section 2481, Revised Laws 1910, defines adultery as:

"The unlawful voluntary sexual intercourse of a married person, with one of the opposite sex. * * *

It is clear, that in this information one of the essential ingredients which distinguishes the offense sought to be charged from other sexual crimes is totally absent. There is nowhere in the information any sort of allegation that the intercourse was voluntary. That ingredient in the statutory definition of adultery is not accidental, but is one of the ingredients that essentially distinguishes this crime from that of rape. And it is as important that the pleader in charging adultery should make this distinction, and allege in some way that the intercourse was voluntary, as it is in pleading rape to allege that the intercourse was accomplished by force and violence. The mere naming the offense, adultery, or rape, does not charge the crime; but it is the facts pleaded, the acts alleged to have been done, that fixes the status of the crime, binds the state, and puts the defendant on notice as to what he may expect to meet and defend against. Suppose the pleader had said:

"Mike O'Hern did unlawfully and feloniously commit the crime of rape with one Jeanette Culbertson, who was then and there the lawful wife of Casner N. Culbertson, by then and there having carnal knowledge of the body of the said Jeanette Culbertson."

Would it be contended for a moment that that would be sufficient to charge the offense of rape? Why not? Because the essential ingredient which distinguishes rape from other sexual crimes is absent. But if we should sanction the information in this case under it, the state would be as much at liberty to prove the intercourse was accomplished by force and violence as it would to prove it was voluntary; for in it the state is bound by no statement which indicates in the least whether the intercourse was voluntary or accomplished by force. And the law will not permit this. The allegation that the woman is married, and the wife of a certain man, does not, of itself, show the crime to be adultery, any more than rape, for that is one way of pleading that the woman is not the wife of the accused, which is a necessary allegation in charging rape.

And no presumption, or intendment, can supply the defect in this information; for if we should indulge in presumptions, then the presumption that a woman will resist illicit intercourse is much greater than the presumption that she will voluntarily submit.

We are forced to the conclusion that this information is fatally defective; and the conviction had under it cannot be sustained. The judgment is therefore reversed.

DOYLE, P. J., and ARMSTRONG, J., concur.

TAGGART v. STATE. (No. A-2570.)
(Criminal Court of Appeals of Oklahoma. Sept. 18, 1916.)

(Syllabus by the Court.)

1. **INDICTMENT AND INFORMATION** § 171 — **CONVICTION—VARIANCE.**

A conviction cannot be upheld where the evidence wholly fails to establish the offense charged in the information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 536, 537, 549; Dec. Dig. § 171.]

2. **CRIMINAL LAW** § 560 — **CONVICTION—TESTIMONY.**

The law will not permit a conviction in a haphazard way. If it did, no citizen's liberty would be secure; for even the most upright might become the victim of hearsay testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1266; Dec. Dig. § 560.]

Error from County Court, Oklahoma County; Wm. H. Zwick, Judge.

Jim Taggart was convicted of having possession of intoxicating liquors with intent to illegally dispose of same, and he brings error. Reversed.

Reardon & Hereford, of Oklahoma City, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. The plaintiff in error was prosecuted and convicted of having possession of intoxicating liquors with intent to illegally dispose of same.

[1, 2] The state confesses error on the ground that the verdict and judgment is not supported by the evidence; and we have carefully read the evidence, and are forced to the same conclusion. Had the state elected to prosecute plaintiff in error for illegally transporting and conveying the beer found in his buggy, the record before us would sustain a conviction, but there is a total failure to prove that he intended to sell or otherwise furnish it to others. There was considerable evidence concerning a fishing camp out on the river which bore the earmarks of a "booze joint," but there was no evidence admitted which connected the plaintiff in error with this camp. There was some incompetent, hearsay evidence tendered, which was properly ruled out by the court, which tended to connect him with this camp; and this tendered evidence doubtless left its impress upon the jury, and resulted in the verdict returned. The plaintiff in error may be guilty of the offense charged, but the law will not permit a conviction in a haphazard way. If it did, no citizen's liberty would be secure; for even the most upright might become the victim of hearsay testimony.

The judgment is reversed.

DOYLE, P. J., and ARMSTRONG, J., concur.

MARTIN v. STATE. (No. 2522.)

(Criminal Court of Appeals of Oklahoma.
June 10, 1916. Rehearing Denied
Sept. 20, 1916.)

(Syllabus by the Court.)

1. **CRIMINAL LAW** § 510, 511(2) — **EVIDENCE—TESTIMONY OF ACCOMPLICE—NECESSITY OF CORROBORATION.**

One cannot be convicted upon the uncorroborated testimony of an accomplice; but the testimony of the accomplice must be corroborated by such evidence as in itself, and without the aid of the testimony of the accomplice, tends to in some degree connect the defendant with the commission of the offense. The corroborating evidence in this case examined, and held to be sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126, 1129; Dec. Dig. § 510, 511(2).]

2. **LARCENY** § 1 — **ELEMENTS OF OFFENSE—ACTS OF CONFEDERATES.**

Where the evidence discloses a course of conduct between the appellant and his codefendants which justifies the conclusion that they were confederates in a plan by which the codefendants were to steal cattle, and the appellant conceal and market same, the appellant may properly be prosecuted for the larceny of the animals; and the contention that he should have been prosecuted for receiving stolen property, instead of larceny, is not well taken.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 1; Dec. Dig. § 1.]

Appeal from District Court, McCurtain County; C. E. Dudley, Judge.

J. E. Martin was convicted of larceny of a domestic animal, and appeals. Affirmed.

Jeff D. McLendon, of Idabel, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. This appeal is from a judgment in the district court of McCurtain county. J. E. Martin, the defendant in that court and appellant here, was tried for the larceny of a cow, and was convicted and sentenced to two years in the penitentiary. The information charged the defendant, Martin, jointly with Ollie Wright, Benson Maytubbe, and Alvin Nelson, with the theft of the cow. Martin was granted a severance, and placed upon trial alone.

[1] The state used Benson Maytubbe as a witness against Martin, and one of the complaints of appellant in this court is that he was convicted upon the uncorroborated testimony of Maytubbe, an alleged accomplice. Maytubbe testified that he and Wright took the cow to appellant's home, reaching there about 11 o'clock at night; that they awoke him, and, after some conversation between the appellant and Wright, the three roped the cow, changed the brands on her, altered the earmarks, and dehorned her by the light of a lantern; that appellant gave Wright \$20 for the cow, and he got a quart of whisky for assisting Wright in delivering her to the appellant. The appellant as a witness in his own behalf disputed this testimony; but the horns of this cow, which seem to have been of a rather unusual character, were found near the spot where Maytubbe says she was dehorned, while the blood was still fresh upon them, and later were positively identified. A neighbor, a few days after this, offered appellant \$40 for the cow; but he declined to sell her to him solely upon the ground that he lived in too public a place. Members of Maytubbe's family testified that he and Wright left their house after dark with the cow, and did not return until next morning. The earmarks had been altered and the brand changed from "G. K." to "O. B." There were also other corroborating circumstances; and the corroborating testimony, all taken together, furnished sufficient evidence, if believed by the jury, to justify a conviction without the testimony of Maytubbe.

[2] 2. The appellant complains that, if the evidence proved any offense at all, it was that of receiving stolen property rather than larceny; and, also, that on this account the instructions given by the court were erroneous.

If this was the only transaction in which these parties had been connected, there might be more force in this contention; but there was evidence, properly admitted, of other and similar transactions between these parties, which taken as a whole justified the conclusion that the codefendants of appellant were confederates of his in a plan to steal cattle and deliver them to him at one-half

their market value, and he to rebrand, dehorn, and conceal until they could be disposed of for their real worth, and thus reap to himself the benefit of the alliance. And under this state of the record it was not error for the court to give the instructions complained of, which were to the effect that if the jury believed beyond a reasonable doubt that Benson Maytubbe, Ollie Wright, and Alvin Nelson, or either of them, did steal the cow of George Kirk, with intent to deprive the owner thereof, and that the defendant, J. E. Martin, was concerned in the taking of the said cow, or aided or abetted in the taking of said cow, though not present, it would be their duty to find the defendant guilty.

There appearing no errors prejudicial to the substantial rights of the appellant, the judgment of the lower court is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

SMITH et al. v. STATE ex rel. GALLAHER, Co. Atty. (No. A-2010.)

(Criminal Court of Appeals of Oklahoma. Sept. 18, 1916.)

(Syllabus by the Court.)

1. CONTEMPT \S 44 — INTOXICATING LIQUORS \S 269 — ABATEMENT OF NUISANCES — PUNISHMENT FOR CONTEMPT—JURISDICTION.

(a) District courts have jurisdiction of injunction proceedings to abate as a nuisance places where persons congregate and resort for the purpose of drinking intoxicating liquor.

(b) The court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it, or entertain proceedings to that end. Courts which have no criminal jurisdiction can punish for so-called criminal contempt, because the power to do so is inherent, and necessary to the efficiency and very existence of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. \S 128-130; Dec. Dig. \S 44; Intoxicating Liquors, Cent. Dig. \S 408; Dec. Dig. \S 269.]

2. INJUNCTION \S 132 — TEMPORARY INJUNCTION—NATURE OF.

There is a wide distinction between a temporary injunction and a temporary restraining order. The former embodies a restraint which continues, unless modified by the court, until the hearing of the cause, and then it is either made permanent or discharged altogether; while the latter, strictly speaking, is not an injunction at all, but an order of the court, to compel parties to maintain the matters in controversy in statu quo, until the question of whether or not a temporary injunction ought to issue may be determined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 302; Dec. Dig. \S 132.]

3. FINES \S 12 — IMPRISONMENT — CREDIT ON FINE.

Where an offense was committed before section 1, c. 112, Sess. Laws, 1913, went into effect, a defendant is allowed credit on his fine, if laid

out in jail, as provided by the Revised Laws, 1910.

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 12, 13; Dec. Dig. ¶12.]

4. CRIMINAL LAW ¶655(5)—WITNESSES ¶246(1)—EXAMINATION OF WITNESSES—CONDUCT OF COUNSEL—REBUKE.

There is no rule or reason why a trial judge should not ask a proper and pertinent question, for the purpose of eliciting competent and material testimony; yet it is improper for him to assume the role of prosecutor, and persistently examine and cross-examine witnesses. No matter what his motives may be, or what explanation or excuse he may offer for this course, it can have but one effect upon the jury; and that is to place the judge in a hostile attitude toward the defendant, and discredit any defense he might offer. No trial judge has a right to indicate to the jury, by word or action, his opinion as to the merits of a case being tried, or as to the credibility of any witness examined.

If the conduct of counsel for defendant is improper, the court must excuse the jury before administering a rebuke or threatening to fine or imprison him for contempt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1522; Dec. Dig. ¶655(5); Witnesses, Cent. Dig. §§ 852, 856; Dec. Dig. ¶246(1).]

Error from District Court, Wagoner County; R. O. Allen, Judge.

Proceeding by the State of Oklahoma, on the relation of Edward M. Gallaher, County Attorney of Wagoner County, against W. C. Smith and C. W. Norman, to abate a nuisance. Defendants were convicted of contempt, and they bring error. Reversed.

Watts & Watts and Edward M. Gallaher, all of Wagoner, for plaintiffs in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

BRETT, J. On August 14, 1911, Edward M. Gallaher, who was then county attorney of Wagoner county, filed a petition on behalf of the state in the district court of Wagoner county, alleging that a certain building in the city of Wagoner known as the City Drug Store, and located on certain lots described in the petition, was owned jointly by one J. M. Livingston and T. A. Parkinson, and that one J. F. Studyvin and Frank Barnes were occupying and operating a drug store in said building, and that in this building intoxicating liquors were being kept and sold, and divers persons congregated and resorted there for the purpose of buying and drinking such intoxicating liquors, and asked that a temporary injunction be granted enjoining each and all of said defendants, their agents, successors, and assigns, and all other persons, from illegally handling intoxicating liquors on said premises, and that upon final hearing said place be adjudged a public nuisance, and be perpetually abated. Summons was duly issued, and on the 14th day of August, 1911, a temporary injunction was granted enjoining the defendants, their agents, servants, employés, successors, or assigns, and

each of them, and all other persons, from keeping, selling, or permitting to be sold any intoxicating liquor upon said premises, etc. This order was served upon each of the defendants on the 15th day of August, 1911, by the sheriff delivering to each of them a copy of the order.

The matter then seems to have remained in statu quo until the 24th day of March, 1913, when C. E. Castle, who had succeeded Gallaher as county attorney, filed an affidavit reciting the terms of the temporary injunction, and alleging that W. C. Smith, who succeeded the former occupants of the building, had violated the terms of the injunction, and praying that he be adjudged guilty of contempt. An attachment for contempt was issued, and Smith brought before the court to answer the charge of contempt in violating said injunction. And on April 17th, and while the contempt proceedings were still pending, the county attorney filed a supplemental affidavit charging that W. C. Smith and C. W. Norman entered said premises with full knowledge of the existence of this injunction and its terms, and that they, and each of them, willfully and contumaciously refused to respect and obey said injunction, and charged in detail the dates upon which and the persons to whom defendants had sold intoxicating liquors in violation of said injunction, and asked that they be required to show cause why they should not be punished for contempt on account of the violation of said injunction. An order to show cause was then duly and properly issued.

The defendants demurred to the supplemental affidavit, which was overruled. Thereupon they filed an affidavit denying the allegations of the supplemental affidavit of the county attorney, and on the same day filed a response to the order to show cause.

On April 22, 1913, the matter came on for hearing, and was tried to a jury, which returned a verdict finding each of the defendants guilty of contempt.

A motion for new trial was heard, and overruled, and the court fixed the penalty of each of the defendants at a fine of \$300 and six months in the county jail. And to reverse this judgment an appeal has been perfected to this court. There are numerous assignments of error urged, all of which it will not be necessary for us to consider.

[1] 1. The first assignment is that the district court had no jurisdiction of the subject-matter of the action: (1) Because the district court was without authority to enjoin the sale of intoxicating liquors; and (2) because the penalty fixed by the statute for this class of contempt, reduces the offense to that of a misdemeanor, and the county court has exclusive jurisdiction of misdemeanors.

(a) Both contentions urged under this assignment are without merit. The authority of the Legislature of this state extends to all

rightful subjects of legislation; and it is clearly within the province of the Legislature to declare certain things to be a public nuisance, and to provide a remedy for the abatement of the same. And the provisions of the statute which declare all places where persons congregate or resort for the purpose of drinking intoxicating liquors to be a public nuisance, and that such places may be abated by injunction, is within the authority granted the Legislature by the Constitution of the state, and the district courts or judges thereof have jurisdiction to hear and determine such actions.

(b) And in *Nichols v. State*, 8 Okl. Cr. 550, 129 Pac. 673, this court passed squarely upon the second contention urged under this assignment, and held that the contention is without merit. To hold that a court must look to an inferior tribunal to enforce its orders and decrees would be ridiculous. As is stated in *Nichols v. State*, supra:

"The power to fine and imprison for contempt is a necessary attribute of a court. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power to enforce its orders, judgments, or decrees would be a disgrace to the laws which created it. Such a condition could but result in the degradation of courts, and to make them truly subjects of contempt."

No court could exist, or, if existing, would be a curse rather than a blessing, if stripped of the power to enforce its orders, judgments, and decrees. Hence it is the universal rule that even courts of chancery and other courts which have no criminal jurisdiction can punish for so-called criminal contempt, because the power to do so is inherent, and necessary to the efficiency and very existence of the court. And as stated in *Rapalje on Contempt*, § 13:

"It is a well-settled rule that that court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it, or to entertain proceedings to that end. * * * The highest court of a state will not punish a contempt offered to the processes or authority of an inferior tribunal."

And with much less reason could it be urged that the highest court of original jurisdiction in the state must look to an inferior tribunal to enforce its orders and decrees.

[2] 2. It is also contended that the injunction the defendants are alleged to have violated was a temporary restraining order, and when no hearing was had upon it, on September 14, 1911, the date fixed in the summons as answer day, it spent its force, and was therefore a nullity at the time the defendants are alleged to have violated its terms. But this contention is not borne out by the record. This, as is shown by the record, is not a temporary restraining order, but a temporary injunction. And *Ex parte Grimes et al.*, 1 Okl. Cr. 102, 94 Pac. 668, cited and relied upon by the defendants, does not support their contention. In that opinion the court makes the distinction between

a temporary injunction and a temporary restraining order, saying:

"The former embodies a restraint which continues, unless modified by the court, until the hearing of the cause, and then it is made either permanent or discharged altogether; while the latter, strictly speaking, is not an injunction at all, but a writ of the court to compel parties to maintain the matters in controversy in statu quo until the question of whether or not a temporary injunction ought to issue may be determined."

This distinction is clear and sound, and is a complete answer to the contention of the defendants. This was a temporary injunction, and consequently remained in force until a hearing should be had for the purpose of making it perpetual, or discharging it altogether. And the defendants had a right to insist upon a speedy hearing, if they felt the injunction should be dissolved.

[3] 3. There is also an assignment to the effect that the judgment imprisoned the defendants, in case of a failure to pay the fine, until both fine and costs are paid as provided in section 1, c. 112, Session Laws 1913, and that this law did not become operative until a few days after the offense is alleged to have been committed; and therefore the penalty could not be assessed under its provisions. This judgment, however, does not include the costs in the sentence of imprisonment in case of failure to pay fine, but does allow only \$1 per day in case the \$300 fine is laid out in jail. This is error, since the offense is alleged to have been committed prior to the date the 1913 law became operative, and the defendants should have been sentenced under the statutes in force at the time the offense was committed, which allowed \$2 on the fine for each day of imprisonment, and \$1 additional for each day the defendants performed labor. *Ex parte Harry*, 6 Okl. Cr. 168, 117 Pac. 726; *Turner et al. v. State*, 8 Okl. Cr. 11, 126 Pac. 452.

[4] 4. Another matter complained of is the conduct of the court during the trial of this cause.

(a) It appears from the record that the judge, over the objections of counsel for defendants, persisted in rigidly examining and cross-examining the witnesses placed upon the stand, and at one time delivered to the jury a lengthy statement as to the position he occupied in the trial of that case, and at another time severely rebuked counsel for defendants in the presence of the jury, threatening to summarily punish him for contempt; and at the close of the examination of a witness that the court had taken from the county attorney and examined himself he remarked: "I think that is all this witness knows." All this was highly improper.

We know of no rule or reason why a court should not ask a proper and pertinent question, for the purpose of eliciting competent and material testimony. But we also know of no rule that would permit the court to assume the role of prosecutor. And when

the court takes the place of the county attorney, and examines and cross-examines witnesses, no matter what his motives may be, or what explanation or excuse he may offer for this course, his conduct can have but one effect upon the jury, and that is to impress them that the judge is convinced of the defendant's guilt. In the minds of the jurors, it places the judge in a hostile attitude towards the defendant, and discredits any defense that he might offer. No judge has a right to indicate to the jury, by word or action, his opinion of the merits of any case being tried before him, or to in any way indicate his opinion as to the credibility of any witness examined. Absolute fairness should characterize every word and action of a judge. *Harrison v. State*, 11 Okl. Cr. 14, 141 Pac. 236, and cases therein cited.

(b) Besides, to reprimand counsel for a defendant, in the presence of a jury, is highly prejudicial. If counsel's conduct is improper, the court must excuse the jury before administering a rebuke, or threatening to fine or imprison him for contempt.

There are other assignments, but, as the case must be reversed by reason of the conduct of the judge, we deem it unnecessary to pursue the matter further.

The judgment is reversed.

DOYLE, P. J., and ARMSTRONG, J., concur.

MOCABEE v. STATE. (No. A-2573.)
(Criminal Court of Appeals of Oklahoma. Sept. 20, 1916.)

(Syllabus by the Court.)

INTOXICATING LIQUORS §236(1)—OFFENSES—EVIDENCE—SUFFICIENCY.

Evidence reviewed in a prosecution for unlawfully conveying intoxicating liquor, and held sufficient to sustain the verdict and judgment of conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 300; Dec. Dig. § 236(1).]

Appeal from County Court, Canadian County; R. B. Forrest, Judge.

Sherman Mocabee was convicted of a violation of the prohibition law, and appeals. Affirmed.

J. N. Roberson, of El Reno, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Sherman Mocabee, Amos Clark, and J. Turner were jointly charged with having unlawfully transported intoxicating liquor from one place in Canadian county to another place in said county, and upon their trial were found guilty, and the punishment of each defendant assessed at \$100 fine and 60 days' confinement in the county jail. The

plaintiff in error, Sherman Mocabee, alone appeals.

The proof on the part of the prosecution is that the three defendants, while driving along one of the streets of El Reno in a spring wagon loaded with a barrel of beer and two cases of whisky, were arrested by the sheriff; that the defendant Mocabee was in charge of and driving the team, and he said to the officer, "We haven't delivered it yet," and also stated that "the barrel of beer was his." As a witness in his own behalf he testified that he borrowed the team to haul the beer and whisky for his codefendants from the express office for them, and denied any ownership therein. His codefendants testified that they owned the beer and whisky, and that it was a lawful purchase, and was shipped to them from Ft. Worth, Tex.

The only question presented by this appeal is the sufficiency of the evidence to support the verdict.

After a careful examination of the evidence in this case, we are not prepared to say that the jury were not warranted in finding the defendants guilty. The credibility of the witnesses and the weight and value to be given their testimony are questions solely for the jury's determination, and to reverse a judgment on the ground that the verdict is contrary to law and the evidence, this court must find, as a matter of law, that the evidence is insufficient to warrant the conviction.

The instructions fully and fairly presented the law of the case, and we are unable to find any error in the record. It follows that the judgment must be, and the same is hereby, affirmed.

KINDMAN v. STATE. (No. A-2644.)
(Criminal Court of Appeals of Oklahoma. Sept. 23, 1916.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1130(4) — APPEAL — ABANDONMENT.

Where accused, who appealed from a conviction of violating the prohibitory law, filed no brief and made no appearance on appeal, and it appeared that the appeal was abandoned, it will be dismissed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2970, 3205; Dec. Dig. § 1130(4).]

Appeal from County Court, Kiowa County; J. B. Carpenter, Judge.

Bill Kindman was convicted of violating the prohibitory law, and he appeals. Appeal dismissed.

Smith, Jones & Smith, of Cordell, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. On information charging that he did permit gambling in a certain

house in the town of Mountain View in Kiowa county, the plaintiff in error, Bill Kladman was convicted, and by the judgment of the court he was sentenced to be confined in the county jail for a period of 30 days. From the judgment he appeals.

No brief has been filed, and when the case was called for final submission no appearance was made on behalf of plaintiff in error, whereupon the Attorney General moved that the appeal be dismissed as having been abandoned. It appears that the appeal in this case has been abandoned, and for this reason the motion to dismiss is sustained, the appeal herein dismissed, and the cause remanded to the trial court. Mandate forthwith.

RHOADS v. STATE. (No. A-2572.)

(Criminal Court of Appeals of Oklahoma. Sept. 23, 1916.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS \Leftrightarrow 236(7)—OFFENSES—PROSECUTION—EVIDENCE.

Proof of possession of intoxicating liquors of any kind at a place where intoxicating liquors of the same or any other kind are kept and sold by the person owning or keeping the place is, in the absence of a reasonable explanation, sufficient to support a judgment of conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 809; Dec. Dig. \Leftrightarrow 236(7).]

2. INTOXICATING LIQUORS \Leftrightarrow 236(6)—OFFENSES—EVIDENCE—SUFFICIENCY.

Proof of possession of large quantities of intoxicating liquors and that the person in possession thereof has paid the tax required by the United States government of retail liquor dealers is sufficient, in the absence of any reasonable explanation, to support a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 810; Dec. Dig. \Leftrightarrow 236(6).]

Appeal from County Court, Canadian County; R. B. Forrest, Judge.

H. B. Rhoads was convicted of a violation of the prohibitory law, and he appeals. Affirmed.

J. N. Roberson, of El Reno, for plaintiff in error. B. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Plaintiff in error, H. B. Rhoads, was convicted at the August, 1915, term of the county court of Canadian county on a charge of having unlawful possession of intoxicating liquors with intent to sell the same, and his punishment fixed at a fine of \$400 and imprisonment in the county jail for a period of six months.

[1] The information charges that plaintiff in error had possession of beer on or about the 15th day of April, 1915, with intent to sell the same. It appears that deputy sheriffs searched the residence of plaintiff in error under a search and seizure warrant, and found 52 bottles of beer beneath a trapdoor in the floor. The liquor was discovered by removing the carpet or rug, and then

raising the trapdoor. Beneath this trapdoor the beer was found. Three officers who searched the premises testified to these facts. It is also shown that intoxicating liquors had been frequently sold on the premises, and that the plaintiff in error had paid the special revenue tax to the federal government and acquired a retail liquor dealer's license covering the year in which this beer was found. On previous occasions the officers had found as much as two barrels of whiskey in the possession of the plaintiff in error, and at other times had found beer. It appears that the place was never raided without intoxicating liquor of some character being found on the premises. The plaintiff in error neither denies the possession of the beer nor the payment of the internal revenue tax. Nor does he deny the fact that his place was one where intoxicating liquors were kept and sold. The state's case was overwhelmingly made out; in fact, there was no denial of the same on the part of any one. The verdict of the jury was therefore a proper one, and the judgment of the court correct.

Counsel argue that, since the plaintiff in error was charged with the sale of beer, the court should not have permitted proof tending to show that plaintiff in error was a frequent seller of other intoxicating liquor of different kinds. This evidence was properly admitted. Possession of intoxicating liquors of any kind at a place where intoxicating liquors of the same or any other kind are sold, in the absence of any reasonable explanation, will sustain a judgment of conviction.

[2] Besides, in this case the plaintiff in error apparently was engaged in the saloon business, having provided himself with overwhelming quantities of intoxicating liquors and a government retail liquor dealer's license. The appeal is without merit.

The judgment of the trial court is affirmed.

DOYLE, P. J., and BRETT, J., concur.

GOOCH v. COLEMAN. (No. 1879.)

(Supreme Court of New Mexico. Aug. 10, 1916.)

(Syllabus by the Court.)

CONTRACTS \Leftrightarrow 303(1) — CUSTOMS AND USAGES \Leftrightarrow 17 — EVIDENCE \Leftrightarrow 397(1) — PAROL EVIDENCE RULE—EFFECT OF CUSTOMS—PERFORMANCE—DISCHARGE.

Parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written contract.

A custom or usage which is repugnant to the terms of an express contract is not permitted to operate against it, and evidence of it is inadmissible; for, while usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain.

The fact that A. has reasonable cause to believe, and does believe, that B. will be unable to

perform his part of the contract does not, of itself, discharge A. from performing his part.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1409; Dec. Dig. ¶ 303(1); *Customs and Usages*, Cent. Dig. § 34; Dec. Dig. ¶ 17; *Evidence*, Cent. Dig. §§ 1756, 1763-1765, 1945; Dec. Dig. ¶ 397(1).]

Appeal from District Court, Socorro County; M. O. Mechem, Judge.

Action by Ben F. Gooch against Henry Coleman. From a judgment for plaintiff, defendant appeals. Affirmed in so far as judgment was rendered for plaintiff, and reversed and remanded as to that portion of the judgment denying plaintiff relief.

This action was brought by appellee against appellant to recover the sum of \$3,000, as damages for an alleged breach of a certain contract for the sale of 400 head of cattle. Under a peremptory instruction by the court, the jury returned a verdict for appellee in the sum of \$1,072.00, which was the amount of forfeit money, with interest, which had been posted by appellee to guarantee his performance of the terms of the contract, under which he agreed to purchase 150 steers, one year old and up to five years old; 175 dry cows; 50 cows and calves; and 25 heifer yearlings. The contract provided that the appellee should have the privilege to cut back or reject 10 per cent. of cattle offered under the contract, exclusive of cattle not in good shipping condition, diseased or unmerchantable, and that he should reject the said 10 per cent. on the 14th day of November, 1914, at the ranch where party of the first part, appellant here, should have the cattle rounded up in a herd, just before starting for the point of delivery. It was also further agreed by the terms of the contract that appellee was to receive said cattle at the time, place, and on the terms and conditions set forth in the contract, and to make final payment to appellant on said cattle, at the time of delivery, failure on his part causing a forfeiture of the sum of \$1,050 paid over to appellant at the time the contract was entered into as a first payment on said cattle.

The consideration for the sale of the cattle referred to was expressed in the contract as \$14,550, the cattle to be delivered on board cars and to be of a good grade of stock, free of disease, and in good shipping condition, the point of delivery being fixed as Magdalena, N. M. The date for delivery at Magdalena was left blank, owing to an uncertainty as to when the railroad company could furnish the necessary cars, it being understood, however, as disclosed by the record, that the delivery was to be made November 20th, or at the earliest date thereafter when the cars could be furnished.

On the morning of November 14th, the day specified for the appearance of appellee at the ranch of appellant to exercise his privilege to make a 10 per cent. cut, the appellee

left Magdalena in an automobile, but owing to certain accidents, did not arrive at the ranch until a late hour in the evening. On the following morning the parties, with certain others, rode to where the cattle were being held, and inspected the herd, after which there were some negotiations between the parties as to the terms of certain notes to be given for the balance of the purchase price. About the same time it also developed that the parties could not agree as to the meaning of the term in the contract "50 cows and calves," whereupon the appellant declared the contract void because the appellee had not appeared on the previous day to make the 10 per cent cut. Appellee then announced his willingness to waive his right to the cut, and insisted that the appellant should drive the cattle to Magdalena, stating that he would there pay for them, and if they could not agree as to the meaning of the contract, they could leave it to three cow men, who could settle the matter. Appellee further testified that he would take the cattle as soon as they arrived at Magdalena, whether the cars were there or not, and pay for them in cash. He proceeded to Magdalena, and was there on the 20th of November and for several days thereafter, but appellant failed to drive the cattle to Magdalena and elected to treat the contract as of no effect.

At the trial the evidence of a number of cattle men was offered as to the meaning of the term "50 cows and calves," all agreeing that the term meant 50 cows with calves by their sides. Witnesses also testified concerning the market value of the cattle on November 20, 1914, and for the remainder of that month, the testimony varying in figures from \$16,000 to \$17,000, as shown by the evidence of appellee, and the evidence for the appellant tending to show that the value of the cattle under the contract in question was \$15,350.

The court refused to direct the jury to include in its verdict the difference between the contract price and market price at the time and place of delivery, and in effect instructed them that the plaintiff, appellee here, in order to recover for this item of damage, must first show that the defendant, or appellant, did not have any reason to believe that the plaintiff could not comply with the terms of the contract.

From the judgment of the trial court this appeal is prayed.

W. H. Winter, of El Paso, Tex., and M. C. Spicer, of Socorro, for appellant. James G. Fitch, of Socorro, for appellee.

HANNA, J. (after stating the facts as above). The first point raised by appellant in his brief is that appellee should have cut out of the herd at the Coleman ranch on the 14th day of November all animals falling within his 10 per cent. cut, and should have,

at that time and place, received or accepted the remaining cattle on that day in accordance with the contract as it was understood between the parties, and according to the custom of cattle men when acting under a contract like the one sued upon, and for these reasons the court erred in holding that appellee did not breach the contract by his failure to make the cut at the ranch, and did not forfeit to the appellant the forfeit money which had been posted under the conditions of the contract. It is to be borne in mind that the contract provided for the final delivery of the cattle at Magdalena, and, while true that the 10 per cent. cut was to be made at the ranch of appellant, it is argued by appellant that until the cut was made he would not know what cattle to drive to Magdalena for final delivery. It is contended that the contract was ambiguous as to where it was to be determined what were unmerchantable cattle, and when and where they were to be cut out, and that therefore it was competent to offer verbal evidence to prove the intention of the parties in these respects. While not disagreeing with the contention of appellant as to the general rules for the interpretation of contracts when ambiguous, we cannot agree that a necessity for the application of these rules prevails. The evident purpose of the offer of the evidence in question was to show that the purchaser agreed to come to the ranch on November 14th, for the purpose of classifying and receiving cattle. If this be true, and the evidence be admissible, it is clear that appellant would be correct in his position that the purchaser, appellee here, failing to appear at the time and place fixed, had forfeited his contract, and appellant, therefore, would not have been compelled to tender the delivery at Magdalena, or, failing so to do, to assume responsibility for a breach of the contract on his part. The evidence offered, tending thus to vary the terms of contract, was not admitted by the trial court, and in this ruling we do not consider that the trial court committed error. Under the terms of the contract the seller was bound to deliver on board the cars at Magdalena a good grade of stock, free of disease, and in good shipping condition. The purchaser by the terms of the contract had the "privilege to cut back or reject 10 per cent. of cattle offered on this contract exclusive of cattle not in good shipping condition, diseased, or unmerchantable." This privilege it was further provided in the same paragraph of the contract, was to be exercised by the purchaser on the 14th day of November, 1914, "at the ranch where first party shall have said cattle rounded up in a herd just before starting for point of delivery." This latter provision of the contract would tend to clear away all questions of ambiguity as to the matter of the point of delivery, which was clearly not to be at the ranch of appellant, but at Magdalena, as

elsewhere stated in the contracts. Therefore, there being no ambiguity in this respect, there could not have been error on the part of the trial court in excluding testimony seeking to show that the purchaser was bound to receive the cattle at the ranch, or in other words, seeking to show that the point of delivery was at the Coleman ranch rather than at Magdalena, which latter place is clearly indicated by the terms of the contract.

In the case of *Locke v. Murdoch*, 20 N. M. 522, 151 Pac. 298, this court approved the well-known general rule that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written contract. While this rule is subject to some exceptions, as in the case of ambiguity, we cannot agree that any exception to the rule exists under the facts of this case. The argument that the evidence was admissible because of the custom which existed among cattle men is not tenable, and we need not give the matter further consideration in this respect.

The second proposition urged by appellant is based upon alleged error in the action of the trial court in sustaining an objection to the following question, addressed to the plaintiff, appellee here, on cross-examination, to wit:

"If what you say is true that the understanding was that you were not to receive the cattle at the ranch on the 14th, why were you in such a hurry to get there on the 14th?"

It is argued that it was proper to show how the parties interpreted the contract as to where the cattle were to be received, and where the unmerchantable cattle were to be cut out, under the general rule that where parties have given to a contract a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. Again we find no grounds for controversy as to the general rule, but cannot agree as to its application to the facts under consideration. To permit the application of this rule to the facts of the case at bar would be to change the clear meaning of the terms of the contract itself and give to them a meaning different from that expressed, for reasons which we have quite definitely set out in the foregoing part of this opinion. It must be borne in mind that the seller was, under the terms of the contract, to deliver only merchantable cattle, the privilege of the purchaser being to cut back or reject 10 per cent. of the cattle offered. With this privilege, for a privilege it clearly was, in mind, it was not unnatural that the purchaser was in a hurry to arrive at the place designated for the exercise thereof, and his haste does not in any way indicate that the place referred to was necessarily the place of delivery. Furthermore, the construction contended for by appellant, and under which he insisted upon his right to interrogate the witness, would have required the admis-

sion of evidence contradicting the express terms of the contract had the answers been such as were apparently called for by the question of appellant. Aside from the difficulty we find in seeing any light that the question and answer thereto might have thrown upon the terms and conditions of the contract, we consider that the question and answer at best could have done no more than contradict the terms of the contract, and therefore, under the rule in the case of *Locke v. Murdoch*, previously referred to, we do not consider that the court erred in rejecting the testimony offered.

The third, fourth, fifth and sixth contentions of appellant are predicated upon the same contention that appellant should have been permitted to show that the parties had given a construction to the contract different from its expressed conditions, and should further have been permitted to show the usage or custom among cow men, under contracts similar to the one sued upon, as to the place where the unmerchantable cattle were to be cut out, and the merchantable cattle to be received. Each particular assignment is based upon the offer of evidence and its exclusion by the trial court. But these several assignments are disposed of by our conclusion that the admission of the several items of evidence in question would have been objectionable on the ground that the terms of the written instrument were sought to be varied by parol testimony. For the reasons stated we do not find that the trial court committed error in ruling as it did upon the several matters in question.

The seventh point relied upon is that the court should not have received the testimony as to the custom among cow men that calves should not be counted in the use of the phrase "50 cows and calves," and that such testimony was in direct variance of the express written terms of the contract, which called for 400 head, the testimony as to the custom having a tendency to vary the terms of the contract in this respect, in that by the testimony a larger number of cattle would be shown to have been sold than the number fixed by the contract. As indicated, the testimony in question was that the expression "50 cows and calves," when used in contracts of this character, meant 50 cows with calves by their sides. The rule contended for by appellant is long established and not to be contradicted. It is set out in 12 Cyc. at pages 1091 and 1092, in the following language:

"A custom or usage which is repugnant to the terms of an express contract is not permitted to operate against it, and evidence of it is inadmissible; for while usage may be admissible to explain what is doubtful, it is never admissible to contract what is plain."

The trial court evidently considered that the term "50 cows and calves" was doubtful in meaning, and we cannot see how it could be considered to have erred in this respect. To the lay mind the expression "50 cows

and calves" might have meant 48 cows and two calves, but the custom of cow men is shown to put a different construction upon the use of the words, as was indicated by the testimony of the several witnesses, who said that this expression would be understood "50 cows with calves by their sides," or "50 cows and 50 calves." For the reasons stated, we do not consider that the court committed error in admitting the testimony of the custom in question in order that the somewhat ambiguous term of the contract might be made clear.

The eighth point of appellant is that the testimony offered by him that appellee verbally agreed to receive the cattle for classifying and cutting out at his ranch on November 14th, before appellant should be required to drive them to Magdalena, was improperly excluded, on the ground that the contract was not clear, and therefore verbal evidence was admissible to explain its meaning and the intention of the parties. Again this matter is disposed of by our conclusion that the contract was plain, and for that reason parol evidence could not properly be admitted to change its express terms or conditions.

This brings us to a consideration of the questions presented by the cross-appeal of appellee. It is to be borne in mind that the trial court held that appellee had not breached the contract by his failure to make the cut on November 14, 1914, and that it was the duty of the defendant to carry out the contract and make delivery at Magdalena. While directing that the jury should return a verdict for the appellee for the amount of purchase money advanced, with interest, the trial court declined to direct them to include in their verdict for damages the difference between the contract price and the market price at the time and place of delivery. The only ground of error urged by appellee in support of his cross-appeal which we deem it necessary to consider is the one predicated upon the third instruction of the trial court, which instruction is as follows:

"The second cause of action here alleged is for the loss which the plaintiff claims he suffered by reason of the failure of the defendant to comply with said contract. I instruct you that it is necessary, in order for the plaintiff to recover any damages for and on account of the alleged failure of the defendant to perform said contract, that you must find from the evidence in the case that the defendant did not have any reason to believe that the plaintiff could not comply with the terms of said written contract; and, if you believe that the defendant had no reason to think but that the plaintiff could comply with the contract, then you will give the plaintiff by your verdict such damages for the failure of the defendant to deliver the cattle at Magdalena in accordance with the contract as you may find under the following instructions."

It is argued that there was nothing in the evidence to warrant this instruction, and that appellant did not base his refusal to make delivery at Magdalena upon such ground, but that appellee advised appellant

of his willingness and ability to take and pay for the cattle as soon as they arrived at Magdalena, irrespective of whether or not cars should be available, and then apparently went to Magdalena in order to receive the same, as to all of which there is no contradiction in the testimony. As to this last contention we are inclined to believe that appellee is correct. The rule is stated in 3 Page on Contracts, § 1449, that:

"The fact that A. has reasonable cause to believe, and does believe, that B. will be unable to perform his part of the contract does not, of itself, discharge A. from performing his part."

Considering this rule, it would seem to be evident that the trial court substituted therefor a possible belief which might or might not have been present in the mind of appellant, and which, even though present, would not have excused his failure to perform the terms of his contract.

For the reasons stated, the judgment of the lower court, for the sum of \$1,072.05, is affirmed, and the judgment in so far as it refused the plaintiff damages, arising from the breach of contract by appellant, is reversed, and the cause remanded, with instructions to award execution for the said sum of \$1,072.05 and to award a new trial as to the said cause of action for damages for breach of the contract by appellant; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

LACEY v. LEMMONS. (No. 1788.)

(Supreme Court of New Mexico. Aug. 9, 1916.)

(Syllabus by the Court.)

ANIMALS—§14½ New, vol. 19 Key-No. Series—CONSTITUTIONAL LAW—§298—REGULATIONS—DUE PROCESS OF LAW—WHAT CONSTITUTES.

Section 1632, Code 1915, which authorizes the seizure and sale of animals under seven months of age if confined in any of the ways mentioned in the section and unaccompanied by their mothers, and which requires no notice, actual or constructive, to the owner, of such seizure and sale, is unconstitutional as authorizing the taking of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 812-814; Dec. Dig. § 298.]

Appeal from District Court, Lincoln County; E. L. Medler, Judge.

Action by Erastus Lacey against Charles Lemmons. From a judgment for plaintiff, defendant appeals. Affirmed.

Mann & Nicholas, of Albuquerque, for appellant. George W. Prichard, of Santa Fé, for appellee.

PARKER, J. This was an action in replevin brought by the plaintiff and appellee against the defendant and appellant for eleven head of cattle. The complaint alleged that

the plaintiff was the owner of the calves, and that in January, 1912, all the said calves were in his possession at his ranch; that defendant, claiming to be an inspector of the cattle sanitary board of the state, took the said calves from his possession and failed and refused to return them; that at the time they were taken the animals were young calves from four to eight or ten months old, and were kept in a corral and pasture adjoining plaintiff's ranch; that four of the calves were only four or five months old, and for that reason were unbranded; that they were worth \$22 per head. It appears that six of the calves were returned to the plaintiff after suit was brought.

The defendant answered, admitting the taking of the calves in controversy, alleging that at the time of the taking the calves were held in an inclosure and were not accompanied by their mothers, and that they were not calves of milch cows actually used to furnish milk for household purposes or carrying on a dairy; that upon information and belief each of the said calves was under the age of seven months at the time of taking, and were separated from their mothers, and that demand of plaintiff that he produce the mothers of the said calves within a reasonable time was made; that appellee failed to produce the mothers; and that up to the time of the service of the writ of replevin no attempt had been made by appellee to prove his ownership.

The court sustained a motion interposed by plaintiff for judgment on the pleadings, and rendered judgment against the defendant. The defendant appealed.

The defendant justifies under sections 1628 and 1632, Code 1915, which are as follows:

"Sec. 1628. That hereafter it shall be unlawful for any person, firm or corporation to hold under herd, confine in any pasture, building, corral or other enclosure, or to picket out, hobble, tie together or in any manner interfere with the freedom of calves of neat cattle or colts of horses, asses and burros which are less than seven months old except such young animals be accompanied by their mothers.

"This provision shall not apply to the calves of milch cows when such cows are actually used to furnish milk for household purposes or for carrying on a dairy; but in every such case the person, firm or corporation separating calves from their mothers for either of these purposes shall, upon the demand of any cattle owner, sheriff, inspector or any * * * officer, produce, in a reasonable time, the mother of each one of such calves so that interested parties may ascertain if the cow does or does not claim and suckle such calf."

"Sec. 1632. That all animals held in violation of the preceding four sections shall be considered estrays, and it shall be the duty of any inspector appointed by the cattle sanitary board of the state of New Mexico, who shall receive notice of such violation, to take into his possession as estrays or unclaimed live stock all such animals and hold them for proof of ownership. If the ownership of such estrays be not proved within ten days, they shall be sold by the inspector having them in charge at the highest price obtainable; the funds received from such sale,

after the costs of keeping and sale have been deducted, shall be turned over to the cattle board to be kept and disposed of in the same manner as is now provided by law for funds arising from the sale of estrays."

No question is made but that the cattle inspector followed the provisions of this statute. The question presented is whether section 1632, Code 1915, is violative of section 18, art. 2, of the Constitution, which contains the usual guaranty against the deprivation of life, liberty, or property without due process of law. In *State v. Brooken*, 21 N. M. —, 143 Pac. 479, L. R. A. 1915B, 213, we had section 1628, Code 1915, before us for consideration, and we there upheld the constitutionality of the same. In that case there is contained what might be construed as an intimation by the court that section 1632, Code 1915, might be held to be unconstitutional on the ground that it provided for the taking of private property without due process of law. But this question was not decided by the court in that case, and was mentioned for the reason merely that, even if it were unconstitutional, it would not invalidate section 1628, which was there under consideration.

We have, then, for consideration for the first time, the question as to whether section 1632 authorizes a proceeding violative of the citizens' constitutional right. It is to be noticed that this section contains a definition of what are estrays. It provides, taken in connection with section 1628, that all calves of neat cattle, and other animals named, under seven months of age, held under herd or confined in any of the ways named in the section, shall be considered estrays. Taking into consideration the nature of the property, we can see no objection to this definition. It is a matter of common knowledge that calves of neat cattle, if separated from their mothers long enough to become weaned, can never afterwards be identified so that the ownership thereof may be established. Cattle in this state almost universally roam at large upon the public ranges, and the only means of identification and the only proof of ownership is by brands. It is also a matter of common knowledge and experience that the only means of identification of the ownership of calves until they are branded is by the observation of the mother and the calf together. If the mother suckles the calf, the identity of the ownership of the calf is established. If the calf is separated from the mother until it becomes weaned, this evidence of ownership is lost and destroyed, rendering the calf subject to the machinations of the cattle thief and with no means of bringing him to justice.

This section, then, is but a legislative declaration that, in regard to this class of property, the mere possession of calves under seven months of age is no evidence whatever of ownership, and that calves held under the

circumstances mentioned in the statute and as existing in this case are really estrays because the ownership thereof is, and must be, from a legal and practical standpoint, unknown. As we pointed out in *State v. Brooken*, supra, it is a proper and legitimate exercise of the police power for the Legislature, in the interest of the stock-raising business in the state, to regulate to this extent the use, management, and control of this class of property.

A much more serious consideration arises out of the fact that the statute provides for a seizure and sale of the animals and the payment of the money, less the costs of keeping and sale, to the cattle board, to be kept and disposed of in the same manner as is provided by law for funds arising from the sale of estrays. The disposition of the funds arising from the sale of estrays is provided for in section 162, Code 1915. This section provides that at any time within two years after the sale of the animals the lawful owner may apply to the cattle sanitary board and receive the net amount resulting from such sale, less the sum of \$1 for each estray to be retained by the cattle sanitary board upon the owner proving his ownership to the satisfaction of said cattle sanitary board.

It is to be observed in this connection that this statute provides for no judicial hearing, and provides for no notice of any kind whatever to the owner of the animals seized. It is to be further noticed that the net proceeds, less \$1 for each estray, are to be paid over to the owner of the animals at any time within two years, upon such owner proving his ownership to the satisfaction of the cattle sanitary board. The nature of the proof required of the owner to establish his ownership is not pointed out in the statute.

The question then is whether this statute authorizes the taking of property without due process of law. The term "due process of law" has been often defined, but it is of such a nature that no general definition can be formulated which—

"shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising when we consider the diversity of cases for the purpose of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another." *Cooley's Const. Lim.* (7th Ed.) p. 502.

Mr. Webster's definition in the famous *Dartmouth College Case*, *Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L. Ed. 629, is as follows:

"By the law of the land is most clearly intended the general law; a law which bears before it condemn; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, * * * and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of

an enactment is not, therefore, to be considered the law of the land."

Judge Cooley points out that this definition is apt and suitable as applied to judicial proceedings. He says, however:

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribed for the class of cases to which the one in question belongs."

See Cooley's Const. Lim. pp. 503 and 506.

It is well established that, in the exercise of the police power, the power of taxation, and the power of eminent domain for governmental purposes, due process of law, in a constitutional sense, does not require judicial process and a proceeding according to the course of the common law. Cooley's Const. Lim. (7th Ed.) p. 507; 6 R. C. L. 452, § 448; 1 R. C. L. 1148, § 89; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 68 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; Chicago, B. & Q. R. Co. v. Neb., 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 984; People v. Smith, 21 N. Y. 595, 599; Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; In re Tax Sale, 54 Mich. 417, 23 N. W. 189; Davidson v. City of New Orleans, 96 U. S. 97, 104, 24 L. Ed. 616; Crum v. Bray, 121 Ga. 709, 49 S. E. 686, 1 Ann. Cas. 991; Gleichrist v. Schmidling, 12 Kan. 263, 271; Welmer v. Bunbury, 30 Mich. 201, 210; Shook v. Sexton, 37 Wash. 509, 79 Pac. 1093.

If the proceedings in the case at bar are otherwise lawful, there can be no objection to them because they are administrative and not judicial.

The trouble with this statute arises out of the fact that no notice is required to be given the alleged owner, either actual or constructive. We assume that either would be sufficient in cases of this kind. It is true that in this case the alleged owner did have knowledge of the seizure of the cattle by the cattle inspector, as is evidenced by the fact that he brought this action of replevin against the inspector, and by the allegations in the pleadings. But this was accidental, and can have no effect in determining the question. It is not what is done under a statute in a given case, but it is what may be done, that determines its constitutionality. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. And in cases like this the circumstances might, and often would, be such that the alleged owner would have no notice whatever of the seizure and sale of the cattle until long after the same had occurred. The statute also contemplates the passing of the title and relegates the alleged owner to the recovery of the proceeds of sale, less certain deductions, from the cattle sanitary board.

We are compelled to hold that this statute

authorizes the taking of property without due process of law. That the proceedings authorized are without judicial process is no objection. But in proceedings before administrative officers or bodies, at some time before the property is finally taken, the owner ordinarily must have notice and opportunity to be heard. 6 R. C. L. p. 446, § 442; *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; *Wilcox v. Hemming*, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625; *Crum v. Bray*, 121 Ga. 709, 49 S. E. 686, 1 Ann. Cas. 996; *Greer v. Downey*, 8 Ariz. 164, 71 Pac. 900, 61 L. R. A. 408.

The doctrine stated has been specifically applied to the taking up of animals running at large, in some of the cases cited, and the doctrine is stated and many cases cited in 1 R. C. L. p. 1148, § 89. See, also, *Armstrong v. Brown*, 106 Ky. 81, 50 S. W. 17, 90 Am. St. Rep. 207, and note.

In this connection it may be well to note the distinction between a case of this kind and those cases where some controlling necessity for the public good requires immediate action, and where property of the citizen may be taken without notice and without compensation. The destruction of property to prevent the spread of fires in cities and towns, the destruction of animals afflicted with contagious diseases endangering the public health, are familiar examples of this class of cases. In those cases the rights of the individual must yield to the general welfare of the many.

But in cases like the one at bar no controlling necessity exists to seize and sell cattle taken by a cattle inspector. When cattle situated as these were are seized, the claimant or owner should have an opportunity to assert his right thereto by producing the evidence of their ownership before the cattle inspector, before the same are sold. He should have the right to institute and maintain a suitable action for their recovery, and, as before seen, the statute should require notice to him for that purpose.

It is a matter of regret that we are compelled to declare this act unconstitutional. It is a matter of common knowledge that the most effective way and the method most largely practiced in this state to effectuate the larceny of cattle is to separate calves from their mothers; this destroying all means of identification and proof of ownership by the true owner. The fact remains, however, that the law must be enforced as it is found to exist, and the remedy lies with the legislative department to enact a suitable statute on this subject.

For the reasons stated, the judgment of the court below will be affirmed; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

FULLEN v. FULLEN. (No. 1709.)
(Supreme Court of New Mexico. Sept. 5, 1916.)

(Syllabus by Editorial Staff.)

DIVORCE ¶189 — **ACTIONS** — **DUTY OF HUSBAND.**

In divorce cases it is ordinarily the duty of the husband to furnish means to the wife to maintain or defend her rights, and the costs in such proceeding will not be apportioned.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 577; Dec. Dig. ¶189.]

Error to District Court, Chaves County; McClure, Judge.

On motion to retax costs. Motion denied.
For former opinion, see 153 Pac. 294.

W. W. Gatewood, of Roswell, for plaintiff in error. O. O. Askren, of Roswell, and Renahan & Wright, of Santa Fé, for defendant in error.

PARKER, J. Defendant in error moves the court to retax the costs in this case upon the ground that the court held in its opinion that there were two separate and distinct final judgments in the case, and that a large portion of the record and the consequent expense incurred in this court related to the decree of divorce which was final in character, and which was not appealed from for more than one year after the same was rendered, and that the court held with the defendant in error, so far as the decree of divorce was concerned. It is therefore urged upon the court that the costs in this court should be apportioned between the parties instead of taxing all of them to the defendant in error; the plaintiff in error having succeeded upon only one of the issues in the case.

Counsel for defendant in error base their argument upon the proposition that this cause is a cause in equity, and that the statute (section 4282, Code 1915) has reference only to actions at law. It is urged that this court has power and ought in this case to apportion the costs according to the equities. The statute referred to is as follows:

"Sec. 4282. For all civil actions or proceedings of any kind, the party prevailing shall recover his cost against the other party, except in those cases in which a different provision is made by law."

This section has been interpreted in *King v. Tabor*, 15 N. M. 488, 110 Pac. 601, and in *Gallup Electric L. Co. v. Pac. I. Co.*, 16 N. M. 279, 117 Pac. 845, wherein it was held that it applied as well to the Supreme Court as to the district courts. In the former case the application of the section was limited to actions at law, but in the latter case no such limitation was recognized, although the point was not specifically raised.

We do not deem it necessary in this case to determine whether this section of the statute applies to all cases, or whether it is limited in its application to actions at law. This is

a divorce case, and was conducted in the equity side of the court. The appellant brought the whole case here, including the divorce decree and the decree in regard to the property of the parties. No objection was interposed by the appellee to the consideration by this court of the entire record, and the objection on his part is made to appear for the first time in this motion to retax costs. The appellee is the husband, and the appellant is the wife. The court in its decree practically stripped the wife of all of the community property, and, with the exception of one small piece of property of no particular value, left her without means. We mention this fact, not in criticism of the decree of the court, but simply to show the condition in which the respective parties are now placed.

In view of this situation of the parties, and in view of the general principle governing divorce cases which ordinarily require the husband to furnish the means to the wife to maintain or defend her rights in such a proceeding, we fail to see in this record anything to move our discretion to apportion these costs.

The motion to retax costs should, under the circumstances, be denied; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

MILLIKEN v. MARTINEZ et al. (No. 1838.)
(Supreme Court of New Mexico. June 28, 1916.)
On Motion for Rehearing, Sept. 4, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶511(1)—**EXCEPTIONS, BILL OF** ¶57—**FILING—RECORD.**

A bill of exceptions must be filed in the office of the clerk of the district court, and the fact of such filing should be shown by the transcript of record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2319; Dec. Dig. ¶511(1); Exceptions, Bill of, Cent. Dig. §§ 97-99; Dec. Dig. ¶57.]

2. APPEAL AND ERROR ¶880(1) — **REVIEW — RIGHT TO COMPLAIN OF ERRORS.**

Where one appeals from a judgment adverse to him in a cause in which he has intervened, he cannot complain of irregularities in the judgment entered against the principal defendants therein, and must rely upon errors solely prejudicial to himself, and cannot take advantage of errors prejudicial to others.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584, 3585, 3587, 3589; Dec. Dig. ¶880(1).]

3. ANIMALS ¶22 — **HERDING OF ANIMALS — RIGHTS OF HERDER.**

Under section 42, Code 1915, where any sheep, bovine cattle, or other animals are received from the owner, under a written contract for the herding or caring for the same for pay or on shares, or in any other manner, except by absolute purchase, such animals, together with the increase and product thereof at all times, and until the full completion of such contract according to its terms, remain the property of

such owners, so letting them out to be herded or cared for. Hence, under a "partido" contract, which calls for the return of a like number and kind of animals, at the expiration of the contract, the original animals and their increase remain the property of the original owner until the full completion of the contract, and the person having such animals in charge has no power to sell or dispose of the same until after his title has vested, by full completion of the contract according to its terms, or "by express consent of the owner of such animals."

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 40-42; Dec. Dig. ¶ 22.]

4. TRIAL ¶ 192—INSTRUCTIONS—ASSUMPTION OF FACT.

Where the evidence introduced in support of facts is of a conclusive character and is not controverted by other evidence, the court in instructing the jury may assume that such facts are true.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 432-434; Dec. Dig. ¶ 192.]

Appeal from District Court, Colfax County; T. D. Leib, Judge.

Action by Jennie Milliken against Juan C. Martinez and wife, in which John King intervened. From the judgment, intervener appeals. Affirmed.

O. T. Toombs, of Clayton, and J. Leahy, of Raton, for appellant. Morrow & Alford, of Raton, and E. P. Davies, of Santa Fé, appellees.

ROBERTS, C. J. This action was originally instituted in the court below by the appellee Jennie Milliken, against Juan C. Martinez and Juanita B. Martinez, in replevin, to recover the possession of 1041 head of ewes. The complaint was based upon section 4340, Code 1915, which gives to any person having a right to the immediate possession of any goods or chattels wrongfully taken, or wrongfully detained, the right to bring an action of replevin for the recovery thereof and for damages sustained by reason of the unlawful caption or detention thereof. A writ of replevin was issued, by virtue of which the sheriff seized and took possession of 746 head of ewes, described in the complaint and writ.

Thereafter John King, by leave of court first granted, intervened in the cause and alleged that he was the owner of and in possession of said ewes at the time they were levied upon by the sheriff. King gave a forthcoming bond and took possession.

Martinez and wife filed a general denial to plaintiff's complaint. Plaintiff denied the allegations of ownership and possession by King.

The cause was tried to a jury, which returned a verdict in favor of the plaintiff, and on said verdict judgment was rendered in favor of the plaintiff and against the defendants and intervener, wherein the plaintiff was awarded the possession of the sheep taken by virtue of the writ of replevin as against the defendants and intervener, and

a money judgment against the defendants for other sheep which were not found in the possession of the defendants, the recovery of which were sought by the complaint.

From this judgment the defendants and intervener jointly prayed an appeal, which was granted by the trial court. King filed a supersedeas bond, but the defendants filed neither a supersedeas nor a cost bond, and did not join in the bond filed by King. Upon motion, because of such default, the appeal was dismissed as to the two defendants; hence King, the intervener, is the sole appellant.

[1] The appellee has filed a motion to strike the purported bill of exceptions from the transcript of record, because it is not shown, either by recital in the transcript or by the certificate of the clerk of the district court, that such purported bill of exceptions was ever filed in his office. That the bill of exceptions must be filed in the office of the clerk, and that the record should so show, was held by this court in the case of *City of Tucumcari v. Belmore*, 18 N. M. 331, 137 Pac. 585. In a recent case (*Baca v. Board of County Commissioners of Guadalupe County et al.*, 158 Pac. 642) this court has pointed out the proper method of showing the filing of the transcript of testimony and bill of exceptions, and suggested the use by clerks of the district courts of the form of certificate set forth in *Wade's Appellate Procedure*, § 441. Before filing the transcript of record with the clerk of this court, the attorney for appellant should see to it that it is properly prepared and certified, thus avoiding all objections in this regard. As this case must be affirmed on the merits, we have decided to treat the bill of exceptions as properly a part of the record; hence will not further consider appellee's motion to strike the same.

The facts necessary to be stated may be briefly summarized as follows:

The defendants since the year 1905 had sheep of the intervener, John King, under what is called a "partido contract." Some time after 1910 John Milliken, the husband of the appellee, also let sheep to the defendants under a similar contract. Mr. Milliken died prior to the 25th day of October, 1914, the exact date not being material, and Mrs. Milliken, the plaintiff, upon that date entered into a written contract with the defendants by which she let to them on "partido" 1,041 head of ewes for the period of one year, she to receive a stipulated amount of wool and a given number of lambs, the defendants agreeing to deliver to her, at the expiration of the stated term, the same number of sheep so received by him and of the same age as those received. During the winter of 1913 the defendants lost some 500 head of sheep by reason of heavy snow, and in October, 1914, they had but few over 1,000 left out of the King and Milliken sheep, numbering something over 2,000 originally.

In October, 1914, and prior to the expiration of the time stated in the contract, Mr. Doherty, the son-in-law of Mrs. Milliken, acting under directions from Mrs. Milliken, went to the Martinez range and demanded of Mr. Martinez possession on behalf of Mrs. Milliken of the sheep which she had let to him. Martinez told him to take the sheep, and Mr. Doherty and his assistant went to the corrals and commenced cutting out sheep marked with the ear marks mentioned in the written contract. After having cut out some over 100, Mr. Martinez appeared and told him that sheep bearing another brand than the one mentioned in the contract also belonged to Mrs. Milliken; that he had branded them with the named brand, by direction of Mr. Milliken, who had supplied him with the branding iron. Doherty then, with Martinez's consent, cut out all bearing the named brands. While they were at work, or soon thereafter, Mr. King, the intervener, appeared, and asked Doherty to permit Martinez to keep the sheep for another term, in order that he might be able to increase the flock and protect all parties. Doherty replied that the matter would have to be taken up with his principal, and consented to leave the sheep in the possession of Martinez until Mrs. Milliken could be communicated with. Immediately afterwards, and before any of the parties had left the premises, King notified Martinez that he claimed all the sheep, under his "partido" contract, and Martinez, so he testified, told King that he would let him have them. Thereupon King gave Martinez a written release from all liability under the "partido" contract between them. Thereupon King took possession of the sheep or put his agent in charge of them, so he testified, and turned them loose upon the "open" range. Mrs. Milliken then filed her complaint in replevin for the sheep, which her agent had separated from the common herd, and which bore the brand stated by Martinez to be the brand of her late husband.

The brief filed in behalf of appellant, the intervener, was prepared and filed jointly on behalf of the intervener and defendants, and discusses many errors assigned which could only affect the rights of the defendants, who, as stated, are not before this court. The question thus presented will not be considered.

[2] "Where one appeals from a judgment adverse to him in a cause in which he has intervened, he cannot complain of irregularities in the judgment entered against the principal defendants therein, and must rely upon errors solely prejudicial to himself, and cannot take advantage of errors prejudicial to others." *Meadors v. Brown* (Ky.) 29 S. W. 325. Many other authorities to the same effect might be cited, but the proposition is so elementary that further citation would be useless.

[3] The principal contention of appellant,

King, presented in divers ways, by objecting to the introduction of evidence, motion for a directed verdict, and objections and exceptions to instructions, is that, because the "partido" contract executed by and between Mrs. Milliken and the defendants provided for the return, not of the identical sheep let under the contract, but of the same kind, quality, and number, Mrs. Milliken had parted with all her right, title, and interest in and to the sheep let by her, and the increase thereof. This question, however, is settled adversely to the contention by section 42. Code 1915, which reads as follows:

"When any one has or shall receive from the owner thereof any sheep, bovine cattle, horses or other animals under written contract, for the herding or caring for the same for pay or on shares, or in any other manner, except by absolute purchase, such sheep, bovine cattle, horses or other animals, together with the increase and product thereof at all times, and until the full completion of such contract according to the terms thereof, shall be and remain the property of the said owner or owners, so letting them out to be herded or cared for; and the person or persons so receiving the same for such purpose shall have no authority or right to sell, transfer, mortgage, or dispose of the same, or any part thereof, in any manner whatever without the express consent of the owner or owners thereof; and when a copy of any such contract shall be filed with the county clerk, as provided in the preceding section, it shall be notice to every one that the person or persons in charge of such animals, sheep, cattle or horses, had no right to sell or dispose of the same in any manner."

Under this section it will be observed that, where any sheep, bovine cattle, horses, or other animals are received from the owner, under a written contract for the herding or caring for the same for pay or on shares, or in any other manner, except by absolute purchase, such sheep or other animals, together with the increase and product thereof at all times, and until the full completion of such contract according to the terms thereof, shall be and remain the property of the said owners so letting them out to be herded and cared for. Hence, under a "partido" contract which calls for the return of a like number and kind of animals at the expiration of the contract, the original animals and their increase remain the property of the original owner until the full completion of the contract, and the person having such animals in his charge has no power to sell or dispose of them until after his title thereto has vested, by full completion of the contract according to its terms, or "by express consent of the owners." And section 1620, Code 1915, makes it a felony for a person to knowingly buy such animals without the written consent of the owner of such animals. It is not contended here that defendants either had such written consent, or that the contract had been completed according to its terms; hence there is no merit to this contention.

Objection is urged by intervener to the action of the court in overruling the demurrer interposed by the defendants to the com-

plaint. Waiving the right of intervener to object, we see no error in this, as the complaint contains every allegation required by the statute (section 4340, Code 1915), and the affidavit in replevin was pursuant to the form prescribed by section 4355, Code 1915. A complaint in replevin which alleges all the facts required by statute to sustain the right is sufficient to withstand a general demurrer.

Appellant, King, by assignment of error No. 5, complains of the first instruction given by the court, and in the trial court objected to the giving of this instruction, upon the ground that it was a comment upon the weight of the evidence. In this instruction the court attempted to state the issues between the parties, saying in part:

"The plaintiff replevined 748 head of sheep, as shown by the undisputed proof herein."

[4] That the plaintiff did replevin the stated number of sheep was shown by the sheriff's return, and no evidence was introduced which contradicted the same. The rule in this regard is stated in 38 Cyc. 1667, as follows:

"Where the evidence introduced in support of facts is of a conclusive character and is not controverted by other evidence, the court in instructing the jury may assume that such facts are true. It has been held that this principle is especially applicable where the evidence introduced is documentary or record evidence."

Hence there is no merit in the point made against the instruction in the trial court. Grounds of objection other than those urged in the trial court will not be considered.

Many objections are urged to the few instructions given by the court, but no one of the points made is meritorious, and to consider them in detail would unduly lengthen this question, without benefit to the profession. Practically all of the objections urged relate only to the rights of the defendants, who are not here complaining, but, even were they before the court asking relief, we would be compelled to hold that there was no reversible error in giving the same.

Appellant, King, requested the court to give an instruction to the effect that, if the Milliken sheep had become intermingled with the sheep owned by King, with Milliken's consent, then the burden was upon Milliken to show that the sheep taken by her were her sheep. That the fact that all the sheep which she took under the writ of replevin were either the original sheep let to Martinez or their increase was not disputed by either the defendants or the intervener; hence there was no impropriety in refusing this instruction.

Upon the trial the intervener proceeded upon the erroneous theory that the appellee had parted with title to the sheep in question by virtue of the terms of the "partido" contract, because by such contract she was not to receive, at the expiration of the same, the identical sheep let, but a stated number of like kind and ages. Under the plain pro-

visions of the statute this was not true; hence many of the questions urged need not be further considered.

Many objections are urged to the action of the court, either in excluding evidence proffered by the defendants and intervener, or in admitting evidence, over objection, tendered by the plaintiff. We have examined and have carefully read appellant's brief, but no error on the part of the court, nor any point made in this regard is of sufficient merit to justify a discussion of the same.

The intervener argues, at some length, alleged error on the part of the court in refusing to submit to the jury special interrogatories which he requested, but, if there was any error on the part of the court in so refusing, the intervener has failed to make such alleged error available here, because he saved no exception to the action of the court in this regard.

On the whole, we believe the cause was fairly tried, and the evidence fully sustains the verdict, and the judgment of the trial court will be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

On Motion for Rehearing.

ROBERTS, C. J. Appellant, King, contends that he should be granted a rehearing herein because the court erroneously construed the testimony given by James Doherty, in that we held that Doherty testified that Martinez told him to take the sheep. Upon a review of the evidence we find that we were mistaken in assuming that this testimony applied to the first demand made by Doherty for possession of the sheep. This statement by Martinez was not made at that time, but subsequently, when the levy was made by the deputy sheriff. But this is wholly immaterial for two reasons:

First, the testimony given by Mr. Martinez is to the effect that at the time of the first demand by Doherty for possession of the sheep with Martinez's consent the sheep were rounded up and inclosed in a corral, and while so confined Martinez took both King and Doherty to the corral and said to them:

"Gentlemen, there is your sheep. Do whatever you want with them. I have not got enough to turn over. You can handle them as you want."

The sheep held by Martinez under partido contract with King and Mrs. Milliken bore separate brands, and this action on the part of Martinez could only be construed as a delivery of the sheep to the parties and a termination of the contract under which he held them; hence there could be no merit in appellant's contention that under the terms of the contract Mrs. Milliken was not entitled to possession of the sheep, assuming that the contract had not been breached.

The second answer to the contention is that Doherty testified that he had made demand upon Martinez for the sheep belonging to

Mrs. Milliken, but, if we assume, as does appellant, that the contract had not terminated, and Mrs. Milliken had no right to the possession of the sheep at the time the demand was made, appellant is met by the proposition, according to his own evidence and that of Martinez, that Martinez had delivered to King possession of the sheep in fulfillment of his partido contract with King. In other words, he had turned over to King, not only the King sheep, but all of the Milliken sheep, to make good the loss out of the King flock. This amounted to a conversion of the Milliken sheep which he held under his partido contract, which rendered a demand unnecessary. *Kitchen v. Schuster*, 14 N. M. 164, 89 Pac. 261. This view of the case renders wholly immaterial the fact as to whether Martinez had taken possession of the sheep prior to the bringing of the action herein and before King attempted to exercise dominion over them.

It is next insisted that the court in some manner overlooked the evidence as to the levy upon the sheep in question made by the deputy sheriff; his contention being that the deputy sheriff did not actually levy upon all of the sheep in question, because after he had separated 123 head of sheep from the flock he was called away and left instructions that Doherty, who was present, proceed and separate the remainder of the sheep, which Doherty did. He argues that Murray, being only a deputy sheriff, could not deputize Doherty to act. But this matter was rendered wholly immaterial by reason of the fact that appellant, King, executed a forthcoming bond and took possession of the sheep.

"Any irregularity in a levy made under a writ of replevin is cured by defendant giving a bond to return the property." 34 Cyc. p. 1356.

No other ground in the motion merits consideration, and it will therefore be denied; and it is so ordered.

HANNA and PARKER, JJ., concur.

CULP et al. v. SANDOVAL. (No. 1858.)

(Supreme Court of New Mexico. May 1, 1916.
On Motion to Dismiss Motion for
Rehearing, Sept. 4, 1916.)

(Syllabus by the Court.)

1. SALES §150(1) — PERFORMANCE—IMPLIED AGREEMENTS—DELIVERY.

Where a person has agreed to perform an act, whatever is necessary to the performance of the act is a part of the agreement, and it is implied that he must furnish the means of accomplishing the act; hence, when a vendor has contracted to sell goods f. o. b. cars, he must procure the cars and load the goods thereon.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 350, 351; Dec. Dig. §150(1).]

2. SALES §153—PERFORMANCE—RIGHTS OF VENDOR.

Where, under a contract, the vendor reserves unto himself the option of delivering the

goods sold to the vendee, on board a vessel or the cars of a railroad company, upon any one of 5 days or any one of 15 days, assuming that it is the duty of the vendee to furnish the vessel or cars, the vendor is obligated to notify the vendee at what time he proposes to deliver the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 358-366; Dec. Dig. §153.]

On Motion to Dismiss Motion for Rehearing.

3. APPEAL AND ERROR §158(1)—SATISFACTION OF JUDGMENT—ESTOPPEL.

Where a party appealed from a judgment adverse to him in the district court and executed a supersedeas bond which stayed and suspended all proceedings under such judgment, and preserved the status quo pending the determination of the appeal and prior to a final determination of the appeal, such party voluntarily pays and satisfies such judgment; such payment amounts to a voluntary acquiescence in and recognition of the validity of such judgment, and estops appellant from further prosecuting his appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 973, 977; Dec. Dig. §158(1).]

Appeal from District Court, Bernalillo County; H. F. Reynolds, District Judge.

Action by C. S. Culp and B. C. Culp and Isaac Barth, copartners doing business as Culp-Barth Sheep Company, against Jesus M. Sandoval. From a judgment for plaintiffs, defendant appeals. Affirmed.

Neill B. Field, of Albuquerque, for appellant. Mann & Venable, of Albuquerque, for appellees.

ROBERTS, C. J. On the 23d day of November, 1910, a complaint in two counts was filed by the appellees against the appellant, alleging in the first count that the appellant, Sandoval, agreed to sell and deliver to the said appellees, f. o. b. cars at Albuquerque, between the 5th day of November, 1910, and the 10th day of November, 1910, 1,800 lambs at agreed prices, which lambs were to be in good condition, free from scab, and to pass government and territorial inspection. A copy of this contract was attached as an exhibit to the complaint. It was further alleged that the appellant, Sandoval, refused to deliver the lambs at the time and place agreed upon, and that thereby the appellees suffered certain damages. They further alleged that they advanced and paid to the appellant as an advance payment \$500, and they asked damages for the alleged breach of the contract upon the first cause of action in the sum of \$1,328. The second cause of action alleged the breach of a contract entered into on the 20th day of October, A. D. 1910, between the same parties, whereby the appellant agreed to sell and deliver f. o. b. cars Albuquerque, N. M., one double-deck car of old ewes at a certain agreed price. It was alleged that \$75 had been advanced and paid to appellant as an advance payment upon these sheep, and alleged the failure of the appellant, Sandoval, to keep his contract

and to deliver the sheep. A copy of this contract was also attached as an exhibit.

[1] The appellant filed an amended answer and counterclaim. For the purpose of this appeal it is sufficient to say that the appellant denied that he failed and refused to deliver to the said appellees the said lambs, or any part thereof, and alleged that the appellees did not, at any time before or subsequent to the 10th day of November, 1910, provide any cars upon which the appellant could deliver the lambs and ewes so contracted and agreed to be delivered, and alleged that after appellees had failed to supply the cars, he made a tender of the lambs and sheep to the appellees, which appellees refused to accept, for the reason that the market price of lambs and sheep of the quality and character contracted for had greatly depreciated prior to the time the appellees had agreed to accept the delivery of the lambs. Appellant alleged in his amended counterclaim that as a result of the failure of the appellees to keep their contracts, he has suffered damages in a certain amount, and he filed a bill of particulars, showing damage in the amount of \$1,428.90. A reply was filed to the amended answer and counterclaim, which denied substantially all the new matter set up in the amended answer and counterclaim, and denied that the appellees ever agreed to furnish appellant any cars whatever, and alleged that the cars were to be furnished by the appellant for the shipment of said sheep and lambs. This allegation as to the liability of the appellant to furnish the cars, the court, after full argument, struck out of the reply on motion of appellant, holding that, as a matter of law, the appellees were obligated to furnish cars. The cause thereafter came on for hearing, and the court made certain findings, some at the request of the appellant, and some at the request of the appellees, and signed a bill of exceptions, in which the substance of all the evidence is set forth. The court found:

"That the plaintiffs never demanded from the defendant, Sandoval, at any time the delivery of sheep and lambs in compliance with the contract, and never designated nor pointed out to the said defendant, Sandoval, any cars upon which Sandoval might load the sheep and lambs described in the contracts, nor notified the said Sandoval that the plaintiffs were ready to receive the sheep and lambs, or had cars in readiness upon which the sheep and lambs might be loaded by the defendant."

It also found:

"That between the 5th and 16th days of November, 1910, the market price of lambs in Albuquerque depreciated to the extent of approximately one cent a pound."

It also found that the appellant, Sandoval, failed to deliver the sheep and lambs at the times and places agreed upon in said contracts, and rendered judgment for appellees for \$500, with interest at the rate of 6 per cent. per annum from October 8, 1910, until

paid, and the further sum of \$75 with 6 per cent. per annum from the 20th day of October, 1910. It also found that the appellant, Sandoval, did, upon the 16th day of November, tender the sheep and lambs of the kind and number described in the contracts, and which substantially complied with the requirements thereof, and that appellees refused to accept the same upon the ground that the time for the delivery thereof had expired. To the action of the court in holding that the defendant had been guilty of breach of contract, and therefore was liable in damages to the plaintiffs, and from the final judgment rendered in accordance with such decision, this appeal is prosecuted.

The order, entered June 2, 1911, striking out the third paragraph of appellees' reply, which paragraph of reply set up the fact that it was the appellant's duty to furnish the cars and load the lambs and sheep thereon, was made by the presiding judge of said court prior to statehood. Judge Reynolds, who tried the case, as appears from the finding, quoted *supra*, evidently took the view that under the terms of the contract it was the duty of appellant to furnish the cars and deliver the sheep and lambs loaded thereon. Appellant, in his brief, says:

"The controlling question in the case which the plaintiffs disputed at all times in the lower court is, Who was to furnish the cars under the terms of the contract?"

Appellees refuse to meet appellant upon this issue, and advance a theory, which they deduce from the evidence, in support of the judgment in their favor. Without discussing appellees' theory, we will proceed upon the assumption that appellant has correctly stated the issue, and pass to a consideration of the question upon which he relies for a reversal.

The general rule is that one who undertakes to accomplish a certain result implicitly agrees to supply all means necessary to such result. Here appellant agreed to deliver the lambs and ewes to appellees *f. o. b.* cars at Albuquerque. The term "*f. o. b.*" has a well-known and clearly understood meaning in the business world, signifying "free on board." *Bouvier's Law Dictionary*. Under this contract, then, appellant undertook and stipulated with appellees that he would deliver the stock to them, at his own expense, on board the cars at Albuquerque and within a stipulated time. When delivery was made, in accordance with the contract of sale, appellees were to make payment for the lambs and ewes.

Appellant admits that he could not deliver the lambs and ewes from his own flock, as was evidently contemplated by both parties, because such animals were infected with scabbies, and he was required to "dip" them by the government inspectors. He contends, however, that he did not breach his contract because appellees failed to have the railroad company set out cars to receive the designat-

ed number of lambs and ewes purchased, and to notify him thereof.

It is undeniably true that the early English cases held that, unless it was otherwise provided in a contract to ship f. o. b., the duty of specifying or furnishing the transportation facilities fell upon the buyer. *Armistage v. Insole*, 14 Q. B. 728; *Sutherland v. Allhusen*, 14 L. T. N. S. 666. Some of the American state courts have followed the same holding. *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836; *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32; *Kunkle v. Mitchell*, 56 Pa. 100; and the early Wisconsin case of *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938. In Illinois the question has been frequently discussed, but never definitely decided. In the case of *American Trust & Savings Bank v. Zeigler Coal Co.*, 165 Fed. 34, 91 C. C. A. 72, the Circuit Court of Appeals, Seventh Circuit, in discussing the Illinois cases, said:

"In Illinois, however—where these contracts were entered into and made performable—the Supreme Court has rejected both of the foregoing views of a general rule for ascertaining the obligation, under like contracts for delivery at a mine, and, resorting to evidence of subsequent conduct in performance, has uniformly 'adopted the construction placed upon the contract by the parties themselves' as the test, and so charged the seller with duty to furnish the cars in each instance. *Consolidated Coal Co. v. Jones & Adams Co.*, 232 Ill. 326, 83 N. E. 851, and prior cases reviewed."

In a more recent Illinois case (*Harman v. Washington Fuel Co.*, 228 Ill. 298, 81 N. E. 1017), the Supreme Court said:

"There has been a difference of opinion between different courts as to whether the duty devolves upon the seller or the purchaser to furnish cars where there is a contract for delivery f. o. b. cars and the contract is silent as to which one shall furnish the cars. Some courts have followed the rule, applicable in other cases, that where one makes an agreement to perform an act, whatever is necessary to the performance of the act is a part of his agreement, and it is implied that he will secure the means necessary to the accomplishment of the act. The natural meaning of the words 'free on board' is, that the goods are to be furnished by the seller on board free of all charges and expenses up to and including the loading, and the courts adopting the rule just stated hold that the seller must furnish the cars. Other courts, apparently following the rule established when goods were to be delivered free on board a ship, have held that the duty to furnish cars rests upon the purchaser. The term in question was frequently inserted in contracts for sale and delivery of goods free on board a vessel, and it was held that the seller was under no obligation to act until the purchaser should name the ship on which delivery was to be made, for the reason that, until the seller knew the ship, he could not put the goods on board. It was held that the seller was entitled to know on what ship and where he was required to deliver the goods, and that rule has been referred to, although it is manifestly wholly unsuited to shipments by rail under present conditions, at least unless the sale is made to a railroad company, or the means of transportation contemplated is under the control of the purchaser. The question, which is the correct construction of such a contract? has not been determined by this court, and is not now determined."

In the federal cases (*Chicago Lumber Co. v. Comstock*, 71 Fed. 477, 18 C. C. A. 207; *American Trust & Savings Bank v. Zeigler*, supra), the courts adopted, in this regard, the construction placed upon the contract by the parties, following the Illinois rule. These two cases originated in Illinois, and the federal courts applied the law as construed by the Supreme Court of that state.

In the case of *Evanston Elevator & Coal Co. v. Castner*, 183 Fed. 409, decided in the Circuit Court, Northern District of Illinois, Judge Kohlsaat followed the Pennsylvania rule, and held that under the contract for the delivery of coal f. o. b. cars at the mines, it was the duty of the buyer to furnish the cars.

In *Davis v. Alpha Portland Cement Co.*, 142 Fed. 74, 73 C. C. A. 388, and *Baltimore & L. Ry. Co. v. Steel Rail Supply Co.*, 123 Fed. 655, 59 C. C. A. 419, the same rule was announced, but these cases both arose in Pennsylvania, and naturally the federal courts followed the rule established by the Supreme Court of that state.

In *Graham v. United States*, 188 Fed. 651, 110 C. C. A. 465, Circuit Court of Appeals, Fourth Circuit, the text of 35 Cyc. 197, was approved, but a decision of this question was not necessarily involved in the case.

We have referred to all the American cases which have been called to our attention, holding that the duty of furnishing the cars or means of transportation rests upon the buyer, under a contract by the seller to deliver goods to the buyer f. o. b. cars. From the foregoing it will be seen that the Supreme Court of Pennsylvania is the only state court so holding, and that only two federal cases, one a decision by a district judge, uninfluenced by state decisions, so decide.

On the other hand, the following state courts have followed the rule, of general application, that where a person has agreed to perform an act, whatever is necessary to the performance of the act is a part of the agreement, and it is implied that he must furnish the means of accomplishing the act, and that therefore, when a vendor has contracted to sell goods f. o. b. cars, he must procure the cars: *Hurst v. Altamont Mfg. Co.*, 73 Kan. 422, 85 Pac. 551, 6 L. R. A. (N. S.) 928, 117 Am. St. Rep. 525, 9 Ann. Cas. 549; *Elliot v. Howison*, 146 Ala. 568, 40 South. 1018; *R. J. Menz Lumber Co. v. E. J. McNeely & Co.*, 58 Wash. 223, 103 Pac. 621, 23 L. R. A. (N. S.) 1007; *Vogt v. Schlenbeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 753, 106 Am. St. Rep. 989, 2 Ann. Cas. 814.

As the question has never been heretofore decided in this state, this court is unhampered by precedent, and is free to adopt the rule which appears to be best suited to present business conditions and the most consonant with reason. The early English cases, in establishing the rule contended for by appellant, necessarily were familiar with the

course of business and the manner and method of transporting goods. Such courts knew that most of the shipping was done by boats, which plied at irregular intervals between the different ports of England and foreign countries; that there were no established and unvarying freight rates, and that inland transportation was likewise almost exclusively a matter of private contract. The buyer, in cases where the goods were delivered to the carrier for transportation *f. o. b.* the point of origin, was required to pay the cost of cartage; hence he was vitally interested in selecting the carrier. No such reason can exist for adherence to this doctrine, under the present transportation methods in the United States. Here the freight charges are fixed and unvarying, without first obtaining the approval of the United States Interstate Commerce Commission in so far as interstate rates are concerned, and the State Corporation Commission in so far as intrastate rates are concerned. This consideration, which undoubtedly largely influenced the courts in the early cases, no longer is an element to be taken into consideration.

In view of the known methods of conducting business and the further fact that daily transactions take place between buyer and seller for the purchase and sale of goods to be shipped to the seller, where the purchase is made *f. o. b.* cars at the point of shipment, which may be many thousands of miles removed from the point of destination, it would be unreasonable to say that the seller can excuse his default in the shipment of the goods according to the terms of his contract because the buyer has failed to specify or furnish the means of transportation.

In the case of *Vogt v. Schlenbeck*, *supra*, the Supreme Court of Wisconsin said:

"The proposition seems contrary to universal understanding, which ought to be deemed a matter of judicial cognizance without the aid of evidence or adjudged cases. We apprehend that when one buys merchandise of another to be shipped to him by rail from a distant point, the delivery to be made to him *f. o. b.* cars at the point of starting, such other, as a matter of course, is expected to obtain from the railway company the necessary cars upon which to load the subject of the deal."

This we believe to be the more reasonable and rational rule; hence should be applied in this case, unless some peculiar reason exists by virtue of the contract which makes it non-applicable. The only one which might be suggested is that the contract fails to name the point of destination; hence appellant was unadvised as to the cars to select. Whether appellees ever advised appellant as to the proposed destination of the lambs and ewes does not appear from the findings by the court, or from the bill of exceptions, which, however, does not purport to contain a stenographic copy of the evidence adduced upon the trial. It is possibly true that it would be incumbent upon the buyer to indicate to the

seller, prior to his engaging the cars, the point of destination of the goods purchased, by reason of some rule or custom of the carrier, but as this point was not raised in the trial court by the pleadings, findings, or evidence, in so far as we are advised by the transcript of record, we will not consider it.

There is another point, not suggested by counsel, but equally fatal to appellant's recovery. Under the contract appellant had the option of delivering the lambs at any time between the 5th and 10th days of November, and the ewes any time between the 1st and 15th days of the same month. Until appellant notified appellees of the day on which he proposed to deliver, the latter could not possibly know when to have the cars ready for the reception of the stock, if we should assume that it was the duty of the buyer to furnish the cars. That such notice was given is not claimed by appellant.

[2] Where, under a contract, the vendor reserves unto himself the option of delivering the goods sold to the vendee on board a vessel or the cars of a railroad company, upon any one of 5 days, or any one of 15 days, assuming that it is the duty of the vendee to furnish the vessel or cars, the vendor is obligated to notify the vendee at what time he proposes to deliver the goods. *Brooklyn Oil Refinery v. Brown*, 38 How. Prac. (N. Y.) 444; *Ketcham v. Hiller*, 48 Barb. (N. Y.) 596; *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

On Motion to Dismiss Motion for Rehearing.

ROBERTS, C. J. On the 2d day of June, 1916, appellant, by his attorney, filed a motion for rehearing herein, in which he contends that the former opinion filed by the court is not in harmony with the correct interpretation of the authorities cited by the court in support thereof, and, further, that it was unfair to appellant for the appellate court to affirm the judgment of the lower court upon a theory which the ruling of the trial court precluded from consideration, and, in order to so decide, to assume that the appellees introduced evidence not contained in the record, which would have supported the opinion upon such theory, and, further, that the appellant not having delivered the lambs and ewes before the last day of the time within which he had the opportunity of so delivering was equivalent to notice to the appellees that he had elected to deliver on the last day.

[3] Appellees have moved to dismiss the motion for rehearing filed, on the ground that the original judgment against the appellant was fully discharged and paid by appellant before the filing of the motion for rehearing,

and that such payment was voluntary. The motion to dismiss is accompanied by a certificate of the clerk of the district court of Bernalillo county, showing full payment of the judgment, and it is further shown in the motion that appellees have executed to appellant a full release and discharge from such judgment.

Appellant contends that the motion for rehearing should not be dismissed because under the majority rule even a voluntary compliance with the judgment or decree of the court by payment or performance is no bar to an appeal or writ of error for its reversal, particularly where repayment or restitution may be enforced, or the effect of compliance may be otherwise undone, in case of reversal. In support of this contention he cites 3 C. J. p. 675; *Lott v. Davis*, 262 Ill. 148, 104 N. E. 199; *Dakota County v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981; *Erwin v. Lowry*, 7 How. 172, 12 L. Ed. 655; *O'Hara et al. v. McConnell*, 93 U. S. 150, 23 L. Ed. 840; *Patterson v. Keeney*, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232.

It must be conceded that the weight of authority is to the effect that a judgment debtor does not waive the right to appeal and to reverse the judgment for error by paying the amount thereof, either before or after taking his appeal, no matter whether the payment is made before or after execution has issued and been served upon him. This is so because the judgment creditor has the right and power to issue execution to enforce the judgment or decree, and the judgment debtor by paying and discharging the judgment presumably does not do so voluntarily, but is coerced into paying the same. That this is true is shown by an excerpt from 2 Freeman on Judgments, § 480a, quoted in appellant's brief, in which it is said:

"The better rule we think is, that though execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors nor depriving the payor of the right to appeal."

In each of the cases cited by appellant payment was made on the judgment, while the judgment debtor had the right to cause execution to be issued and enforce its collection. These cases are all distinguishable from the present case because here appellant, when he took his appeal, executed a supersedeas bond under the provisions of section 16, c. 77, Laws 1915, by which act on his part the efficacy of the judgment was suspended; hence appellees were powerless to cause execution to be issued on the judgment and enforce the collection of the amount called for thereby.

These facts are somewhat similar to those in the Colorado case of *Bull et al. v. Doss Bros. Electric Construction Co.*, 51 Colo. 459, 119 Pac. 156. There the defendant in error recovered judgment against the plaintiffs in error, and, in order to make the same a lien upon the real property of the judgment

debtors, caused a transcript of the docket entry of such judgment to be filed with the recorder of the city and county of Denver, as provided by the Colorado statute. Thereafter the judgment debtors, plaintiff in error, took the cause to the Supreme Court for review, applied for and secured a supersedeas, staying the execution of the judgment. Thereafter, and prior to a decision of the case in the Supreme Court, plaintiffs in error paid the judgment, and had the same satisfied of record. The court held that such payment was voluntary, and that the writ must be dismissed.

One of the early leading cases on the effect of the payment of the judgment before execution issued upon the right of appeal is that of *Richeson v. Ryan*, 14 Ill. 74, 56 Am. Dec. 493. There Ryan recovered a judgment against Richeson. The latter paid the judgment before execution issued, and then sued out a writ of error to reverse it. The court states the question, "Did the payment operate as a release of errors," and then proceeds:

"If the judgment had been collected by execution, there would not be a doubt of the right of Richeson to prosecute the writ of error. A payment made under such circumstances would be compulsory, and would not preclude him from afterwards reversing the judgment, if erroneous, and then maintaining an action to recover back the amount paid. The payment in question must equally be considered as made under legal compulsion."

The court held that by so paying he did not waive his right to appeal or prosecute error. We believe, from an examination of the authorities, that the correct determination of the question depends upon whether the payment of the judgment is under legal compulsion; that is, assuming that payment is made prior to the issuance of execution, that such payment is regarded as having been compulsory by reason of the right existing in the judgment creditor to have issued execution and to have enforced payment at the time payment is made. It is well settled that:

"If a person voluntarily acquiesces in, or recognizes the validity of, a judgment, order, or decree, or otherwise takes a position which is inconsistent with the right to appeal therefrom, he thereby impliedly waives his right to have such judgment, order, or decree reviewed by an appellate court." 3 C. J. p. 665, § 636.

The reason for the majority rule which recognizes the right of appeal, even though the judgment be paid without execution, is that, the judgment debtor having the power to coerce payment, the payment by the judgment creditor without execution is not a voluntary acquiescence in, or recognition of, the judgment.

Here the appellees were powerless to issue execution, or in any other manner to compel payment of the judgment, notwithstanding which the appellant voluntarily paid the full amount of the judgment. Under these circumstances we believe that the payment amounted to a voluntarily acquies-

cence in and recognition of the validity of the judgment which precludes him from seeking further relief therefrom in this court; hence we must hold that, where a party appeals from a judgment adverse to him in the district court and executes a supersedeas bond which stayed and suspended all proceedings under such judgment, and preserved the status quo pending the determination of the appeal and prior to a final determination of the appeal, such party voluntarily pays and satisfies such judgment; such payment amounts to a voluntary acquiescence in and recognition of the validity of such judgment, and estops appellant from further prosecuting his appeal. Hence the motion for rehearing must be dismissed; and it is so ordered.

HANNA and PARKER, JJ., concur.

In re LEWIS' ESTATE. (No. 2191.)

(Supreme Court of Nevada. Sept. 8, 1916.)

1. WILLS \S 775—DEATH OF DEVISEE—RIGHTS OF HEIRS—STATUTES—"DEVISEE"—"DEVISE"—"LEGATEE"—"LEGACY."

Under Rev. Laws, \S 6219, continued practically in the form in which it was enacted in 1862, providing that when any estate shall be devised to any relative of the testator and the devisee shall die before the testator, leaving lineal descendants, they shall take such estate as the devisee would have taken had he survived the testator, and in view of the specific use of the terms, "devisees," "legacies," etc., in section 6205, and the specific and correct use of the words "devisee" and "devisor" in section 6220, and in the absence of an interchangeable or indiscriminate use of such terms in the statute, the words "devisee" and "devise" are not to be given the scope of "legatee" and "legacy," and do not comprehend the disposition of personal property; so that, where a will gave and bequeathed the residue of all property of testatrix to a relative and her daughter and the devisee predeceased the testatrix, the daughter was entitled to all the residue of the realty, and to one half the residue of the personal property, but as to the other half of the residue of the personal property, the testatrix died intestate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 1997-2000; Dec. Dig. \S 775.

For other definitions, see Words and Phrases, First and Second Series, Devise; Devisee; Legacy; Legatee.]

2. STATUTES \S 212—CONSTRUCTION—COMMON-LAW SENSE OF WORDS.

Where a statute uses a word which is well known and has a definite sense at common law, without specific definition, it will be presumed to be used in its common-law sense, unless it clearly appears that it was not so intended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 289; Dec. Dig. \S 212.]

3. WILLS \S 457 — CONSTRUCTION — "BEQUEATH" DISTINGUISHED FROM "DEVISE."

The word "bequeath" is generally used to express a gift of personalty made in a last will, and the word "devise" is a term generally used to express a gift of realty made by will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 975; Dec. Dig. \S 457.

For other definitions, see Words and Phrases, First and Second Series, Bequeath.]

4. STATUTES \S 192—CONSTRUCTION—TECHNICAL WORDS.

Technical words and phrases having peculiar and appropriate meaning in law are to be understood according to their technical import; but to such rule there is an exception where words are used to express convertible terms in a statute, and where a court, seeking to carry out the legislative will, applies to the terms the meaning that will give the most unrestricted scope to the enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 270; Dec. Dig. \S 192.]

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

In the matter of the estate of Jennie Lewis, deceased. Objections were filed to the amended petition for distribution, and from a final decree of distribution Delle B. Boyd, administratrix with the will annexed, appeals. Decree affirmed.

On the 24th day of June, 1914, Jennie Lewis, a widow, died, leaving an estate consisting of both real and personal property within the county of Washoe, state of Nevada. As to the disposition of this estate, she left a last will and testament, which last-named instrument was duly admitted to probate in the district court. The testatrix left no surviving husband, nor child, nor child or children of any deceased child; and, as appears from the record, her sole and only heirs at law were a sister, Elizabeth Johnston, a brother, Charles Johnston, and a nephew, Robert Johnston, the son and only heir of Robert Johnston, deceased brother of testatrix. The will of the deceased set forth several gifts, devises, and bequests to individuals, friends and relatives; and section 17 of the instrument is as follows:

"All the rest and residue of my property, of every kind and character, wheresoever situated, which I may own or possess at the time of my death, I give and bequeath to Mrs. Hattie Cunningham and her daughter, Hattie, residing at 2220 Webster avenue, in the city of Mattoon, in the state of Illinois."

All matters and things essential to the due carrying out of the administration having been accomplished, the administratrix with the will annexed filed her petition for the distribution of the said estate, and on the 28th day of May, 1915, filed an amended petition for distribution. In the said amended petition for distribution, it was alleged:

"That by the terms of said will Mrs. Hattie Cunningham is named as a residuary devisee and legatee, and, as this administratrix is informed and believes and alleges the fact to be, that the real name of the said devisee and legatee is Harriet B. Cunningham, and that she died prior to the death of the testatrix, Mrs. Jennie Lewis. That by the terms of said will, one of the residuary devisees and legatees named and designated therein as Hattie, the daughter of said Mrs. Hattie Cunningham, is, as this administratrix is informed and believes and alleges the fact to be, Mrs. Harriet E. Bailey, residing at No. 6845 Euclid avenue, in the city of Chicago, state of Illinois; that she was sometimes called and known as Hattie Cunningham, and that she was known to the decedent by the name of Hattie, and that she is the only child and sole heir

of said Harriet B. Cunningham, designated in said will as Hattie Cunningham. That this administratrix is informed and believes and alleges the fact to be that the said Mrs. Harriet E. Bailey is a second cousin of the said deceased, Jennie Lewis. That the next of kin of said Jennie Lewis, whom your petitioner is advised and believes and therefore alleges to be the heirs at law of said testatrix, are Eliza Johnston, a sister, residing at Sullivan, Moultrie county, state of Illinois; Charles Johnston, a brother, residing at Reno, Nev.; and Robert Johnston, whose residence is unknown, a son and only heir of Robert Johnston, a deceased brother of said Jennie Lewis, deceased."

Pursuant to the prayer of the petitioner for distribution, the court found and decreed:

"That the said Harriet E. Bailey is entitled to have distributed to her, as a residuary devisee and as sole heir to the estate of Harriet B. Cunningham, all of the residue of the real estate belonging to the estate of said Jennie Lewis, deceased. That she is entitled to have distributed to her one-half of the residue of the personal property belonging to said estate of Jennie Lewis, deceased. That by reason of the death of said Harriet B. Cunningham prior to the death of said Jennie Lewis, deceased, all the right, title, and interest bequeathed to her by said will as a residuary legatee of the estate of Jennie Lewis, deceased, lapsed, and the said Jennie Lewis, as to one-half of the residue of the personal property of her estate, died intestate."

Written objection having been filed to the amended petition for final distribution prior to the rendition of the decree, she appeals from said decree of distribution to this court.

Hoyt, Gibbons & French, of Reno, for appellant. James T. Boyd, of Reno, for Lewis heirs. John S. Orr, of Reno, for Delle B. Boyd.

MCCARRAN, J. (after stating the facts as above). [1] It may, we think, be properly stated that but one question is presented in this appeal, and that a question of construction and application of a statutory provision.

The law of this state concerning wills was enacted by the Legislature of 1862, and, with but one slight exception, has remained since unamended, and is handed down to us in our Revised Laws practically in its original form and verbiage. Our law in this respect is found from section 6202 to section 6222, Revised Laws 1912, inclusive. It is with section 18 of the act (section 6219, Revised Laws) that we have to deal in the matter at bar:

"When any estate shall be devised to any child or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done if he would have survived the testator."

Under the provisions of this statute, we are asked the question: Did Harriet B. Cunningham, or Harriet E. Bailey as she is now known, as the daughter of Hattie Cunningham, deceased, a beneficiary under the will of Jennie Lewis, take that part of the residue of the estate of Jennie Lewis consisting of personal property which would have passed

to her mother had the latter survived the testatrix?

Appellant here, while admitting that the word "devise," or "devised," as used in the statute at common law and in ordinary acceptance, applies to real property, yet contends that what they term a "more modern meaning" should be applied, so that the term should also comprehend the disposition of personal property. In other words, appellant takes the position that the words "devised" and "devisee" should be given such a scope of meaning as to include that comprehended by the words "legacy" and "legatee." In furtherance of the contention they refer us to a line of decisions where courts have announced that view.

In the case of Rountree, Administratrix, v. Pursell et al., 11 Ind. App. 522, 39 N. E. 747, it was held that the word "devise" usually relates to real estate acquired through a will; that it is a gift by will of real estate, and cannot be applied with legal precision to personal property. A bequest, on the other hand, is a gift by will of personal property; but, says the court:

"In order to favor the manifest intent of the testator, * * * the courts often construe the word 'bequest' to mean 'devise,' and 'devise' to mean 'bequest.'"

The reasoning there followed by the court might have proper application where, as in the state of Indiana, the Legislature had used the terms "devise" and "bequeath" or "bequest" and "devise" more or less indiscriminately or interchangeably, at least to such an extent that the court was justified in saying that:

"Whilst some confusion exists in the terms used, we think it clear that the enactment governs the descent of real estate as well as the distribution of personalty. This much is clear: That when personal property has reached that point when the law undertakes to divide it among the persons entitled to it, it shall be divided in the same manner and into the same parts, and to the same persons that real estate is divided when it descends. We have no other statute in this state regulating the distribution of the surplus of the estate of an intestate. And we have no other enactment regulating the descent of the real estate of an intestate. Descent and distribution are combined in the same act."

In the case of Logan v. Logan, 11 Colo. 44, 17 Pac. 99, the Supreme Court of Colorado had under consideration the question here presented, and there held that "legacies and bequests" as used in the statute embraced "devises." It will be noted, however, that the court in arriving at this conclusion did so by reason of the acts of the Legislature of the state of Colorado and an indiscriminate use of the terms by that body. The court said:

"Our Legislature has not always used these words in their strict legal sense, which fact of itself would authorize us to inquire in what sense they were employed in the present instance. Section 3481, Gen. St., empowers testators to devise all their estate in 'lands, tenements, hereditaments, annuities, or rents, charged upon or issuing out of them, or goods and chattels and

personal estate of every description whatsoever, by will or testament."

The court concludes its reasoning in the following:

"No violence is done by giving the words referred to the enlarged application which the authorities above referred to hold to be admissible, and which the framers of these statutes have themselves applied."

What was the intention of our Legislature when it used the words "devised" and "devisee" in section 6219?

It will be noted that in section 4 of the act (section 6205, Revised Laws 1912) the terms "devises," "legacies," and "gifts" are specifically made use of. In section 19 of the act (section 6220, Revised Laws 1912) we find the Legislature making specific and correct use of the words "devisee" and "devisor." Nowhere in the act do we find an interchangeable or indiscriminate use of the terms here referred to, but in each instance the terms appear to be correctly used, and used in the same sense as was customary at common law.

[2] Where a statute uses a word without specific definition which is well known and had a definite sense at common law, it will be presumed to be used in its common-law sense, and will be so construed unless it clearly appears that it was not so intended. 2 Lewis' Sutherland Stat. Const., 757 (2 Ed.).

[3] It will not be gainsaid, we apprehend, that the word "bequeath" is one generally used to express a gift of personalty made in a last will or testament. The word "devise" is a term generally used to express a gift of realty made by last will or testament. That these terms have been by the courts construed in some instances to have interchangeable significance takes sanction rather from the use made of the terms by the legislative bodies of the respective states where such construction has been applied. In re Campbell's Estate, 27 Utah, 361, 75 Pac. 851; Evans v. Price, 118 Ill. 593, 8 N. E. 854.

[4] It is, we think, a general principle that technical words and phrases having peculiar and appropriate meaning in law shall be understood according to their technical import. This rule, however, has its exception where words are used to express convertible terms in a statute, and where a court, seeking to carry out the will of the legislative body, applies to the terms the meaning that will give the most unrestricted scope to the enactment.

In the case of *Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283, the Supreme Court of Missouri, having under consideration the force and effect of a statute wherein it was provided that, on filing of petition for sale of real estate of a decedent, notice be published, provided, that where the heirs or "devisees" are residents of the county, notice shall be served on each, held, that the word "devisees" does not include legatees.

The statute of the state of California, as enacted in 1872 and for many years prevail-

ing in that state, was quite analogous to our statute here under consideration. Section 1310, Civil Code of California 1903.

In the matter of the Estate of Ross, 140 Cal. 288, 73 Pac. 978, the Supreme Court of that state held that the statute did not apply to legacies, but simply to devisees. There the court took occasion to remark:

"In the whole chapter on Wills (Civ. Code, §§ 1270-1377) the Legislature has, with extreme care and technical accuracy, used the terms 'devise' and 'legacy' in their well-recognized common-law sense and distinction; the one as a testamentary disposition of land, the other a like disposition of personalty."

The court referred to the intendment of the Legislature as made manifest by the several sections of the act wherein the terms "devise" and "devisee" and "legacy" and "legatee" were used "with legal exactness," and hence with the intention to employ them precisely as defined at common law. In that case, the court applied the rule which we think applicable to the matter at bar:

"Where clear, direct, and explicit terms are used by the Legislature, which have had a definite meaning since the beginning of common-law terminology, there can be no room for discussion as to their meaning. Time has marked them too distinctly not to be clearly recognized and understood."

The court in that case commented on the fact that the Legislature should have limited the application of section 1310 to devisees alone, and refers to the fact that the act concerning wills as passed by the first session of the Legislature of the state of California in 1850 set forth this section the same as it stood in the Code in 1903.

It may not be out of place to remark here parenthetically that, inasmuch as many of the members of our Territorial Legislature of 1862 were former residents of the state of California, and as much of the statute law found to have been enacted by that session had its prototype in the state of California, it is not unreasonable to suppose that this section was taken, in substance, at least, from the statute of that state.

The decision of the Supreme Court of California in the Matter of the Estate of Ross was followed by a specific enactment of the Legislature of the state of California, wherein the statute passed upon in that case was amended in 1905, and section 1310 of the Civil Code of California now reads:

"When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator."

In the Matter of the Estate of Claus Spreckels (Coffey's Prob. Dec. vol. 5, p. 348), Judge Coffey, referring to the original as well as to the amended statute of the state of California, commenting on the decision of the Supreme Court of California in the Ross Case, *supra*, emphasized the assertion that

the statute of California as it stood at the time of the decision in the Ross Case admitted of no other construction, inasmuch as the use of the terms "devise" and "devisee," "legacy" and "legatee," all through the chapter on Wills with legal exactness exhibited the intention of the Legislature to employ them precisely as defined at common law, and hence the word "devise" as used in the former statute of California in the chapter pertaining to wills applied only in its common-law acceptance, and hence affected realty rather than personality.

We are asked to give to the word "devise" a more modern significance, in order that it may apply interchangeably with the word "bequeath." Indeed, if we had the power of legislation, we might so declare, but such function is not ours. While we may be at a loss to know why the act of the Legislature was so worded, we cannot change the words or alter the policy. It has stood all of these years unamended, and we are bound to construe the term in accordance with the intentment of that branch of the government as best we may ascertain that which was the intentment.

The authorities found on the subject are quite well divided; the one line, holding strictly to a common-law interpretation of the terms here involved, the other, giving the terms interchangeable significance, base their reasoning upon the intention of the Legislature as expressed in the several legislative enactments.

As was indicated in the Ross Case by the Supreme Court of California, so here we may say, if our Legislature by the language used in the act pertaining to wills had used the terms "devise" and "bequeath" indiscriminately or with interchangeable meaning, we would be inclined to follow that line of decisions which holds that the term "devise" may comprehend a conveyance by will of personality as well as realty. But the Legislative intentment is our lodestar in applying and construing statutory enactments, and we find nothing in this statute that would cause us to believe that the Legislature used the term in other than its common-law significance.

The decree of the lower court must be affirmed.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

HENINGER v. OREGON SHORT LINE R. CO. (No. 2850.)

(Supreme Court of Utah. Aug. 25, 1916.)

JUSTICES OF THE PEACE ~~§~~174(18)—PLEADING—JURISDICTIONAL FACTS—SUFFICIENCY.

Comp. Laws 1907, § 3683, provides that actions in justice's courts must be tried in the precinct wherein the injury was done or defendant resides. Section 3685 provides that the com-

plaint must be written and verified, but that other pleadings may be oral, and must show the jurisdiction. Section 3685x makes every judgment on complaint containing no allegation of jurisdictional fact void. Held that, conceding, without deciding, that section 3685x must be strictly construed, a complaint before a justice of the peace in M. precinct alleging killing of cows one mile north of M. station grounds at a crossing known as M. Lane, sufficiently alleges the injury to be within M. precinct to permit amendment on appeal to the district court by insertion of words "within M. precinct," and the judgment was not void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 683, 684; Dec. Dig. ~~§~~174(18).]

Action by H. C. Heninger against the Oregon Short Line Railroad Company. Certiorari to review and annul proceedings in the district court, resulting in judgment for plaintiff. Writ quashed, and judgment affirmed.

George H. Smith and A. B. Robertson, both of Salt Lake City, for petitioner. George Q. Rich, of Logan, for respondent.

LOOFBOUROW, District Judge. The defendant in the court below filed in this court its petition for a writ of certiorari to have reviewed and annulled the proceedings in the above-entitled case had in the district court of the First judicial district in and for Cache county. The writ issued on September 17, 1915, and in compliance therewith a transcript of the record and proceedings in the case was duly certified to this court.

The material facts to be considered here are as follows: The plaintiff commenced an action against the defendant in the justice's court of Millville precinct, Cache county, Utah, to recover damages for the negligent killing of two cows owned by the plaintiff. He alleged that one of the defendant's passenger trains while operating along and over its line of railroad committed the injury to the cows on the 15th day of August, 1914, at the hour of 10 o'clock a. m. Summons issued and was served upon the defendant's agent. The defendant appeared in the action and answered, denying the allegations of negligence contained in the complaint; and as special defense thereto admitted the killing of the cows and alleged contributory negligence on the part of the owner. No demurrer to the complaint was interposed. Upon the issues thus joined a trial was had that resulted in a judgment for the plaintiff and against the defendant. At this trial each party was represented by an attorney who took part in the proceedings. Following the rendition of the judgment the defendant took the steps necessary to perfect an appeal to the district court. In that court the case was docketed and set for trial, and at the time fixed for trial the defendant made the following motion:

"Now comes the defendant herein, by its attorneys, appearing specially for the purpose of this motion, and for no other purpose, and shows

the court that the complaint of the plaintiff does not contain an allegation of any jurisdictional fact as required by section 3688, c. 73, Comp. Laws Utah 1907, and that the judgment heretofore entered herein, in the justice of the peace court, on said complaint, is absolutely void by virtue of the provisions of section 3685x, c. 75, Comp. Laws Utah 1907. Therefore defendant moves the court for an order declaring said judgment void.

"George H. Smith,
"John V. Lyle,
"Baldwin Robertson,
"Attorneys for Defendant."

The complaint at that time contained the following and no other allegation of the place where it was claimed the injury to the cows was committed, to wit:

"(3) That on said 15th day of August, 1914, at the hour of about 10 o'clock a. m. on said day, at a point on the defendant's line of railroad about one mile north from the Millville station grounds of defendant, and at a public crossing where defendant's said railroad track passes over a public highway running east and west and known as 'Mauchley's Lane,' the defendant, while engaged in operating its passenger train southward from Logan City to and beyond said Millville station, so negligently ran and operated its train, * * *" etc.

The motion to declare the judgment of the lower court void was resisted by plaintiff, who asked leave to amend the complaint by interlining the words "within Millville precinct, in Cache county, Utah," after the words "Mauchley's Lane" in the part of the complaint above quoted. The district court thereupon denied the defendant's motion to declare the judgment void, and permitted the plaintiff to amend the complaint as above indicated, to all of which the defendant excepted. After this the case proceeded to trial de novo, with the result that a verdict was rendered for the plaintiff upon which judgment was duly entered. At this stage of the proceedings the defendant came into this court and procured a writ of certiorari.

The statutes of the state of Utah (Comp. Laws 1907) contain the following provisions:

"Sec. 3668. Actions in justices' courts must be commenced, and, subject to the right to change the place of trial as in this chapter provided, must be tried: * * * 3. In cases of injury to the person or property,—in the precinct or city where the injury was committed or where the defendant resides."

"Sec. 3685. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

"Pleadings, except the complaint, may be oral or in writing. If in writing, must be filed with the justice; and, if oral, an entry of the substance must be made in the docket.

"The complaint must be in writing, and must be verified, and must fully allege and set forth at least one of the grounds mentioned in Sec. 3668, showing that the action is commenced in the city or precinct as required by said section."

"Sec. 3685x. Every judgment made or given on a complaint * * * that contains no allegation * * * of the jurisdictional fact required by this section * * * shall be void; and shall be so declared, on review, at the instance of the party aggrieved, either on appeal or by means of a writ of * * * certiorari. * * *"

The first question presented is whether the complaint upon which judgment was ren-

dered in the justice's court contains an allegation, or, rather, whether it "contains no allegation," of the jurisdictional fact, to wit, that the injury was committed within Millville precinct; and, if this question should be determined in the negative, that is, that the complaint contains no allegation of such jurisdictional fact, as required by the above sections of our statutes, then what effect should be given section 3685x in this case?

At the outset it is well to observe that defendant does not claim that the justice of the peace of Millville precinct did not in fact have jurisdiction of the subject-matter of this action, nor that the defendant was in any way misled by the allegations on that subject in the complaint, nor by any omission of allegation. In fact, from reading the defendant's answer it may well be inferred that the defendant intended the fact of the killing of the cows described in the complaint, by defendant's passenger train, within Millville precinct should be admitted; for the answer contains the following paragraph:

"The defendant admits that on or about the 15th day of August, 1914, at or about the hour of 10 o'clock a. m., a collision occurred between one of its passenger trains and two cows on the public crossing known as Mauchley's Lane, and that said cows were killed as a result of this collision."

And further in its separate defense to the cause of action set up in the complaint the defendant—

"alleges that the killing of the animals at the time and place in question was caused, and the cause thereof directly contributed to, by the negligent, careless, and heedless act of the person in charge of them at the time and place in question, said person being an agent of the owner for the purpose of driving said animals over said highway at the point in question," etc.

The defendant contends for a strict and literal construction of section 3685x, and that, if the complaint contains no formal allegation of the jurisdictional fact in the language of section 3668, then the whole proceeding is without jurisdiction and void, and upon motion for the first time made in the district court, that court must enter its order declaring the judgment of the justice of the peace void and dismiss the action.

Assuming, for the purposes of this case, though not holding, that section 3685x is subject to the construction thus contended for, let us examine the complaint with a view of determining whether or not it contains no allegation that the injury alleged was committed in Millville precinct. It will be observed that the complaint has fixed with more particularity than is usual the precise place where the injury is claimed to have been committed. It says, in substance, that:

"The injury occurred at a point on defendant's line of railroad one mile north of Millville station grounds of the defendant and at a public crossing where defendant's track passes over a public highway running east and west and known as Mauchley's Lane, and by a passenger train operated southward from Logan City to and beyond Millville station."

What the complaint fails to say is that the point so described is within Millville precinct. Does the complaint "contain no allegation" or does it contain an allegation that is imperfect and informal? Following the most approved course, the ultimate fact, that is, that the injury complained of was committed in Millville precinct, should be plainly alleged; but, while that is not done, yet facts from which that ultimate fact may reasonably be inferred are alleged, and, we think, constitute a substantial compliance with the statute where the pleading itself is not attacked directly by special demurrer. The allegation is not in the form ordinarily used, and that should have been used, but, though incomplete and imperfect it is sufficient to admit proof of the material ultimate fact. The place where the plaintiff claims the injury was committed is not left at large. The subject is not avoided. The place is fixed very particularly, so that there can be no doubt about it; and the defendant is informed just where the plaintiff's evidence will locate the act—the delict—upon which the plaintiff will rely for a recovery. Certainly there is here something to amend. It cannot be said that this complaint "contains no allegation" of one of the grounds mentioned in section 3668. The district court was therefore justified in permitting the plaintiff to amend his complaint and in overruling the motion to declare the judgment of the justice of the peace void.

The conclusion we have reached in this case is well supported by the reasoning and decision in the case of *State ex rel. Burt v. District Court*, 39 Utah, 1, 114 Pac. 143. In view of the conclusions reached as to the allegations of the complaint and the power of the district court to permit an amendment thereto, it is unnecessary to discuss other questions raised relative to section 3685x.

The writ of certiorari heretofore issued by this court is quashed, and the ruling and judgment of the district court affirmed; the petitioner to pay the costs.

STRAUP, C. J., and FRICK, J., concur.

MOORE v. SHERMAN et al. (No. 3675.)
(Supreme Court of Montana. July 17, 1916.)

1. DESCENT AND DISTRIBUTION § 8 — WATER RIGHTS—"PROPERTY."

The right acquired by the appropriation of a certain number of miner's inches for the irrigation of a desert claim was "property," and passed at appropriator's death to his successor.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 33-39; Dec. Dig. § 8.]

For other definitions, see Words and Phrases, First and Second Series, Property.]

2. ABANDONMENT § 2 — NATURE AND ELEMENTS—IN GENERAL.

An "abandonment" is the relinquishment of a right, the giving up of something to which the

owner is entitled, and must be made by the owner without being pressed by any duty, necessity, or utility to himself, but simply because he no longer desires to possess it; the giving up of a thing absolutely without reference to any particular person or purpose.

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. §§ 2-6; Dec. Dig. § 2.]

For other definitions, see Words and Phrases, First and Second Series, Abandonment.]

3. WATERS AND WATER COURSES § 32 — ABANDONMENT—INTENT—NONUSER.

Abandonment is a matter of intention; and, where there was no conscious intent to abandon either an irrigation ditch or a water right, there could be no abandonment. The nonuser of the water for a period longer than the statute of limitations, while evidence if it stood alone of an intention to abandon, would not constitute abandonment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22; Dec. Dig. § 32.]

4. WATERS AND WATER COURSES § 32 — WATER RIGHTS—EQUITABLE ESTOPPEL.

One entitled to certain water rights might be estopped by conduct from saying that she did not intend to abandon the right, or that she had a present claim to such right, which estoppel might arise from action or nonaction, from silence or speech.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22; Dec. Dig. § 32.]

5. ESTOPPEL § 58 — EQUITABLE ESTOPPEL — PREJUDICE.

To constitute an estoppel to deny an abandonment of water rights or to assert a present claim thereto there must be some representation made or some position assumed upon which another, having the right to rely, did rely in good faith to his prejudice.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. § 58.]

6. ESTOPPEL § 58 — EQUITABLE ESTOPPEL — SILENCE—INTENT.

Mere silence cannot work an estoppel, but, to be effective for such purpose, the person to be estopped must have had the intent to mislead, or a willingness that another might be deceived, and such other must have been misled by the silence.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 126, 127; Dec. Dig. § 53.]

7. WATERS AND WATER COURSES § 32 — ABANDONMENT OF RIGHTS—ESTOPPEL.

To create an obligation upon the part of a defendant to speak or assert a claim, it was incumbent to show that defendant knew of another's contemplated or actual expenditure of time and money in making an appropriation of water rights, relying for any benefit on the assumption that the defendant's rights had been abandoned, or would not be asserted to his prejudice.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22; Dec. Dig. § 32.]

8. WATERS AND WATER COURSES § 20 — WATER RIGHTS—SUBSEQUENT APPROPRIATION—ADVERSE CLAIM.

A subsequent appropriation of water is no notice of an adverse claim.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 13; Dec. Dig. § 20.]

Appeal from District Court, Meagher County; John A. Matthews, Judge.

Suit by Perry J. Moore against Roy O.

Sherman and Annie Helen Pump. From a decree denying a particular right to defendant Pump, and from an order denying a new trial, she appeals. Modified and affirmed.

Walsh, Nolan & Scallon, of Helena, for appellant. H. O. Smith and Park Smith, both of Helena, for respondent.

HOLLOWAY, J. This suit was instituted by Perry J. Moore to have determined the relative rights of several claimants to the use of the waters of the East fork of Little Elk creek, in Meagher county. Defendant Helen Pump was denied any right by virtue of a certain appropriation made by her predecessor in 1892, and it is from the decree in so far as it denies this right, and from an order refusing a new trial, that these appeals are prosecuted.

The trial court found that in 1892, F. Miller made an appropriation of 50 miner's inches for the irrigation of a desert claim then owned by him; that he used the water upon the land continuously until his death in 1903; that his widow, executrix of his last will, did not thereafter exercise such right at all; that in 1911 defendant Pump succeeded to the land and its appurtenances, and that she did not use the water nor assert any claim to the right up to the time she appeared in this action; that the ditch constructed in 1892 was suffered to become out of repair and to become overgrown and filled until it was practically indistinguishable upon the ground, was incapable of carrying water, and gave no notice of its existence. Finding No. 15 is as follows:

"That the said defendant Helen Pump did not show, or attempt to show, either by herself or her predecessors in interest, any use of the waters of Little Elk creek through said 1892 ditch, or the exercise of act of dominion or ownership over the said ditch or water right by said Roy O. Sherman, but it does appear that neither the said Mrs. Miller, while managing said F. Miller estate, nor the said defendant Helen Pump, as successor in interest of said estate, had any conscious intent to abandon said ditch and water right, but, on the contrary, if they had any conscious thought on the subject, in their own minds did not intend to abandon the same, although said intention was not communicated, in any manner, to the public, and the said Mrs. F. Miller explained her failure to use the said water or ditch as being due to the amount of work involved in the management of said Miller estate property."

In what is denominated "conclusion of law E," the court declared that:

By failing "to so use any of said waters or to do any work upon said ditch and water right, and permitting, without objection or actual notice, third parties to initiate rights and place lands under cultivation and to cultivate the same for years, under the assumption that no such right existed and that the said right of 1888 was the only right claimed by said defendant as appurtenant to her lands acquired from said F. Miller, and by a course of conduct, which would, in the absence of her statement to the contrary, show a clear intent and purpose to abandon said right and ditch, if any she had, the said defendant is declared to have failed to es-

tablish any right in and to the waters of said Little Elk creek by reason of said ditch constructed in the year 1892, and to have forfeited any right which may have existed at the time of the death of said F. Miller, and to be estopped from asserting any such right as against the answering defendant Roy O. Sherman."

This conclusion presents the court's explanation of the decree, in so far as it denied to this appellant any right based upon the Miller appropriation of 1892.

[1] The right acquired by Miller by virtue of his appropriation in 1892 was property. *Smith v. Denniff*, 24 Mont. 20, 60 Pac. 898, 81 Am. St. Rep. 408. It continued to be property to the time of his death, and passed to his successor. The use of the term "forfeiture" in connection with the loss of this property right was doubtless a mere lapsus linguae. The right might be lost altogether by abandonment. It might be lost to another by adverse user, or the owner of the property might become estopped to assert his ownership as against another, but "forfeiture," in the connection employed, is a misnomer. There is not any claim of adverse user—no finding upon it and no adjudication. The judgment must be sustained, if at all, upon a theory of abandonment or estoppel.

[2, 3] 1. *Abandonment*. In *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054, this court quoted with approval the following:

"An abandonment is 'the relinquishment of a right, the giving up of some thing to which we are entitled.' *Bouvier's Law Dictionary*. 'Abandonment must be made by the owner, without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing; and, further, it must be made without any desire that any other person shall acquire the same; for, if it were made for a consideration, it would be a sale or barter, and, if without consideration, but with an intention that some other person should become the possessor, it would be a gift' (*Bouvier's Law Dictionary*);" and said, "Abandonment is a matter of intention."

In *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059, we said:

"Abandonment is the giving up of a thing absolutely without reference to any particular person or purpose." 1 Cyc. 4. Neither party could abandon to the other, either with or without a consideration, for that would amount to a sale or gift. Abandonment is a matter of intention."

The court found that neither Mrs. Pump nor her predecessor, Mrs. Miller, intended to abandon the 1892 right, but, on the contrary, so far as they had any conscious intent, it was not to abandon either the ditch or water right. In the absence of any intention to abandon, there could not have been an abandonment. There was nonuser for 10 years, but nonuser does not constitute abandonment. If any principle of the law of water rights can be settled, this one is. In *Smith v. Hope Min. Co.*, 18 Mont. 432, 45 Pac. 632, the court said:

"The nonuser of water for so long a period, and especially a period longer than the statute

of limitations, is certainly very potent evidence, if it stood alone, of an intention to abandon. Abandonment is a question of intention."

In *Featherman v. Hennessey*, 42 Mont. 535, 113 Pac. 751, the court said:

"Mere lapse of time during which there is non-user is not sufficient. The circumstances must be such as to justify an inference of intention to abandon; in other words, to leave the property to be taken by any other person who chooses to do so."

There was not any abandonment of the 1892 right, and the decree cannot be justified upon that theory.

[4-6] *Estoppel*. There is not any plea of estoppel, but the pleadings were treated as amended to conform to the proof, and we are therefore to search the testimony for the facts which estop this appellant, if any such are disclosed by the record. Either Mrs. Pump or her predecessor, Mrs. Miller, by her conduct might be estopped to say that she did not intend to abandon the 1892 right, or that she has a present claim to that right, and the estoppel might result from action or nonaction, from silence or speech.

"Where A. has, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induced B. to believe certain facts to exist, and B. has rightfully acted on this belief, so that he will be prejudiced if A. is permitted to deny the existence of such facts, A. is conclusively estopped to interpose a denial thereof." The very essence of this doctrine is that the party relying upon the estoppel was misled to his prejudice by reason of the silence of the other party, when in equity and good conscience he ought to have spoken, or by reason of the affirmative acts or conduct of such other party." *Kennedy v. Grand Fraternity*, 36 Mont. 325, 92 Pac. 971, 25 L. R. A. (N. S.) 78.

Defendant Sherman is the only one who is benefited by the decree in its present form; the only one to be injured by a recognition of the 1892 Miller right, and the only one contesting appellant's claim to that right; so that, if appellant is estopped to claim the right, or if she or her predecessor is estopped to say she did not intend to abandon it, the elements constituting the estoppel must be found in some representations made or some position assumed, upon which defendant Sherman, having the right so to do, in good faith relied, and from which inequitable consequences must follow if the representations be repudiated or the position be changed. 10 Rul. Case Law, 689.

Constructive fraud underlies every equitable estoppel—

"that is the person estopped is considered as having, by his admissions, declarations, or conduct, misled another to his prejudice, so that it would work a fraud to allow the true state of facts to be proved." 10 Rul. Case Law, 691.

The Sherman appropriations were made in 1907, when the Miller property was in charge of Mrs. Miller. The record contains all the evidence produced relative to the 1892 right, but there is not a suggestion that Mrs. Miller, this appellant, or any one else

said or did anything with reference to that right. Although Sherman testified at length with reference to the physical condition of the 1892 ditch, he did not intimate that in making his appropriations he relied upon an abandonment of the 1892 Miller appropriation, or that he even considered the probability of that right being asserted or abandoned. So far as disclosed by this record, he was not misled at all. There is not even a bare scintilla of evidence that either Mrs. Miller or Mrs. Pump knew anything of Sherman's intentions, or of his appropriations until long after they were made. The only inference to be drawn from the evidence is that they kept silent and did not use the right. But mere silence cannot work an estoppel. To be effective for this purpose, the person to be estopped must have had an intent to mislead or a willingness that another should be deceived, and the other must have been misled by the silence. 10 Rul. Case Law, 693.

[7] If there was no legal obligation resting upon Mrs. Miller to speak in 1907, or upon her or her successor thereafter to make known their claim, then no estoppel arose, even though Sherman may now be injured by the recognition of the 1892 right. 10 Rul. Case Law, 692. To create an obligation upon the part of Mrs. Miller to speak out in 1907, it was incumbent upon Sherman to show that she knew of his contemplated or actual expenditure of time and money in making his appropriations, and that he was relying for any benefit to accrue from his efforts upon the assumption that the 1892 Miller right had been abandoned or would not be asserted to his prejudice. The record is barren of any such facts.

[8] A subsequent appropriation of water is not any notice of an adverse claim. Assuming that Mrs. Miller knew of Sherman's contemplated expenditures in 1907, she was not called upon to assert her rights, or to notify him of their existence. The validity of his appropriations could not be made to depend upon the extent of prior appropriations. The conclusion that appellant is estopped cannot be justified by this record.

Upon the findings made, the trial court should have awarded appellant 50 miner's inches or 1¼ cubic feet per second of time. A new trial is unnecessary, and the order refusing it will be affirmed. The cause is remanded to the district court, with directions to modify the decree so as to award to appellant 50 miner's inches, or 1¼ cubic feet per second of time, of the waters of the East fork of Little Elk creek, and, when thus modified, the decree will stand affirmed. The appellant will recover her costs of appeal.

Modified and affirmed.

BRANTLY, C. J., and SANNER, J., concur.

CLARK v. CLARK.

(Supreme Court of Oregon. Sept. 12, 1916.)

1. PLEADING \S 355 — VERIFICATION — STRIKING OUT.

It is proper to strike a pleading from the files when it is not properly verified.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1102-1110; Dec. Dig. \S 355.]

2. APPEAL AND ERROR \S 959(1)—DISCRETION OF TRIAL COURT — AMENDMENT — VERIFICATION.

The action of a trial court in permitting or refusing an amendment of verification is discretionary, and not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3826; Dec. Dig. \S 959(1).]

3. DISMISSAL AND NONSUIT \S 58(3) — GROUNDS—UNVERIFIED PLEADING.

Where a complaint has been properly stricken from the files for want of a verification without leave to amend, the plaintiff has no standing in court, and the dismissal of the suit follows as a matter of course, irrespective of the reasons therefor given by the presiding judge.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 136; Dec. Dig. \S 58(3).]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Marcella Clark against A. E. Clark. Decree for defendant striking the complaint and dismissing the suit, and plaintiff appeals. Affirmed.

Plaintiff filed her complaint herein on January 7, 1915, and on January 12, defendant filed a motion to strike it from the files for want of verification. On January 25th an order was made by Judge Gantenbein, of department No. 6, directing that the cause be reassigned, and thereafter it was assigned to department No. 3, in which Judge McGinn presided. The motion to strike was heard in the latter department, and a decree entered on February 20th striking the complaint from the files and dismissing the suit. Plaintiff perfected her appeal from such decree in March, and on July 7th obtained from Judge Gantenbein, of department No. 6, an order allowing her to amend her complaint by verifying the same and directing that the order be entered nunc pro tunc as of January 14th, and thereafter, on July 12th, the same judge made and entered an order vacating and canceling the order and entry of July 7th.

Thos. McCusker and Seneca Fouts, both of Portland, for appellant. John F. Logan and B. G. Skulason, both of Portland, for respondent.

BENSON, J. (after stating the facts as above). [1, 2] There are several assignments of error, but it is necessary to consider but one: Did the court err in striking the complaint from the files and dismissing the suit? It does not require a citation of authorities to show that it is proper to strike a pleading from the files which is not properly verified.

It is settled in this state that the action of a trial court in permitting or refusing an amendment of verification is discretionary, and not reviewable here. *Blanchard v. Bennett*, 1 Or. 328. In the case at bar there is no record of any application for leave to amend and no order permitting amendment until long after the decree was entered, and then by a judge before whom the matter was not pending. Even that order was afterwards vacated during the term at which it was made, and cannot now be considered as affecting the case.

[3] Her primary pleading having been properly stricken from the files without leave to amend, the plaintiff had no standing in court. Litigation cannot proceed if there is no complaint. Hence dismissal of the suit followed as a matter of course irrespective of the reasons given by the presiding judge for his decision. Under these circumstances there was no error in the decree, and it is therefore affirmed.

MOORE, C. J., and BEAN and McBRIDE, JJ., concur.

CARLTON LUMBER CO. v. LUMBER INS. CO. OF NEW YORK.

(Supreme Court of Oregon. Sept. 12, 1916.)

Department No. 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

On petition for rehearing.

For former opinion, see 158 Pac. 807. Decree modified.

Veazie, McCourt & Veazie, of Portland, for appellant. James G. Wilson, of Portland, for respondent.

McBRIDE, J. The petition for rehearing challenges the right of the circuit court to allow interest on the amount recovered, from the 10th day of December, 1914, to the 15th day of April, 1915, the date of the decree entered in that court. Upon the authority of *Richardson v. Investment Co.*, 66 Or. 353, 133 Pac. 773, and *Sargent v. American Bank & Trust Co.*, 156 Pac. 431, such allowance was erroneous, and the decree will be modified so as to eliminate that item. In all other respects we adhere to the views expressed in our former opinion.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

HANCOCK LAND CO. v. CITY OF PORTLAND.

(Supreme Court of Oregon. Sept. 12, 1916.)

1. EVIDENCE \S 265(7)—ADMISSIONS OF COUNSEL.

On appeal in a suit against a city to cancel an assessment of realty and to enjoin its sale,

where defendant's counsel admitted that the proof of the posting of notices of the proposed improvement originally filed did not meet the requirements of Portland City Charter, § 376, and that, if the proceedings were based only on such proof, there was a lack of jurisdiction, the court would assume that the proof submitted was inadequate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1035; Dec. Dig. ¶265(7).]

2. EVIDENCE ¶89 — PRESUMPTIONS — REBUTTAL.

L. O. L. § 868, subd. 2, provides that the jury are not bound to find against a presumption or other evidence satisfying their minds, and Portland City Charter, § 404, provides that in any suit assessment proceedings shall be presumed to be regular until the contrary is shown. In a suit to cancel an assessment of real property and to enjoin its sale where the defendant relied on the presumption of regularity, the affidavit of the posting of the notices of the proposed improvement, received in evidence, was defective. *Held*, that a presumption cannot contradict facts or overcome facts proved; that the affidavit overcame the presumption that official duty had been regularly performed and imposed upon the defendant the duty of introducing in evidence another affidavit regular in form, showing the posting of the notices as required, or to substantiate the loss of such proof in the manner prescribed by law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 111; Dec. Dig. ¶89.]

Department 1. Appeal from Circuit Court, Multnomah County; Lawrence T. Harris, Judge.

Suit by the Hancock Land Company against the City of Portland to cancel an assessment of real property and to enjoin its sale. Decree for plaintiff, and defendant appeals. Affirmed.

This is a suit to cancel an assessment of real property and to enjoin the sale of the premises alleged to have been benefited by a street improvement. The complaint states generally that, pursuant to authority conferred by the common council of Portland, Page street in that city was improved from the east line of Albina avenue to the west line of Ross street, extended southerly, and the cost thereof, \$3,568.38, was undertaken to be imposed upon the real property bordering upon that part of Page street and asserted to have been benefited by the improvement; that a part of the land thus included within the prescribed district was, at the time the improvement was made, owned by the heirs of J. B. Montgomery, deceased, and their estate in the premises was assessed to the extent of \$1,581.16, which sum was entered in the docket of city liens; and that thereafter the plaintiff purchased from such heirs the real property last referred to, "subject to said assessment." The initiatory pleading particularly sets forth many alleged failures to comply with the municipal law in respect to the making of the improvement, only one of which defects will be adverted to:

"That the charter of the city of Portland also provides: 'Sec. 376. The resolution of the council declaring its purpose to improve the street shall be kept of record in the office of the auditor and shall be published for ten consecutive publications in the city official newspaper. The city engineer within five days from the first publication of said resolution shall cause to be conspicuously posted at each end of the line of the contemplated improvement a notice headed "Notice of Street Work" in letters of not less than one inch in length, and said notice shall contain in legible characters a copy of the resolution of the council and the date of its adoption, and the engineer shall file with the auditor an affidavit of the posting of said notices, stating therein the date when, and places where the same have been posted.' That the defendant disregarded said provisions of the charter and neglected and failed to post at each end, or to post at all, in a conspicuous place, the notice provided in said section of the city charter, and the city council failed to obtain jurisdiction of said property, and its proceedings in relation to said improvement were void."

The answer admits, *inter alia*, the excerpt quoted from the charter, denies that there was any failure to comply with the requirements of such municipal law in making the improvement, and sets forth facts as further defenses. The averments of new matter in the answer were denied in the reply, and based on these issues the cause was tried, resulting in a decree granting the relief prayed for in the complaint, until a reassessment of the real property within the district can be made, and the defendant appeals.

Henry A. Davie, of Portland (W. P. La Roche, City Atty., of Portland, on the brief), for appellant. J. F. Boothe, of Portland (Boothe & Richardson, of Portland, on the brief), for respondent.

MOORE, C. J. (after stating the facts as above). [1] At the trial the plaintiff's counsel offered in evidence an affidavit of posting the notices of the proposed improvement, whereupon the court, referring to such written sworn statement, remarked:

"As I understand, counsel for the defense admits this proof of posting originally filed does not meet the requirements of the law?"

The defendant's counsel replied:

"Yes; we will admit that."

The Court: "And that if the proceedings were based only on this original proof, that there is disclosed a lack of jurisdiction?"

Defendant's Counsel: "Yes; if they were based on that alone, it would disclose a lack of jurisdiction."

Neither the original affidavit of the posting of the notices nor a copy thereof has been brought to this court. It will be assumed, from the admission of the defendant's counsel, that the proof submitted was inadequate. It is admitted by defendant's counsel that the posting of notices of the street improvement was a jurisdictional prerequisite, but contended that proof thereof by filing the city engineer's affidavit was not

essential to an exercise of the power of the common council to hear and determine that matter. They maintain that, notwithstanding the defective affidavit of such posting which was made, filed, and received in evidence, the trial court should have disregarded such proof and invoked the presumption that official duty had been regularly performed, but in failing to do so and in granting the relief prayed for in the complaint errors were committed.

[2] Section 404 of the municipal law reads:

"In any action, suit or proceeding in any court concerning any assessment of property or levy of taxes authorized by this charter, or the collection of such tax or proceeding consequent thereon, such assessment, levy, consequent proceeding, and all proceedings connected therewith, shall be presumed to be regular and to have been duly done or taken until the contrary is shown."

Rule 119 of Lawson's Law of Presumptive Evidence is as follows:

"A presumption cannot contradict facts or overcome facts proved."

A text-writer in discussing this subject observes:

"There is some confusion in the cases upon the question whether a presumption is evidence and has probative force. Since the function of a presumption logically considered is merely to impose the burden of going forward with the evidence upon the party against whom it operates, when contrary evidence is adduced the presumption disappears, although the facts upon which it rested still remain as evidence in the case." 9 Ency. Ev. 885.

In the absence of any other proof, a presumption is usually indulged as substantive evidence to substantiate or refute a material fact. The jury, however, are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds. L. O. L. § 868, subd. 2. In the case at bar the trial court, for want of any other evidence on the subject, would undoubtedly have been authorized to indulge the presumption now invoked, and, having done so, to deduce therefrom the conclusion that the notices of the street improvement had been regularly posted, and that the engineer had filed with the auditor an affidavit as required by section 376 of the charter, stating in the written sworn declaration the date when and the places where the same had been posted, but that the affidavit had been mislaid or lost. In the present instance the affidavit was produced and received in evidence, thereby overcoming the presumption that official duty had been regularly performed and imposing upon the defendant the duty of introducing in evidence another affidavit, regular in form, showing the posting of the notices as required, or to substantiate the loss of such proof in the manner prescribed by law. The presumption can be relied upon "until the contrary is

shown." City Charter, § 404. The contrary having been established as thus stated, no foundation remained upon which to predicate the presumption. Thus in *Hughes v. City of Portland*, 53 Or. 370, 384, 100 Pac. 942, 948, Mr. Justice Bean, discussing this subject, says:

"In a suit to enjoin the enforcement of a reassessment, it will, when the record of the council is silent, be presumed that the objections of the property owners were considered by the council and found without merit, when it subsequently passes the reassessment ordinance, as though such objections were not in the way."

To the same effect see, also, *Trummer v. Konrad*, 32 Or. 54, 56, 51 Pac. 447; *Duniway v. Portland*, 47 Or. 103, 117, 81 Pac. 945; *Goodnough Merc. Co. v. Galloway*, 48 Or. 239, 243, 84 Pac. 1049.

The decree is therefore affirmed.

BENSON, McBRIDE, and BEAN, JJ., concur.

GUNNELL v. VAN EMON ELEVATOR CO.
et al.

(Supreme Court of Oregon. Sept. 12, 1916.)

1. MASTER AND SERVANT §101, 102(8)—MASTER'S DUTY—EMPLOYERS' LIABILITY ACT.

Under Employers' Liability Act (Laws 1911, p. 16) § 1, an elevator company, employing a constructor's helper to do repair work upon the premises of a realty company and having charge of such work and control of the situation, was bound to use every device, care, and caution which it was practicable to use for the protection and safety of life and limb.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 173, 178; Dec. Dig. §101, 102(8).]

2. NEGLIGENCE §45—CONDITION OF PREMISES—ELEVATOR.

The owner of a building in which an elevator was operated was bound to take reasonable care and precaution against injuries to a constructor's helper in the employ of an elevator company engaged in repairing such elevator.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 60; Dec. Dig. §45.]

3. MASTER AND SERVANT §284(2) — ACTION FOR INJURY—QUESTION FOR JURY—CONTROL OF PLACE OF WORK.

In an action by plaintiff, employed by an elevator company as a constructor's helper, for injury while on the premises of a realty company engaged in the repair of an elevator, evidence that the elevator company assumed control of the elevator in the adjoining shaft by which plaintiff was injured held sufficient to take the case to the jury on the issue of failing to provide a safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1004; Dec. Dig. §284(2).]

4. APPEAL AND ERROR §877(5)—RIGHT TO COMPLAIN—INSTRUCTIONS.

Plaintiff having joined the employer and the owner of the premises upon which he was injured while engaged in repair work, and alleged negligence on the part of each concurring in the resulting injury, neither defendant could complain

of an instruction more favorable to its codefendant than to itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3562, 3568; Dec. Dig. ☞ 877(5).]

5. NEGLIGENCE ☞101—MASTER'S LIABILITY—CONTRIBUTORY NEGLIGENCE.

Under Employers' Liability Act, § 6, the contributory negligence of the person injured is not a defense, but may be taken into account in fixing the amount of the damages.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. ☞ 101; Damages, Cent. Dig. § 371.]

6. TRIAL ☞252(11) — INSTRUCTIONS — EVIDENCE.

In an action by a constructor's helper in the employ of an elevator company for injury while engaged in repair work on the premises of a realty company by reason of the employer's failure to provide a safe place in which to work, an instruction that, if there was a safe way to do the work and plaintiff voluntarily chose an unsafe way, his negligence would defeat recovery was properly refused, where there was no evidence that there were two ways of doing the work, one dangerous and the other safe.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. ☞252(11).]

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by R. C. Gunnell against the Van Emon Elevator Company and the Broadway Realty Company. Judgment for plaintiff against the elevator company, and it appeals. Affirmed.

The plaintiff brings this action against two corporate defendants. The Van Emon Elevator Company is a California corporation authorized to transact business in this state, and the Broadway Realty Company is a domestic institution. The complaint avers that the latter concern at the time mentioned therein was in possession and control of eight office floors, the machinery room, the two elevators in the lobby, and the elevator lobby on the first floor of what was known as the Broadway Building in Portland, and employed men to operate the elevators for the use and accommodation of its tenants in the building. When the injuries complained of happened the plaintiff was an employé of the elevator company as a constructor's helper. His employment is admitted by his employer. He states that at 6:30 o'clock p. m. on August 28, 1913, he was ordered by the elevator company to report with a fellow employé at the Broadway Building for the purpose of making some repairs upon one of the elevators, and to that end his employer instructed him and his fellow servant, and the realty company permitted, allowed, and directed the two to use the elevator running in the south hatchway. In the progress of the work the plaintiff seated himself upon a concrete beam adjacent to the north elevator, for the purpose of countersinking some bolts in the guide rails which controlled the counterweights of the elevator, as instructed by his

employer and permitted and directed by the realty company. While this was going on the operator of the north elevator, an employé of the realty company, whom the plaintiff alleges was under the direction, control, and instruction of the elevator company and the realty company, carelessly and recklessly started the north elevator, but without warning, and, heedless of the warning cries given him by plaintiff, continued to operate the elevator upward at a high rate of speed, so that it struck the plaintiff on the left hip as he sat upon the beam on the fifth floor, and threw his body, and particularly his left foot, so that it came in contact with the counterweight, causing the injury of which complaint is made. The charge of negligence is in these terms:

"At the time and place at which plaintiff was injured, the defendants were negligent in permitting the elevator, which was operated by electricity, to be operated when the same was not 'provided with a system of communication by means of signals so that at all times there might be prompt and efficient communication between the employes and operator of the motive power,' as by law provided, and that it would have been practical to install such a system by furnishing electric bells, or by having the elevator stop while ascending at the fourth floor, and by having said elevator stop at the sixth floor, to ascertain whether the hatchway was clear at the fifth floor, and by having said elevator stop at the sixth floor when descending from the top to ascertain whether the hatchway was clear at the fifth floor, all of which could have been done without impairing the efficiency of the work as by law provided; in failing to give plaintiff warning that the elevator in the north hatchway was to proceed upward at the time in question, and not stopping to ascertain whether the hatchway was clear at the fifth floor; in failing to furnish plaintiff with a safe place in which to work; in failing to give plaintiff warning as to the dangers to be encountered in working in and about the place where plaintiff was injured; in failing to provide and have on the job an experienced and competent foreman in charge of the work at the time of the accident; and in failing to use every device, care, and precaution which it was practical to use for the safety of life and limb of the plaintiff, in that the elevator in the north hatchway could have been shut down while work was being carried on in the elevator in the south hatchway, and that such precaution would not have impaired the efficiency of the elevator as by law required; that as a result of said failures, the weight which counterbalances the elevator in the north hatchway came in contact with plaintiff at the fifth floor, crushing plaintiff's said foot and causing the elevator operator to become excited and reverse the elevator, making it descend, with the result that the counterweight of said elevator was further moved and plaintiff's said foot further injured."

The answer of the elevator company traverses all the allegations imputing liability to it. It stated, in substance, that it had no control whatever over the north elevator; that the same was operated at the time by an employé of the other defendant, all of which was well known to the plaintiff; that the latter carelessly and unnecessarily allowed his foot to hang over the well in which the counterweight of the north elevator was hung, fully knowing that if he did so the

weight would crush his foot and injure it; and that with such knowledge he fully appreciated and understood the risks of taking such a position, and thereby assumed all the danger of injury. A second defense is couched in much the same language, and imputes to plaintiff negligence contributing to his own injury. All this new matter was traversed by the reply. The other defendant made a separate answer, which it is not necessary to consider, for the reason that at the trial the jury brought a verdict in favor of the plaintiff and against the Van Emon Elevator Company without mentioning the other defendant in any way. Upon this verdict a judgment was rendered in favor of the plaintiff and against the elevator company, and the latter appeals.

C. A. Sheppard, of Portland (Sheppard & Brock, of Portland, on the brief), for appellant. Giltner & Sewall, of Portland, for respondent Broadway Realty Co. E. L. McDougal, of Portland, for respondent Gunnell.

BURNETT, J. (after stating the facts as above). [1-4] One of the contentions of the defendant appealing is that the court erred in instructing the jury that the degree of care due from it to its employé was measured by what is known as the Employers' Liability Act, while the same instruction imputed to the other defendant only the common-law measure of care, the deduction being that, inasmuch as the plaintiff had charged the defendants jointly, it must follow that they should be treated alike by the court as to the measure of diligence in protecting the plaintiff from harm while engaged in the work in question.

It is admitted in the pleadings between the parties before us that the plaintiff was an employé of the elevator company at the time of the accident. Its liability must be measured by the relation thus existing between it and the plaintiff. The same general principle would apply to the other defendant. Each of them must be judged by the duty it owed to the plaintiff. But the record shows that the connection between the plaintiff and each of the defendants was different. In the one case there was the condition of master and servant, and in the other that intimate connection did not exist. The Broadway Realty Company was bound only to take reasonable care and precaution against injuring the plaintiff. As to the appealing defendant, the employer of the plaintiff, the rule is prescribed in the Employers' Liability Act, the concluding clause of the first section of which is in this language:

"And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety

of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

There are many authorities cited by the appellant to the effect that where a master sends a servant in his general employment to work upon the premises of a third party, the employer is not responsible for an injury happening on account of the dangerous condition of the place over which the employer has no control, but that the liability, if any, must be visited upon the owner of the realty. All of those cases are instances where no such statute as our Employers' Liability Law existed. This legislation has superseded that rule, and has explicitly visited upon a person who has charge of a work involving a risk or danger the duty of taking every precaution against the happening of an injury. There is ample testimony in the case to show that the Van Emon Elevator Company had control of the situation. It is admitted that it had charge of the work of repairs. It knew the surroundings, and it was incumbent on it, when it sent its employé into the elevator shaft, to take precautions for his safety and provide for him a safe place in which to work. If it could not do so, it should have declined the undertaking. There was testimony, however, tending to show that it did assume control of the elevator, at least on the south side. This is sufficient to take the case to the jury independent of the authorities cited by the defendant. The negligence imputed to the Van Emon Elevator Company was of a negative sort, in failing to provide a safe place in which to work, and the like. The violation of duty attributed to the other defendant was of an affirmative nature, in that its careless act of operation of the machine produced the injury. In other words, approaching the scene from a different standpoint, the several shortcomings of each defendant concurred with the result that the plaintiff was hurt. Each defendant was bound by his own duty. Neither can complain of a direction given to the jury more favorable to its codefendant than to itself. The instruction correctly defines the duty of the elevator company, and it must be bound by it, irrespective of a charge more favorable to the other defendant.

[5] Complaint is made of the refusal of the court to instruct the jury, at the request of the elevator company, to the effect that if there was a safe way for doing the work and an unsafe way, choice between which was within the power of the plaintiff, and he voluntarily chose the unsafe way, he would be guilty of contributory negligence utterly defeating his recovery. An answer to that is that the Employers' Liability Law (section 6), expressly says:

"The contributory negligence of the person injured shall not be a defense, but may be taken

into account by the jury in fixing the amount of the damages."

[8] Moreover, the testimony fails to disclose a situation of the kind intimated by the requested instruction. It does not show that there were two ways of doing the work, one dangerous and the other safe. The only testimony on that point is that of the plaintiff himself, to the effect that the position he assumed was the only one from which could be accomplished the particular part of the work in which he was engaged when the accident happened. On both grounds, therefore, the court was justified in refusing the instruction. There is no error in the record, and the judgment is affirmed.

MOORE, C. J., and BEAN and HARRIS, JJ., concur. EAKIN, J., absent.

WALLACE v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. Sept. 19, 1916.)

APPEAL AND ERROR § 771 — PERFECTION OF RECORD—BRIEFS — FAILURE TO FILE—EXCUSES.

That indictments have been returned against plaintiff and her witness, for subornation of perjury and perjury, respectively, and that proceedings were had to set aside the judgment on that ground, is sufficient excuse for failure of defendant's counsel to file briefs on appeal within the time allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3105; Dec. Dig. § 771.]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Selma L. Wallace against the Portland Railway, Light & Power Company. Judgment for plaintiff, and defendant appealed. Plaintiff moves to dismiss the appeal. Motion denied.

Frank J. Lonergan and Griffith, Leiter & Allen, all of Portland, for appellant. Asher & Johnstone, of Portland, for respondent.

PER CURIAM. The plaintiff on September 17, 1915, obtained a judgment against the defendant, from which it perfected an appeal within 60 days. Several extensions of time in which to file a brief were granted the defendant's counsel; the last enlargement expiring June 10, 1916. Fourteen days thereafter the plaintiff's counsel moved to dismiss the appeal on the ground that no brief had then been filed by the appellant. Many affidavits made on behalf of the respective parties have been filed. From these sworn statements it appears that an indictment had been returned against one of the plaintiff's witnesses for perjury alleged to have been committed at the trial of this action and

against the plaintiff for subornation of perjury. Based upon these charges the defendant's counsel moved in the lower court to set aside the judgment, which motion was denied. Thereafter the defendant's brief was filed in this court. The subsequent proceedings against the plaintiff and her witness were so unusual as to excuse the neglect of defendant's counsel in failing to comply with the rules of this court as to the filing of the brief.

For this reason the motion, to dismiss the appeal is denied, and the filing of the brief is approved as of this date.

COOVERT v. OLCOTT, Secretary of State.

(Supreme Court of Oregon. Sept. 19, 1916.)

ELECTIONS § 147—NOMINATIONS—METHOD—POWERS OF PRECINCT COMMITTEEMEN—"POLITICAL PARTY."

L. O. L. § 3333, provides that any political party may, by certificate of nomination, nominate candidates. Section 3359 defines a political party to be an affiliation of electors which at the next general election preceding polled for Congressman at least 25 per cent. of the entire vote. Section 3343 provides for withdrawal of nominees. Section 3344 provides procedure in case of withdrawal or death. Section 3345 provides that the party nominating a candidate who has withdrawn may fill the vacancy. Section 3387 makes the provision of sections 3343 and 3344 applicable in case of direct primary nominations only in case of death or removal from the district before election, but in no other case. Section 3389 empowers precinct committeemen to make nominations to fill vacancies among candidates caused by death or removal from the district, but not otherwise. The incumbent of office of state senator for the term ending in 1919 resigned in 1916 after the direct primary nominating election. Thereafter on notice a joint convention of precinct committeemen was held, and petitioner was nominated for the vacancy. Held that, as no nomination was made at the direct primary nominating election, and as the vacancy did not occur through death or removal from the district, no nomination could be made to fill the vacancy.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 122; Dec. Dig. § 147.

For other definitions, see Words and Phrases, First and Second Series, Political Party.]

In banc. Mandamus by E. E. Coovert against Ben W. Olcott, Secretary of State. Defendant demurs to the alternative writ. Demurrer sustained.

In 1914 George M. McBride was elected to the office of state senator from the Fourteenth senatorial district, comprising Clackamas, Columbia, and Multnomah counties, for the term ending January 1919. On August 3, 1916, he resigned. The direct primary nominating election having already been held on May 19, 1916, a joint convention of the Republican precinct committeemen from the three counties was held on August 29th, pursuant to notice, for the purpose of nominating a Republican candidate for the office made vacant by the resignation so that such

candidate could be voted for at the ensuing biennial election which will occur on November 7, 1918. The convention was organized by the election of a presiding officer and a secretary with an attendance of 478 precinct committeemen out of a total of 477 elected from the senatorial district. E. E. Coovert received the votes of 456 of the precinct committeemen, "including the state central committeemen from each of said three counties, each being a central committeeman from his respective county"; and the convention declared that he was the Republican candidate for the unexpired term of the office made vacant by the resignation of George M. McBride. The presiding officer and the secretary of the convention prepared and verified a certificate setting forth the doings of the convention; and on September 1, 1916, the certificate was filed with the secretary of state, who now refuses to list and certify the name of E. E. Coovert as a Republican nominee.

This court granted an alternative writ of mandamus directing the secretary of state to list and certify the name of E. E. Coovert as a candidate or to show cause for not so doing. The defendant shows cause by demurring to the writ.

C. A. Johns, of Portland, for petitioner.
Geo. M. Brown, Atty. Gen., for defendant.

HARRIS, J. (after stating the facts as above). The Republican party is a political party within the meaning of the direct primary nominating elections law, which was adopted by the people in 1904, and is codified in sections 3349 to 3391, L. O. L., and amendments, and therefore by the express terms of section 3359, L. O. L., amended by chapter 108, Laws 1913, it "shall nominate all its candidates for public office, under the provisions of this law and not in any other manner, and it shall not be allowed to nominate any candidate in the manner provided by section 3333." Section 3333, L. O. L., was enacted in 1891, and speaks of nominations by "any political party," by assemblies, and by individual electors. Every political party which is subject to the direct primary nominating elections law must nominate all its candidates "under the provisions of this law, and not in any other manner," because the direct primary nominating elections law furnishes the exclusive modes of nomination. *Healey v. Wipf*, 22 S. D. 343, 117 N. W. 521. Section 3359 continues by declaring that "the names of candidates for public office nominated under the provisions of this law shall be printed on the official ballots for the ensuing election as the only candidates of the respective parties for such public office." Being subject to the direct primary nominating elections law, the Republican party cannot nominate its candidates in the manner provided by section 3333 or by

an assembly or by individual electors; but its nominations must be made by the persons and in the manner specified by the law. The only persons who are empowered to select candidates for the Republican party are: (1) The members of the party; and (2) their representatives. A party candidate is selected by the direct vote of the members of such party at an election held for that purpose or is chosen by the representatives of the party.

It was impossible for the members of the Republican party to nominate a candidate for the office of senator for the Fourteenth senatorial district when the direct primary nominating election was held on May 19, 1916, for the reason that George M. McBride had not then resigned and his term of office extended until January, 1919. The members of the Republican party cannot now by their votes nominate a candidate for the office because another direct primary nominating election will not be held until 1918, which will be after the next biennial election for public officers. A Republican candidate could not be nominated on May 19th, and cannot now be nominated by the direct vote of the members of the party, and consequently the question for decision is whether the precinct committeemen, acting as the party representatives, had authority to nominate the petitioner as the candidate of the Republican party.

Provision is made in section 3389, L. O. L., for the election of party committeemen. Every political party subject to the direct primary nominating elections law elects a committeeman for each election precinct, and the committeeman thus elected "shall be the representative of his political party," and all the committeemen of a county constitute the county central committee of such party. The county central committee elects the county members of the state central committee and of the congressional committee, and the state and congressional committees "shall have the same power to fill all vacancies * * * that the county committee has to fill county vacancies. Said county and city central committees shall have the power to make nominations to fill vacancies occurring among the candidates of their respective parties nominated for city or county offices by the primary nominating election, where such vacancy is caused by death or removal from the electoral district, but not otherwise."

Assuming, but not deciding, that the committeemen from the three counties comprising the Fourteenth senatorial district have power to fill vacancies, then the measure of that power is determined by the authority conferred upon the county central committee to fill county vacancies. Section 3389 provides for only one class of vacancies. Aside from vacancies among committeemen, the only kind of vacancies spoken of are those "occurring among the candidates * * * nominated * * * by the primary nominating election." The statute affords a

method for filling a vacancy among candidates who have been nominated by the members of the party, and no provision whatever is made for filling a vacancy of any other kind by committeemen. The party committeemen can nominate a candidate to fill a vacancy caused by the death or removal from the electoral district of another person who has previously been nominated by the members of the party; but the representatives of the party are powerless to nominate a candidate for an office unless the members of the party have themselves first nominated a candidate for that office. Moreover, the authority of the committeemen is further restricted to vacancies "caused by the death or removal from the electoral district," and consequently the committeemen cannot select a substitute for a person who has been chosen as a party candidate at a nominating election unless the first nominee dies or removes from the electoral district. The language of the statute is plain and unambiguous; but, apparently for the purpose of making assurance doubly sure, the framers of the enactment emphasized the limitations placed upon the power of precinct committeemen to fill vacancies by declaring that the power could be exercised as restricted by the statute which confers the power, "but not otherwise." Analogous, although not parallel, situations have arisen in other jurisdictions, and the conclusions reached there are in harmony with what is said here. *State v. Hayward*, 141 Iowa, 196, 119 N. W. 620; *Corser v. Scott*, 87 Minn. 313, 91 N. W. 1101; *Stewart v. Polley*, 30 S. D. 54, 137 N. W. 565.

Corroboration of the construction placed on section 3389 is found in other sections of the statute. The direct primary nominating elections law was adopted by the people in the exercise of the initiative at an election held in 1904. Chapter 1, Laws of 1905. Sections 3343 to 3345, inclusive, L. O. L., were enacted in 1891. Section 3343 permits "any person who has been nominated and accepted some nomination" to withdraw his name from

nomination by pursuing a prescribed method. Section 3344 states that, if any person nominated dies or withdraws before the day fixed by law for the election of public officers, then the name of such candidate shall not be placed upon the ballot. Section 3345 declares that, "if the original nomination thus vacated was made by a political party," and the party can reconvene, it may fill the vacancy, or a committee may fill the vacancy if the party has delegated the power to such committee. The provisions of sections 3343 and 3344 are made applicable to nominations under the direct primary law by section 3367, L. O. L., "in case of the death of the candidate or his removal from the * * * electoral district," before the date of the ensuing election, but in no other case; and in case of such vacancy by death or removal the committee may fill the vacancy. It will be noted that sections 3343, 3344, and 3345 speak of the death or withdrawal of any person who has been nominated, and section 3367 applies to the death or removal from the electoral district "of the candidate," and "in no other case."

The direct primary nominating elections law provides for the election of precinct committeemen, and then specifies the powers which they can exercise, and consequently no power can be exercised by them unless it is granted by statute. The law defines in plain and unambiguous language the extent of the power of precinct committeemen to make nominations for their party, and then in language equally plain and unambiguous commands that the power to nominate candidates shall not exceed the defined authority. The statute must be taken as it is written, regardless of the results; and if there is need for enlarging the powers of precinct committeemen the right to enlarge the authority of party representatives is exercisable by the legislative and not by the judicial department.

The demurrer to the writ is sustained.

EAKIN, J., absent.

SKINNER et ux. v. McCRACKAN et al.
(No. 13383.)

(Supreme Court of Washington. Sept. 15, 1916.)

1. EJECTMENT \Leftrightarrow 142(2) — POSSESSION — BETTERMENT STATUTE.

Under the betterment statute, Rem. & Bal. Code, § 797, providing that, in an action to recover real property upon which permanent improvements have been made or general or special taxes paid by defendant holding in good faith adversely to plaintiff, the value of such improvements and the amount of such taxes shall be allowed as a counterclaim to the defendant, and section 790, declaring that there can be no adverse possession against the United States, defendants in ejectment, holding in good faith under color of title, and making improvements while the title was in the United States, had no right to claim betterments for such improvements which went with the land under a subsequent patent.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 483-489, 493-499; Dec. Dig. \Leftrightarrow 142(2).]

2. EJECTMENT \Leftrightarrow 142(1) — BETTERMENT STATUTE — TAXES — PIPE LINE.

Under such betterment statute, the defendants, who had paid taxes on the land subsequent to the date of the patent from the United States and before any payment of taxes by the plaintiff, were entitled to reimbursement therefor, and to the value of a pipe line installed subsequent to such patent, and which was a permanent and valuable betterment to the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 472, 476, 477; Dec. Dig. \Leftrightarrow 142(1).]

3. APPEAL AND ERROR \Leftrightarrow 1011(1) — REVIEW — FINDING.

In ejectment, where the estimates as to the value of the three acres of land varied from \$5 an acre to \$150 an acre, the finding that its value was \$55, and its rental value \$45, in view of the better position of the trial court to judge of the testimony, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. \Leftrightarrow 1011(1).]

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Ejectment by Frank M. Skinner and wife against Ida O. McCrackan and others. Judgment for plaintiffs, and from the parts thereof fixing damages and the value of the land and betterments, the plaintiffs appeal. Reversed, and cause remanded, with directions to enter judgment in counterclaim in favor of defendants for taxes, etc.

McAnlay & Meigs, of North Yakima, for appellants. Englehart & Rigg, of North Yakima, for respondents.

MOUNT, J. This action was brought in ejectment to recover possession of about three acres of land lying south of the right of way of the Sunnyside canal, in Yakima county. The complaint alleged ownership and right of possession in the plaintiff. The defendant for answer denied generally the allegations of the complaint, and, after several affirmative defenses, pleaded payment

of taxes and construction of betterments amounting to \$961.48 while holding in good faith under color and claim of title. For reply the plaintiffs denied the affirmative matter set forth in the answer.

Upon these issues the case was tried to the court without a jury. The court made findings of fact and conclusions of law, and entered a judgment awarding the land to the plaintiff, and adjudging that the value thereof, exclusive of the improvements, at the time the defendants took possession, was \$55; that the plaintiffs' damages for the withholding of possession amounted to \$45; that the value of the improvements and the taxes paid by the defendants was \$742.03; that this amount should be set off against the damages; and that neither party should recover costs.

The plaintiffs have appealed from that part of the judgment fixing the value of the lands at \$55, damages at \$45, and fixing the value of the betterments at \$742.03.

It appears that in the fall of 1904 the defendants purchased a tract of land south of the three acres in dispute. This three acres was supposed to be a part of that tract, and a deed was executed to the defendants describing the tract by metes and bounds, including the three acres. At that time the title to this three acres was in the United States, and not in the defendants' vendor. Afterwards, in January, 1908, the Northern Pacific Railway Company acquired title to the three acres, with other lands, from the United States, and a patent was issued therefor. Thereafter the plaintiffs, the appellants here, by mesne conveyances, became the owner of the three-acre tract. In the year 1905, while the title to this three-acre tract was in the United States, the respondents purchased therefor a water right for \$102.60, fenced the three acres at an expense of \$70, cleared the lands at an expense of \$59.40, and constructed a board flume at an expense of \$11. At about the same time they planted about two acres of the tract to peach trees. In 1907 the respondents purchased an additional water right for \$19.80. In November, 1900, the respondents paid taxes for the year 1908 amounting to \$5.96; in 1910, taxes for 1909, \$6.22; February 17, 1911, taxes for 1910, \$4.12; and in May 1911, building pipe line, which was valued by the court at \$240; and on February 15, 1912, taxes for 1911, \$5.11.

[1] It is argued by the appellants that the court erred in allowing all the items which were expended by the defendants upon the land while the title thereto was still in the United States. Our betterment statute (Rem. & Bal. Code, § 797) is as follows:

"In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good

faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant."

It is plain from this statute that before the counterclaim for betterments in the way of permanent improvements can be allowed, the person claiming for such improvements must be holding in good faith under color or claim of title adversely to the claim of the plaintiff. *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073; *Gould v. White*, 62 Wash. 406, 114 Pac. 159.

As we have seen above, the title to this property, both legal and equitable, was in the United States prior to January 6, 1908. The defendants went into possession and made a large part of these improvements in 1905 while the title was in the United States. It is plain, therefore, that when these improvements were made upon this property, there was no adverse holding by the defendants, because there can be no adverse holding against the United States. *Rem. & Bal. Code*, § 790.

In the case of *Hawke v. Deffebach*, 4 Dak. 20, 22 N. W. 430, where the defendant was dispossessed and made claim for improvements, and where his predecessors in interest were in the occupation of the land and had made improvements thereon prior to the time the plaintiff initiated his right by which he subsequently obtained title from the government, and where there was a statute like our own, the court said:

"For it is manifest that, standing by itself, the territorial statute could have no operation or effect so long as these lands were the property of the United States, and that the patent of the government would carry with it the full and unincumbered title, free from every adverse claim, since it would be impossible for any one to hold adversely or in good faith against the government, and hence to acquire any right, legal or equitable, to compensation for improvements erected while the title was yet in the United States. *Steel v. Smelting Co.*, 106 U. S. 456 [1 Sup. Ct. 389, 27 L. Ed. 226]."

This judgment was afterwards affirmed by the Supreme Court of the United States in 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423. See, also, *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357; *Chavez v. Chavez de Sanchez*, 7 N. M. 58, 32 Pac. 137.

It follows that, when the United States issued a patent to the railway company, all the improvements which were then upon this three acres went with the land, and the defendants would have no right to claim betterments for the improvements then upon the land. We are of the opinion, therefore, that the trial court erred in allowing to the defendants the costs of the improvements placed upon the land prior to the disposition thereof by the United States in 1908.

[2] The appellants further argue that the trial court erred in allowing for the taxes

paid upon the land by the defendants after 1908. The taxes were a lien upon the land. They were paid by the defendants. And, as a matter of course, they are entitled to be reimbursed therefor, under the terms of the statute. It is true the plaintiffs claim to have paid the taxes upon this land in paying upon a larger tract owned by them. But it is not disputed that the defendants paid the taxes upon this particular tract; and it is not disputed that the defendants paid the taxes before any payments were made by the plaintiffs, if they were due from the plaintiffs. We think the trial court properly allowed the amount of the taxes stated above.

It is next urged as error that the court allowed to the defendants the value of a pipe line installed in the year 1911 at \$240. There is evidence in the record that this pipe line is a permanent improvement and betterment to the land, and of value thereto. There is some dispute upon this question; but we are of the opinion that the trial court properly found upon that item.

[3] It is next argued that the trial court erred in finding the value of the land at \$55. There were different estimates made of the value of the land, all the way from \$5 an acre to \$150 an acre. We think the trial court was in a better position to judge of the value of the land upon the testimony than we are, and, for that reason, we are not disposed to disturb either the finding of value of the land, or the rental value thereof at \$45, as found by the court.

For the reasons above stated, the judgment of the trial court is reversed, and the cause remanded, with directions to enter a judgment in counterclaim in favor of the defendants for taxes paid amounting to \$21.41, and for betterments \$240, in accordance with section 799, *Rem. & Bal. Code*, the appellants to recover costs in this court.

CHADWICK, ELLIS, and FULLERTON, JJ., concur.

JENSEN v. KOHLER et al. (No. 13074.)
(Supreme Court of Washington. Sept. 8, 1916.)

1. PLEADING ~~§ 84(7)~~—DEFECT—COMPLAINT—WAIVER.

Where defendants jointly answered a complaint and proceeded to trial on the merits, the complaint would not be narrowly scanned on appeal for defects in stating a cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 74; Dec. Dig. ~~§ 34(7)~~.]

2. PLEADING ~~§ 406(9)~~—DEFECTIVE ALLEGATIONS—SUPPLY BY EVIDENCE.

In an action by the trustee appointed under a stipulation of the stockholders of a corporation, any insufficiency in the complaint in not alleging that defendants had in their possession the money claimed by the trustee was cured by the statement of another defendant in evidence that he had collected the money and turned it over to such other defendants.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1374, 1386; Dec. Dig. ~~§ 406(9)~~.]

3. CORPORATIONS ⇨619 — STIPULATION TO WIND UP—RIGHT OF PARTIES.

Where the defendants as stockholders of a corporation were all parties to a stipulation, providing that all its assets should be turned over to a trustee for administration, they had no right to retain any of the assets or to divide assets among themselves.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⇨619.]

4. CORPORATIONS ⇨619—WINDING UP—ACTION BY TRUSTEE—ISSUES.

In an action by the trustee appointed under a stipulation of the stockholders of a corporation for the balance of a collection made by defendant, a stockholder, claimed as an asset of the corporation, and for attorney's fees incurred in an action brought by the defendant for an injunction, an accounting, etc., where the latter cause of action was stricken, the issues did not involve the trustee's administration of the trust; and hence defendant could not show the time within which the trustee might have properly performed his services, or his partiality or his excessive charges for his services.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⇨619.]

5. CORPORATIONS ⇨619—TRUSTEE TO WIND UP—STIPULATION—EVIDENCE.

In such action, where the evidence in support of defendants' claim that on the dismissal of their action for an injunction and an accounting it was understood that the trustee would forego all claim to the money sought to be recovered was conflicting, and where there was no claim that stipulation to that effect was made in open court and entered on the court's minutes, or was reduced to writing, as required by superior court rule 10, and where the trial court made no finding thereon, the Supreme Court was not warranted in finding that any such understanding was had.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⇨619.]

6. ATTORNEY AND CLIENT ⇨186—CHARGING LIEN—WAIVER.

Where an attorney, one of the stockholders of a corporation, signed a stipulation that plaintiff as its trustee might collect its assets, etc., and agreed to turn over to the trustee all money due the corporation, and where he had already received a retainer of \$50 with a claim for collection and failed to reserve any lien in his stipulation, he waived his right under Rem. & Bal. Code, § 136, to thereafter claim a charging lien on money and stock certificates in his hands.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 393; Dec. Dig. ⇨186.]

7. CORPORATIONS ⇨619—TRUSTEE TO WIND UP—EXCESSIVE CHARGE—REMEDY.

A trustee, appointed by stipulation of the stockholders of a corporation, whose charges for his services were claimed to be excessive, was not bound to pursue the summary method of adjustment provided by Rem. & Bal. Code, §§ 137, 138, but had the right to maintain an action to enforce the trust agreement against the parties thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⇨619.]

8. PLEADING ⇨236(6)—AMENDMENT—DISCRETION—STATUTE.

In an action by a trustee under a stipulation of the stockholders of a corporation to recover the balance of a collection made by defendant, a stockholder, as attorney, where defendant's evidence to prove his services in making the collection and the reasonable value thereof was excluded, the denial of his request to amend to meet the objection that there was no such is-

sue tendered by his answer, in view of the trustee's knowledge of such claim, so that the amendment could not have resulted in a prejudicial surprise, and of the liberal rule as to amendments imposed by Rem. & Bal. Code, § 303, was an abuse of the court's discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. ⇨236(6).]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge. Action by C. R. Jensen, trustee of the Rodgers & Kohler Company, against Ineson J. Kohler and others with affirmative defenses and a prayer for a dismissal. Decree for plaintiff, and defendants appeal. Remanded.

Milo A. Root, of Seattle, for appellants. Alfred Gfeller, of Seattle, for respondent.

ELLIS, J. Plaintiff, as trustee of the Rodgers & Kohler Company, a corporation, brought this action to recover a balance of a collection made by defendant, Isaac J. Kohler, as attorney, claimed as an asset of the corporation, and to enforce the surrender of the stock of defendants in the corporation preparatory to a final settlement of the trusteeship, which arose as follows:

Charles W. Rodgers and wife and defendants, Isaac J. Kohler and his son Ineson J. Kohler and wife, owned all the stock of the corporation. In the summer of 1911, irreconcilable differences having arisen between the Rodgers and Kohler interests, Rodgers brought a suit in the superior court of King county for the appointment of a receiver to wind up the affairs of the corporation. A receiver was appointed, but before he had qualified, all the parties and their attorneys signed a stipulation that all of the books and assets of the corporation be transferred and assigned to C. R. Jensen, as trustee, to divide among the parties the physical assets as specified in the stipulation, collect all accounts not assigned to Rodgers in satisfaction of a claim of \$1,479.72 held by him against the corporation, and divide the proceeds among the parties, share and share alike, all stock certificates to be delivered to the trustee for cancellation, the trustee to receive for his services \$25 a week to be paid from the assets. On August 16, 1911, pursuant to this stipulation, the Rodgers & Kohler Company, by its president and secretary, executed to C. R. Jensen, plaintiff herein, a transfer in the nature of an assignment in trust, conveying all the right, title, and interest of the corporation "to all stock in trade, goods, merchandise, machinery, tools, books, leasehold premises and effects; also all its right, title and interest in and to all debts and sums of money now due and owing to said corporation, whether the same be by bond, bill, note or account or otherwise," to be held for the benefit of the stockholders and disposed of according to the above-mentioned stipulation. Jensen accept-

ed the trust, and the receivership action brought by Rodgers was dismissed. Jensen at once proceeded to collect the accounts, and had distributed the proceeds and other assets pursuant to the stipulation, except the proceeds of the Rounds & Co., claim hereinafter mentioned.

In November, 1911, the Kohlers began an action against the trustee and Rodgers to restrain the trustee from further action and for an accounting. Defendants in that action demurred to the complaint, and the matter so stood until in January, 1913, when the Kohlers through their attorney dismissed that action without prejudice.

Prior to the transfer of the assets to the trustee, the corporation had placed in the hands of Kohler, Sr., who is an attorney, a claim of \$717.38 due to it from E. J. Rounds & Co., a bankrupt concern, for collection, paying him a retainer of \$50. On taking over the assets Jensen permitted him to retain this claim for collection. Proceeding in the federal court in which the bankrupt matter was pending, Kohler, Sr., shortly before the dismissal of the above-mentioned injunction suit, succeeded in collecting from the bankrupt and its bondsman the face of this claim. Deducting \$200 as his fee for the collection and \$22.50 for expenses, he paid to himself, Ineson J. and Pearl Kohler, as stockholders of the Rodgers & Kohler Co., \$333.82, and sent Jensen a check for \$161.06 as Rodgers' share. Jensen demanded that the full amount of the collection be turned over to him as trustee, and demanded that the Kohlers deliver to him their certificates of corporate stock. Both demands were refused. Jensen, about a month after the dismissal of the injunction suit, cashed the check, and in July, 1913, commenced this action to collect the balance of \$556.32 from the Kohlers and to secure a surrender of their stock certificates. In this cause of action all the foregoing matters were alleged. For a second cause of action the trustee charged that the Kohlers had instituted the injunction suit in November, 1911, maliciously and to embarrass the trustee in the performance of his duties, compelling him to incur a liability of \$150 for attorney's fees, which sum he asked as damages.

Defendants jointly demurred to the complaint on grounds, among others, that the complaint stated no cause of action, and that the two alleged causes of action were improperly united. The court overruled the demurrer, except as to the last-mentioned ground, whereupon plaintiff asked, and was granted, leave to abandon and strike out the second cause of action. Defendants jointly answered, denying that plaintiff had divided the assets, except the proceeds of the Rounds claim, in accordance with the trust agreement, denying that defendants had converted the proceeds of the Rounds claim, denying that they had refused to

surrender their stock certificates, and alleging as a first affirmative defense that at the time of the collection of the Rounds claim the affairs of the Rodgers & Kohler Company had been wound up, that plaintiff for a long time had been employed by Rodgers, and had been working in the interest of Rodgers and against the interests of the trusteeship, and that he had paid to himself from the trust funds \$250 to which he was not entitled. As a second affirmative defense defendants alleged that on the dismissal of their suit for an injunction and an accounting it was stipulated between the parties by their attorneys in that case that Rodgers and the trustee, in consideration of such dismissal, would release any and all claim to the proceeds of the Rounds claim sued for in the present action. Defendants' prayer was simply for a dismissal of the present action.

The court found the facts substantially as alleged in the complaint, and concluded as matters of law that plaintiff, having received \$161.06 of the proceeds of the Rounds collection, was entitled to have turned over to him, as trustee, \$533.82, being the balance of that collection, less \$22.50 costs and expenses of the collection proceedings; that \$333.82 of this sum was withheld by, and should be turned over by, Isaac J., Ineson J., and Pearl Kohler, and \$200 was withheld by, and should be turned over by, Isaac J. Kohler individually; that all of defendants should be required to surrender their certificates of stock in the corporation. Decree went accordingly. Defendants appeal.

[1] We shall consider appellants' contentions in their logical order. It is claimed that, the action being for specific performance of the trust agreement, the complaint stated no cause of action, and particularly none against Kohler, Jr., and wife, in that there was no allegation that appellants, at the time this action was commenced, had in their possession the money claimed. Appellants, however, jointly answered, and proceeded to trial on the merits. In such a case the complaint will not be narrowly scanned for defects. *Johnson v. Johnson*, 68 Wash. 113, 119 Pac. 22.

[2, 3] The evidence cured any insufficiency of the complaint in this particular. The statement of Kohler, Sr., transmitting to respondent the \$161.06, which is in evidence, stated that he had collected the money, and indicated that he had turned over to Kohler, Jr., at least some part of it. There was no evidence that he had otherwise parted with any of the money. Appellants were all parties to the stipulation which provided that all the assets of the corporation should be turned over to the trustee for administration. In the face of the stipulation none of the appellants had any right to retain any of the assets and divide them among the stockholders. That is the office of the trust-

tee until he has finally accounted or has been removed.

[4] It is insisted that the court erred in refusing to allow appellants to show the length of time in which the trustee could properly have performed his services; that he did not perform those services in good faith, but was guilty of partiality and made excessive and improper charges for services. While it is true these things were charged in appellants' first affirmative defense, the issues were narrowed to the single question of the Rounds & Co. collection when respondent in response to appellants' demurrer to the complaint struck from the complaint the second cause of action. That part of the complaint tendered the very issue which appellants sought to try. The court was of the opinion that the issues thus narrowed did not involve the conduct of the trustee in his administration of the trust, and that these were matters which could only be litigated in an action against the trustee for an accounting. In this we think the court was right. Appellants, by their own action having forced the elimination of this matter from the complaint, could not insist upon litigating it under their answer. The issues were narrowed at their own instance.

[5] Appellants also contend that the evidence clearly sustained their second affirmative defense, and showed that on the dismissal of their suit for an injunction and an accounting against the trustee it was the understanding between the attorneys for both parties in that action that the trustee and Rodgers would forego all claim to the money claimed by respondent in this action. The evidence as to such an understanding was in the sharpest conflict. We shall not review it in detail. There is no claim that any such stipulation was made in open court and entered upon the court's minutes, or that it was reduced to writing, as required by rule 10 of the superior courts. See rules in volume 82 Wash. xlv. The trial court made no findings on this subject, and, so far as the record shows, none was requested. On the record before us we are not warranted in finding that any such agreement was made.

[6] Appellants further claim that in any event, under Rem. & Bal. Code, § 136, Kohler, Sr., was entitled to a lien on the money and stock certificates in his hands, and could not be compelled to surrender either until his fees were paid. He was a party to and signed the stipulation, agreeing to turn over to the trustee "all debts and sums of money now due and owing to said corporation, whether the same be by bond, bill, note or account or otherwise." If he intended to claim an attorney's lien in the Rounds account, which was then in his hands for collection, he should have so stipulated. He

had already received a retainer of \$50 when he signed that stipulation. It is not claimed that he had a contract for a greater sum or any contract lien for any sum. By failing to reserve a lien in the stipulation he waived the right to claim such lien thereafter. *State v. Lucas*, 24 Or. 168, 33 Pac. 538. In *Davis v. Bartz*, 65 Wash. 395, 402, 118 Pac. 334, we sustained a similar waiver of a mechanic's lien. Having no lien by contract, and having waived his right to the statutory attorney's charging lien by signing the stipulation, Kohler, Sr., had no right to retain any part of this money, under a claim of lien.

[7] But it is urged that if the charges made for his services were claimed to be excessive, respondent should have pursued the summary method provided by Rem. & Bal. Code, §§ 137, 138, to have the matter adjusted. But the statute does not declare this summary remedy exclusive. Respondent had the right to maintain an action to enforce the trust agreement against the parties to that agreement.

[8] One question remains. At the trial appellant Kohler, Sr., sought to prove what services he performed in making the Rounds & Co. collection and the reasonable value of such services. Respondent objected on the ground that no such issue was tendered by the answer. The objection was sustained. Appellant then asked leave to amend the answer to meet this objection. The request was denied. Whether or not a trial amendment shall be permitted is a matter resting largely in the discretion of the trial court, but in this case it is obvious that the amendment could not have resulted in prejudicial surprise. Respondent knew from the beginning that Kohler, Sr., claimed an attorney's fee for the service rendered in addition to the retainer he had already received. Under the liberal rule imposed by the statute (Rem. & Bal. Code, § 303) we think the refusal to permit the amendment was an abuse of discretion. But it does not follow that the judgment should be reversed and a new trial ordered. The other issues were clearly made, fairly tried, and correctly decided.

The cause is remanded, with direction to permit the amendment of the answer, take evidence as to the services performed and their reasonable value, determine the amount of the fee which should be allowed, and, if this be found to exceed the sum of \$50 already paid, reduce the recovery against Isaac J. Kohler in the amount of such excess, but in no event shall such reduction exceed the sum of \$200 claimed. Neither party may recover costs in this court.

MORRIS, C. J., and FULLERTON, MOUNT, and CHADWICK, JJ., concur.

MYERS et ux. v. WILLIAMS. (L. A. 3621.)

(Supreme Court of California. Aug. 28, 1916.)

1. VENDOR AND PURCHASER ⇨299(3)—FAILURE TO MAKE DEFERRED PAYMENTS—PLEADING—SUFFICIENCY.

In a vendor's suit to forfeit a contract, allegations of complaint *held* to sufficiently allege notice of intention to forfeit for failure to pay installments due.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 841; Dec. Dig. ⇨299(3).]

2. VENDOR AND PURCHASER ⇨299(2) — FAILURE TO MAKE DEFERRED PAYMENTS—FORFEITURE—NOTICE.

Where the entire course of business between parties to a contract of sale has amounted to a waiver by the vendors of the clause making time of payment of installments of the essence thereof, they may not declare a forfeiture without proper notice and demand.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 838; Dec. Dig. ⇨299(2).]

3. VENDOR AND PURCHASER ⇨299(3)—FAILURE TO PAY INSTALLMENTS — WAIVER — PLEADING.

Before the purchaser can rely on alleged waiver of forfeiture for failure to pay installments when due, he must plead and allege it, unless it appears from the vendor's complaint.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 841; Dec. Dig. ⇨299(3).]

In Bank. Appeal from Superior Court, Los Angeles County; Z. B. West, Judge.

Action by David Myers and wife against Wesley Williams. From the judgment and order denying motion for new trial, defendant appeals. Affirmed.

G. W. Wickliffe, of Los Angeles, for appellant. Thorpe & Widney, of Los Angeles, for respondents.

MELVIN, J. Defendant appeals from a judgment and an order denying his motion for a new trial. The suit was one whereby it was sought to forfeit defendant's rights under a contract for the sale of real property and to recover possession of said realty. The agreement dated September 25, 1911, fixed the price of the land at \$2,800. There was to be a payment of \$20 at the date of the agreement and \$20 on the first of each month beginning November 1, 1911, for one year, after which, beginning November 1, 1912, the monthly payments were to be \$25 each. The contract provided for the payment of interest, which was first to be taken from the monthly installments, the residue to be applied upon the principal. There was also a provision that if the vendee failed to pay any installment when due, the vendors should be released from all obligation to convey, and the purchaser's rights should be forfeited. Time was made of the essence of the contract. The monthly payments were made for more than a year, but no installment was paid on time. In each instance the vendors

accepted tender of the money after it became due. The installment of \$25 due January 1, 1913, was not paid until February 10, 1913. From this payment at the request of Williams, who was so bound under the agreement, the taxes were paid, leaving a balance to be applied on the purchase price. On March 19, 1913, the vendee paid \$7.80 and on the 24th of the same month \$7. These payments were accepted. On April 1, 1913, another installment became due and on the following day Williams tendered \$40, which plaintiffs refused to accept. They immediately employed an attorney, and on April 9th instituted this suit, which was successful in the superior court.

Appellant presents three reasons, each of which he says will justify a reversal of the judgment. He says that: (1) The complaint does not contain averments of facts sufficient to constitute a cause of action; that (2) plaintiffs, by the acceptance of many installments after they became due and by the crediting of defendant with sums less than the indebtedness under the terms of the agreement, had waived the right of forfeiture; and that (3) after said alleged forfeiture plaintiffs did not give defendant a definite and specific notice of their intention strictly to enforce the terms of the contract, and defendant therefore was not in default when the action was commenced.

[1] Appellant's objection to the complaint is that it failed to allege that plaintiffs had given defendant a proper and timely notice of their intention to exact a forfeiture. That pleading set forth the substance of the contract and also pleaded it in *hæc verba*. It then alleged the payment of \$20 on the first day of each month from November 1, 1911, to October 1, 1912, and the sum of \$25 on the 1st days, respectively, of November and December, 1912. In other words, from the complaint it appears that the terms of the agreement of sale were regularly and timely followed until the end of the year 1912. There are further allegations that \$3.88 of the principal and \$13.48 of interest were paid on January 1, 1913, \$7.80 by way of interest on March 19th and \$7 also as interest on March 24th. It is averred that at divers times since the 1st day of February, 1913, and prior to the commencement of the action, plaintiffs had demanded payment of the moneys due under the contract, but that defendant had refused to comply with such demands. The complaint contains the further averment that on or about the 2d day of April, 1913, plaintiffs notified defendant that they intended to exercise their option to declare the contract at an end, etc. As a pleading the complaint does aver that defendant was given proper and timely notice, and it is not vulnerable to the objection urged against it by him.

Mrs. Myers, the only witness who testi-

fied on behalf of plaintiffs, said that the January payment in 1913 was not made until February 10th, when Mr. Williams paid \$25, obtaining a receipt for that amount. Out of this, by agreement, the taxes were paid, and Mr. Williams was given credit in the copy of the contract for \$3.80 principal and \$13.48 interest, leaving a balance due on the principal for January of \$7.64. She also testified that on March 19th Mr. Williams paid \$7.30, and \$7 was paid on March 24th. She said that on April 2, 1913, Mrs. Williams, the wife of defendant, offered to pay some money on the contract. "I refused to accept any money," said the witness, "and told her the matter would be placed in the hands of our attorney."

Mr. Williams testified that his wife took \$40 to the home of the plaintiffs. Later on the same day he went to the office of the attorney for the plaintiffs and offered to pay \$40, which the attorney refused to accept. "I went there to make the payment," he testified, "because the Myerases told me they had put the matter in his hands." The witness offered to pay, at the time of the hearing in court, all moneys due on the contract up to that date.

[2] It thus appears, says appellant, that not until the refusal of the plaintiffs to accept the amount tendered in April was there anything which might be construed by defendant as notice to him that the vendors would insist upon strict compliance with the terms of the contract. Undoubtedly it is the rule that where the entire course of business between the parties to a contract of sale has amounted to a waiver on the part of the vendors of that clause of the agreement making time of the essence thereof, they may not declare a forfeiture without proper notice and demand. *Boone v. Templeman*, 158 Cal. 290-299, 110 Pac. 947, 189 Am. St. Rep. 126; *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751.

[3] There can be no doubt of the existence of the rule, and possibly the facts would have supported its application in favor of defendant, but the difficulty which confronts him is that no claim of waiver of the right of forfeiture was made by the answer. In that pleading the only denial with reference to the allegations of payments in the complaint is the statement that they were not all of the moneys offered. The answer contains no word of allegation that the payments were not duly made and on time up to the end of the year 1912. It is averred that the sum of \$25 was paid on account of interest on February 10, 1913, and that a tender of \$40 was made to and refused by plaintiffs on April 1, 1913, and the pleader set forth the conclusion that he was not in default in the payments on said contract on the 2d of April, 1913, or at the time of the commencement of this action. Unless we are

to hold, therefore, that the mere fact of receiving the three payments after January 1st necessarily amounted to a waiver of the provision as to time of future payments and a waiver, too, of which defendant may take advantage without pleading it, defendant may not prevail on the record before us. If a waiver does not appear from the complaint, it is a matter of defense. None is deducible from that pleading. As we have seen, no allegation of waiver of that part of the agreement making time of the essence of the contract is set forth in the answer, and, in the absence of any such claim, the forfeiture must be held to have taken place. *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363. The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

TEMPLE v. GORDON. (Civ. 1989.)

(District Court of Appeal, Second District, California. July 22, 1916.)

1. INJUNCTION §151—PRELIMINARY WRIT—SCOPE OF INQUIRY.

On motion for preliminary injunction, the court, to warrant its refusal, need not examine the merits, if the essential facts are in dispute.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 336; Dec. Dig. §151.]

2. APPEAL AND ERROR §954(1)—INJUNCTION §135—SCOPE—REVERSAL.

The granting of a preliminary injunction is not a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case; and its action upon such application will not be reviewed in the appellate court unless it shall clearly appear that there was an abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954(1); *Injunction*, Cent. Dig. § 304; Dec. Dig. §185.]

3. TRADE-MARKS AND TRADE-NAMES §3(4)—RIGHT TO EXCLUSIVE USE — DESCRIPTIVE TERMS.

The name "Faultless," applied to a brand of bread, is descriptive only of the kind or quality, so that, under Civ. Code, § 991, the owner could not exclusively appropriate it, such section excepting from individual appropriation names relating only to quality or description.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 7; Dec. Dig. § 3(4).]

4. TRADE-MARKS AND TRADE-NAMES §95(1)—RIGHT TO EXCLUSIVE USE — DESCRIPTIVE TERMS.

Evidence held insufficient to show abuse of trial court's discretion in refusing preliminary injunction against use of trade-name similar to that registered by plaintiff.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 108; Dec. Dig. §95(1).]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Injunction by William J. Temple against George B. Gordon. From an order dissolving restraining order and denying motion for preliminary injunction, plaintiff appeals. Affirmed.

Joseph F. Westall, of Los Angeles (Henry T. Hazard, of Los Angeles, of counsel), for appellant. Jones & Weller, of Los Angeles, for respondent.

CONREY, P. J. This is an appeal by the plaintiff from an order dissolving a restraining order and denying plaintiff's motion for a preliminary injunction. The application for the order was heard upon the complaint, and affidavits produced on both sides.

For about two years prior to defendant's acts of which the plaintiff complains plaintiff was engaged in manufacturing and selling a certain kind of bread, to which he gave the name of "Faultless" bread. In June, 1913, he caused to be registered as belonging to him the trade-mark and trade-name "Faultless" as applied to that product, and obtained a certificate thereof from the secretary of state of the state of California. In selling his bread thereafter he was accustomed to have each loaf wrapped in a certain kind of paper upon which was printed:

FAULTLESS
BREAD
MADE BY
OCCIDENTAL BAKERY

Brdy. 4770 Los Angeles A-5020.

These words and figures were printed in dark blue ink in a certain distinctive form. He advertised extensively his product under said trade-name, and built up a valuable business in the sale of the described bread. The plaintiff charged that thereafter the defendant, with intent to deceive and defraud the public and to injure and defraud the plaintiff, caused to be put up in similar packages a kind of bread sold by him, copying the general design, color of ink, etc., and caused the bread to be sold in a nearly similar wrapper to that of the plaintiff, on which he placed the following printed matter:

PEERLESS
PURITY
PEERLESS
BREAD
MADE BY
GORDON BREAD CO.

South 4797 Los Angeles.

Samples of these wrappers are attached as exhibits to the complaint, and are found in the transcript on appeal. The affidavits which accompanied the complaint were made by drivers of bread wagons for the plaintiff, and contain statements of fact tending to show a similarity in appearance of the articles as placed on the market by the defendant to those sold by the plaintiff; tending also to show that some persons were deceived thereby, and that the bread sold by the defendant was inferior in weight and

quality, but that nevertheless it was competing successfully with plaintiff's bread in the various establishments where bread was sold in the city of Los Angeles, and that plaintiff's business was being injured thereby. In response to the order to show cause the defendant presented to the court affidavits of himself and of several drivers of his delivery wagons and of several grocers who had been selling bread purchased from the plaintiff as well as from the defendant. The defendant denied many of the important allegations of the complaint. Among other things, the defendant stated in his affidavit, and the accompanying affidavits stated, matters tending to show that it was not true that by reason of close similarity of the names "Faultless" and "Peerless" or of the wrappers and packages as sold by the defendant the public could be or was misled or imposed upon; that the defendant had been engaged in the manufacture and selling of bread in the city of Los Angeles for at least five years prior to the commencement of this action; that the wrappers used by him did not, nor did he intend by them to, imitate the plaintiff's trade-mark or label.

[1, 2] On the hearing of this motion it was not necessary for the court, in order to warrant a denial of the order asked for by plaintiff, to pass upon the merits of the case. The court may have concluded that the essential facts were so clearly in dispute, and the right of plaintiff to any relief so much in doubt under the showing made, that it would decline to grant any injunction at all until a trial on the merits.

"The granting of a preliminary injunction is not a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case; * * * and its action upon such application will not be reviewed in the appellate court unless it shall clearly appear that there was an abuse of its discretion." Santa Cruz Association v. Grant, 104 Cal. 306, 37 Pac. 1034.

[3, 4] The plaintiff's case does not appear to be based upon any claim of exclusive right by reason of a trade-mark, since the trade-mark as registered by him relates only to the name or quality of the thing sold. Civ. Code § 991. The claims asserted by him are based upon—

"the principle that in the interest of fair commercial dealing courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of making competitors use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field." Dunston v. Los Angeles Van, etc., Co., 135 Cal. 89, 94, 131 Pac. 115, 117.

The relief rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public. In view of the nature of the relief demanded, and in view of the conflicting evidence which came before the superior court under the order to show cause, we are

unable to say that the plaintiff's right to a temporary injunction was conclusively established, or that the court abused its discretion in denying the motion.

The order appealed from is affirmed.

We concur: JAMES, J.; SHAW, J.

WIGLEY v. SOUTH SAN JOAQUIN IRR. DIST. et al. (Civ. 1540.)

(District Court of Appeal, Third District, California. July 26, 1916. Rehearing Denied by Supreme Court Sept. 21, 1916.)

1. CONSTITUTIONAL LAW — 26—LEGISLATIVE POWER—PRESUMPTIONS.

In view of Const. art. 4, § 1, vesting legislative power in the Legislature, there is no implication of absence of power in it to do anything not expressly prohibited.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 37; Dec. Dig. —26.]

2. OFFICERS — 61—RECALL—POWERS OF LEGISLATURE.

Prior to enactment of Const. art. 23, § 1, empowering recall of officers, the Legislature had power to provide for the recall.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. —61.]

3. OFFICERS — 61—RECALL—POWERS OF LEGISLATURE.

Const. art. 4, § 18, providing for impeachment, trial, and removal of certain executive and judicial officers, does not deprive the Legislature of power to provide for recall of public officers by the electorate.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. —61.]

4. OFFICERS — 61—RECALL—POWERS OF LEGISLATURE.

As Const. art. 23, § 1, providing for recall of certain specified officers, is not a grant of power to the Legislature, it will not be held to remove from the Legislature the power to pass acts for removal of public officers.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. —61.]

5. WATERS AND WATER COURSES — 227—IRRIGATION DISTRICTS—OFFICERS—RECALL—POWERS OF LEGISLATURE.

Acts Ex. Sess. 1911, p. 185, providing for recall of officers of irrigation districts, is constitutional and a valid exercise of legislative power.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. —227.]

Application for writ of mandate by G. W. Wigley against the South San Joaquin Irrigation District and others, to which defendants demurred. Demurrer overruled, and writ awarded.

Clary & Louttit, of Stockton, for petitioner.
L. L. Dennitt, for respondents.

ELLISON, Judge pro tem. This is an application for a writ of mandate to the board of directors of the South San Joaquin Irrigation District, commanding it to call an election for the recall of one of its members.

The application for the writ shows that the recall petition presented to said board

conformed in all respects to the provisions of an act of the Legislature as found in the statutes of the extra session of 1911 at page 135. This act provides:

"The holder of any elective office of any irrigation district may be removed or recalled at any time by the electors."

[1] Counsel for the board of directors take the position that the Legislature, in passing the above act and extending the recall to officers of an irrigation district, acted in violation of certain provisions of the state Constitution and exceeded its powers. This conclusion is attempted to be sustained by a reference to section 18, art. 4, of the Constitution, and to section 1, art. 23. Section 18 provides for the removal of certain officers, such as Governor, judges, etc., by impeachment, and concludes with this sentence:

"All other civil officers shall be tried for misdemeanor in office in such manner as the Legislature may provide"

—and section 1, art. 23, provides for the recall of certain specified officers, viz., for the recall of elective officers of counties, cities and counties, and cities and towns of the state, but does not, in express terms, provide for the recall of district officers. Considering these two sections of the Constitution, counsel's position may be stated as follows: Since the Constitution does not provide for the recall of district officers, but does provide that they may be removed from office after a trial and conviction of misdemeanor in office, it follows that the latter provision is exclusive, and the Legislature has no power to pass any act for their removal other than an act to provide for their removal for cause. The argument challenges the power of the state Legislature to pass the act of 1911. It must be considered, however, that, in the absence of section 1, art. 23, of the state Constitution, the Legislature would have plenary power to pass laws providing for the recall of public officers. This results from the nature and form of our state government. As was said, in *Sheehan v. Scott*, 145 Cal. 684, 79 Pac. 350:

"The express declaration in section 1, art. 4, of the Constitution of this state, that 'The legislative power of the state shall be vested in a Senate and Assembly,' includes all the legislative power of the state whose exercise is not expressly prohibited to the Legislature, or conferred upon some other body. In the face of this declaration there can be no implication of the absence or nonexistence of such power, but whoever would claim that the power does not exist in any particular case, or has been improperly exercised, must point out the provision of the Constitution which has taken it away or forbidden its exercise. 'The Constitution of this state is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature, and it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the state, or delegated to the general government, or prohibited by the Constitution of the United States.' *People v. Coleman*, 4 Cal. 46 [60 Am. Dec. 581]."

[2] Prior to the enactment of section 1, art. 23, of the Constitution, it was conceded, if not directly decided, that the Legislature had the power to pass acts for the recall of public officers. Thus, in *Conn. v. City Council*, 17 Cal. App. 717, 121 Pac. 719, the record in that case disclosed that the charter of the city of Richmond was adopted at a time when there were no recall provisions in the state Constitution. The charter expressly provided for the recall of all elective city officers. It was held in that case that the charter provision as to recall of the elective officers of the city was valid and within the power of the people of the city to make, and within the power of the Legislature to approve. The charter, when approved by the Legislature, became a law of the state in the same sense that the act of 1911 is a law of the state. We have here, then, a decision holding that the Legislature did not need any constitutional grant to give it power to pass an act for the recall of public officers.

2. In the same case it was said:

"Manifestly the tenure of office, and the method of removing an elected city official, are purely municipal affairs, which in no sense conflict with the constitutional provisions relating to the tenure of office or the removal by impeachment of state officers. Similar recall provisions, as applied to administrative officers, have been upheld and declared not to be in conflict with either state or federal Constitution in other jurisdictions, where the points of attack were identical with the arguments advanced here."

In *Good v. Common Council*, 5 Cal. App. 269, 90 Pac. 46, it is said:

"A case of 'removal for just cause' in this sense implies some misconduct upon the part of the officer, or imputes to him some violation of the law. Under such circumstances it is necessary that the charges against him shall be based upon some refusal to obey or intention to violate the law prescribing his duties. There are often such penalties attached to proceedings for the removal of officers 'for cause shown' that they are, and should be, carefully guarded from abuse (*Croly v. Sacramento*, 119 Cal. 234, 51 Pac. 323); but as to the right to the office as against the people, it is a well-recognized rule that the agency may be terminated at any time by the sovereign power without reason given (*Matter of Carter*, 141 Cal. 319, 74 Pac. 997)."

[3] We conclude that section 18, art. 4, providing that officers may be tried for misdemeanors in office in such manner as the Legislature may prescribe, does not deprive the Legislature of power to provide for the recall of public officers by the electorate.

[4] 3. As section 1, art. 23, of the Constitution is not, nor was it intended to be, a grant of power to the Legislature, so it will not be held to take from the Legislature the power it already had to pass acts for the removal of public officers, unless such intent clearly appears and is the reasonable conclusion to be drawn from the language used. It contains no language prohibiting the Legislature from passing such acts. "There can be no implication of the * * * nonexistence of such power, but whoever would claim that

the power does not exist in any particular case * * * must point out the provision of the Constitution which has taken it away or forbidden its exercise." *Sheehan v. Scott*, 145 Cal. 686, 79 Pac. 351.

[5] Our conclusion is that the act of 1911 is not in conflict with any constitutional provision, and is a valid exercise of legislative power. The demurrer to the petition for a writ of mandate is overruled. Let a writ of mandate issue directed to the board of trustees of the South San Joaquin Irrigation District, commanding it to call the election asked for in the recall petition on file with it.

We concur: CHIPMAN, P. J.; HART, J.

PACIFIC COAST DRIED FRUITS CO. v. SHERIFFS et al. (Civ. 1411.)

(District Court of Appeal, Third District, California. July 22, 1916.)

1. SALES \hookrightarrow 52(5)—CONTRACT—EXECUTION—EVIDENCE.

Evidence held sufficient to sustain finding that defendants had made no contract to purchase with plaintiff as alleged.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 136, 137, 139; Dec. Dig. \hookrightarrow 52(5).]

2. EVIDENCE \hookrightarrow 588—WEIGHT OF EVIDENCE—PROVINCE OF COURT.

It is within the discretion of the trial court to reject in toto the testimony of any witness, if not done arbitrarily.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2437; Dec. Dig. \hookrightarrow 588; *Witnesses*, Cent. Dig. § 1164.]

3. APPEAL AND ERROR \hookrightarrow 994(3)—SUFFICIENCY OF EVIDENCE.

Evidence held such that the court on appeal could not say that the trial court abused its discretion in rejecting plaintiff's testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3904-3905½; Dec. Dig. \hookrightarrow 994(3).]

4. SALES \hookrightarrow 359(1)—ACTION ON CONTRACT—EVIDENCE.

Evidence held to sustain judgment for defendant in action on alleged contract, based on ground that plaintiff was not the real party in interest.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1056, 1057; Dec. Dig. \hookrightarrow 359(1).]

Appeal from Superior Court, Sonoma County; Thos. O. Denny, Judge.

Action by the Pacific Coast Dried Fruits Company against Charles and George Sheriffs, doing business as the Sheriffs Bros. Company. Judgment for defendants, and plaintiff appeals. Affirmed.

T. J. Butts and Rolfe L. Thompson, both of Santa Rosa, for appellant. T. J. Geary and W. Finlaw Geary, both of Santa Rosa, for respondents.

HART, J. The plaintiff appeals from a judgment rendered and entered against it and in favor of the defendants.

The action is for the recovery of the sum of \$1,837.12, alleged to be the balance due

from the defendants to the plaintiff on a contract of sale made and entered into between the parties on the 29th day of September, 1913, whereby, it is alleged, the plaintiff sold and delivered to the defendants 132,878 pounds of dried prunes, at the agreed price of \$100 per ton for the first 10 tons thereof and \$120 per ton for the balance thereof.

The undisputed facts are: That one H. W. Eberling was, in the year 1913, and for several years prior thereto, the lessee of the prune orchard known as the "Leak ranch," situated on Mark West creek, in Sonoma county. He also, in the year 1913, was the lessee of another prune orchard, in said county, known as the Gibbons ranch. On the 1st day of May, 1913, the said Eberling entered into a written contract with the California Fruit Cannery Association, whereby he agreed to sell and deliver to said association from 40 to 50 tons of dried prunes, grown on the Leak and Gibbons ranches, at "3 cent. base," said prunes to be delivered on board of cars at a station called Fulton, in Sonoma county. The consummation of said contract of sale was made dependent upon the happening of certain conditions pertaining to quality of fruit as dried. Upon the execution of said contract, the California Fruit Cannery Association paid said Eberling the sum of \$500, in two different checks made payable to Eberling, one for \$200 and the other for \$300. Thereafter, and before the prunes or any portion thereof were delivered, the cannery association paid Eberling the additional sum of \$200, making a total payment of \$700. On the 15th day of August, 1913, the following contract was mutually entered into by Eberling Bros. and the defendants:

"In consideration of the sum of one dollar by each to the other paid, the receipt of which is hereby acknowledged, Eberling Bros. has this day sold, and Sheriffs Brothers Company of Healdsburg, Cal., have this day bought my crop of dried French and sugar prunes grown on what is known as Leak and Givins ranches Est 100 tons more or less
10 tons @ \$100.00 per ton
Balance @ \$120.00 " "

"It is hereby expressly agreed that said fruit shall be delivered in first class order, all of which is to be of choice merchantable quality, thoroughly cured and well dried.

"Any wet or rain damaged stock is to be weighed back, or taken at a reduced price as may be agreed upon.

"To be delivered at on board cars Mark West.

"Terms—Cash on delivery.

"Seller: Eberling Bros.

"Sheriffs Brothers Company,

"By Chas. Sheriffs."

These further facts are also undisputed: That, subject to the conditions of the foregoing contract, viz. that the prunes so bargained for should "be delivered in first class order, all of which are to be of choice, merchantable quality, thoroughly cured and well dried," etc., the defendants bought the crop of prunes on the ranches in said contract named, estimated at 100 tons, at the rate of

\$100 per ton for the first 10 tons and \$120 per ton for the remainder, the fruit to be delivered on board the cars at the railroad station at Mark West, in Sonoma county; that all the prunes, except the two cars in dispute here, were so delivered to the defendants and received by them at Healdsburg, in said county; that all the prunes were, prior to the commencement of this action, paid for except the last two cars, which are involved in this action, and which amounted in money to the sum herein sued for; that, when the said last two cars reached Healdsburg, the place of consignment, the California Cannery Association seized and took possession of them in an action brought by it in claim and delivery, said association claiming to be the owner of said prunes by virtue of its contract with H. W. Eberling, above mentioned herein; that H. W. Eberling had, prior to the seizure by the cannery association of the two cars of prunes as above indicated, delivered to the said association 9 or 10 tons of prunes, which amounted to more in money than the sum of \$700, which was advanced to said Eberling by the cannery association.

The appellant expressly admits these facts: That H. W. Eberling was the lessee of the Leak and Gibbons ranches, and owned half the prune crops grown thereon; that H. W. Eberling entered into the contract, above referred to, with the cannery association for the sale of the prunes in controversy in this action; that, after the making of the contract between the cannery association and H. W. Eberling, and before the making of the contract between Eberling Bros. and the defendants, the plaintiff was incorporated. The disputed fact in the case and upon which the decision of the controversy is made to hinge is whether the fruit in question was sold to the plaintiff by Eberling prior to the making of the contract with the defendants.

The plaintiff contends that the determination of the ultimate issue presented here is whether the contract between Eberling and the cannery association is merely executory or constituted a sale. "If it was a sale," proceeds the plaintiff, "then the title passed to the cannery company, and Eberling could not thereafter convey the fruit to the Pacific Coast Dried Fruit Company. And if the cannery fruit was shipped to Sheriffs Bros. at Healdsburg, the cannery company had a right to replevin it." On the other hand, continues the plaintiff, "if said contract was executory and Eberling had until the 15th day of October, 1913, in which to fulfill it, and he did not fulfill his contract by that time, the California Cannery Association had an action for damages against H. W. Eberling, but it had no title to the fruit, and the sale of the fruit to the Pacific Coast Dried Fruit Company was valid, as was the sale to Sheriffs Bros." Counsel for the appellant then proceeded to show that the contract referred to was executory, and that

therefore the canners' association did not and could not acquire title to the fruit until the same was delivered to and accepted by it.

[1] The case, however, was tried and decided upon the sole theory that the defendants never entered into any contract with the plaintiff whereby the latter agreed or promised to sell and deliver to them any prunes; that said plaintiff, as a matter of fact, never did sell and deliver to the defendants any prunes, and that said plaintiff is not the real party in interest in this action (section 367, Code Civ. Proc.); that it cannot therefore maintain this action, and is not entitled to any judgment of any kind or character against the defendants. Upon this theory of the case, it is manifestly unimportant whether the contract between Eberling and the canners' association constituted a sale or a mere agreement to sell.

The court made no other findings than the following:

"(1) That the plaintiff did not, on or about September 29, 1913, or on any other date or at any time, sell or deliver to the defendants, * * * at Healdsburg * * * or any other place * * * any quantity of prunes; (2) that the defendants * * * did not at any time or place agree or promise to pay to the plaintiff any price for any prunes, and that defendants * * * did not at any time or place enter into any contract with the plaintiff for the purchase from plaintiff of any quantity of dried prunes; (3) that the defendants * * * have not paid to the plaintiff the sum of \$5,885.56, or any sum of money whatever, on account of any dried prunes received by the defendants * * * from the plaintiff; (4) that there is nothing due from the defendants * * * to the plaintiff on any account."

Thus it will be observed that, as stated, the whole theory of the case as it was tried by the defendants and decided by the court was that the plaintiff was not the real party in interest, and the sole question here is, therefore, whether the above findings derive sufficient support from the evidence.

We cannot say that the decision was not justified.

The contract upon which this action is founded was, as is above shown, between Eberling Bros. and Sheriffs Bros. The prunes referred to in said contract were those produced or to be produced on the Leak and Gibbons ranches of which H. W. Eberling, who conducted the negotiations culminating in the contract, was the lessee. In that contract, it is expressly provided that the Sheriffs Bros. were to receive, for the prices therein specified, "my crop of dried French and sugar prunes grown on what is known as the Leach (Leak) and Givins (Gibbons) ranches."

Charles Sheriffs testified that, in the course of his negotiations with H. W. Eberling for the purchase of said prunes, no word was ever uttered or suggestion made or intimated that the Pacific Coast Dried Fruit Company had any interest, direct or remote, in said prunes or the contract into which he

was about to enter with Eberling Bros. for the purchase of the same. Indeed, he testified that, having heard prior to the time he began negotiations for the purchase of the prunes that the Eberlings had formed a company called the "Pacific Dried Fruit Company," he asked H. W. Eberling, just before the contract was executed, why he did not sell his crop of prunes to his own company (referring to plaintiff), and that Eberling replied that he did not desire to take that course, that the fruit belonged to him (Eberling), and that "he wanted to sell it on the outside for the best price he could get for it." The witness further testified that, when making payments for prunes delivered to him under said contract, he invariably did so by drawing his checks in the name and favor of H. W. Eberling, the latter having requested him to make his checks out in that manner.

On the other hand, the plaintiff presented some testimony which raised an apparent conflict in the evidence upon the question whether it at any time became the owner of the prunes in question, or whether said prunes were transferred to it by Eberling before the making of the contract to which the defendants are parties. H. W. Eberling testified that he transferred his 1913 crop of prunes to the plaintiff prior to the making of the contract between Eberling Bros. and Sheriffs Bros. The consideration for the transfer, he said, was the issuance to him by the plaintiff of 800 shares of its stock. He never received any cash from the plaintiff for the transfer. The minutes of a meeting of the board of directors of the plaintiff, held July 21, 1913, were introduced in evidence, and disclosed that, upon motion of Director C. W. Eberling, "the property of Harry W. Eberling, known as Eberling Bros., viz.: 100 tons of prunes, valued at \$10,000.00, with the packing house, cannery and other equipment, and cash to the value of \$6,000.00, together with his good will, accepted by the company and that the secretary be instructed to issue 336 shares of the company's stock in respect thereof." The foregoing action, the minutes further show, was subsequently ratified by Directors H. W. Eberling, C. W. Eberling, and J. T. Lyons, and acknowledgment of receipt of stock issued by the plaintiff, to whom it does not appear, was also noted in said minutes. There were also introduced what purported to be the minutes of a meeting of the board of directors, held on August 7, 1913, which tended to show that the corporation, by said board, had invested H. W. Eberling with authority "to sell the whole or any part of the prunes that he put into this corporation as one of his assets and which are grown on his ranch at Fulton, Sonoma county, and to receive payment therefor. And, moreover, he is hereby authorized to use such moneys as he may receive in payment therefor in such a way as may seem

fit and to the best interests of said corporation in the discharge of its obligations."

The foregoing is, substantially, about all the testimony the object of which was to show ownership of the prunes in the plaintiff.

As stated, there is apparently a conflict in the evidence upon the question of the ownership of the prunes involved in this action. Whether, however, in reality, there was a conflict was a question for the determination of the trial court. If that court concluded, as with perfect propriety we may assume that it did, that the testimony introduced by the plaintiff upon that question was wholly unbelievable and so entirely discredited and disregarded it, then there was no actual conflict, for the situation in that case would be the same as if the plaintiff had introduced no proof whatsoever upon the subject.

[2] That it is within the legal province or discretion of the trial court to reject in toto the testimony of any witness is a proposition so obvious under our system and so often confirmed by the courts, that its statement is all that should be necessary to certify its soundness. In the very nature of the case this should be the rule. It was announced in the earliest history of the jurisprudence of the state and has never been varied from. In *Blankman v. Vallejo*, 15 Cal. 639, 646, the very learned Mr. Justice Baldwin, with the sanction of the court, said:

"We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief."

See, also, *County of Sonoma v. Stofen*, 125 Cal. 32, 35, 57 Pac. 681; *People v. Milner*, 122 Cal. 171, 179, 180, 54 Pac. 833; *Clark v. Tulare Dredging Co.*, 14 Cal. App. 414, 432, 433, 112 Pac. 564.

It is unnecessary to say, of course, that neither a trial court nor a jury may arbitrarily reject the testimony of a witness. There must be a sufficient legal reason for its rejection or discretion is abused. But, unless the action of a trial court or jury in repudiating testimony given before it appears to be inherently erroneous or upon its face as involving an arbitrary disregard of such testimony, an appeal court must assume and, indeed, presume, that upon sufficient reasons the testimony was deemed to be wanting in verity, and therefore without probative or evidentiary force or value.

[3] While it does not rest upon this court to search for and develop the specific reason or reasons by which the trial court was led into the rejection of the testimony presented by the plaintiff, we may, nevertheless, properly call attention to some considerations disclosed by the record which, upon their face at least, might well lead to the

conviction that the testimony so brought into the case was entitled to no weight or possessed no persuasive force. In the first place, it is to be observed, in this connection, that the prunes in question were shipped to Sheriffs Bros. by and in the name of "Eberling Bros.," and that, when the fruit was seized by the canners' association under the writ of replevin, H. W. Eberling alone fought the case, apparently for and in behalf of himself, and, according to his own admissions on the witness stand, at no time after the fruit was so taken possession of did he say or represent or pretend, in that action or otherwise, that the prunes were the property of the plaintiff, until about the time of the commencement of this action. In the second place, it is to be noted that the contract with the canners' association was made prior to the incorporation of the plaintiff and prior to the execution of the contract between Eberling Bros. and the defendants. It will further be noted that the latter contract called for better prices and profits for and on the prunes than H. W. Eberling agreed to sell the prunes at and would have obtained under the contract with the canners' association. Thus it is manifest that it would have been greatly to the financial advantage of H. W. Eberling to have delivered the prunes in question to the Sheriffs Bros. under the latter's contract than to have delivered them to the canners' association under its contract. And it by no means involves a far-fetched proposition to venture, upon the record as it appears here, that the reason which inspired Eberling to attempt to make it appear that the plaintiff and not he was the real party to the contract with the defendants was this: That, if it could be shown that the fruit was delivered by the plaintiff to the defendants, under the latter's contract, when said fruit was placed in the cars for shipment at Mark West, the seizure of the prunes by the canners' association, which confessedly had had no dealings with the plaintiff, would involve a matter which concerned no other person than the Sheriffs—that is to say, the fruit having been delivered to them by the plaintiff according to their contract, the title thereto had vested in the defendants before the seizure, and that it was therefore the latter's duty, and no concern of the plaintiff, which was under no obligation of any kind or character to the canners' association, to see that the association restored the fruit to their possession. However that may be, the considerations to which we have above referred, we repeat, are, at least upon their face, sufficient justly to generate distrust in the asseverations of H. W. Eberling that the prunes in question were the property of the plaintiff and in the good faith of the purported transfer of the fruit to said plaintiff by H. W. Eberling, as the minutes of its board of directors introduced in evidence in this case purport to attest. And if, upon those considerations, the

trial court felt constrained to discredit the testimony presented by the plaintiff upon the question of ownership, and so disregarded entirely said testimony, we cannot say that the court, in so doing, was not justified or abused its discretion in that respect.

[4] Thus we have reviewed the record as it is presented to us, and, while thus we have been led to the conclusion that the findings of the court that the defendants never at any time had any transaction whatever with the plaintiff, and are not indebted to the plaintiff in any sum on account of the prunes in question, are amply supported, and that said findings support the judgment, it must be conceded that the sole defense relied upon by the defendants, as indicated, and the theory upon which the cause was decided, which theory necessarily followed from the nature of said defense, are extremely technical; for H. W. Eberling was, according to the testimony, practically the corporation plaintiff itself. He organized it and owned all the capital stock thereof, with the exception of a few shares issued for the working purposes of the corporation, and the money, property, and assets transferred to it by him—indeed, the whole of its assets—had constituted his own individual property. If he had made out a clear case of indebtedness to him or the corporation for the prunes in question, we might, under the circumstances thus pointed out, be justified in reversing the judgment. As shown, however, technically plaintiff was not the owner of the prunes in question according to the court's findings, which are fortified by sufficient evidence, and is therefore not the real party in interest in this action; but more than this, it is very clear from the record that apparently the court could have further found, as certainly it should have found, if the face value of the testimony presented by the defendants may be accepted as the correct test of its probative force, and thus have disposed of the case upon its merits against the plaintiff, that H. W. Eberling did agree in writing to sell the prunes in dispute to the canners' association prior to the incorporation of the plaintiff, and prior to the making of the contract with the defendants; that while the prunes were still on a "siding" at the Mark West railway station, H. W. Eberling assured an agent of the canners' association that they were there to be consigned to that association in pursuance of the terms of its contract with "Eberling Bros."; that the assurance so made to the said agent was false and designed to mislead the canners' association as to the disposition which Eberling really intended to make of the prunes; that, as a matter of fact, he at all times intended to ship them to Sheriffs Bros., to whom he had agreed to sell them at prices in advance of those specified in the contract with the association; that he did consign them to the de-

fendants; that the canners' association, having learned of the duplicity, brought suit to obtain possession of the prunes, did, in fact, secure possession of and retained them, and presumably paid Eberling the prices for them stipulated in its contract; that, as a consequence of the act of the association in taking possession of the prunes, the defendants did not then, nor did they ever, get actual possession of the fruit; that H. W. Eberling treated the action by the association as of his and not as of the concern of the defendants, and, accordingly, himself fought the case for and on behalf of himself; that, on the 17th day of December, 1913, almost three months after the association brought its claim and delivery action for the purpose of obtaining possession of the prunes, H. W. Eberling, upon being paid by the defendants the sum of \$327.57, executed and delivered to them a receipt therefor, acknowledging payment "in full for all fruits delivered by Eberling Bros."; that, at the time of the delivery of said receipt, Eberling said nothing about an indebtedness due him from the defendants on account of the prunes in question, and that he made no claim against the defendants on that account until long after the delivery of said receipt. In view of all these facts, we think it is very clear that justice demands that the judgment, though resting on a technical defense, should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; ELLISON, Judge, pro tem.

BAILEY v. SUPERIOR COURT OF CALIFORNIA IN AND FOR KERN COUNTY et al. (Civ. 2073.)

(District Court of Appeal, Second District, California. July 11, 1916.)

1. APPEAL AND ERROR ⇨460(2)—EFFECT OF APPEAL—STAY—NECESSITY OF BOND.

Under Code Civ. Proc. § 943, as to stay of execution pending appeal, where sheriff appealed from order requiring delivery of goods to plaintiff, without giving bond, and without delivering the goods to a custodian for the purpose, appointed by the court, execution was not stayed, and it was necessary that he comply with the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224, 2246; Dec. Dig. ⇨460(2).]

2. APPEAL AND ERROR ⇨460(2)—EFFECT OF APPEAL—STAY—NECESSITY OF BOND.

Perfection of appeal, alternative or under Code Civ. Proc. §§ 939-941, as to judgments appealable, procedure, and bonds on appeal, does not stay execution if the judgment is one, under section 942, as to money judgments, section 943 as to judgments for delivery of documents or personalty, section 944 as to judgments for execution of a conveyance, or section 945 as to judgments affecting real property, unless bond is filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224, 2246; Dec. Dig. ⇨460(2).]

3. APPEAL AND ERROR §—485(1)—EFFECT OF APPEAL—STAY—NECESSITY OF BOND.

1. Petitioner secured judgment, and defendant appealed, giving stay bond. Pending appeal, petitioner secured an order, directing the sheriff to deliver goods to him. The sheriff appealed by alternative method without bond, and failed to deliver goods. *Held*, on petitioner's application for writ of mandate to require delivery, that the defendant's appeal was immaterial, and, the order against the sheriff not being stayed, it was his duty to make delivery.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2264, 2265, 2267; Dec. Dig. §—485(1).]

Original application for writ of mandate by Matthew Bailey against the Superior Court of State of California in and for Kern County and another. Peremptory writ awarded.

El. L. Foster, Geo. E. Whitaker, and Chas. A. Barnhart, all of Bakersfield, and Sullivan & Sullivan, Theo. J. Roche, and Leon E. Morris, all of San Francisco (Robert M. Clarke, of Los Angeles, for counsel), for petitioner. Wiley & Lambert and C. E. Arnold, all of Bakersfield, for respondents.

SHAW, J. It appears that the petitioner, Matthew Bailey, as plaintiff, filed a petition in the superior court of Kern county, wherein Thomas A. Baker was made respondent, praying judgment that a writ of mandate be issued directed to Baker as sheriff of Kern county, requiring him to deliver to petitioner certain personal property and documents in the petition fully described. Upon trial of said proceeding, judgment was rendered for the plaintiff, in accordance with which a peremptory writ of mandate was issued, commanding Baker as such sheriff to immediately take into his possession the personal property and documents described therein and deliver the same to Matthew Bailey, the petitioner for said writ; that Baker refused to comply with the writ upon the ground that he had appealed from the judgment. Thereupon petitioner presented to the court an affidavit setting forth the fact of Baker's refusal to comply with the order of court, and upon which he prayed that a citation be issued by respondent, requiring Baker to appear and show cause why he should not be punished for contempt of court in so refusing to obey the writ of mandate. The court refused to issue such citation, whereupon petitioner has applied to this court for a writ of mandate to be directed to the respondent herein, requiring it to issue the citation to Baker as prayed for. In response to the alternative writ of mandate granted by this court directed to the respondent, requiring it to show cause why it should not issue the citation prayed for by petitioner in the proceeding against Baker, respondent has made return, assigning as grounds for its refusal: First, the fact that Baker, adopting the alternative method of appeal as

provided in sections 941a, 941b, and 941c, Code of Civil Procedure, has perfected an appeal from the judgment wherein said writ of mandate was issued; and, second, that the defendant in a certain action for claim and delivery of the personal property and documents involved, brought by defendant against the Security Trust Company, and wherein judgment was rendered in favor of Bailey, has appealed therefrom, giving a stay bond as provided in section 943, Code of Civil Procedure.

[1] It is conceded that Baker in perfecting his appeal gave no undertaking or bond whatsoever, and the sole question presented is whether or not the order made, requiring Baker to take into his possession and deliver to petitioner the personal property and documents involved, is stayed by the mere fact of perfecting an appeal from the judgment therein without giving the stay bond provided for in section 943, Code of Civil Procedure. This section provides:

"If the judgment or order appealed from direct the * * * delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be * * * delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."

The order requiring Baker as such sheriff to deliver the documents and personal property to petitioner brings it clearly within the provisions of the section quoted. No bond or undertaking was given, and hence the enforcement of the order was not stayed by the taking of an appeal therefrom.

[2] The perfecting of the appeal, whether taken pursuant to the alternative method in which no undertaking on appeal is required, or taken pursuant to sections 939, 940 and 941, Code of Civil Procedure, the last of which sections provides that an undertaking in the sum of \$300 shall be filed, does not operate as a stay of execution where the judgment or order is one designated in sections 942 and 945, inclusive, Code of Civil Procedure. Thus, where an appeal from a judgment or order directing the payment of money is perfected under either method, it does not effect a stay of execution unless a written undertaking be executed on the part of the appellant in double the amount named in the judgment; and so, where an appeal is taken from an order or judgment directing the delivery of personal property or documents, then, as provided in said section 943, an undertaking must be given in order to stay the enforcement thereof. See *Ex parte Clancy*, 90 Cal. 553, 27 Pac. 411; *Doudell v. Shoo*, 159 Cal. 448, 114 Pac. 579; *United States Fidelity, etc., Co. v. More*, 155 Cal. 415, 101 Pac. 302. In support of its contention respondent re-

lies upon the cases of *Palache v. Hunt*, 64 Cal. 473, 2 Pac. 245, and *Ballagh v. Superior Court*, 25 Cal. App. 149, 142 Pac. 1123. In those cases, however, respondent was not required to deliver personal property or documents, and therefore the facts were not such as to bring the cases within the provisions of section 943, nor of any other provision of the Code requiring a stay bond to be given.

[3] Neither is the fact that the Security Trust Company has given a stay bond for a judgment rendered against it, a matter for consideration in this proceeding. The judgment here is against Baker, and until reversed or set aside, since no stay bond was given, it is clearly his duty to comply with the order; and whether or not the order is one with which he can comply can only be determined by the court upon the showing made by him in response to a citation to show cause why he should not be punished for contempt for failure so to do.

In the absence of any stay bond given, plaintiff is entitled to the processes of the court to enforce the order made, which, until reversed or stay bond given, stands as a valid judgment to be enforced by the processes of the court to which petitioner is entitled for the purpose of having a judicial determination of the question as to whether Baker can perform the acts as ordered. Assuming the property to be held by another, there is nothing to show that such other would not, on demand, deliver it to Baker as sheriff, or that he has made any effort to obtain possession of it. At all events, no legal reason whatever is presented here showing why Baker should not comply with the order, from which it follows that the trial court, respondent here, should issue the citation, and upon a hearing determine whether he be in contempt for disobedience of the order.

The alternative writ heretofore issued, directing respondent to issue the citation as prayed for by petitioner, is made peremptory.

We concur: CONREY, P. J.; JAMES, J.

CITY OF LOS ANGELES v. LOS ANGELES PAC. CO. et al. (Civ. 1832.)

(District Court of Appeal, Second District, California. July 21, 1916.)

1. EMINENT DOMAIN §68—POWERS OF CITY —LAND ALREADY IN PUBLIC USE.

St. 1009, p. 1066, makes the ordinance of a city directing condemnation of lands for parks conclusive evidence of public necessity. Code Civ. Proc. § 1241, subd. 2, provides that before property can be taken it must appear that the taking is necessary to public use, and that, when the city has determined that public necessity requires the acquisition, the ordinance shall be conclusive on that point. Section 1240, subd. 4, provides that property already in public use may be taken for another public purpose in common,

if the uses are consistent. Section 1247a empowers the court to determine the conditions on which property already in public use may be taken for another public use in common. *Held* that, while section 1241 authorizes the city to determine finally that public necessity requires condemnation, such general rule is modified by section 1240, subd. 4, so that the court need not accept as final the decision of the city to take the fee, but may declare the terms on which the land may be taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 168-170; Dec. Dig. §68.]

2. EMINENT DOMAIN §47(6) — POWERS OF CITY—LAND ALREADY IN PUBLIC USE.

Los Angeles Charter (St. 1911, p. 2113) § 119b, providing that all park lands shall remain inviolate as park land, and no part shall be used for any other purpose, does not prevent condemnation of right to use land in common under Code Civ. Proc. § 1240, subd. 4, when land condemned is already burdened with a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 109, 110, 116-120; Dec. Dig. §47(6).]

3. EMINENT DOMAIN §20(1)—“PUBLIC USE.”

Land used for pole line for transmission of power to a public railway is used for a public use, although indirectly.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59, 60, 62-65; Dec. Dig. §20(1).]

For other definitions, see Words and Phrases, First and Second Series, Public Use.]

4. EMINENT DOMAIN §10(1) — RAILROADS — ELECTRIC LINE.

Since by Civ. Code, § 465a, all steam roads are authorized to use electric motive power, electric railroads, in their principal essentials have the same legal status as steam roads, including the power of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35, 37, 39-48; Dec. Dig. §10(1).]

5. EMINENT DOMAIN §20(1)—“PUBLIC USE” —RAILWAYS—ACQUISITION OF WHOLE WAY.

Where an electric railway acquired land for construction of subway, the use of that acquired was no less public because it had not acquired the entire amount needed, or had not actually begun construction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59, 60, 62-65; Dec. Dig. §20(1).]

6. EMINENT DOMAIN §169 — PUBLIC USE — RAILWAYS—ACQUISITION OF WHOLE WAY.

It is sufficient that a railroad company in charge of a public use, in the due prosecution of its enterprise, has lawfully obtained for that use property necessary therefor, with a reasonable prospect that the work will be carried to completion, and the prior ownership of a franchise relating to street crossings is not essential to the right to condemn, or to hold for the proposed use, other portions of the right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461; Dec. Dig. §169.]

7. EMINENT DOMAIN §196—LAND ALREADY IN PUBLIC USE—BURDEN OF PROOF.

A railway company claiming land as in public use has the burden of proving that the use is public, but the party seeking to condemn it for its sole use then has the burden of proving that the proposed new use is inconsistent with the existing use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. §196.]

8. EMINENT DOMAIN \Leftrightarrow 198(1) — QUESTIONS FOR COURT.

In condemnation proceedings it is for the court to determine as a question of fact whether the land is already devoted to a public use, if so alleged, and whether the existing and the proposed use are inconsistent.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 525; Dec. Dig. \Leftrightarrow 198(1).]

9. EMINENT DOMAIN \Leftrightarrow 124—COMPENSATION—AMOUNTS INCLUDED.

Under Code Civ. Proc. § 1249, providing that for the purpose of assessing compensation and damages, if such issue is tried within one year after commencement of the action, the right shall be deemed to have accrued on issuance of summons, and the value at that date shall be taken, and that damages shall draw interest from the date of the order of possession, the party whose land is condemned is not entitled to an allowance for taxes accruing between commencement of the action and decree.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332-344; Dec. Dig. \Leftrightarrow 124.]

10. EMINENT DOMAIN \Leftrightarrow 85—PROPERTY ALREADY IN PUBLIC USE—COMPENSATION.

Where an electric railroad entered upon lands without objection by the owners, and erected and maintained a pole line for transmission of power, the easement it acquired was a substantial property right, and on condemnation for park purposes the landowners could not have the entire compensation, but the railroad should share therein.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 221-226; Dec. Dig. \Leftrightarrow 85.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Condemnation proceedings by the City of Los Angeles against the Los Angeles Pacific Company, Martha J. Aylesworth, and others. Interlocutory judgment for plaintiff, and order denying new trial, and the Company and others appeal. Reversed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellants. Albert Lee Stephens, City Atty., Charles S. Burnell, Asst. City Atty., and Lewis E. Whitehead, all of Los Angeles, for respondents.

CONREY, P. J. Appeal from interlocutory judgment of condemnation, and from an order denying motion for new trial. This action was brought for the condemnation of a large tract of land within the city of Los Angeles for the purpose of a projected public park commonly known as "Silver Lake Park." The action was brought after and pursuant to proceedings by the city council of the city of Los Angeles, which said proceedings were had in accordance with the provisions of the "Park and Playground Act of 1909" (found at page 1066 et seq., Stats. of 1909). Included with the land sought to be condemned were certain parcels belonging to appellants herein and designated as parcels 43, 46, 86, 87, 92, 93, and 94; also a certain other parcel of land claimed by the defendant railway company as belonging to it by virtue of dedication to public use

and occupied by it for pole line purposes, which parcel is not separately described in the complaint, but is described in the answer and amendment to answer of appellants, and was at the trial of this action designated, for convenience, as parcel 46½. Parcels numbers 86, 87, 92, 93, and 94 stand of record in the name of the Los Angeles Pacific Land Company, but that company holds the same as trustee for the Pacific Electric Railway Company, the land company having been formed as a matter of convenience in holding lands for the railway company, and all of the money for the purchase of said lands having been advanced by the railway company, which owns all of the stock of the land company. The Los Angeles Pacific Company is merely the predecessor of the Pacific Electric Railway Company, and has been absorbed into the latter company by a consolidation under section 473, Civil Code. Parcels 43, 46, and 46½ are, and at the time of the commencement of this action, on January 18, 1913, were, being used for the purposes of a high-tension electric power transmission line extending from defendant's Olive substation on Sunset boulevard, across the proposed parkway in a general southwesterly direction. This pole line carries 15,000 volts of electricity which form the chief supply of energy for the operation of defendant's cars over its western division, which includes all of Hollywood, Beverly, Sawtelle, Santa Monica, and several other west coast beaches. Parcels 87, 93, and 94 were prior to the commencement of this action acquired for the purpose of constructing and operating an electric railroad subway from defendant's Hill street station, Los Angeles, to its Vineyard station at the westerly city limits. The subway has not been actually constructed, and the court found that these parcels of land, which form but part of a long strip of land, acquired and held as a right of way for electric railroad subway purposes, had not been devoted to public use. Parcels 86 and 92, it is admitted, have never been devoted to public use, and with respect to those parcels no complaint is made by appellants which will require separate consideration.

The court refused to reserve in its judgment any electric railroad power pole line or subway rights to these defendants or to limit the plaintiff's taking to an estate subject to the existing pole line and subway rights. The lands are by the judgment condemned in fee, and in effect it requires the elimination of the power pole line and subway from the parkway district. The court also denied the defendant any award for the taking of pole line parcel 46½. The court, while it made allowances to defendants for certain taxes and assessments which accrued since the commencement of this action, refused to provide for payment to de-

fendants of other taxes and assessments which may be levied upon the condemned lands before the entry of final judgment and payment of awards.

Among the principal points which appellants urge upon this appeal are the following: (1) That the court erred in refusing to preserve to defendants their existing electric railroad power pole line and subway rights in parcels 43, 46, 46½, 87, 93, and 94; (2) that the court erred in refusing to make allowance for accruing taxes and assessments as requested by defendants; (3) that an award should have been made for the taking of pole line parcel 46½; also that the court failed to find upon important issues of fact, and that certain material findings fall of support in the evidence.

An issue as to consistency between the proposed park use and the existing uses claimed by appellants, and of the right to a reservation of the right of common user, was raised by the answer, which, besides denying the necessity of taking the whole or any part of the land for park purposes, also set forth the existing public uses to which the lands of defendants had been devoted by them, and alleged damages which will accrue to portions not sought to be condemned, unless such reservation of the right of common user be allowed. This issue is not met by the findings, except by finding that "it is necessary that the plaintiff take and condemn for public use" the described land. It is also found, in effect, that the subway parcels are not devoted to public use. There is no specific finding that the taking of an unqualified fee is necessary for the purpose for which the plaintiff is condemning, but the court as a conclusion of law holds "that the plaintiff is entitled to an interlocutory judgment adjudging that * * * said property be condemned in fee to the use of the plaintiff for public park purposes." In the absence of qualification, this must mean an absolute, unconditional fee, ever free from all rights on the part of the defendants to use the premises for either electric railroad power pole line or subway purposes.

Appellants contend, and it is not denied, that the court treated this question as a question of law, and not as one of fact. The court deemed itself bound by the decision of the city council to take the fee of the lands described in the ordinance of intention, because the Legislature, in the court's opinion, had delegated to the city council the determination of the question of what lands should be taken and what estate therein should be taken for park or playground purposes, and assumed that that determination was, under the park act, final, and deprived the court of any power whatever to pass upon these questions, which appellants say are delegated to the court under sections 1240 and 1247a, Code of Civil Procedure. The court treated it as a question of necessity,

and determined the case upon a solution of the question of whether the council's decision is conclusive as to the necessity of taking any particular land for a given improvement and the necessity of taking the entire estate in the land.

The "Park and Playground Act of 1909," in section 7 thereof, referring to condemnation of land for park purposes, reads as follows:

"The complaint shall set forth, or state the effect of, the ordinance of intention, and the ordinance ordering the improvement, but need not set up any other proceedings had before the bringing of the action. Said ordinances shall be conclusive evidence, in such action, of the public necessity of the proposed improvement."

As stated in the complaint and found by the court, the city council by its ordinance, adopted by a vote of more than two-thirds of its members, declared that the public interest and convenience required that the described lands be acquired for park purposes, and that for that purpose it is necessary that the plaintiff take and condemn for public use the said lands; and the court, relying upon that ordinance, and without other evidence showing the necessity for the taking, made its findings as we have stated.

Section 5 of the park and playground act provides for a condemnation action to be brought, pursuant to direction therefor by the city council; and section 6 declares that:

"Said action shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure now existing, or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act."

The procedure in condemnation is outlined in the title on Eminent Domain, section 1237 et seq. of the Code of Civil Procedure. Section 1241, as in force in January, 1913, when this action was commenced, provides that:

"Before property can be taken, it must appear: * * * 2. That the taking is necessary to such use."

By an amendment in force on August 10, 1913 (before this action came on for trial), the following addition was made to subdivision 2 of that section:

"Provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury: Provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city

or town, of property located outside of the territorial limits thereof."

Section 1240, Code of Civil Procedure (St. 1911, p. 620), as in force in January, 1913, provides that:

"The private property which may be taken under this title includes: * * * 4. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated: Provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a public street or highway of a municipal corporation, or the use thereof by a municipal corporation for the same public purpose to which it has been so appropriated, shall be deemed more necessary uses than the public use to which such property has been already appropriated: And provided, further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by a municipal corporation, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by such municipal corporation, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures or improvements therein or thereon, so far as may be required by such common use."

By amendment in force August 10, 1913 (St. 1913, p. 547), said subdivision 4 was amended to read as follows:

"Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated: Provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a public street or highway of a county, city and county, or incorporated city or town or the use thereof by a county, city and county, or incorporated city or town or municipal water district, for the same public purpose to which it has been so appropriated, or for any other public purpose, shall be deemed more necessary uses than the public use to which such property has already been appropriated: And provided, further, that where property already appropriated to a public use or purpose by any person, firm or private corporation, is sought to be taken by a county, city and county, incorporated city or town, or municipal water district, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by such county, city and county, incorporated city or town, or municipal water district, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures or improvements therein or thereon, so far as may be required by such common use. But property appropriated to the use of any county, city and county, incorporated city or town or municipal water district, may not be taken by any other county, city and

county, incorporated city or town, or municipal water district while such property is so appropriated and used for the public purposes for which it has been so appropriated."

Section 1247a, Code of Civil Procedure, reads as follows:

"The court shall also have power to regulate and determine the place and manner of removing or relocating structures or improvements, or of enjoying the common use mentioned in the fourth subdivision of section 1240."

[1] No one here denies that the power to finally determine the necessity of taking specified property for a public use may be delegated to a city council. The questions now at issue are to be settled by reading the park and playground act together with the Code provisions applicable to the case, and thereby ascertaining the legislative will. The statutes contemplate the taking of private property for public use. They also contemplate that property already devoted to a public use may be taken for a more necessary public use. They further contemplate that, where it is proposed to take for public use property already devoted to a public use, and where the proposed new use is also consistent with the existing public use, the two rights shall be exercised in common, under the terms and conditions appropriate to the case. To meet this particular situation, section 1240 of the Code of Civil Procedure, in subdivision 4 thereof, authorizes the court in its decree of condemnation, to "fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes." In the comparative construction of statutes, they are to be harmonized as fully as may be, so as to give them complete and reasonable effect. An apt means to this end is obtained by permitting a statute applicable to a particular class of facts to operate as a modification of statutes of broad and general scope. So here we may assume that the general rule as found in section 1241 of the Code of Civil Procedure and in the park and playground act authorizes the city council, in an ordinance like that here in question, to finally determine that the public necessity and convenience require that certain described land be condemned for park purposes. But this general rule is modified by subdivision 4 of section 1240, enacted to meet the specifically designated cases where it is proposed to condemn land already subject to an existing public use. In this particular situation, while the court, under the above assumption, will recognize as final the determination of the council that the taking of the land is necessary for the proposed use, it is required also to recognize the existing public use, and to provide for the terms and conditions upon which the existing use may continue, if in fact the two uses are capable of coexisting on the same premises. It is not uncommon to have railroads in parks, and their pres-

ence has been so regulated that they aided in making the parks accessible, without interfering with safe administration of both of those public uses. *People v. Park & Ocean R. R. Co.*, 76 Cal. 156, 18 Pac. 141. Respondent's counsel argue that these principles can have no application in this case, because the use for which the city seeks to take the property is not, and under the law cannot be, consistent with the existing use of the property. They say that the use of the property either for the purpose of maintaining a pole line thereover or a subway thereunder is not, and as a matter of law cannot be, consistent with its use for park purposes, since the organic law governing the city of Los Angeles prohibits the use of park lands for any other purpose whatsoever. The property sought to be condemned in this action is sought to be taken for the purpose of a public park, and for no other purpose, and the charter of the city of Los Angeles provides:

"All lands and real property located in the city of Los Angeles which have been heretofore, or which may be hereafter, set apart or dedicated for the use of the public as a public park or parks, shall forever remain to the use of the public as such park or parks, inviolate, and no part of said lands or real property shall ever be used or occupied for any other purpose." Charter of the City of Los Angeles, § 119b, Stats. of 1911, p. 2113.

[2] Under this provision it is contended that the city has no power to permit the use of any part of a public park for the maintenance of a power line or of a railroad, either above, on, or below the surface of the ground; that the use of park lands for such purposes would be unlawful, and the city would not have the power to condemn land for park purposes subject to a use prohibited by the charter; therefore, they say, it follows that the use which the city intends to make of the land sought to be taken is not, and under the law cannot be, consistent with the continuance in use of such land for pole line purposes, or for the projected subway, and neither the court, the city council, nor any other tribunal would have the power to find or declare that the use of the land for park purposes was consistent with its use for any other purpose, and for these reasons that the court was not only not required to pass upon the question of consistency, but was without any power whatsoever to do so.

In response to the above contention we may observe, by the way, that the ordinance upon which respondent relies does except from condemnation certain railroad rights of way located within the limits of the proposed park, and those exceptions are carried into the judgment of condemnation. It is also worthy of note that the pole line and the right of way for a subway pertain to a railroad which extends beyond the city limits and is under state control. If respondent's theory of the case is to be accepted, it will follow that a state or interstate railway, hav-

ing established rights of way, tracks, and depots within the city, may be excluded from the city by virtue of a city ordinance ordering that the lands thus occupied shall be taken and included within a city park, and the courts must obey such legislative mandate by condemning the property, without the right to make any inquiry as to the consistency of the public uses, or to prescribe conditions under which the several uses may coexist. Under the statutes to which we have referred, we do not perceive that any such extraordinary limitations have been drawn around the judicial power as vested in the courts. And giving to the above-quoted section of the city charter its full effect in any case to which, within the limits of the state Constitution, it may be applied, it means no more than that, when land has been acquired by the city for park uses, such land shall not thereafter be appropriated to other uses.

[3] Respondent's counsel insist that the use of the land occupied by appellants for pole line purposes is not a public use, because the power is furnished only to the railway company, and not to the general public. They rely upon authorities which they claim in support of the proposition that a power pole line furnishing electric power to operate the cars of a railway company is not a part of the railroad or a necessary adjunct thereto, in aid of which such company would be entitled to exercise the power of eminent domain. Conspicuous among the decisions to which they refer is *Re Condemnation of Land by Rhode Island Suburban Railway Co.*, 22 R. I. 455, 48 Atl. 590. The action was one wherein the railway company sought to condemn a lot for a power house, to generate electricity for its lines of road for coal pockets for the storage of coal, and for a conduit to carry water from the river to the engine. The Supreme Court of Rhode Island set aside the judgment in favor of petitioner and ordered a new trial. The court conceded that it is not always necessary that the public use be direct and obvious.

"There is a class of cases where the public does not use the land itself, and yet the public necessity is so direct and obvious as to imply a public use. Such, for example, are cases of taking land for engine houses, car houses, and repair shops on steam railroads. These buildings must necessarily be contiguous to the railroad; and, while the public may not use the buildings as such, yet they are of such a character that without them the public could not adequately use the railroad itself. They are, in fact, a part of the railroad. In some cases land for the storage of wood and coal for steam railroads has been held to be taken for a public use. In all these cases, however, a particular location is made necessary because of the requirements of a steam railroad."

The court was of the opinion that these considerations do not apply to an electric railroad, since in the latter case there is a wide area of location and consequent freedom of choice, as contrasted with the imperative necessity which is usually found on steam railroads for a particular location.

"Neither is it of interest to the public whether the cars are run by trolley or by storage batteries. The company is not limited to a particular location for a power house, for coal pockets, or for a water supply."

The foregoing decision was discussed in *Rockingham County Light & Power Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581, where that court expressed a different view of the matter, and pointed out the reason why greater freedom of choice of location in the case of an electric road does not interfere with the element of necessity in determining the right of condemnation.

"It is probable that in many cases the establishment and operation of electric railways for the accommodation of the public will depend upon the possibility of generating or collecting electricity at a low cost. A water power, or a port at which coal may be landed from seagoing vessels directly into the coal pockets of a power house, will render it possible to furnish electric railway facilities for public use at points situated many miles distant from the water power or port that could not otherwise be furnished at all, or at least without much greater cost to the public. In such cases the imperativeness of the necessity attaches to the freedom of choice as to location, rather than to the proximity of a particular location to the railroad line. If land adjoining an electric railway may be taken for a power house—as to which there can be no doubt—no good reason is apparent why land at a distance may not be taken if the public good so requires. Of course, if land located at a distance may be taken for a power house, it must follow that necessary land or rights in land may be taken for constructing and maintaining a line of wires between the power house and the railway."

Without entering into a discussion of the lines of decision illustrated above—there being apparently no California decision directly meeting the specific case—we are of the opinion that the power pole lines in question here are devoted to a public use as part of the railway system operated by the Pacific Electric Railway Company.

[4] In their principal essentials, electric railroads now have the same legal status as steam railroads. Civ. Code, § 465a.

Section 465, Civil Code, says:

"Every railroad corporation has power: * * *
3. To purchase, * * * hold and use all such real estate and other property as may be absolutely necessary for the construction and maintenance of such railroads, and for all stations, depots and other purposes necessary to successfully work and conduct the business of the road. * * *

"4. To lay out its road * * * and to construct and maintain the same, * * * with such appendages and adjuncts as may be necessary for the convenient use of the same. * * *

"7. To purchase lands * * * to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title seven, part three, Code of Civil Procedure, for the condemnation of lands. * * *

Since, as we have concluded, parcels 43, 46, and 46½ have been dedicated to public use, it becomes the duty of the court to determine, as a matter of fact, the issue raised as to the consistency or inconsistency of that use with the proposed park use. If the respective uses are not, in fact, wholly incon-

sistent, then it was the further duty of the court to fix the terms and conditions of condemnation by the city, and the manner and extent of use of the property "for each of such purposes."

[5, 6] The same result would follow as to the so-called subway parcels, if in fact they were devoted to public use as subways of the railroad prior to the commencement of proceedings by the city for the creation of the proposed park. As to each of these parcels, the finding of fact, based upon undisputed evidence, is:

That the land was purchased and is held by the defendant Los Angeles Pacific Land Company "for a special and peculiar purpose and use, to wit, for the purpose of constructing therein, thereunder, and over, and in and along its lands extending from a point in the vicinity of Fourth and Hill streets in the city of Los Angeles, in a general westerly and southerly direction through said parcel to the westerly city limits of the city of Los Angeles and beyond to a point of connection in the railroad of the Pacific Electric Railway Company at or near Vineyard station, a railroad to be operated through a subway; but in this connection the court finds the fact to be that said land was not at the commencement of this action and is not now, and never has been, used for such purposes, and, further, that said defendant has not acquired either the fee to or easements or rights of way under or over, or any other interests in, such entire strip of land between said terminal points as would be necessary in order to enable it to construct and operate such railroad, nor has it acquired any franchise so to do."

Although the title to the parcels in question is held in the name of the land company, the consideration therefor was paid by the railway company, and the land is held for its use for the purpose stated in the findings. The entire expenditures made by the defendant in purchasing the property required by it for the proposed subway exceeded \$2,000,000, and there is a great public need for a subway, to relieve the congestion of traffic on the street surfaces of the city. The enterprise, although delayed, has not been, in any sense of the word, abandoned by the railway company. About 90 per cent. of the right of way therefor has been acquired. All of this is shown by uncontradicted evidence. The judgment of the court below, in its relation to the matter of the subway, proceeds upon the theory that, under the facts found, these parcels were not already devoted to public use, but should be treated as private property.

"It is property appropriated to public use, which is * * * protected from condemnation except 'for a more necessary public use'; and as to lands owned by defendant, but which have not been thus appropriated, and are not likely in the future to be needed for the existing public use, the inhibition does not apply." *Southern Pac. R. R. Co. v. So. Cal. Ry. Co.*, 111 Cal. 221, 43 Pac. 602.

In that case it was clear that the strip of land sought to be condemned—although located within the limits of a tract acquired by defendant as part of its right of way—was not in use by the defendant, and would not probably be needed for railroad purpos-

es. The defendant had completed its road upon adjacent land, and had ample room thereon for its business. We are plainly left to infer that, if the execution of its plans had been merely unfinished, and if the orderly completion of the work under those plans had required that defendant use for railroad purposes the land sought to be condemned for the use of the plaintiff, the claimed prior devotion thereof to public use by the defendant would have been sustained. From the findings quoted above, it seems that the court, in determining that the parcels in question have not been appropriated to a public use, placed its principal stress upon the facts that appellants have not yet acquired title to all of the property necessary to complete the strip over which they expect to construct the proposed lines, and have not obtained any franchise allowing the road to be constructed across the streets which intersect the strip. We cannot subscribe to the doctrine that no part of a right of way may be considered as having been devoted to the public use for which it has been acquired, until all of the right of way has been acquired. That rule would place unreasonable and unnecessary obstacles in the way of such enterprises. It is sufficient that a corporation in charge of a public use, in the due prosecution of its enterprise, has lawfully obtained for that use property necessary therefor, with a reasonable prospect that the work will be carried to completion. And the prior ownership of a franchise relating to street crossings is not essential to the right to condemn, or to hold for the proposed use, other portions of the right of way. *Tuolumne Water, etc., Co. v. Fredrick*, 13 Cal. App. 498, 110 Pac. 134.

[7, 8] It is our opinion that the court in its findings should have determined as a matter of fact, both as to the pole line and the subway parcels, whether they had been devoted to a public use, and that upon this issue the burden of proof was upon the defendants. If either of them was devoted to a public use, then the court should have determined as a matter of fact whether that and the proposed use were consistent, and on this issue the burden of proof was upon the plaintiff to show that the uses were not consistent, and that they were not on any reasonably possible terms capable of continuing together on the parcels sought to be condemned. The general principle that the state will not exercise the power of eminent domain any further than the necessity of the public requires is recognized by the provisions of the Code to which we have referred. Therefore, after the defendants in a case like this have shown that their land is devoted to a public use for which the right of condemnation might be exercised in their behalf, they are protected from destructive interference unless the city can establish by sufficient evidence that in fact the use for park purposes cannot coexist with

continued use of the property by the defendants.

[9] Appellants claim that the court in making its interlocutory judgment erred in refusing to reserve this action for further orders covering the matter of taxes and assessments accrued subsequent to the commencement of the action and levied by the city of Los Angeles. In accordance with the findings of fact, the court allowed to the defendants certain sums covering the values of the parcels of land to be condemned, of which it was specified that certain portions of the aggregate sums represented taxes and assessments which became liens upon said parcels subsequent to the filing of this action, and which the defendants have paid or owe. The defendants requested that the interlocutory judgment contain a provision reserving the case for further consideration in order that the respective defendants may receive, in addition to the awards therein provided for, the amount of any and all taxes and assessments upon parcels of land owned by them respectively which shall have been levied or accrued or become a lien upon said premises at the time of payment of the awards herein. With this request the court did not comply, and we think that the refusal was justified. In section 1249, Code of Civil Procedure, it is provided that for the purpose of assessing compensation and damages (when, as in this case, the issue is tried within one year after the date of commencement of the action):

"The right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken. * * * If an order be made letting the plaintiff into possession, as provided in section 1254, the compensation and damages awarded shall draw lawful interest from the date of such order. * * *"

Section 1254 states the conditions under which, pending an appeal from the judgment, a plaintiff who has paid into court, for the defendant, the required sums, may take possession of and use the property until the final conclusion of the litigation. The property is not taken, so as to interfere with the defendants' ownership of their property, until the compensation is made to, or paid into court for, the owner. These facts draw a line of distinction between the case in hand and the New York decisions relied upon by appellants. In *re Mayor, etc., of the City of New York*, 40 App. Div. 281, 58 N. Y. Supp. 58; In *re Morris Avenue in the City of New York*, 118 App. Div. 117, 103 N. Y. Supp. 180. Those cases arose under statutes whereby the actual appropriation of property occurred at a time prior to the ascertainment of the amount of damages to be paid. Manifestly the defendants could not be charged with subsequent taxes against property which they had ceased to own. Therefore the city was not permitted to retain, out of the award made in the condemnation proceedings, the amount of

such tax assessments. Section 1249, Code of Civil Procedure, "excludes all consideration of other than the value of the property at the date of the issuance of the summons in the action." *City of Los Angeles v. Gager*, 10 Cal. App. 378, 102 Pac. 17.

[10] It is next claimed that the court erred in refusing to make an award to defendant Pacific Electric Railway Company for the taking of power pole line parcel 46½. Respondent replies that in fact the term "parcel 46½" was not used to designate any parcel of land sought to be taken, but was a term adopted merely for convenience, to indicate that portion of the pole line which had been built across certain parcels designated by appropriate numbers, and which were all owned by defendants other than these appellants, and awards were made to the owners for the taking thereof. To this appellants reply that the bill of exceptions is stipulated to contain all of the evidence in the case and a full and true copy "of all of the judgment roll, except the pleadings of defendants other than the above-named defendants, which said pleadings of said other defendants do not relate to or in any manner affect the rights of the above named defendants-appellants herein, and have no bearing upon the issues raised by the said defendants-appellants in the superior court"; and appellants say that there is no evidence to the effect that there is or was any other owner of parcel 46½ or any interest therein, except the Pacific Electric Railway Company, who was in occupation of the same under claim of dedication, and who was devoting the same to public use, that the evidence is absolutely all one way on this point, and that therefore the court erred in failing to award to appellants the value of the right of way. While it does appear in the findings and judgment that the court found that this land belonged to other defendants and did award to other defendants sums for the taking thereof, appellants claim that under this bill of exceptions, which contains all of the evidence in the cause, that those findings and those awards were entirely without the support of any evidence. In the answer of defendants they describe the so-called power pole line parcel 46½, allege their ownership thereof and devotion thereof to public use, and further say:

"That said parcels of land constitute a part of a right of way for said transmission power line, as an adjunct to the railroad of the defendant, and if said parcels of land are taken without reserving to these defendants the right to hereafter maintain and operate said high-power transmission line, this defendant and said remaining portion of said lands will be damaged in the sum of \$1,000,000; that the defendant Pacific Electric Railway Company now owns, and has for many years heretofore owned and been in possession of, a right of way through" certain lands, describing the same in detail.

Testimony was introduced by the defendants showing the facts with reference to the

dedication of the land to public use and the acquirement of title to a perpetual pole line easement by the Pacific Electric Railway Company. Basing their argument upon the facts thus shown, appellants contend that the owner of the land, by permitting the railway company to enter thereon and establish its public use, thereby dedicated the land to public use so that the title to the land, so far as necessary to that public use, passed to the company; that is, a perpetual easement; that the defendant has therefore a title to this power pole line easement by dedication, and not by adverse possession. It has been held in the case of public service corporations that when it appears that, although the entry was originally without right, the owner permitted the corporation to make an entry on his land and complete and construct works for which his land was appropriated, and failed to bring an action until after public interests, by reason of the construction, have intervened, the right of the owner to maintain ejectment is denied, and he is remitted to an action for damages alone. *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 709, 117 Pac. 906, 36 L. R. A. (N. S.) 185. It follows, say appellants, that they are entitled to compensation for the taking of this land, although their title was an easement only.

To the foregoing the respondent replies that the answer contains only an allegation of ownership by the defendants of a right of way over the land. Transcript fols. 477-493. Respondent denies that the testimony shows a dedication thereof to public use and the acquiring of title to a perpetual or any pole line easement. This argument seems to be based upon the previous argument that the use of a pole line for the purposes described is not a public use. It is admitted by respondent that the testimony shows the construction of the pole line and its use for transmission of power to the railway company, but respondent says this does not prove that any title to an easement has been acquired. Respondent's Brief, p. 163 et seq.

"Not only did they fail to introduce any testimony to that end, but, even had they done so, the finding of the court that the title to the land embraced in the parcels traversed by this portion of the pole line was in other parties was equivalent to a finding against the contention of these appellants."

We are inclined to the view that *Gurnsey v. Northern California Power Co.*, supra, recognizes that under the circumstances there stated the easement acquired by the corporation became a substantial property right, the value of which would have to be accounted for by any other party seeking to enforce a superior right of eminent domain upon the same premises. The owners of the fee, therefore, are not entitled to all of the compensation to be allowed for the taking of the land, if the right of way is to be included in the condemnation without any reservation of further right of use thereof by the defendants.

It is deemed unnecessary to review in detail the several other claims by appellants that the findings do not cover all of the issues raised by the answer, and that the evidence is insufficient to support certain findings. Assuming that upon another trial the court will apply to the case the principles which we have endeavored to make clear in this decision, it is not to be expected that the findings then made will omit any necessary fact, or leave room for doubt as to their meaning.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

SECURITY LIFE INS. CO. OF AMERICA v. BOOMS et al. (Civ. 1462.)

(District Court of Appeal, Second District, California. July 22, 1916.)

1. TRIAL \S 391—FINDING—ISSUE.

In an action to cancel a policy of life insurance on the ground that when the application was accepted, and when the premium was paid and the policy delivered, the insured was not in good health, alleging that the plaintiff had no knowledge thereof until after her death, and where the evidence as to knowledge was conflicting, the plaintiff was entitled to a finding thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 914; Dec. Dig. \S 391.]

2. APPEAL AND ERROR \S 981(4) — REVIEW — FINDING.

Where appellant was entitled to a finding upon an issue of fact, but the findings were silent thereon, the appellate court must determine the case as if the finding had been in favor of the appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3764; Dec. Dig. \S 981(4).]

3. INSURANCE \S 291(1)—REPRESENTATIONS—RISK—HEALTH.

An applicant for life insurance is bound to disclose such changes in his physical condition as occur pending the negotiation as would influence the insurer's judgment as to the advisability of accepting the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 681; Dec. Dig. \S 291(1).]

4. INSURANCE \S 291(1)—REPRESENTATIONS—SICKNESS—PENDING DELIVERY OF POLICY.

Civ. Code, \S 2577, declares the completion of a contract of insurance to be the time to which a representation must be presumed to refer. An application for life insurance declared that the policy should not take effect until the premium was paid and the policy delivered. The insured in her application stated that she had not any of the diseases mentioned or any illness other than as specifically stated by her. She was attacked by typhoid fever after making the application and before delivery of the policy. *Held* that on such delivery, in the absence of insured's knowledge of her sickness, the policy was properly rescinded.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 681; Dec. Dig. \S 291(1).]

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Security Life Insurance Company of America against Lena M. Scott Booms and others, with cross-complaint by defendant Booms. Judgment that plaintiff

take nothing on its complaint and judgment for defendant on the cross-complaint, and plaintiff appeals. Reversed.

C. R. Allen, of Los Angeles, and B. E. Tarver, of Santa Ana, for appellant. Head & Marks, of Fullerton, for respondents.

CONREY, P. J. On or about October 12, 1910, Mary L. Young made application to appellant for an insurance policy upon her life, to be issued in favor of her daughter Lena M. Scott, who is the respondent Lena M. Scott Booms. In that application she agreed that the statements therein made by her were full, complete, and true, and should, in the absence of fraud, be deemed representations and not warranties. It was further agreed therein that the policy should not take effect until acceptance of the application and payment of the first premium. Payment of the first premium was completed and the policy was delivered on the 18th day of November, 1910. The application contained answers to questions asking whether the applicant had theretofore had any of certain named diseases, the list not including typhoid fever. The following question was, "Have you had any illness, disease, or injury other than as stated by you above?" to which a negative answer was returned. In February, 1911, Mrs. Young was afflicted with appendicitis, and after an operation therefor she died. On or about the 3d day of November, 1910, Mrs. Young became ill with typhoid fever. The disease ran its course in about 10 or 12 days, and she was substantially recovered therefrom on the 18th day of November. The evidence does not show that the appendicitis was in any way consequent upon the typhoid fever, and we shall assume that the two diseases were entirely separate and disconnected. After proof of death of Mary L. Young had been made in connection with respondent's claim on the policy, the plaintiff commenced this action to obtain cancellation of the policy, basing its demand upon the allegation that at the time said application for insurance was accepted by the plaintiff, and also at the time when the premium was paid and the policy delivered, Mary L. Young was not in good health, but was then and there seriously ill. It was further alleged that immediately upon being informed of the condition of the said Mary L. Young's health and illness as above stated, which was not until after the death of said Mary L. Young, the plaintiff tendered to the defendant the amount of the premium paid, and demanded return of the policy for cancellation, which demand was refused. By her answer respondent denied said allegations as to illness of Mrs. Young; denied that the plaintiff did not learn of Mrs. Young's illness until on or about the 23d day of November, 1911, but alleged that plaintiff

was fully advised of such illness during the time thereof, to wit, between the 3d and 11th days of November, 1910; alleged that such illness existed only between the 3d and 11th days of November, 1910. The defendant filed a cross-complaint, seeking to recover judgment on the policy, to which an answer was filed, setting up the same facts as were alleged in the complaint. Judgment was entered to the effect that the plaintiff recover nothing on its complaint, and also was in favor of the defendant as demanded in her cross-complaint. The court's findings of fact state that Mary L. Young was in good health from the 10th day of October, 1910, until the 3d or 4th day of November, 1910, and that she was in good health on the 18th day of November, 1910; also that the application for insurance was accepted on the 1st day of November, 1910, and that the policy was delivered and the premium paid on the 18th day of that month.

[1, 2] The findings are silent concerning the question as to plaintiff's knowledge of any illness of the assured during said month of November. The evidence shows that no information came to the corporation concerning that illness until after the death of Mrs. Young, unless such information is shown by the disputed evidence that the agent who received and forwarded the application, and who delivered the policy and collected the premium, visited the house of the assured during her said illness early in November, 1910. It was further agreed that the acceptance of the application should be by the company at its executive office in Chicago, Ill., and the policy named certain officers who alone should have power to make or modify the contract or make any promise or representation concerning the same. Assuming only for the purpose of the argument that the company would have been bound by knowledge of said agent concerning the illness in question, it follows that appellant was entitled to a finding upon this issue of fact, and we must determine the remaining question in the case as if the finding had been in favor of the plaintiff; that is, that the plaintiff was without knowledge or notice of Mrs. Young's illness until after the delivery of the policy and after the death of the assured.

[3] "The completion of the contract of insurance is the time to which a representation must be presumed to refer." Civ. Code, § 2577. "It is well settled that the obligation rests upon an applicant for life insurance to disclose such changes in his physical condition as occur pending the negotiation as would influence the judgment of the company as to the advisability of accepting the risk." *Thompson v. Travelers Insurance Co.*, 18 N. D. 444, 101 N. W. 900. The decisions generally are to the same effect. See note in 8 L. R. A. (N. S.) 983.

[4] Since, in accordance with the section of the Civil Code quoted above, the representations contained in the application must, in this case, be deemed to refer to the time when the premium was paid and the policy delivered, it follows that the assured at that time represented that she had not had any of the diseases to which she returned a negative answer, and had not had any illness or disease other than as specifically stated by her. To say that these representations may be ignored in the instance of a person who receives a life insurance policy immediately following upon an attack of typhoid fever would be to deny one of the most important rights of the contracting party. The inherent probability that the plaintiff would have hesitated to issue a policy upon the life of Mrs. Young at that particular time raises to very substantial importance its right to have been informed of the facts.

The appeal is from the judgment, and the judgment is reversed.

We concur: JAMES, J.; SHAW, J.

WELLS v. ROMERO. (No. 1885.)

(Supreme Court of New Mexico. Sept. 5, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 162(1)—SATISFACTION OF JUDGMENT—EFFECT.

The receipt and acceptance of the amount of a judgment in full settlement and satisfaction thereof defeats the right to review such judgment on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 981, 982, 984-988, 990; Dec. Dig. \Leftrightarrow 162(1).]

Appeal from District Court, Torrance County; Medler, Judge.

Action by N. A. Wells against Cleofas Romero, begun in justice court, and appealed to the district court. From a judgment there in his favor, plaintiff appeals. Affirmed.

George W. Prichard, of Santa Fé, for appellant. E. P. Davies, of Santa Fé, for appellee.

PARKER, J. Appellant recovered a judgment before a justice of the peace for \$0.51 against the appellee. From this judgment the appellant appealed to the district court, where the judgment of the justice of the peace was affirmed and final judgment rendered. Thereafter, and prior to the taking of the appeal to this court, the appellee paid into court the amount of this judgment, which was accepted and received by the appellant in full settlement and satisfaction of the judgment. Thereafter he appealed to this court. Under such circumstances the right to review the judgment had been waived.

ed and lost to the appellant. 3 C. J. p. 681, § 554.

It follows that the judgment of the district court should be affirmed; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

MORRIS v. WARING et ux. (No. 1865.)
(Supreme Court of New Mexico. Aug. 30, 1916.)

(Syllabus by the Court.)

HUSBAND AND WIFE \S 149(1) — MARRIED WOMEN—PURCHASE BY.

Sections 2757, 2758, 2759, 2762, 2764, 2765, Code 1915, interpreted, and held that property purchased by a married woman with money borrowed upon her own personal credit, and which money is repaid out of her separate estate, is her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 573; Dec. Dig. \S 149(1).]

Appeal from District Court, McKinley County; Herbert F. Raynolds, Judge.

Action by W. H. Morris against T. A. Waring and Lella W. Waring. From a judgment for defendants, plaintiff appeals. Affirmed.

Marron & Wood, of Albuquerque, for appellant. A. T. Hannett, of Gallup, for appellees.

PARKER, J. The plaintiff, appellant here, brought an action against the defendant, T. A. Waring, one of the appellees, to recover the sum of \$3,859.07 in the district court of McKinley county, and recovered judgment for the amount. Execution was issued and returned nulla bona. At the time of the incurring of the debt, the recovery of the judgment, and the issuance and return of the execution, the said defendant and Lella W. Waring were husband and wife. When the debt was contracted the defendant T. A. Waring was the owner of certain property in the town site of Gallup. Thereafter he conveyed to his wife the said property for the sum of \$80, and thereafter had no other property upon which execution could be levied. It was alleged that this conveyance was without valuable consideration, and was for the purpose of hindering, delaying, and defrauding the plaintiff and other creditors of the defendant T. A. Waring, and was accepted by the defendant Lella W. Waring with full knowledge of that purpose. It was further alleged that the defendants purchased with the funds of the marriage community certain other property described in the complaint, and that all of said property was properly applicable to the payment of the plaintiff's judgment, and that the defendant T. A. Waring was insolvent, except for his interest in said community property. The plaintiff prayed that the deed from the defendant T. A. Waring to his wife, be declared null and void as

against the plaintiff, and that all of the property be held subject to the payment of the plaintiff's judgment.

The answer admitted that the defendant T. A. Waring gave the note described in the complaint, but denied that it was a community debt, and alleged that it was the separate debt of the said Waring. It admits that the said Waring, when the debt was contracted, was the owner of the property first mentioned, and that he conveyed the same to his wife by two deeds, and that he had no other property standing in his name. It denies that said transfer to his wife was made for the purpose of hindering, delaying, or defrauding the plaintiff or other creditors, and alleged that said deeds were made from the defendant Waring to his wife, for a good, sufficient, and valuable consideration, to wit, \$80. It alleged that all of the other property hereinbefore mentioned was either inherited by the defendant Lella W. Waring, or was purchased with her separate property and money which was bequeathed to her by her first husband, or with money derived by her from the estate of deceased ancestors. It denied that any of the property described in the complaint was community property, and alleged that it was the sole and separate estate of the defendant Lella W. Waring. At the conclusion of the trial the plaintiff made requests for findings, which were denied, and the court, of its own motion, found as follows: That the plaintiff recovered the judgment against the defendant Waring, as alleged in the complaint, and that execution was issued and returned nulla bona as alleged therein; that said judgment was recovered upon a debt which was a community debt of the marriage community of the two defendants, but it was not the individual debt of the defendant Lella W. Waring, nor a debt upon which her separate property might be taken or sold, and that the judgment still remains unpaid and unsatisfied; when the debt was incurred the property, afterwards conveyed to the wife, stood in the name of the defendant T. A. Waring; and that the value of these lots as unimproved was about \$100 in the year 1910; that a dwelling and other permanent improvements were made upon this property during the year 1911 to the amount of \$1,200, which improvements and the taxes on the property were paid for by the defendant Lella W. Waring, and that the value of the lots as improved was substantially \$1,900; that it was not alleged in the pleadings nor was there any proof of an agreement between the defendant T. A. Waring and his wife concerning the payment to her of the moneys paid by her upon these improvements, nor was there any claim or proof that it was to be paid; that after the improvements were made, and while the debt of plaintiff existed, the defendant T. A. Waring conveyed this property to his wife for a

consideration of \$80, and at the time of such conveyance this was the only property standing in defendant's name, subject to the payment of the plaintiff's debt; that the defendant, Lella W. Waring, inherited from her former husband, who died in 1895, personal property to the amount of approximately \$2,000, which she then loaned to her father, and which was repaid to her in different amounts, but had been fully repaid from 12 to 15 years ago, and when repaid was used, in whole or in part; as an investment in a partnership formed between her and her brothers to carry on a trading business at Gallup; that she likewise inherited from her former husband a house and lot which sold for \$3,800, a thousand of which was paid in cash and the balance in notes bearing 8 per cent. interest; the interest of these notes was paid semiannually, and the principal of the notes was not paid until the year 1914; that about the year 1908 her brother, with whom she had engaged in the partnership business, died, and out of her share of that business she received substantially \$2,500; that with a portion of this money she bought and still owns a half interest in a trading partnership known as the Ft. Wingate Trading Company, and other portions she loaned out on notes at interest; that the defendants were married in the year 1900; that thereafter in 1903, 1910, 1911, and 1913, the defendant Lella W. Waring purchased certain property mentioned in the finding for the sum of \$6,625, and that part of the purchase price for the sum was borrowed by her from third persons upon her individual unsecured note, the property then being deeded and conveyed to her; that when some of these notes became due she paid them with money borrowed from other persons, giving them in turn her unsecured promissory note; that these notes were paid by Mrs. Waring out of moneys which were either interest received by her on the loans of the money derived from her former husband's estate, or the proceeds or profit of her investment of her separate funds in the partnership transaction with her brothers, or rents received from the property so purchased by her, or moneys paid to her from roomers whom she took into her house, or from some or all of these sources, and none of the personal earnings of the defendant T. A. Waring, nor the proceeds of the business conducted by him, were used in the payment of the said notes; that just how much of these notes or debts were paid by rents of the property, how much with interest derived from loans of Mrs. Waring's separate estate, and how much with room rent, the evidence failed to disclose, but it was all paid from the combined sources mentioned.

The court concluded, as a matter of law, that the judgment in favor of plaintiff against the defendant T. A. Waring was a judgment and debt of the community, and for which community property may be seized and

applied in payment; that the conveyance to the defendant Lella W. Waring by her husband, above recited, was not fraudulent or void as against creditors; that the property purchased by the wife during the existence of the marriage community with money borrowed by her on her separate individual, unsecured note, and property conveyed to her as a result of said transaction, did not become community property, but became and remains the sole and separate property of the defendant Lella W. Waring, and not subject to the payment of the community debt; that her partnership interest in the Ft. Wingate Trading Company is likewise her separate property under the facts found; that the defendants are entitled to judgment dismissing the complaint upon the merits. Whereupon, a judgment of dismissal upon the merits was entered by the court, and the plaintiff appeals.

1. The principal proposition relied upon by counsel for appellant is that property purchased by the wife with money borrowed on unsecured notes during the existence of the marriage community becomes community property, and its status is not changed because the debt or notes are afterwards paid, in whole or in part, by her separate property. The proposition turns upon a proper interpretation of our statutes. The pertinent provisions are as follows:

"Sec. 2757. All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is her separate property. The wife may without the consent of her husband convey her separate property."

"Sec. 2758. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is his separate property."

"Sec. 2759. The earnings of the wife are not liable for the debts of the husband."

"Sec. 2762. The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts, contracted before or after marriage."

"Sec. 2764. All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing the presumption is that title is thereby vested in her as her separate property. * * *

"Sec. 2765. The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband."

See Code 1915.

We start out with the proposition, as appears from the above provisions, that all property owned by husband or wife before marriage and all afterwards acquired by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, remain the separate property of the spouse so owning or acquiring it. We have the further proposition that the wife's earnings are not liable for the husband's debts. In the case at bar, therefore, this property is the separate prop-

erty of the wife, it all having been paid for out of the earnings of the wife and out of the proceeds or income of her separate property, unless the fact that she bought some of it on her own personal credit, and afterwards paid the obligation out of her separate estate, changes the rule.

The contention of appellant is that the purchase on credit, or the borrowing of money on the wife's own personal credit, with which to purchase the property, makes the property community property. This contention is unsound both in principle and upon the weight of authority. In considering the question it is to be borne in mind that the community is, under no circumstances, bound by the contracts of the wife, her separate property alone being chargeable with the payment of her debts, unless the husband secures the same by pledge or mortgage of the common property. It is also concededly true that property which is separate may be exchanged for other property, and the latter will retain the same separate character. Under our statutes the rents, issues, and profits of separate property remain separate, and the earnings of the wife remain her separate property. The doctrine that property acquired during marriage by exchange therefor of separate property remains separate property is contrary to the absolute letter of the statute, and was no doubt formulated by the courts out of necessity, and to render the right to separate property effective. If "all other property acquired after marriage * * * is community property," as is declared by the letter of the statute, then neither husband nor wife during coverture can acquire separate property except by gift, bequest, devise, or descent. If they have separate property, they must keep it just as it is, else if they sell or exchange it and invest in other property, the property so acquired will become common property. The letter of the statute would bring about this result. But the courts wisely ingrafted upon the doctrine the principle that where property is acquired during marriage by the sale or exchange of separate property, it remains separate property. And in this case, if the wife had exchanged her separate property for the property in question, there would be no doubt that it would be separate property. Or, if she had sold her separate property and invested the proceeds in the property involved, there would be no question as to its separate character. But she borrowed the money with which to purchase the property upon her individual credit. In so doing she incurred an obligation which in no event could become a liability of the community, and one which could be enforced only against her separate estate. The community incurred no liability whatever, and to take the property would work a forfeiture of the same, not only against her, but against her creditors. Her creditor has no remedy against the community, and if the

property is to be forfeited, his claim will be defeated. This money must have been loaned upon the credit which she had by reason of her ownership of separate property, for her creditor knew he could not look to the community property for payment. Even if she owned no other separate property when she purchased the property in question, her creditor, at once, upon the passing of title to her, might look to the same for payment. In essentials the purchase of property by a married woman, under statutes like ours, with money borrowed on her individual credit, is an exchange of separate property for separate property. The husband alone can contract a common debt; therefore the wife's creditor looks alone to the wife's credit for repayment. This credit of the wife is usually based upon the property which she had prior to marriage, or which she acquired afterwards by gift, bequest, devise, or descent. But suppose the wife brings into the marriage community no separate estate and afterwards acquires none in the ways mentioned in the statute. All that she has under such circumstances is her credit. This credit is not an asset of the community, for she is in no way liable for the community debts. This credit must belong to the wife as her sole and separate property, and she brings it into the community and it must necessarily remain her separate property.

It is true that credit is not property in a strict legal sense, but potentially it is property of the highest order, and quite as valuable as actual property, and often of even greater value. In the case of the husband the proposition is different. If, by means of his own personal credit he purchases property during the marriage community, not only his separate estate becomes liable for the payment of the same, but all of the common estate is likewise liable. If the community is liable for the debt, it must certainly take the property for which it becomes liable. Therefore his credit belongs to the community and not wholly to himself.

We have found no discussion of the question in the cases along just these lines, but we believe this explains the situation correctly on principle.

The question has been before the courts in the community states. In Louisiana the wife has no general power to contract, unless the husband consents, in writing. If he permits her to exceed her powers to contract, he makes himself liable, and it becomes a community debt, and the property necessarily becomes common. The limitations on her power to purchase on credit are that she have some paraphernal property, which should bear such fair proportion to the purchase price as that the same and the property purchased would be sufficient security for the purchase and enable her to make the purchase with reasonable expectation of being able to meet the deferred payments. Mc-

Kay on Community Property, § 219; Fortier v. Barry, 111 La. 776, 35 South. 900. This rule would seem to require each case to be decided upon its own facts and to furnish no legal guide under statutes like ours.

In Texas property purchased on credit by the wife falls into the common fund. The reason for this is that in Texas the wife, except for necessities, or for expense incurred for her separate estate, cannot bind her separate estate. Her contracts may be enforced against the common estate, and hence the community estate takes the property acquired on credit by her. McKay Community Property, § 220; Heindenheimer v. McKeen, 63 Tex. 229; Wallace v. Finberg, 46 Tex. 35, 44; Epperson v. Jones, 65 Tex. 425.

In California the statute is the same as ours. In Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719, it was held that money borrowed by the wife to invest in real estate will be regarded as community property unless borrowed upon the faith of her existing separate property, which she mortgages or pledges as security for its payment, or against which her contract may be enforced. This doctrine was somewhat modified in Flourney v. Flourney, 86 Cal. 286, 24 Pac. 1012, which is to the effect that money borrowed by the wife upon the faith of her existing separate property is enough to make it separate property. See, also, Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819, to the same effect. The doctrine in California, therefore, seems to be that money borrowed by the wife upon the faith of her separate estate, or which may be collected out of the same, remains her separate property, and is in accord with our view. As we have heretofore pointed out, under our statutes, money can be borrowed by a wife in no way other than upon the faith of her separate property; it alone being liable for her contract.

In Washington a contrary doctrine prevails. Thus, in Main v. Scholl, 20 Wash. 201, 54 Pac. 1125, after citing and relying upon the earlier case of Yesler v. Hochstetler, 4 Wash. 349, 30 Pac. 398, it is said:

"It was the evident purpose of the Legislature to place the spouses upon a footing of equality as nearly as practicable. Let us suppose that this transaction had been that of the husband. In that event it would scarcely be questioned that the property so acquired would have become community property. Is there any reason discoverable in the legislative enactment for regarding it differently because the wife, instead of the husband, is the operator? To depart from the plain letter of the statute is to embark upon a sea of uncertainty."

Idaho seems to take the same position. Northwestern & P. H. Bank v. Rauch, 7 Idaho, 152, 61 Pac. 516.

The argument upon which the doctrine in Washington is based seems open to substantial criticism. It seems to be based upon the proposition that the law has been enacted with the purpose in view of placing the two spouses upon a footing of equality. We do

not so understand the community statutes like ours. As is said in McKay on Community Property, § 215:

"The argument of the court in Main v. Scholl is based on the assumed equality of the spouses. In many respects they are equal; in others they are not. Each has the conceded power to purchase on credit; so far they are equal; but when we turn to the nature of the obligation incurred by each a wide difference appears. He can, and she cannot, bind the common fund; he can purchase on credit and give a binding obligation for the future delivery of community property or funds; she has no such power; if she purchases on credit she must give an obligation for the future delivery of her separate funds or property, for she has no power to give any other. They are totally different, in a legal sense, in respect to their power to contract debts, and in that respect only is their likeness or unlikeness important, so far as the present inquiry is concerned."

It seems perfectly clear to us from what has been heretofore said, and upon the reasoning in the Texas and California cases, that money borrowed by a married woman upon her own individual credit remains her separate property, and that likewise, property purchased with such money remains her separate property.

2. Appellant complained of the failure and refusal of the court to find specifically how much of the moneys invested in the properties in question were separate property and what pieces of property were so purchased in whole or in part. There is no foundation for this objection. The court found that all of the property in question was either inherited or purchased with moneys borrowed by the defendant Mrs. Waring, which said moneys were repaid out of moneys which were either interest received by her on the loans of money derived from her former husband's estate, or the proceeds or profits of her investments of separate funds, or rents received from the property so purchased, or from moneys paid to her by roomers which she took into her house, or from some or all of these sources, and that none of the personal earnings of the defendant Mr. Waring, nor the proceeds of any business conducted by him, was used in the payment of said loans by Mrs. Waring.

3. Appellant complained of the conveyances by the defendant Mr. Waring to his wife of town lots worth \$1,900 for a consideration of \$80, as a legal fraud upon the rights of creditors. The court found that the lots were worth about \$100, and that Mrs. Waring had improved the same with her own separate funds to the amount of about \$1,200. The allegation in the bill of complaint was that the conveyance from Mr. Waring to his wife was without any valuable consideration, and was made with the intent and purpose of hindering, delaying, and defrauding creditors, thus charging an actual, not a legal, fraud. The court found as a conclusion of law that the conveyance to the wife by the husband was not fraudulent or void as against creditors. There is no testimony

brought up in the transcript, and we, therefore, must take the findings of the court as correct. The issue made by the pleadings was as to whether there was any valuable consideration for the transfer, and whether the transfer was made with intent to defraud creditors. The court found with the appellees on both these issues, and there is nothing in the record from which it can be said the findings were incorrect.

From the foregoing it appears that the judgment of the district court was correct, and should be affirmed; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

STATE NAT. BANK OF ARTESIA v. TRAYLOR et al. (No. 1848.)

(Supreme Court of New Mexico. Aug. 30, 1916.)

(Syllabus by the Court.)

HUSBAND AND WIFE \S 131(3) — **SEPARATE PROPERTY OF WIFE—PUBLIC LANDS.**

Sections 2757, 2758, and 2764, Code 1915, interpreted, and held that property acquired by the wife under the Desert Land Act of the United States (Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1913, \S 4674-4676]), for which she receives a patent, will be conclusively presumed, in favor of an incumbrancer in good faith and for a valuable consideration, to be her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 474, 476, 478; Dec. Dig. \S 131(3).]

Appeal from District Court, Eddy County; G. A. Richardson, Judge.

Action by the State National Bank of Artesia against Lucy A. Traylor and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

J. D. Atwood and J. H. Jackson, both of Artesia, for appellant. Reid & Hervey, L. O. Fullen, and J. M. Dye, all of Roswell, for appellees.

PARKER, J. This is a suit to foreclose a mortgage. The decisive question in this case arises under the facts stated in the complaint, and it is whether the property described in the mortgage is conclusively presumed to be the separate property of Lucy A. Traylor, formerly Alice T. Anderson, wife of William T. Anderson. The principal facts alleged in the complaint are that some time prior to April, 1910, Lucy A. Traylor, then Alice T. Anderson, made entry of the mortgaged premises under the desert land laws of the United States; that thereafter, on April 1, 1910, a receiver's final certificate or receipt was issued to her for said lands; that on June 29, 1910, in order to secure the payment of a promissory note theretofore executed by her to obtain money with which to make final proofs on her entry and final payment to the government, said Lucy A. Traylor, then Alice T. Anderson, executed in favor

of appellant the mortgage heretofore mentioned, which said mortgage was accepted in good faith by appellant; that patent from the government of the United States issued to said Alice T. Anderson on November 11, 1911, and that during all of this time, from entry of the land until after the issuance of the patent therefor, Alice T. Anderson and William T. Anderson were husband and wife, but living separate and apart from each other. It is admitted by all the parties that title to the land in controversy was deraigned from the United States. Under these facts the trial court held that the complaint showed that the mortgaged premises were community property, hence the mortgage, in which the husband did not join, was without legal effect.

1. Under the law of this state all property owned before marriage and that acquired after marriage by either spouse by gift, devise, bequest, or descent constitutes the separate property of such spouse. Sections 2757 and 2758, Code 1915. All other property is community property. Section 2764, Code 1915. The section last mentioned, however, contains this provision:

" * * * But whenever any property is conveyed to a married woman by an instrument in writing the presumption is that title is thereby vested in her as her separate property. And if the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common unless a different intention is expressed in the instrument, and the presumption in this section mentioned, is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration. * * *"

From a mere reading of the statute it would appear that, in an action between husband and wife or their legal representatives, where the interests of purchasers and incumbrancers are not concerned, a prima facie presumption is raised that property acquired after marriage, but standing in the name of the wife, is her separate estate, but the presumption is disputable and may be overcome by showing the true fact. However, wherever the rights of innocent purchasers or incumbrancers in good faith and for a valuable consideration are concerned, the presumption, arising by virtue of the grant having been made to the wife alone becomes conclusive and indisputable. Such has been the holding of the Supreme Court of California in all cases in which the statute was construed, which statute is the same as ours.

In *Fanning v. Green*, 156 Cal. 279, 282, 104 Pac. 308, 310, a suit to quiet title by the administrator of a deceased husband against the administrator of the deceased wife, the court said:

"But the presumption so created is only a prima facie one, except in so far as purchasers and incumbrancers in good faith and for a valuable consideration are concerned. This is manifest from a reading of the statute. * * *

Where the controversy is between the husband and the legal representative of the wife, the presumption 'may be controverted by other evidence, direct or indirect.'"

In *Randall v. Washington et al.*, 161 Cal. 59, 118 Pac. 425, plaintiff brought suit to quiet title to certain lands. It appeared that in March, 1906, the Golden State Realty Company conveyed the premises to Delcia Donaldson, wife of L. Donaldson; that in December, 1907, Delcia conveyed the property to Jane Washington, one of the defendants, whom the court found was a purchaser in good faith and for a valuable consideration; and that, presumably, some time subsequent thereto, Delcia Donaldson and her husband conveyed the property to the plaintiff, Randall. The court said:

"The disputable presumption that title to the land in question vested in Delcia Donaldson as her separate property thus became a conclusive presumption in favor of the defendant Jane Washington, and the court rendered its judgment accordingly."

In *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012, the court said that the presumption was but a prima facie one—

"except where a purchaser or incumbrancer in good faith and for a valuable consideration was concerned."

In *Osborn v. Mills*, 20 Cal. App. 346, 128 Pac. 1009 (1913), the court said that:

"Under section 164, Civil Code, the conclusive presumption of title arises only where the wife conveys to a purchaser or incumbrancer in good faith and for a valuable consideration."

In *Re Shirey's Estate*, 167 Cal. 193, 138 Pac. 994 (1914), the court also noted that where purchasers or incumbrancers in good faith and for a valuable consideration were concerned, the presumption was conclusive.

It is to be observed that the direct question as to whether land, acquired under the Desert Land Act of the United States by a married woman, is separate or community property is not involved. In this case, the land having been conveyed to the wife by an instrument in writing, and she having mortgaged the same to appellant, who took the same in good faith as security for a loan made to her to enable her to make final proof and payment for the land, the question is whether the presumption that the land is the wife's separate property is conclusive in favor of appellant under the provisions of section 2764, Code 1915. We hold that the presumption is conclusive.

It is likewise to be noticed that no question is made as to the validity of the mortgage because made before title had passed to the entrywoman if, indeed, any such question could be made.

2. Before concluding the discussion we wish to advert to the action of the trial court in sustaining a motion to make the complaint more definite and certain. The first amended complaint clearly stated a cause of action, but the court required plain-

tiff, by sustaining the motion, to plead whether the mortgagor was a married woman at the time she executed the mortgage, and whether she acquired the property by patent from the United States, or by gift, devise, bequest or descent. Probably the plaintiff waived the error of the court by pleading over, but we are at a loss to understand upon what theory the court sustained the motion, and thus required the plaintiff to bring into the case purely defensive facts, so that the defendants might challenge the same by demurrer, instead of by answer as would seem to have been proper and regular. As before stated, the plaintiff has probably waived the error, and what we say on this point is probably dictum; but as the case is to be remanded for trial, we deem it proper to refer to the matter to this extent.

For the reasons stated, the judgment of the court below will be reversed and the cause remanded, with instructions to overrule the demurrers interposed by the appellees and to proceed with the cause in accordance with this opinion; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

HODGES v. HODGES. (No. 1910.)

(Supreme Court of New Mexico. Sept. 5, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1010(1)—REVIEW—FINDINGS OF FACT.

Findings of fact by the trial court, when supported by substantial evidence, will not be disturbed in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ⇐1010(1).]

2. DIVORCE ⇐286 — OBJECTIONS — SUFFICIENCY.

Although a finding that the wife was the sole owner of furniture and household goods might not be strictly correct under the proofs, where the court has power to award a division of the common property, such error, if error it was, is not available to the husband.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. ⇐286; Appeal and Error, Cent. Dig. § 598.]

3. APPEAL AND ERROR ⇐970(4) — REVIEW — REOPENING OF CASE—DISCRETION OF COURT.

A motion to reopen a case for further proofs is addressed to the sound discretion of the court, which discretion will not ordinarily be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3849; Dec. Dig. ⇐970(4).]

4. DIVORCE ⇐3—POWER OF COURT—STATUTE.

The ecclesiastical law of England in regard to marriage and divorce has never been adopted in its entirety in America. Only such portions thereof as have been formulated into statutes have been adopted, and such statutes form the sole basis of jurisdiction of the courts in this state. There is no power vested by statute in the courts of this state to award a limited divorce, or a legal separation, and hence no such power exists.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 4; Dec. Dig. ⇐3.]

Appeal from District Court, Torrance County; E. L. Medler, Judge.

Action by Dorothy May Hodges against W. K. Hodges. From a judgment for plaintiff, defendant appeals. Reversed and remanded in part.

F. Faircloth, of Santa Rosa, for appellant. W. C. Heacock, of Albuquerque, for appellee.

PARKER, J. This is an action for divorce upon the statutory ground that the defendant failed to support the plaintiff according to his means, station in life, and ability. The defendant answered, denying the allegations of the complaint as to nonsupport, and by way of cross-complaint charged the plaintiff with adultery. The court, upon conflicting evidence, found that the charges of nonsupport set forth in the complaint were proven, and that the charge of adultery in the cross-complaint was not proven, but was false and untrue. The court also found that the defendant was the owner of certain town property and one cow. It also found that the plaintiff was the sole owner of all of the household goods and furniture purchased during the marriage community. The court thereupon decreed, instead of an absolute divorce, a legal separation of the parties; that the defendant was the owner of the real estate and the cow, heretofore mentioned; that the plaintiff was the sole owner of the furniture and household goods purchased during the marriage community; and that the defendant pay all costs of the proceeding, including an attorney's fee of \$100. It was further decreed that the plaintiff have the use of said cow and of the house located upon the real property, free of rent, and that the defendant pay \$15 per month to the plaintiff for support and alimony. The defendant brings the case here upon appeal.

[1] 1. The first assignment of error is to the effect that the court erred in finding that the charge of adultery was not proven, but was false and untrue. The second assignment is to the effect that the court erred in finding that the charge of nonsupport was proven. These two assignments are disposed of by the well-established rule in this jurisdiction that findings of fact, when supported by substantial evidence, will not be disturbed in this court. An examination of the evidence upon which these two findings were made discloses a sharp conflict between the evidence for the respective parties, and we see no reason to disturb the findings.

[2] 2. The third assignment of error is to the effect that the court erred in finding that the plaintiff is the sole owner of all the furniture and household goods purchased during the marriage community. Laying aside the question as to whether this finding was strictly correct under the proofs, it nevertheless remains true that the court had power to award to the wife a suitable portion of the common property of the community, or the

separate property of the husband, and the decree awarding to her the furniture and household goods is to be sustained upon that ground. See section 2778, Code 1915.

[3] 3. The fifth assignment of error is to the effect that the court erred in denying the defendant's motion to reopen the case and hear more testimony. This motion was filed 18 days after the rendition of the decree in the case. A motion to strike the motion from the files was interposed on the same day, on the ground that the defendant had failed, neglected, and refused, up to the date of the filing of his motion, to comply with the decree of the court to pay alimony, attorney's fees, or costs, as in the decree adjudged. The motion to reopen the case was thereupon overruled by the court. We see no objection to the action of the court in this regard. The opening of a decree, or the refusal of the same, is a matter resting in the sound judicial discretion of the trial court, and will not ordinarily be disturbed.

[4] 4. The fourth assignment of error is to the effect that the court erred in decreeing a legal separation of the parties in view of the state of the pleadings. The complaint in the case did not ask, in terms, for a legal separation, but, on the other hand, asked for an absolute divorce. This raises the only point in the case requiring discussion.

A divorce a mensa et thoro originated with the ecclesiastical court of England, and was, in fact, the only form of decree granted by those courts. In those courts the relation of marriage was considered a sacrament, and was not to be dissolved except by order of the Pope. Accordingly, no absolute divorces were granted by the ecclesiastical courts. Great pressure was brought to bear upon the church to grant absolute divorces, and it yielded to the extent of granting divorces for what was known as canonical causes, such as precontract, consanguinity, affinity, impotency, and also for causes which rendered the marriage void, such as prior marriage, mental incapacity, want of age, want of due solemnization, and want of consent. These decrees were, in effect, decrees annulling the marriage, and were not decrees of dissolution. See 1 Nelson on Div. & Sep. § 9.

When the colonies separated from Great Britain, they kept so much of the common law as was suited to their condition. But they neither brought here nor kept the ecclesiastical courts, our institutions being founded upon an entirely different theory so far as the relations of church and state are concerned. Assuming that the ecclesiastical law was a part of the common law, as is commonly conceded, necessarily only so much of the same as was suited to our conditions was adopted here. There is much divergence of view as to how much, if any, of the ecclesiastical law was adopted in this country. One view is that no part of it was adopted; another is that all of it was adopted, but that

it remained in abeyance until our courts were given jurisdiction of it; and another view is that our statutes are original provisions, incorporating portions of the ecclesiastical law, the remainder never becoming a part of our common law.

New York has taken the first view. *Burtis v. Burtis*, 1 Hopk. Ch. 557, 14 Am. Dec. 563; *Perry v. Perry*, 2 Paige, 501; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Patton v. Patton*, 67 Misc. Rep. 404, 123 N. Y. Supp. 329. In *Williamson v. Williamson*, 1 Johns. Ch. 483, Chancellor Kent takes a slightly different view. The same view as that taken in New York is taken in Wisconsin (*Barker v. Dayton*, 28 Wis. 367; *Hopkins v. Hopkins*, 39 Wis. 167), in Nebraska (*Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464), and in North Dakota (*State v. Templeton*, 19 N. D. 525, 123 N. W. 283, 125 L. R. A. [N. S.] 234). See, also, *Kenyon v. Kenyon*, 3 Utah, 431, 24 Pac. 829. See, also, *Hagle v. Hagle*, 74 Cal. 608, 16 Pac. 518, and *Reade v. Reade*, 81 Cal. xix, 22 Pac. 284, for the same rule in California. See, also, 1 Nelson on Div. & Sep. § 10, for a discussion of this proposition.

In Massachusetts it is held that, when the Legislature adopted the divorce statutes and named the causes for divorce, it is presumed to have intended also to adopt the general principles of the ecclesiastical law, so far as applicable. But the subject of marriage and divorce is regulated entirely by statute. *Robbins v. Robbins*, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488.

Without pursuing this subject further we think it well established by the great weight of authority that the powers of courts in matrimonial matters in this country are to be determined entirely upon the terms of the statutes conferring the jurisdiction. These statutes necessarily embody many of the principles contained in the ecclesiastical law, and resort may be had to that law for definitions and interpretations of these statutes; but we cannot give our consent to the proposition that the ecclesiastical law, as a system of substantive and remedial law, has been bodily adopted in this country as a part of our common law, because many of its features are entirely inconsistent with our institutions, and many of its principles and doctrines are unsuited to American beliefs and practices.

We have, then, before us the proposition as to whether, in a suit for divorce upon the statutory ground of failure to support the plaintiff, the court has power to decree a divorce from bed and board, or a legal separation. We are compelled to hold that the court has no such power. The statute authorizes the court to award an absolute divorce or to refuse the same. It does not authorize any form of limited divorce. Such

being the case, the decree of the court is erroneous in this particular.

The findings made by the court justify an absolute divorce in behalf of the plaintiff. The decree, therefore, in so far as it awards a limited divorce, will be reversed, and the cause remanded, with instructions to award a final decree in favor of the plaintiff as prayed for in the bill, without placing any restrictions upon the district court as to its action in regard to division of property and alimony between the parties, which is in the decree expressly reserved for further determination, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

ESSEX v. FIFE et al. (No. 3939.)

(Supreme Court of Oklahoma. May 11, 1915.
Rehearing Denied Sept. 28, 1916.)

(Syllabus by the Court.)

REPLEVIN §21—ACTION—"REAL PARTY IN INTEREST."

In a suit in replevin, an agent authorized by the owner of a chattel to exchange it for realty, who has delivered same to one with whom he has lawfully contracted for the conveyance of land to his principal (the contract not being rescinded), is not "the real party in interest" within the scope and meaning of the statute (section 4681, Rev. Laws 1910), and cannot maintain such action in his own name.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 121; Dec. Dig. §21.

For other definitions, see *Words and Phrases*, First and Second Series, *Real Party in Interest*.]

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Replevin by R. H. Fife against Frank Haskett and another, in which W. F. Essex intervened, claiming the property. There was a verdict for plaintiff, and intervener brings error. Reversed.

Harris & Nowlin, of Oklahoma City, for plaintiff in error. Asp, Snyder, Owen & Lybrand, of Oklahoma City, for defendants in error.

BLEAKMORE, C. This is an action in replevin commenced in the district court of Oklahoma county on the 19th day of April, 1911, by the defendant in error Fife against the defendants in error Haskett and the Palace Garage Company to recover possession of an automobile. Plaintiff in error intervened and claimed the property. The parties will be hereinafter referred to as they appeared in the trial court. The cause was tried to a jury, which at the close of the evidence, under instruction of the court, returned a verdict for plaintiff; and intervener has brought the case here for review.

The record discloses that shortly prior to the 4th day of April, 1911, the plaintiff, an

evangelist, together with his daughter, Mrs. A. K. Brooks, and other members of his family, were at Norman, Okla., where he met the intervenor. The daughter was the owner of the automobile in question and had authorized plaintiff to sell or trade the same for real property. On April 4th intervenor showed plaintiff certain real property, and thereafter on the same day they, together with one F. Harrah, executed the following instrument in writing:

"Harrah-Robb Grain Co.

"Oklahoma City, April 4, 1911.

"This agreement between F. Harrah and F. Essex, party of the first part, and R. H. Fife, party of the second part. Parties of first part agree to sell lots 6 to 12, inclusive, block 1, Park Hill addition, for price of \$2,650.00, payable as follows: One E. M. F. auto with all accessories and note for \$1,800.00, due as follows: Due 2 yrs. after April 4, 1911 at 8% from date and \$50.00 cash, the Recd. of which is hereby acknowledged.

"[Signed] Frank Harrah.

"W. F. Essex.

"Roger H. Fife,

"Party of the Second Part."

The \$50 was paid by plaintiff. Just what part Harrah played is not shown, as he does not appear further in the transaction. Pursuant to an understanding between the parties, intervenor procured an abstract to certain lots in Park Hill addition to the city of Oklahoma City, with reference to which the following stipulation was made at the trial:

"It is admitted the plat shown on pages 98 and 99, Book No. 18 of plats of Oklahoma county, Okla., showing the filing of the plat of Park Hill addition being a subdivision of a part of the southeast quarter of section 24, township 12 north, range 3, w 1 m, filed on the 8th day of April, 1911, is the plat of the so-called Park Hill addition, with reference to which the so-called writing or agreement between the plaintiff and defendant Essex was made."

The abstract was submitted to plaintiff's attorneys, who advised him that a certain oil and gas lease, noted in the abstract, was in force and should be released, and criticized the title in other respects.

The automobile had been left with a garage keeper at Norman, who under instruction of plaintiff delivered it to intervenor. Several days intervened, during which time plaintiff and his family, including the daughter, Mrs. Brooks, had gone from Norman to Britton a town only a few miles north of Oklahoma City, where they were holding an evangelistic meeting.

Intervenor brought the car to Oklahoma City and placed it with the Palace Garage Company in care of defendant Haskett, the manager thereof. Plaintiff was about to close his meeting at Britton and leave that section of the state; and, intervenor up to that time not having procured a release of the oil and gas lease, plaintiff became impatient of the delay and insisted upon a rescission of the alleged contract. As to whether there was, in fact, an agreement between the parties to rescind there is a sharp conflict in the testimony, but all agree that plain-

tiff and intervenor went in person to the Palace Garage; that plaintiff demanded possession of the car, and intervenor directed defendant Haskett not to deliver it, whereupon this action was begun by plaintiff to recover its possession, and a bond was duly executed by him. In his petition and affidavit for replevin it is stated that plaintiff is owner of the car. Intervenor filed an answer and cross-petition claiming the property, and executed a redelivery bond, but such bond was not signed by defendants. This bond was accepted by the sheriff on April 20th, as shown by his return. However, on the same day another return was made reciting that defendants had failed to make bond, and the car was thereupon delivered to plaintiff, who, so far as the record discloses, has since retained possession thereof. On the day of trial plaintiff amended his petition so as to read:

"Comes now the plaintiff and states to the court that he is entitled to the immediate possession of one certain E. M. F. automobile, No. 11575, as agent or bailee for Mrs. A. K. Brooks, which said automobile the above-named defendant wrongfully detained from this plaintiff on the 19th day of April, 1911, and still retains in his possession.

"That as bailee he had possession of said car for his personal use and that of his family; that as agent he had it under general instructions from Mrs. Brooks, to sell it for cash or trade it for real estate.

"Plaintiff further says that the reasonable value of said automobile is \$1,000, and that this plaintiff has made due demand upon defendant to deliver possession of said property to said plaintiff, which said demand has been by said defendant refused."

The testimony developed that Mrs. A. K. Brooks at the time of the filing of suit was at Britton, some eight miles from Oklahoma City.

With reference to the replevin affidavit the plaintiff testified:

"Q. Will you kindly answer my question as to whether you knew what the contents of that was when you swore to it? A. Yes, sir; I knew what I was signing. Q. You knew you were swearing you were the owner of the car? A. I didn't only as agent in that sense. I think the jury will understand that now. Q. I am sure you want the jury to understand it, but just answer my question. A. I signed that; yes, sir. Q. Knowing what it contained and knowing that your daughter did own the car and you didn't own the car; is that correct? A. I had not time to go to Britton and bring my daughter down here to do that. Q. Then because you didn't have time— You knew she was the owner at the time? A. I told the men at the time of the deal that she was the owner, and asked the deed be made to her. Q. Your daughter was with you and in possession of the car along with you all the time, was she not? A. Yes, sir; had been for eight months before. Q. She was with you at Norman and with you there when you left the car; that is, with you at the garage when you took the car down to the garage and left it there with instructions to give it to Mr. Essex when he called? A. She was there. She would have come up here to look at the ground had it not been a stormy, bad day, not fit for anybody to go out."

Intervenor urges, under proper assignment of error, that plaintiff is not the real party

in interest, and therefore not entitled to maintain the action.

Section 4681, Rev. Laws 1910, provides: "Every action must be prosecuted in the name of the real party in interest. * * *

While under the authorities the general rule is that a person having a special property right in chattels, such as an agent in some instances, or a bailee, may maintain replevin against one who wrongfully takes or withholds the property from him, yet in every such case the present right to possession of the property must exist in the plaintiff. In *Robinson & Co. v. Stiner*, 26 Okl. 272, 109 Pac. 238, it is said:

"The gist of the action of replevin is the right to possession, and the declaration or petition must contain an averment that the plaintiff is the owner of the property, or that the title is in him, or that the right of possession is in him at the commencement of the suit. Where the plaintiff is entitled to possession by virtue of a special ownership in the property, he must in his declaration or petition aver the facts creating such ownership."

See *Cobby on Replevin* (2d Ed.) §§ 141, 142; *Wells on Replevin* (2d Ed.) §§ 94-132.

"It is well settled that an action in replevin cannot be brought in the name of one person for the use of another, for the action involves nothing by legal rights, and, if equities are to be settled, another form of action must be resorted to. While the name of the usee might be treated as surplusage, a recovery can only be had where it is shown that the plaintiff is entitled to recover. The usee's title cannot be considered in the action, and if the plaintiff have no title the action must fail." *Cobby on Replevin*, § 425; *Roof v. Chattanooga, etc., Co.*, 38 Fla. 284, 18 South. 597; *Moore v. Watson*, 20 R. I. 495, 40 Atl. 345; *Pease v. Ditto*, 189 Ill. 450, 59 N. E. 983.

In the instant case there is a total failure of evidence to show that plaintiff at the time of the commencement of the action was entitled to the possession of the property sought to be recovered. He was not then even a gratuitous bailee; and, if he ever had exclusive possession of the car as agent of his daughter, he had voluntarily, and with her consent, in the course of his dealings in that capacity, parted with it and given possession to intervenor. The extent of plaintiff's agency with regard to the automobile, so far as the testimony discloses, was to enter into negotiations and close the trade for his daughter. This he did by executing the written memorandum, paying the \$50, and delivering the automobile and note. The transaction was concluded so far as he was concerned. It is not contended that he was empowered as agent of his daughter, after the contract was consummated on his part, to rescind it.

Upon a review of this branch of the case it is apparent that the attitude of plaintiff is that of a father of an adult child, who was disqualified in no way from prosecuting the action in her own name, assuming to act in her behalf. If she were the owner of the property, as is so earnestly contended

by the plaintiff, and the same had been taken or was being withheld from her possession, a recovery by the plaintiff, her father, under the circumstances of this case, would not be a bar to her right of action. The plaintiff was not the real party in interest within the scope and meaning of the statute, and the trial court erred in directing a verdict in his favor.

In our opinion, the written memorandum quoted is sufficient to meet the requirements of the statute of frauds. The evidence was conflicting as to whether the contract of sale was canceled; and if this were a proper issue of fact in the case it should have been determined by the jury. But this is an action of replevin. There being no allegation or proof of fraud in the transaction by which intervenor had obtained possession of the property, the rule announced in *Penton v. Hansen*, 13 Okl. 450, 73 Pac. 843, that "the ordinary action of replevin will not lie to correct, modify or cancel a contract," which seems to obtain in this state, is applicable.

There are other assignments of error which it is unnecessary to consider under this view of the case.

The judgment of the trial court should be reversed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. GRACE. (No. 7624.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 26, 1916.)

(Syllabus by the Court.)

1. CARRIERS — §331(4) — CARRIAGE OF PASSENGERS — ACTIONS — RECOVERY.

The rule of contributory negligence as well as section 1423, Rev. Laws 1910, under the conditions therein stated, ordinarily preclude a passenger who is injured while riding upon the platform of the caboose of a freight train from recovering for such injury, but when the freight train upon which a passenger is riding stops, and the passenger reasonably believes it has reached his destination and has stopped for the purpose of his getting off and goes on to the platform for that purpose, when the train starts up again it is not negligence for him to remain on the platform if the train is to go only a short distance before stopping again, if he holds securely to the guard rails.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1376-1378; Dec. Dig. §331(4).]

2. CARRIERS — §318(4) — CARRIAGE OF PASSENGERS — ACTIONS — EVIDENCE.

When a person riding upon a freight train as a passenger is injured by the sudden stopping of the train, in an action for the recovery of damages therefor he makes out a prima facie case when he proves that the injury sustained resulted from a jolt occasioned by an unusually sudden stop of the train which was other than a necessary incident to the careful handling of such train, and the facts and circumstances surrounding the injury were such as to speak negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1307, 1308; Dec. Dig. §318(4).]

Commissioners' Opinion, Division No. 4. Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by W. A. Grace against the Chicago, Rock Island & Pacific Railway Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Roberts, C. O. Blake, and W. H. Moore, all of El Reno, K. W. Shartel, of Oklahoma City, and Edward Howell, of Shawnee, for plaintiff in error. W. N. Maben, of Shawnee, for defendant in error.

MATHEWS, C. The parties will be designated as in the trial court. This is an action for the recovery of damages for personal injuries alleged to have been received by plaintiff while a passenger upon defendant's freight train. Judgment was for the plaintiff in the sum of \$300, and, the motion for a new trial having been overruled, this appeal was lodged here.

[1] At the close of the evidence the defendant moved the court to instruct the jury to return a verdict for the defendant, and the refusal of the same is the first assignment of error presented. At the time of the alleged injuries the plaintiff was riding upon a local freight train which carried passengers, having boarded the same at McCloud for Shawnee. When the train reached the yards of defendant at Shawnee it went onto a side track and stopped, and the plaintiff testifies that he thought it had reached Shawnee and had stopped for the passengers to get off, and so he walked out on the platform for that purpose, and the train started up again, so he just stood on the platform holding to the iron guard, and the train suddenly stopped again, causing him to fall and to be injured thereby.

It was proven at the trial that the following notice was posted up in a conspicuous place in the caboose of the train where plaintiff was riding before he went out on the platform:

"Notice to Passengers.

"Passengers are not allowed to ride in mail, baggage, express or freight cars, nor on the steps or platforms of coaches and cabooses. They must remain seated until train comes to a full stop."

Section 1423, Rev. Laws 1910, reads as follows:

"In case any passenger on any railroad shall be injured while on the platform of a car while in motion, or in any baggage, wood or freight car, in violation of the printed regulations of the corporation posted up at the time in a conspicuous place inside of its passenger cars then in the train, such corporation shall not be liable for the injury, if it had furnished room inside its passenger cars sufficient for the accommodation of its passengers."

Defendant contends that, as plaintiff had voluntarily gone out on the platform and stood there while the train was in motion, under the provisions of the above statute he is precluded from recovery even if he was

injured. Ordinarily this contention would be true, but in the case at bar the plaintiff, in our opinion, justifies his conduct for being on the platform at that time. The train had reached his destination, and after going onto the side track in the yards at Shawnee had stopped. We think plaintiff's conclusion that it had stopped for the passengers to get off was reasonable, and so he went out on the platform for the purpose of getting off, but before he could do so the train started up again. The question then arises whether it was his duty to return to his seat in the caboose after the train started up, or should he have remained upon the platform and held to the iron guards provided for that purpose? In view of the fact that the train was moving slowly and was approaching the real stopping place where he was to get off, ordinarily there would have been a greater probability of an injury in leaving his position with the protection of his hold on the handrail for the purpose of re-entering the caboose than in remaining on the platform, and under these conditions we do not believe he should forfeit his right to recover because he happened to be upon the platform at the time of the accident. Ordinarily the above statute, as well as the rule of contributory negligence, would preclude a recovery, but we believe the special facts in this case avoid the usual rule.

Defendant's next contention is that under the rule laid down in the case of *St. Louis & S. F. Ry. Co. v. Gosnell*, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892, it was entitled to an instructed verdict. The question now presented is: When does the plaintiff, in cases like the one at bar, make out a prima facie case?

In the *Gosnell* Case, *supra*, it was held that in order to send the question of negligence in handling the train to the jury it must affirmatively appear that the jar that occasioned the injury was of extraordinary severity and directly attributable to the negligent or careless handling of the engine by the engineer, and that, in the absence of such evidence, it is presumed that the engineer did his duty, and that the sudden stop of the train and the jar which caused the injury arose from the exigencies of the service. While in that case the court held that the trial court erred in not instructing a verdict for the defendant, yet in arriving at the conclusion that the jar caused by the stopping of the train was not ipso facto negligence and proof thereof insufficient to take the question of negligence to the jury, it will be noted that the court rejected in toto the evidence adduced by plaintiff as to the nature and character of the stop, holding the same to have no probative force and the mere expressions of opinion. No reason is given in the opinion as to why the court rejected plaintiff's evidence, but it is plainly apparent that such a holding is based upon the fact that such evi-

dence called for expert witnesses, and that it was not shown that plaintiff's witnesses showed themselves to have had sufficient experience or information so as to testify when a jar or jolt of a train was unusual and out of the ordinary. Defendant had offered evidence tending to prove that the jar or jolt which occasioned the injury complained of was only the usual jar which ordinarily accompanies the operation of freight trains, and, the plaintiff having no counter evidence at all on that subject, it naturally follows that there should have been an instructed verdict for the defendant, and that is all the Gosnell Case intends to hold.

While the case of *St. Louis & S. F. R. Co. v. Fitts*, 40 Okl. 685, 140 Pac. 144, L. R. A. 1916C, 348, was a passenger train case, yet we believe the same is more in point, because there plaintiff's evidence was not declared inadmissible, and from this case we take the following:

"The general rule, however, is that, where the thing which causes the accident is exclusively controlled or managed by the carrier, and the accident is such as in the ordinary course of events does not happen if those who have the control or management use proper care, it affords reasonable evidence, in the absence of explanation by the carrier, that the accident arises from want of care. *Gilmore v. Brooklyn Heights Ry. Co.*, 6 App. Div. 117, 39 N. Y. Supp. 417. Among the cases governed by the foregoing rule are those where the injury arose from sudden starts, sudden stops, jerks, jolts, etc. The tendency of the decisions seems to be that, if the jerk is of such violence that it would not be one likely to occur, or necessary, in the ordinary operation of transportation, a presumption of negligence will arise. It has been held that a very violent jerk of a car, resulting in injury to a passenger, raises a presumption of negligence against the carrier. *Chicago City R. Co. v. Morse*, 98 Ill. App. 662; *Evansville & T. H. R. Co. v. Mills*, 37 Ind. App. 598, 77 N. E. 608; *Southern R. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979. And that a violent jerk, throwing a passenger down and out of a car, raises a presumption of negligence in the carrier. *Ill. Cent. R. Co. v. Beebe*, 69 Ill. App. 363; *Griffin v. Pacific Elec. R. Co.*, 1 Cal. App. 678, 82 Pac. 1084; *Scott v. Bergen County Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060; *Consolidated Traction Co. v. Thalheimer et al.*, 59 N. J. Law, 474, 37 Atl. 132; *Lomas v. N. Y. City Realty Co.*, 188 N. Y. 628, 81 N. E. 1169."

The latest expression of our court on this point is found in the case of *Ramsey v. McKay*, 44 Okl. 774, 146 Pac. 210, which is a freight train case, which follows the *Fitts* Case, *supra*, and, we believe, is decisive of the proposition under consideration, and holds adversely to defendant's contention. It is true that in this case there were some statements made by the conductor in charge of the train in which he complained of the engineer making such sudden stops, and the court held that evidence that the stop which caused the injuries was of such violence that it was not likely to occur or necessary in the ordinary operation of the freight train in question, together with the said statement of the conductor, made out a *prima facie* case and cast upon the railroad company the burden of relieving itself of responsibility by

showing that the sudden stop complained of was the result of an accident which the exercise of skill, foresight, and diligence could not have prevented.

The law as established by the authorities in cases of this character will not permit a recovery until there is evidence to justify a finding by the jury that the jolt complained of was something more than the ordinary jolt necessarily incident to stopping of freight trains under circumstances similar to the occasion at bar. It is a matter of common knowledge that jolts and jerks are common and nearly always incident to the stopping of freight trains, and for that reason an injury resulting from a jolt caused by the sudden stopping of a freight train does not of itself speak negligence, and before a recovery can be sustained there must be produced evidence to support the contention that the jolt caused by the sudden stop was of such unusual severity that it was not attributable to the jolting ordinarily incident to the ordinary stopping of freight trains under the same or similar conditions, and in those cases wherein it is proven to the satisfaction of the jury that the injury sustained resulted from a jolt occasioned by a sudden stop of a freight train which was other than a necessary incident to the careful handling of such train, and the facts and circumstances surrounding the injury were such as to speak negligence, a *prima facie* case is thereby made out. *Hawk v. Railroad*, 130 Mo. App. 658, 108 S. W. 1119; *Todd v. Missouri Pacific Ry. Co.*, 126 Mo. App. 684, 105 S. W. 671; *Foley v. Boston & Maine R. R.*, 193 Mass. 332, 79 N. E. 765, 7 L. R. A. (N. S.) 1076; *McGinn v. New Orleans Ry. & Light Co.*, 118 La. 811, 43 South. 450, 13 L. R. A. (N. S.) 601; *Brown v. Union P. R. Co.*, 81 Kan. 701, 106 Pac. 1001, 29 L. R. A. (N. S.) 808.

We find the following in *Shearman & Redfield on Negligence*, par. 59:

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. * * *

[2] This brings us to an examination of the evidence in this case to determine whether or not it comes within the above rule.

The plaintiff introduced only one witness besides himself. This witness testified that he boarded the train at the same time plaintiff did for the same destination; that after the train got into the yards at Shawnee it stopped all at once and shoved the cars together, tearing things up considerably; "they stopped the train just like that (indicating by slapping his hands together); it did not stop gradual, but just like that (indicating as before);" he was sitting inside the door, and it threw him about six feet against the side of the seat; that it knocked the com-

ductor, who was sitting at his desk in a big chair, out of his chair into the aisle about four or five feet from his desk, and also knocked the brakeman down and threw all the water out of the cooler. This witness also testified that he was injured, and at that time had a suit pending against the defendant for the same.

The plaintiff testified the train stopped very suddenly; was an unusual stop; that he was standing holding to the guard rails, and all at once the train stopped like that (indicating by slapping his hands together) and threw him against some object.

It is probably true that plaintiff's own testimony falls to prove anything, and does not tend to make out a prima facie case, but the testimony of his witness as above detailed to the effect that he was jolted from his seat into the aisle, that the conductor was knocked out of the big chair in which he was sitting, and that the brakeman also was thrown down, and all the water emptied from the water cooler, presents such a condition that no railroad company would care to claim to be an ordinary and usual occurrence on its freight trains. Such a condition would not be very inviting to passengers, and it would be a very strenuous life for the crew to have to endure from day to day. We think such proof establishes a prima facie case, and that such occurrences are out of the ordinary and very unusual.

All of the above evidence was emphatically contradicted by the train crew, and each testified that the stop complained of resulted in no mishaps of any kind, and was only an ordinary stop of the average freight train. Such contradictions in evidence is unexplainable, other than some one was very careless with the truth. However, the credibility of the witnesses is a matter for the jury to decide, but it is to be deplored that such glaring and emphatic contradictions among witnesses should be so common. Especially so in cases like the one at bar, where there is no room for an honest difference.

Defendant finally contends that the evidence of the plaintiff as set out above are mere expressions or conclusions of the witnesses which prove nothing. In the Gosnell Case, *supra*, such evidence was rejected by the court, but, we believe, on account of the incompetency of the witnesses. In the Fitts and McKay Cases, *supra*, similar evidence was admitted, and while its probative value is of an uncertain quantity, which is a matter for the jury, we believe, if the witness is otherwise qualified to testify on the point, that the evidence should not be rejected as mere opinion evidence or as a conclusion of the witness. In the case at bar each of the witnesses testified that they were accustomed to riding on freight trains, and had ridden on them often, and it is to be presumed that they were offered as experts, and their qual-

ification as such rested largely within the discretion of the trial judge, and we are not prepared to say that he abused his discretion in admitting the evidence.

We recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

WILLIS v. STATE. (No. A-2425.)
(Criminal Court of Appeals of Oklahoma. Sept. 23, 1916.)

(Syllabus by the Court.)

HOMICIDE \S 342—APPEAL—REVERSAL.

A person who is convicted of manslaughter cannot secure a reversal in this court, in the absence of errors of law, when the proof shows that the jury should have found a verdict for murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 722; Dec. Dig. \S 342.]

Appeal from District Court, Carter County; A. Eddleman, Judge.

Hickman Willis was convicted of manslaughter, and appeals. Affirmed.

Brown, Brown & Brown, of Ardmore, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Hickman Willis, was convicted of manslaughter in the first degree at the September, 1914, term of the district court of Carter county, and his punishment fixed at confinement for 25 years in the state penitentiary. It appears that Hickman Willis, the plaintiff in error, and the deceased, Rena Davis, were full-blood Choctaws, belonging to the class commonly designated Mississippi Choctaws. They lived in the same community in Carter county, and something like three-quarters of a mile apart. Rena Davis was more than 70 years of age. Hickman Willis was a comparatively young man. The killing occurred on the 12th of August, 1914. Upon this date, Hickman Willis and other Choctaws were in Ardmore, where they secured whisky. Willis, it is contended, became intoxicated before leaving Ardmore, and drank some on the way home after leaving the city. Arriving home, he assisted in unharnessing the team and putting away certain paraphernalia which had been used on a hunting trip. One or two other Choctaws, among them Robert Lee, were with him. When the team was unharnessed, Lee, who, it appears, lived with Rena Davis, left the home of Willis, going in the direction of his own home. Before going a great ways he and a companion discovered that Willis was following them with a shotgun. They hastened their steps in order to avoid him. Soon after arriving home Willis appeared on the scene and began shooting into the house, wounding a number of the inmates, some three or four, and killing Rena Davis. All of the able-

bodied persons in the house at the time, who were not seriously wounded, escaped and left the premises. Willis was found in his own home about midnight by the sheriff of the county, and arrested. He denied any knowledge of the killing, his plea being based upon the contention that he was insanely drunk, and remembered nothing whatever about the affair. Proof was also offered to the effect that Willis had received a severe injury to the head several years before, and a part of the frontal bone had been removed; that on account of this injury the intoxicating drinks affected him to the extent of delirium his reason. The court permitted all the proof offered by the plaintiff in error along these lines, and submitted the same to the jury fairly and with much consideration for the rights of the plaintiff in error. We have read the record fully, and have given careful consideration to the written argument of counsel. There is no error disclosed prejudicial to the rights of the plaintiff in error. In fact, the only error disclosed is error committed in his favor. The homicide was a most brutal murder committed by a drunken full blood, whose victim was a law-abiding, harmless, old full-blood woman. There is not an extenuating circumstance or fact in evidence. There was absolutely no defense disclosed under the testimony. The jury before whom the case was tried evidently extended clemency to the accused on account of his intoxicated condition. A conviction for murder would have been proper in this case. The plaintiff in error and his counsel are to be congratulated that they secured from the jury a verdict of manslaughter rather than of murder, for the facts disclosed would have fully supported a conviction for the higher offense.

No prejudicial error appearing, the judgment of the trial court is affirmed.

DOYLE, P. J., and BRETT, J., concur.

CORLISS v. STATE. (No. A-2439.)
(Criminal Court of Appeals of Oklahoma. Sept. 23, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1170½(5)—WITNESSES §337(5)—TRIAL—EXAMINATION OF WITNESSES.

Counsel have no right, under the law in this jurisdiction, to inquire of a witness whether or not he has been arrested upon a criminal charge. A witness can only be asked for the purpose of affecting his credibility if he has been convicted of crime.

(b) A county attorney has no right to ask the defendant at bar if he has not been arrested on similar charges to the one upon which he is on trial. An examination of this character is prejudicial, and, where permitted by the court, is reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. §1170½(5); Witnesses, Cent. Dig. §§ 1132, 1140-1142, 1146-1148; Dec. Dig. §337(5).]

2. CRIMINAL LAW §643, 1086(11), 1128(4), 1166½(3)—TRIAL—REPORT OF CASE.

(a) It is the duty of the trial court to require the court reporter to take down all of the proceedings of every character from the beginning to the close of a criminal trial when a request therefor is made by counsel.

(b) After the failure or refusal upon the part of the trial court to require the reporter to take all or any part of the proceedings when requested by counsel for the accused, a judgment of conviction will be followed by reversal upon appeal.

(c) It is only necessary for the proceedings to disclose the fact that counsel for the defendant made such request, and that the court failed or refused to comply therewith.

(d) When any controversy arises as to the demand by counsel for the defendant at bar that the proceedings be taken down by the reporter, the fact of such demand, and the failure or refusal of the court to comply therewith, can be shown by affidavit of persons present who know the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1458, 2741, 2744, 2749, 2752, 2952, 3119; Dec. Dig. §643, 1086(11), 1128(4), 1166½(3).]

3. CRIMINAL LAW §684—TRIAL—CONDUCT OF STATE'S COUNSEL.

It is the duty of counsel for the state to introduce the testimony available to establish the charge against the defendant at the bar in the hearing in chief. The court should not permit a rehash of such testimony under the guise of rebuttal. Counsel for the state have no more right to reserve the principal testimony and introduce it under the guise of rebuttal nor to rehash testimony introduced in chief under the guise of rebuttal, than the accused would have to reintroduce his testimony after the state has closed the rebuttal. In a strict sense, only such testimony which goes to contradict or rebut something proved by the defendant is entitled to be introduced in rebuttal. The discretion of the trial courts allowed by the law in this jurisdiction in this respect should always be exercised with these rules of fairness in view.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615, 1618; Dec. Dig. §684.]

Appeal from District Court, Payne County; A. H. Houston, Judge.

A. O. Corliss was convicted of maintaining a place where intoxicating liquors were kept and sold, and he appeals. Reversed and remanded.

J. M. Springer, of Stillwater, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Plaintiff in error, A. O. Corliss, was convicted at the October, 1914, term of the district court of Payne county upon a charge of maintaining a place where-in intoxicating liquors were kept and sold, and his punishment fixed at a fine of \$250 and imprisonment in the state penitentiary for the term of one year and one day. From this judgment of conviction, plaintiff in error has duly prosecuted an appeal to this court.

The propositions preserved for review have been heretofore determined by this court.

[1] The first assignment of error is based upon the failure of the court to exclude incompetent and irrelevant testimony. This

assignment covers several different phases of the testimony; among others, the proposition that the court permitted the county attorney to ask the plaintiff in error if he had not been arrested upon similar charges for conducting the same place as charged in the information. This the county attorney had no right to do, and this court has repeatedly so held. A discussion of the principle is not again required, for the reason that the doctrine is too well established to be misunderstood. A witness can only be asked if he has been convicted of crime. *Porter v. State*, 8 Okl. Cr. 64, 126 Pac. 699; *White v. State*, 4 Okl. Cr. 143, 111 Pac. 1010; *Hendrix v. State*, 4 Okl. Cr. 611, 113 Pac. 244.

[2] The second assignment of error is based upon the proposition that the court erred in refusing to require the reporter to take in shorthand and transcribe as a part of the record the argument of the county attorney, after due and proper demand had been made therefor by the attorney for the plaintiff in error. The court, it appears, had excused the reporter, and he was not in the courtroom, and therefore denied the request of the plaintiff in error to have the argument of the county attorney taken. The fact that the court reporter was out of the room is no fault of the plaintiff in error. We have repeatedly held, and that too in important cases, that controversies of this kind cannot be incorporated into the record by affidavits. Where the court refuses or fails to require the stenographer to take any part of the proceedings upon the defendant's request, then the fact of such refusal can be shown by affidavits. See *Lamm et al. v. State*, 4 Okl. Cr. 641, 111 Pac. 1002. When questions of this kind arise, and the reporter is not available to record the proceedings as provided by law and uniformly followed by this court, it is the duty of the trial court to grant a new trial. Upon his failure to do so, this court will reverse the judgment regardless of the merits of that portion of the record thus omitted. In fact, it is the duty of this court, regardless of the materiality of the proposition, to reverse the judgment and award a new trial. The question of whether or not the particular controversy was material to the issues is not important here. The court reporters are paid to take the proceedings in the trial court, and when a demand is made for the same, it is only necessary for the record to show that this demand was made and not complied with by the court. A reversal follows as a matter of right. But when counsel for the defendant requests the trial court to have the stenographer take down in shorthand any statement made by the prosecuting attorney during his argument to be made a part of the record on appeal, and the court refuses or fails to comply with this request, then the fact of his request and the court's refusal

may be shown by affidavit or other competent evidence, and thus the refusal upon the part of the court so shown constitutes grounds for reversal without regard to the merits of the case.

Section 1786, R. L., provides:

"An attorney in any case pending shall have the right to request of the court or stenographer that all such statements or proceedings occurring in the presence of the stenographer, or when his presence is required by such attorney, shall be taken and transcribed. A refusal of the court to permit, or, when requested, to require any statement to be taken down by the stenographer, or transcribed after being taken down, upon the same being shown by affidavit or other * * * competent evidence, to the Supreme Court, shall be deemed prejudicial error, without regard to the merits thereof."

The statute applies with equal force to proceedings in this court. So it is seen that the doctrine is settled both by acts of the Legislature and decisions of this court.

[3] The third assignment of error is based upon the contention that the court erred in permitting the county attorney to rehash the state's testimony after the defense had closed, under guise of rebuttal. The order of introducing testimony and the character of rebuttal permitted by the court is largely discretionary. It is, however, most unfair to permit a complete rehash of the testimony introduced in chief. The defendant would be justly entitled to introduce his testimony if such practice is permitted. In any trial, many of the authorities hold that only new testimony contradicting or rebutting something proved by the defendant is entitled to be introduced in rebuttal. We are unable to see that this rule is either unfair or unjust to the state; and, although the matter is largely discretionary, the trial courts are warned that an abuse of same, or apparent disregard of the rights of a defendant, would warrant reversal. Fairness and equal recognition to the parties is essential.

Constitutional questions usually raised in this class of cases are not raised in the case at bar. The court is therefore not to be considered as committed to any particular view in those questions.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

DOYLE, P. J., and BRETT, J., concur.

FARMERS' & MERCHANTS' BANK OF
COURTLAND v. TIPTON et al.
(No. 19914.)

(Supreme Court of Kansas. May 6, 1916.
Rehearing Denied June 15, 1916.)

(Syllabus by the Court.)

QUIETING TITLE §16—RIGHT OF ACTION —
INTEREST OF PLAINTIFF.

A vendor sold land under an agreement with the vendee to give a merchantable title and place him in possession of the same; the agreed

consideration being paid to the vendor. The persons from whom the vendor acquired the land and who were in possession of the same set up a claim that the deed they had executed to the vendor was in fact a mortgage, and they refused to yield possession of the land, so that the vendor was unable to carry out his agreement with the vendee. The vendee demanded the return of the money which he had paid for the land and refused to bring an action to quiet his title against adverse claimants. The vendor then brought an equitable action to quiet the title of the land, making the vendee a party defendant. *Held*, that the vendor had an interest in the land sufficient to maintain an action to quiet the title thereto and to determine adverse claims.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 64, 65; Dec. Dig. § 16.]

Appeal from District Court, Republic County.

Action by the Farmers' & Merchants' Bank of Courtland against E. B. Tipton and others. From a judgment for plaintiff, defendant Tipton and another appeal. *Affirmed*.

Mahin & Mahin, of Smith Center, and J. M. Livingood and H. H. Van Natta, both of Belleville, for appellants. N. J. Ward and Vance & McTaggart, all of Belleville, for appellee.

JOHNSTON, C. J. This action was brought by the Farmers' & Merchants' Bank of Courtland, Kan., to quiet title to some lots in that city. In the petition it was alleged that the defendants E. B. and S. L. Tipton, on June 9, 1911, conveyed the lots by warranty deed to the plaintiff in order to satisfy an indebtedness due to the plaintiff from them and also in consideration of the satisfaction by the plaintiff of a judgment lien against the property; that soon thereafter the plaintiff put the Tiptons into possession as its tenants; and that on March 8, 1913, the plaintiff entered into an agreement with the defendant the Swedish-American State Bank, in pursuance of which it conveyed all its right, title, and interest in the lots to the latter, agreeing to deliver possession and give a clear and merchantable title thereto. It was further alleged that the plaintiff was unable to carry out its contract because the Tiptons refused to deliver possession of the lots, and that it was unable to give a clear and merchantable title because the Tiptons had filed of record an affidavit stating that the property was owned by E. B. Tipton, that it was their homestead, and that their deed of June 9, 1911, was in effect only an equitable mortgage given to secure the payment of their debt and not intended to transfer any interest in the property other than a lien. The Swedish-American Bank was made a party defendant because it refused to bring the action in its own name. It was further alleged that the plaintiff had such an interest in the property as to be entitled to bring the action in its own name for the reason that in the event of its failure to deliver the kind of title agreed upon, it would suffer

loss from the nonpayment of the consideration which had been withheld and retained by the defendant bank as a liability against the plaintiff.

The petition as well as the cross-petition filed by the defendant bank were attacked by the Tiptons by motions to make more definite and certain and by demurrers, all of which were overruled by the court, whose action is complained of in the appeal. But their main contention is that the plaintiff had no interest left in the lots so as to entitle it to bring an action to quiet title. In the cross-petition of the defendant bank, it was alleged, among other things, that it had paid to the plaintiff the sum of \$4,000 as consideration for the lots, and that after the commencement of the action and on March 6, 1914, it had tendered a quitclaim deed to the property accompanied by a demand for the return of the consideration, because of plaintiff's failure to deliver a clear title and give possession according to the contract, and that both the tender and demand were refused by the plaintiff. The trial was before the court which made certain findings of fact from the testimony produced, and it was found and adjudged that the title to the lots was in the plaintiff, and its title was quieted as against all the defendants. There was a further finding that the plaintiff was indebted to the defendant bank in the sum of \$4,000, and that the latter was entitled to a lien on the lots to the extent of this indebtedness.

The questions presented for review arise upon the pleadings alone, the evidence not being preserved, and are raised by motions to require the pleadings to be made more definite and certain, and also upon a demurrer challenging the sufficiency of the facts alleged in the petition. On the motions it was contended that there was a lack of definiteness of averment as to the corporate character of the plaintiff; but the meaning of the averment is so obvious that it could not have been misunderstood by the defendants. It is further said that the allegations are indefinite as to the nature and amount of the indebtedness which constituted the consideration for the deed executed by the Tiptons to the plaintiff and the oral agreement under which they held possession of the premises after the execution of their deed to the plaintiff. The rule is that a pleading is sufficient which fairly informs the adversary of the nature of the claim made against him. *Republic County v. Guaranty Co.*, 96 Kan. 255, 150 Pac. 590. The subsequent pleadings indicate that the defendants were able to ascertain the nature and character of the plaintiff's claims, and that they could not have been prejudiced by any ambiguity in the statement of facts. The averments were sufficient to warrant the full disclosure of the facts by the evidence, and in the absence of the evidence it may be inferred that the facts were fully brought out in the trial. Upon an

appeal and especially upon an incomplete record, the overruling of a motion to make a somewhat ambiguous pleading more definite and certain will not be ground for reversal, unless it appears that prejudice resulted from the ruling. *St. L. & S. F. Ry. Co. v. French*, 56 Kan. 584, 44 Pac. 12; *Parker v. Vaughn*, 85 Kan. 324, 116 Pac. 882; *Culbertson v. Sheridan*, 98 Kan. 268, 144 Pac. 268.

The main contention of the Tiptons is that their demurrer should have been sustained, and this upon the theory that the plaintiff, having executed a deed of the lots to the defendant bank, has no interest or standing which warrants it in maintaining an action to quiet title to the property. The plaintiff appears to have treated this action as a proceeding in equity, rather than as an action under the statute to quiet title. It is contended that the plaintiff had neither title nor possession, and hence was not entitled to ask relief in this form of action. It was alleged that the Tiptons had by their deed vested the title of the lots in the plaintiff, and that they were holding the possession of the same for the plaintiff. These averments taken alone show both title and possession in the plaintiff; but there is the further allegation that the plaintiff had undertaken to transfer the property to the defendant bank, and the Tiptons therefore insist that the plaintiff had parted with its interest in the lots and in consequence lost its right to maintain the action. In effect, it was alleged that the attempt of the plaintiff to carry out its agreement with the defendant bank to transfer the property was abortive as it had agreed to give a merchantable title and place the defendant bank in possession of the property, but had been unable to do so because of the action of the Tiptons in asserting title to the property and in their refusal to surrender possession of the same. Not being able to carry out its agreement to give a good merchantable title and give actual possession of the lots, plaintiff became liable to the defendant bank, not only for the money received, but also under the covenants of warranty, and the defendant bank therefore rightly insisted that the transfer was incomplete, and that it was entitled to a return of the price which it had paid. The lots having been practically thrown back upon the

plaintiff, it had an interest therein which entitled it to maintain this equitable proceeding to have the rights of the respective parties determined. The defendant bank declined to assume the burden of bringing the action, and to protect its vendee and itself, the plaintiff brought the action and made the vendee a party defendant. Under the conditions existing, an action at law was wholly inadequate, and a resort to an equitable proceeding was necessary not only to determine the conflicting claims as between the plaintiff and the defendant bank, but also as between the plaintiff and the Tiptons. It was decided in *Sutliff v. Smith*, 58 Kan. 559, 50 Pac. 455, that a vendor who sells land to another and is bound to perfect the title thereto and whose vendee withholds the purchase price and refuses to bring the action to remove the cloud, can quiet title as against those claiming adverse interests, and that the vendor has sufficient interest to warrant the bringing of an action to quiet title against the vendee and the persons claiming the adverse interest. The present case differs from that one in that the agreed consideration had been paid to the plaintiff, but as the plaintiff was unable to carry out its contract it had no right to withhold the money which the defendant bank had paid. It had sold the property with a covenant of warranty and its obligation to deliver actual possession and protect the title required it to refund the money and gave the plaintiff such an interest as warranted it in asking for equitable relief. Case note, 12 L. R. A. (N. S.) 652.

In behalf of the Tiptons it is insisted that the deed which they had executed to the plaintiff was intended as a mortgage only, and that they had never transferred the title nor yielded possession of the property, but the averments of the petition were to the effect that an absolute title was conveyed by them to plaintiff, and that they were holding possession of the property under the plaintiff. The trial court found against their claims and adjudged that the title and right of possession was in the plaintiff. The evidence not being here, the finding of the court conclusively settles that controversy.

The judgment is affirmed. All the Justices concurring.

BOARD OF EDUCATION OF OGDEN CITY
v. HUNTER et al. (No. 2980.)

(Supreme Court of Utah. Sept. 12, 1916.)

1. STATUTES \S 77(1) — GENERAL OR SPECIAL LAW.

The mere fact that Laws 1915, c. 115, amends only the proviso of Comp. Laws 1907, \S 1936, by increasing the tax rate of cities of a certain class, and that Laws 1915, c. 111, amends such proviso, and also amends other sections of the school law, does not make chapter 115 a special law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 79, 81; Dec. Dig. \S 77(1).]

2. STATUTES \S 224—CONSTRUCTION—EFFECT TO ALL PROVISIONS—CONFLICT.

Where a conflict exists between two enactments, whether enacted at the same or at different sessions, the court must, if possible, give force and effect to all the provisions contained in both acts, notwithstanding the apparent conflict.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 300, 302, 306; Dec. Dig. \S 224.]

3. STATUTES \S 217 — CONSTRUCTION — EXTRINSIC AIDS.

It is the duty of the courts in construing statutes, and especially in case of conflict, to consider all matters that may affect their validity or meaning, including the history of legislation and the reasons for and against their passage.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 293; Dec. Dig. \S 217.]

4. SCHOOLS AND SCHOOL DISTRICTS \S 101 — TAXES—STATUTES—CONFLICT.

Laws 1915, c. 115, amends the proviso of Comp. Laws 1907, \S 1936, fixing the tax rate for school purposes by increasing the school levies for cities of the second class, because the rate fixed by the original section was deemed insufficient for that purpose, and takes effect May 22, 1915. Laws 1915, c. 111, also amends such proviso, became effective January 1, 1916, and reduced such rates. Held, that the acts were not conflicting.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 236, 252; Dec. Dig. \S 101.]

5. SCHOOLS AND SCHOOL DISTRICTS \S 101 — REPEAL OF STATUTE — CONFLICTING PROVISIONS.

Laws 1915, c. 115, re-enacting Comp. Laws 1907, \S 1936, and merely amending the proviso thereof, fixing the tax rate for school purposes by increasing the school taxes for the year 1915 for cities of the second class because the rate permitted in the original section was deemed insufficient for that purpose, was repealed so far as it conflicted with Laws 1915, c. 111, re-enacting such section and amending the proviso approved at the same time, but not effective until January 1, 1916, and, in view of the increased assessments, reducing the rate.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 236, 252; Dec. Dig. \S 101.]

6. STATUTES \S 170—REPEAL—RE-ENACTMENT.

Such parts of chapter 115 as were not in conflict with chapter 111 were mere re-enactments, having force and effect from their original enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 245, 248, 249; Dec. Dig. \S 170.]

7. STATUTES \S 200—REPEAL—TIME.

Where a statute is made effective only from a future date, but in terms repeals a former law

on the subject, the repealing clause becomes effective only when the statute goes into effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 841; Dec. Dig. \S 260.]

8. EVIDENCE \S 23(1) — JUDICIAL NOTICE — LEGISLATIVE POLICY—SCHOOL EXPENSES.

The court takes judicial notice that it has always been the legislative policy to provide all the revenue necessary to carry on the public schools for a period of at least 9 months in each year.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 29; Dec. Dig. \S 23(1).]

9. STATUTES \S 92 — CONSTITUTIONAL PROVISIONS—GENERAL OR SPECIAL LAWS—CLASSIFICATION.

Cities and any other subjects may be classified without contravening Const. art. 6, \S 26, subd. 18, providing that in all cases where a general law can be applicable, no special law shall be enacted; but such classification must be reasonable and natural, and not artificial or arbitrary.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 101; Dec. Dig. \S 92.]

10. STATUTES \S 93(6)—CLASS LEGISLATION—SCHOOL TAXES.

Laws 1915, c. 111, effective January 1, 1916, amending the proviso of Comp. Laws 1907, \S 1936, as to the rate of school taxes so as to provide that the tax for school purposes in cities of the first and second classes having an assessed valuation of \$20,000,000 or more, shall not exceed in any one year $3\frac{1}{2}$ mills on the dollar upon all taxable property, and, in cities of the second class having an assessed value of less than \$20,000,000, shall not exceed $3\frac{7}{10}$ mills on the dollar, was invalid, since the classification was unreasonable, arbitrary, and artificial, and without regard to the character of the legislation, in that it was unequal, unjust, and did not operate uniformly on all taxpayers assessed to the same extent in the different cities of the same class, nor upon the public schools in such city.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 102; Dec. Dig. \S 93(6).]

11. STATUTES \S 168—EFFECT—INVALIDITY OF REPEALING LAW.

The effect of such invalidity, in view of the fact that chapter 111 had repealed all statutes in conflict therewith, including the conflicting provisions of Laws 1915, c. 115, which had amended the proviso of Comp. Laws 1907, \S 1936, and increased the tax rate for school purposes, was to leave the rate or limitation fixed for a city of the second class by chapter 115, still in force, under the rule that when a statute repeals another statute or provision on the same subject, so much of the other statute as is superseded by the invalid part of the later statute is not repealed, but continues in full force and effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 244; Dec. Dig. \S 168.]

Original application by the Board of Education of Ogden City, for a writ of mandate, against William C. Hunter and others, Commissioners of Weber County, Utah, Harry Hales, County Clerk, James L. Robson, County Assessor, and J. E. Storey, County Treasurer, commanding them to levy and collect a tax against the property of the school district in the amount required by plaintiff, etc. Peremptory writ of mandate ordered to be issued.

Valentine Gideon and Reinhart L. Gideon, both of Ogden, for plaintiff. I. B. Evans, of Salt Lake City, and Jos. E. Evans, of Ogden, for defendants.

FRICK, J. The plaintiff filed its application in this court for a writ of mandate against the defendants named in the title, "commanding said defendants and each of them as officers of Weber county aforesaid, to levy and collect a tax against the property of said school district in such amount as required by plaintiff," etc. An alternative writ of mandate was issued, requiring the defendants to comply with plaintiff's prayer or show cause why they refuse. They have appeared and have demurred generally to plaintiff's complaint. They have also filed an answer, but the only denial made therein relates to a question of law and not of fact, and is therefore immaterial. The facts, all of which are without dispute, will sufficiently be made to appear from the body of the opinion.

Whether a peremptory writ of mandate shall be directed to issue hinges upon whether certain portions of chapter 111, Laws Utah 1915, p. 191, and of chapter 115, Laws Utah 1915, p. 210, are valid or invalid. Both of said chapters, in certain respects, changed and amended Comp. Laws 1907, § 1936, which has been in force in this state for many years. The original section reads as follows:

"The board of education shall, on or before the 1st day of May of each year, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the school year commencing on the 1st day of July next thereafter; also the amount necessary to pay the interest accruing during such year, and not included in any prior estimate, on bonds issued by said board; also the amount of sinking fund necessary to be collected during such year for the payment and redemption of said bonds; and shall forthwith cause the same to be certified by the president and clerk of said board to the officers charged with the assessment and collection of taxes for general county purposes in the county in which the city is situated, and such officers, after having extended the valuation of property on the assessment rolls, shall levy such per cent. as shall, as nearly as may be, raise the amount required by the board, which levy shall be uniform on all property within the said city as returned on the assessment roll; and the said county officers are hereby authorized and required to place the same on the tax roll. Said taxes shall be collected by the county treasurer as other taxes are collected, but without additional compensation for assessing and collecting, and he shall pay to the treasurer of said board, promptly as collected, who shall hold the same subject to the order of the board of education; provided, that the tax for the support and maintenance of such schools shall not exceed in any one year six and one-half mills on the dollar upon all taxable property of said city, of which at least three mills shall not be used otherwise than for the payment of teachers, and shall not exceed one and one-half mills additional on the dollar in one year, to be used exclusively for the purchase of school sites and the erection of school buildings."

The changes or amendments that are in question here relate to the reduction of the rate of taxation or the levies that cities of a certain class are permitted to make for public school purposes and to the classification of such cities. Section 1936, as originally passed, had once before been amended by chapter 29, Laws Utah 1913, p. 39. The amendments in question all relate to the proviso contained in the original section. The rate was not changed by the amendment of 1913. The proviso was, however, slightly changed in other respects. As that section has been superseded, however, those changes need not be specially mentioned here. In 1915, however, the proviso was again amended, both by chapter 111 and by chapter 115 aforesaid. In chapter 115 the proviso was amended to read as follows:

"Provided, that the tax for the support and maintenance of such school in cities of the first class shall not exceed in any one year six and one-half mills on the dollar upon all taxable property of said city, two and one-half mills additional on the dollar in one year, to be used exclusively for the purchase of school sites and the erection of school buildings; and in cities of the second class, the tax for the support and maintenance of such schools shall not exceed in any one year ten mills on the dollar upon all taxable property in said city."

In chapter 111:

"Provided, that the tax for [the] support and maintenance of such schools, and for the purchase of school sites and for the erection of school buildings in cities of the first class and in cities of the second class, having an assessment valuation of twenty million dollars or more, shall not exceed in any one year three and one-half mills on the dollar upon all taxable property of said city; and in cities of the second class, having an assessed valuation of less than twenty million dollars, the tax for the support and maintenance of such schools, and for the purchase of school sites, and the erection of school buildings shall not exceed in any one year three and seven-tenths mills on the dollar upon all taxable property of said city."

Chapter 111, in addition to amending section 1936, as aforesaid, also amended a number of other sections of our school law, while chapter 115 merely amends the proviso of section 1936 in the particulars stated. Chapter 111 was put on its final passage on the 9th day of March, 1915, while chapter 115 was finally passed on the 11th day of the same month; but both acts were approved by the Governor on the same day, to wit, March 22, 1915. It will thus be noticed that the rate of taxation or levy for public school purposes in cities of the first and second classes having a certain assessed valuation was reduced from not exceeding 9 mills in cities of the first class to not exceeding 3½ mills, and in cities of the second class from 10 mills to not exceeding 3½ mills, or to 37/10 mills according to the amount of assessed valuation in cities of the second class.

It is conceded that Ogden City is a city of the second class, and that the assessed valuation of the property in said city for 1916 is \$31,510,408; that the amount that

is required for the support and maintenance of the public schools, which must be raised by taxation from the assessed valuation aforesaid for 1916, amounts to the sum of \$160,500; that the rate of taxation, or the levy, that is necessary to raise said amount upon said valuation is $5\frac{1}{10}$ mills on the dollar; that the plaintiff has complied with all the provisions of law, and has duly and properly presented the foregoing estimate to the defendants, upon whom the law imposes the duty of levying and collecting the school taxes, and has demanded that said defendants levy and collect a tax of $5\frac{1}{10}$ mills on the dollar of said assessed valuation; that said defendants have refused, and still refuse, to do so, for the alleged reason that they are prohibited by chapter 111 aforesaid from making a levy in excess of $3\frac{1}{2}$ mills on the dollar upon said assessed valuation for school purposes; that a levy of only $3\frac{5}{10}$ mills on the dollar will not produce to exceed the sum of \$110,286.77, which is wholly inadequate to maintain and support the public schools in Ogden City for the school year of nine months, but will be sufficient to maintain and support said schools for a period of only six or seven months during the year of 1916.

[1, 2] Plaintiff's counsel contend that there is an irreconcilable conflict between chapters 111 and 115 with respect to the rate of taxation; that chapter 115 was passed later in point of time than was chapter 111, and that the former must therefore control. They, however, also contend that if it be held that chapter 115 was not passed after chapter 111, chapter 115 is, nevertheless, in its nature a special enactment, while chapter 111 is a general one, and for that reason chapter 115 must prevail over chapter 111. Both chapters 111 and 115 are, in a large measure, mere re-enactments of section 1936, supra, and only change or amend small portions of that section. Section 1936, supra, in which the alleged conflict arises, is therefore re-enacted in chapter 111, and also in chapter 115, with the changes in the provisos which we have copied in full. Chapter 115, therefore, covers precisely the same ground, or subject, that is covered by chapter 111, and, for reasons hereafter appearing, is no more special legislation than is chapter 111. The mere fact that in chapter 115 the rate is different from what it is in chapter 111 does not make one general and the other special, although more ground may be covered in the latter than in the former chapter. But even though it were conceded that chapter 115 is special; and that there are certain provisions in that chapter that are repugnant to similar ones contained in chapter 111, yet that fact, standing alone, would not authorize us to declare chapter 111 void in so far as that chapter may be in conflict with chapter 115, as contended for by plaintiff's counsel. It is an inflexible rule of construction

that in case a conflict exists between two enactments, whether enacted at the same session of the Legislature or at different sessions, the courts must, if possible, give force and effect to all the provisions contained in both acts, notwithstanding the apparent conflict.

In 2 Lewis' *Suth. Stat. Const.* (2d Ed.) § 516, in referring to that subject, the author says:

"A statute should be so construed as to give a sensible and intelligent meaning to every part, to avoid absurd and unjust consequences, and, if possible, as to make it valid and effective."

See, also, 1 Lewis' *Suth. Stat. Const.* (2d Ed.) § 262.

[3] Moreover, it is the duty of the courts, in construing statutes, and especially in case of conflict, to take into consideration all matters that may affect the validity of the statute.

Referring again to the same author and same volume, section 310, it is said:

"The courts will take judicial notice of whatever may affect the validity or meaning of a statute. They will take notice of events generally known within their jurisdiction, of the history of legislation, and of the reasons urged for or against the passage of the law. They will inform themselves of facts which may affect a statute."

The foregoing text is approved by the Supreme Court of Kansas in *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800, and in many other cases cited by the author in the footnotes.

[4-6] While, as stated before, chapters 111 and 115 were passed at the same session and at the times stated, and approved on the same day, yet the time at which chapter 111 should go into effect is expressly stated thus: "This act shall take effect January 1, 1916." Upon the other hand, chapter 115 went into effect under our Constitution on May 22, 1915, while, as we shall see, all those portions that were merely re-enactments always continued in effect. Chapter 111 also repeals "all sections or parts of sections in conflict with the provisions of this act." Chapter 115, so far as the same is in conflict with chapter 111, is therefore repealed by the latter chapter. In view, therefore, that chapter 111 did not go into effect until January 1, 1916, there really was no conflict between that chapter and chapter 111 until that date, and when that date arrived the latter chapter was repealed by the former, and therefore there never was a conflict, nor is there any now, between the two chapters. Again, if we take into consideration, as we must do, the circumstances and conditions that induced the Legislature of 1915 to adopt chapters 111 and 115, it again becomes clear that no conflict was either intended or created.

Prior to the year 1915, and in that year, the property in this state was assessed at a valuation far below its real or cash value. There was much dissatisfaction with that method of valuation and assessment of property.

Moreover, the assessed valuation of 1915 and preceding years, in some instances, was insufficient to produce the necessary amount of revenue for certain state and other purposes. In 1915 the Legislature, therefore, adopted certain measures by which it was intended, so far as possible, to compel the assessment of all property at its actual cash value, and to accomplish that purpose the Legislature, among other things, reduced the rate of taxation or the levies that could be made by the officers of the several counties, cities, and other political subdivisions of this state. It was assumed that in lowering the rate the valuation or assessment of property would have to be correspondingly increased. For that reason the levies were reduced in chapter 111 as compared with what they were permitted to be in chapter 115. In the latter chapter the original section 1936 was therefore amended so as to increase the school levies for the year 1915 for cities of the second class, for the reason that the rate permitted by the original section was, in some instances, deemed insufficient for that purpose. That, apparently, was the controlling, if not the only, reason why chapter 115 was adopted and why the original section 1936 was amended. The Legislature, therefore, assumed that when the property of this state should be assessed at its cash value, the assessed valuation would be so increased that the reduced rates fixed by it in chapter 111 for the year 1916 and subsequent years, would be sufficient to produce the necessary revenue to maintain and support the public schools of the cities as classified in that chapter. Chapter 111, therefore, was intended to apply only after the assessed valuation of the property was increased, which was to begin with the year 1916, and for that reason that chapter was made effective only from January 1, 1916. After that date there was no longer any necessity for chapter 115, and therefore, so far as it was in conflict with chapter 111, it was repealed. That those parts that were in conflict were intended to be, and were, repealed is clearly expressed in chapter 111. Such parts as were not in conflict were mere re-enactments, and thus always were, and still are, in force and effect. The law in that regard is well stated in 1 Lewis' *Suth. Stat. Const.* (2d Ed.) § 246, in the following words: "The re-enacted portions are continuations, and have force from their original enactment."

That all portions of chapter 115 in conflict with chapter 111 were repealed is equally well settled. Referring again to the section last referred to, the author says:

"Where a statute repeals all former laws within its purview, the intention is obvious, and is readily recognized to sweep away all existing laws upon the subjects with which the repealing act deals."

[7] The law is also well settled that in case a statute is made effective only from a future date, but, in terms repeals the former

law upon the subject, the repealing clause becomes effective only at the time the statute goes into effect. The same author, in volume 1 aforesaid, § 175, in stating the law upon that subject, says:

"Where the provisions of a revising statute are to take effect at a future period, and the statute contains a clause repealing the former statute upon the same subject, the repealing clause will not take effect until the other provisions come into operation."

In the same volume, section 280, it is further said:

"Statutes speak from the time they take effect, and from that time they have posteriority. If passed to take effect at a future day, they are to be construed, as a general rule, as if passed on that day and ordered to take immediate effect."

The provisions, therefore, that are common to both chapters 111 and 115, and which are in apparent conflict, were not intended to be, nor were they, in force or effect at the same period of time, and hence there was no real conflict between the two chapters. We are not permitted, therefore, to declare the objectionable limitations contained in chapter 111 invalid for the reasons urged by plaintiff's counsel.

[8-10] There is, however, a valid reason why the limitations and classifications of said chapter 111 cannot be sustained. It will be observed that said chapter classifies or divides the cities of this state into two classes:

(1) "Cities of the first class and cities of the second class with an assessed valuation of twenty million dollars or more;" (2) "all other cities of the second class having less than twenty million dollars assessed valuation."

Here, therefore, all cities of the first class and all cities of the second class having \$20,000,000 or more of assessed valuation constitute one class, while all other cities of the second class having an assessed valuation of less than \$20,000,000 constitute the only other class that is provided for. If there are any cities of the first class which have less than \$20,000,000 assessed valuation, they are not provided for at all. For the purposes of this decision we shall assume, without deciding, that cities of the first and second class may be reclassified and placed in the same class for certain purposes. The difficulty with chapter 111, however, lies deeper than that. In that chapter the Legislature has not only thrown together cities of different classes into one class, but has selected a most unnatural and a most artificial method or basis of classification. Courts are practically harmonious that, not only cities, but many other subjects, may be classified without contravening the constitutional provision that "in all cases where a general law can be applicable no special law shall be enacted." Article 6, § 26, subd. 18, Const. The courts are, however, also agreed that the classification must be reasonable and natural, and not artificial or arbitrary. In referring to the question of classification,

the Supreme Court of North Dakota, in *Edmonds v. Herbrandson*, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725, said:

A "classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation."

The question is also learnedly discussed in the case of *Richards v. Hammer*, 42 N. J. L. 440, 441. Indeed, the case referred to from North Dakota is largely based upon the reasoning of the New Jersey case and cases cited.

Let us pause a moment to inquire whether the classification adopted in chapter 111 in any degree conforms to the rule above stated; which is the one generally recognized, and adopted by the courts? What possible relation has the assessed valuation of property to the number of school children? without children no public schools are necessary, and it is the number of children in any city which, in a large measure at least, determines the number of school buildings and teachers that are required. The number of school children in a given city, to an extent at least, determines the amount of money that is required to support and maintain the public schools for a given school year. It requires no argument to show that the assessed valuation in a given city may have no relation whatever to the schools that are required. Indeed, it has no natural relation to the number of school children that may be in that city, and hence has no relation to the number of schools that must be supported and maintained, nor to the number of teachers that must be employed and paid, and therefore has none to the amount of money or revenue that may be necessary to maintain and support the schools in such city. It is a fact of which we take judicial notice that it always has been the legislative policy and purpose of this state to provide all the revenue necessary to carry on our public schools for a period of at least nine months in each year. Entirely apart, however, from that general policy, the same policy is clearly manifested in section 1986 and in the different amendments of that section, including chapters 111 and 115. The Legislature, therefore, clearly and manifestly intended to provide sufficient revenue to maintain and support the public schools of Ogden City, and of all other cities, and if it had not been for the most peculiar and arbitrary classifications and limitations that were adopted in chapter 111, the intent of the Legislature in that regard no doubt would have prevailed. The validity of every law must, however, be tested by what may be done under it and by what its effects may be. The classification adopted is not only artificial, arbitrary, and wholly foreign to the subject the Legislature deals with, but it is unfair, unequal, and unjust, and does not operate uniformly upon all taxpayers who are assessed to the same extent in the different cities of the same class,

nor upon the public schools in such cities. That fact is easily demonstrated. Ogden City, it is admitted, requires revenues amounting to \$180,500 to maintain and support its public schools for a period of nine months. It has an assessed valuation in round numbers of \$31,510,000. That valuation, under the classification and limitations adopted in chapter 111, will only yield revenue amounting to \$110,000, which is about \$50,000, less than is necessary to support and maintain the public schools of Ogden City for the year 1916. In order to obtain sufficient revenue under chapter 111, Ogden City would have to have an assessed valuation of something in excess of \$46,000,000. Let us assume that A. and B. live in cities of the same class under chapter 111. A., however, lives in a city of an assessed valuation of \$23,000,000, while B. lives in one of an assessed valuation of \$46,000,000, and that both of those cities require the same school facilities that are required by Ogden City. Let us further assume that both A. and B. are assessed for an equal amount, and thus, under chapter 111, must contribute or pay an equal amount to the public school fund of the city in which each lives. Now A., who lives in the city having the \$23,000,000 assessed valuation, only obtains the benefit of about $4\frac{1}{2}$ months of school, while B., who lives in a city of the same class, and who pays into the public school fund precisely the same amount that B. does, enjoys the benefits of a 9 months' school. Again, the Legislature of this state, in chapter 29, Laws 1911, created what is known as a "high school fund," in which all cities that support and maintain a high school up to the standard and for the time required by the state board of education may participate; that is, that fund will be distributed among all the high schools that are maintained according to the standard and for the time required by the said state board of education. In view, therefore, that Ogden City by the classification in chapter 111 is prevented from maintaining its high school for a period of 9 months, which is the time required by the state board of education, it forfeits all rights to its proportion of said state high school fund. Here, again, A. and B., who live in cities of the same class, are differently affected, both as taxpayers and as patrons of the high school, in their respective cities. But in addition to all that, is it not apparent to all that one city of either the first or second class may have a great amount of assessable property in excess of another city of the same class? The city with the greater assessed valuation may, however, not have nearly so many school children, and therefore may not require the same amount of revenue to maintain its public schools as the city with the lesser amount of property. The amount of assessed valuation, therefore, has little, if any, relation to the number of chil-

dren of school age in any particular city. The classification adopted in chapter 111 is therefore, not only arbitrary and artificial, but it operates unequally, unfairly, and unjustly on taxpayers and school patrons living in cities of the same class, and who contribute to the public school fund in precisely the same proportion. Such a classification is condemned by all the courts, and there is no legal ground upon which it can be sustained. While courts do not lightly interfere with the Legislature in choosing or selecting methods of classification, yet they do not, and may not, shut their eyes to classifications that clearly and manifestly operate unequally, unjustly, and unfairly upon those who come within the same class. While we disclaim any intention or right to suggest any method of classification to the Legislature, yet it would be easy for that body to adopt a proper classification which would affect all cities and school districts alike. The per capita cost of maintaining and supporting schools of each city is well known. If it is desired to limit the levy strictly to the actual cost of maintaining the public schools, all that is necessary to do is to multiply the number of children who attend school by the per capita cost of maintaining the separate schools, and, in case taxes must be levied for other purposes, add the amount for such purposes to the per capita cost, which, when added, will give the total amount of revenue that must be raised by taxation. In case there are other sources of revenue that can be applied for school purposes, those, of course, must be deducted. When the per capita cost is ascertained and the assessed valuation is known, it is an easy matter to fix the limit that should be levied. The Legislature need, however, not be governed by the per capita cost of any city or of a number of cities, but by comparison may fix a standard cost which should not be exceeded. The Legislature may thus, by law, provide that no city shall levy taxes for public school purposes exceeding the standard fixed by law as aforesaid. The Legislature may, however, adopt any limitation it sees fit; but in doing so the law must be so framed as to operate with substantial equality and uniformity upon all taxpayers and school patrons who come within the same class. The law if it is discriminatory in that regard is not only abhorrent, but is, as it should be, without force or effect.

By what we have said we do not mean to be understood as holding, nor do we hold, that the Legislature may not fix any limita-

tion they see fit upon the amount of taxes that the cities may levy and collect for certain purposes, but what we do hold is that where classifications are adopted and limitations are imposed, the law must operate and affect all coming within the same class substantially alike. That portion of section 1936, as amended by chapter 111, which relates to the classification of the several cities, and which limits the levy to $3\frac{1}{2}$ mills on the dollar of the assessed valuation of such cities, must, for the reasons stated, be held void and of no effect.

[11] The only question that remains to be determined is, What is the legal effect of declaring the provision aforesaid invalid? It is now well settled that in case it is found that an entire statute, or only a particular provision of a statute, is invalid for any reason, and the statute so found invalid has expressly or by necessary implication repealed another statute or provision upon the same subject, so much of the former statute which was superseded by the invalid portion of the later one is not repealed, but continues in full force and effect. Says the author of Lewis' *Suth. Stat. Const.* (2d Ed.) § 246, a statute is not repealed "by the repugnant spirit of another; nor for conflict with an unconstitutional provision." In view that chapter 111 repeals all sections and all parts of sections in conflict with said chapter, and in view that we have held the classification and the limitation of $3\frac{1}{2}$ mills on the dollar levy void, therefore, the limitation fixed for cities of the second class, within which the city of Ogden comes, in chapter 115 was not repealed and is still in force. That limitation is fixed at not to "exceed ten mills on the dollar" of the taxable property in the city, and that provision will remain in force until it is repealed by a valid enactment.

In conclusion we desire to add that, while courts in case a statute is plain and unambiguous cannot, and do not, consider consequences in arriving at a conclusion, yet in this case we have had less hesitancy in arriving at the foregoing conclusion for the reason that such a result can, in no way, produce any harm or inconvenience, and for the further reason that the Legislature will meet in regular session early in January of next year, and may thus adopt such a law as will operate equally upon all those coming within the same class.

For the reasons stated, a peremptory writ of mandate as prayed for should issue. Such is the order.

CHASE v. McKENZIE et al.

(Supreme Court of Oregon. Sept. 19, 1916.)

1. HUSBAND AND WIFE \S 14(2)—PROPERTY—ESTATE BY ENTIRETY.

An estate by the entirety is recognized in Oregon.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 73, 74; Dec. Dig. \S 14(2).]

2. DIVORCE \S 322—ESTATE BY ENTIRETY—EFFECT OF DIVORCE.

A divorce changes an estate by entirety to an estate in common.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825; Dec. Dig. \S 322.]

3. MORTGAGES \S 316—CANCELLATION—INTERVENING LIENS—RESTORATION.

Where the holder of a realty mortgage cancels it in ignorance of the existence of an intermediate lien upon the premises, though such lien is of record, a court of equity in a suit instituted therefor will, in the absence of intervening rights, restore the original lien and give it priority; but, where a bid upon the execution sale of the lot had been credited on account of the judgment, such credit was an intervening right which could not be set aside so as to restore the original lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 949-954; Dec. Dig. \S 316.]

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Suit by Russell Chase against John H. McKenzie, R. E. Bryan, and others. Decree for plaintiff subordinate to R. E. Bryan's lien, and plaintiff and Bryan separately appeal. Affirmed.

This is a suit to reinstate a mortgage and to foreclose the lien thereof. The facts are these: The defendant John H. McKenzie on April 10, 1909, executed to H. Trenkman a mortgage upon lot 11, block 13, in Central Albina, Portland, Or., to secure the payment of his promissory note for \$1,500, maturing in two years, with interest at 7 per cent. per annum, which note stipulated for the payment of a reasonable sum as attorney's fees if suit were commenced to collect any part of the negotiable instrument. McKenzie and his wife on December 9, 1910, conveyed this lot, subject to the mortgage, to S. J. Fore and Minnie A. Fore, his wife. The latter alone on January 15, 1912, executed to William G. Hale a quitclaim deed of all her interest in the real property. At the same time Mrs. Fore commenced a suit for divorce, alleging in the complaint that her husband was the owner of an undivided half of the lot, but not stating who owned the remainder of the estate therein. She on March 4, 1912, obtained a decree dissolving her marriage contract, but no disposition appears to have been made of what estate she ever had in the premises. Trenkman on March 19, 1912, assigned the mortgage to plaintiff, Russell Chase, who on the 13th of the following month instituted a suit to foreclose the lien. Hale and his wife on May 17, 1912, executed to McKenzie a quitclaim deed of their interest in the lot. The defendant R. E. Bryan

on May 21, 1912, by consideration of the circuit court of the state of Oregon for Multnomah county, secured a judgment against S. J. Fore and others for \$5,576.30, and interest, attorney's fees, costs, and disbursements of the action. S. J. Fore on July 17, 1912, executed to McKenzie a special warranty deed of all his interest in the real property. McKenzie and his wife on September 18, 1912, executed to Sarah Campton a mortgage of the lot to secure the payment of a note for \$1,500, maturing in three years, with 8 per cent. interest, payable semiannually. The plaintiff on the next day dismissed the foreclosure suit, and two days thereafter satisfied the mortgage of record. Pursuant to an execution issued on Bryan's judgment all the right, title, and interest that S. J. Fore had in the premises on May 21, 1912, when the judgment was given, and any estate which he might have subsequently acquired in the lot, were sold January 12, 1914, to Bryan for \$300. The sale was duly confirmed and the sheriff executed to the purchaser a deed of the land.

The complaint herein sets forth most of these facts in substance, and alleges that the deed executed by Hale and his wife and the conveyance by S. J. Fore to McKenzie were made to the latter as agent and trustee for Chase pursuant to an agreement entered into between them to that effect; that when the suit was dismissed, and for a long time thereafter, Chase and McKenzie believed the deeds so executed by Hale and his wife and S. J. Fore conveyed to them a complete title to the real property, thereby avoiding the necessity for a decree of foreclosure, and while relying upon that opinion they satisfied the mortgage of record without any knowledge of the existence of Bryan's judgment, and that the suit would not have been dismissed or the mortgage canceled if they had known such judgment had been rendered; that they had no knowledge of the execution sale, the confirmation thereof, or the giving of the sheriff's deed until long after that conveyance was made. It is further alleged on information and belief that Bryan had knowledge of the understanding between Chase, McKenzie, and Fore whereby the foreclosure suit was dismissed and the mortgage satisfied when the Fore deed was executed.

The answer denies the material averments of the complaint, and for a further defense alleges, in effect, that the plaintiff ought to be estopped to allege and prove that the mortgage should be reinstated for that the judgment so secured by Bryan was based upon a promissory note which he received from Fore and others as assignors and guarantors, each of whom is insolvent except Fore and two others, naming them, and the only property Fore had was his interest in the lot which was sold upon execution; that the summons in that action had not been served

upon the other solvent defendants when judgment was rendered against Fore; that these two, having been subsequently served with process, answered, setting up the sale of Fore's real property for \$300; that Bryan had no notice or knowledge that Chase had or claimed any interest in the premises when they were sold upon execution; that when he obtained his judgment against the two solvent defendants he gave them credit for the \$300, the amount bid at the execution sale; that Chase from September 21, 1912, until the commencement of this suit allowed McKenzie to appear upon the record as the owner of the lot, to lease it and collect the rents due thereon, to execute a mortgage upon the same, and in every way to hold himself out to the world as the owner of the premises, subject only to the lien of such judgment; and that Bryan paid to the sheriff as his costs and expenses upon the execution sale \$10.75. The reply put in issue the allegations of new matter in the answer, and the cause, having been tried, resulted in a decree reinstating the mortgage, foreclosing such lien, and allowing an attorney fee of \$150, subordinate, however, to the sum of \$300 which was credited on Bryan's judgment, and \$10.75 costs and expenses of the sale. From that decree Chase and Bryan separately appeal.

Milton Reed Klepper, of Portland, for appellants. S. B. Huston and Oliver B. Huston, both of Portland, for respondent.

MOORE, C. J. (after stating the facts as above). [1, 2] It will be remembered that the judgment secured by Bryan against Fore became a lien upon whatever interest the latter had in the real property May 21, 1912; that the original suit to foreclose the mortgage was dismissed September 19, 1912, and the lien canceled two days thereafter, thus rendering Bryan's judgment a superior lien upon Fore's interest in the lot. It will also be kept in mind that Mrs. Fore's quitclaim deed was executed before she secured a divorce, and that in such decree no disposition was made of any estate she then or ever had in the premises. It is unnecessary to advert to the estate by the entirety which was created by the conveyance of the lot to S. J. Fore and Minnie A. Fore, his wife, the validity of the quitclaim deed which she executed to Hale before she was divorced, or the effect of the decree dissolving her marriage contract. An estate by the entirety is recognized by this court. *Noblitt v. Beebe*, 23 Or. 4, 35 Pac. 248; *Oliver v. Wright*, 47 Or. 322, 83 Pac. 870. It has also been held that a divorce changed an estate by entirety to an estate in common. *Hayes v. Horton*, 46 Or. 597, 81 Pac. 386. It is unnecessary to inquire whether or not Mrs.

Fore could, without joining with her husband, convey any interest in the land which she held as a tenant by the entirety. Upon this subject see the case of *Howell v. Folsom*, 38 Or. 184, 63 Pac. 116, 84 Am. St. Rep. 785. Nor is it essential to determine, if she took as a tenant in common when the divorce was granted, whether such title inured by estoppel to Hale under her quitclaim deed. As to the latter question in ordinary cases, however, see *Taggart v. Risley*, 4 Or. 235; *Bayley v. McCoy*, 8 Or. 259; *Salem Improvement Co. v. McCourt*, 26 Or. 93, 41 Pac. 1105; *Langley v. Kesler*, 57 Or. 291, 110 Pac. 401, 111 Pac. 248.

[3] Considering the principal question presented by this appeal, the rule is settled in Oregon that, when the holder of a realty mortgage cancels it in ignorance of the existence of an intermediate lien upon the premises, though the charge thus imposed upon the land is of record, a court of equity in a suit instituted for that purpose, will, in the absence of intervening rights, restore the original lien and give it priority. *Pearce v. Buell*, 22 Or. 29, 29 Pac. 78; *Kern v. Hotaling*, 27 Or. 205, 40 Pac. 168, 50 Am. St. Rep. 710; *Capital Lumbering Co. v. Ryan*, 34 Or. 73, 54 Pac. 1093; *Title G. & T. Co. v. Wrenn*, 35 Or. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

In the case at bar intervening rights had accrued before the suit to reinstate the mortgage was commenced. Thus Bryan's bid of \$300 upon the execution sale of the lot having been credited on account of his judgment, the two solvent defendants in his action, who are not parties to this suit, could not be affected by any decree that might be rendered herein, and hence that credit cannot be set aside so as to restore the canceled mortgage to its original lien as to them. Their intervening rights have attached and should be protected.

The evidence shows that before he executed the mortgage to Sarah Campion, McKenzie secured an abstract of the title to the lot, which abridgment set forth a memorandum of Bryan's judgment. McKenzie was extremely careless in failing to note the judgment lien upon the land when the foreclosure suit was dismissed. From the cancellation of the mortgage it is reasonably to be inferred that McKenzie and Chase were ignorant of the intervening lien.

By compelling a payment to Bryan of the amount of his bid and interest, and the sheriff's costs, the sums awarded him as a prior lien upon a foreclosure of the original mortgage, substantial equity has been meted out, and, such being the case, the decree is affirmed.

BEAN, HARRIS, and BENSON, JJ., concur.

ELWERT v. KNAPP et al.

(Supreme Court of Oregon. Sept. 19, 1916.)

JUDGMENT ~~6~~743(2) — CONCLUSIVENESS — TITLE TO PROPERTY.

It having in a suit between E. and R. been finally decreed that R. was owner of certain land, which he claimed as successor to E.'s vendee, and that E. had no interest therein, E. is estopped, in a suit to enjoin defendant city from paying R. the purchase price thereof, whether suing as claimant to the property or as taxpayer, to assert that R., or the city as his grantee, has no title to the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1276, 1284; Dec. Dig. ~~6~~743(2).]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Suit by Carrie M. Elwert against F. C. Knapp, substituted for F. W. Mulkey and others, as the Dock Commissioners of the City of Portland, and another. From an adverse decree, plaintiff appeals. Affirmed.

This is a suit brought by Carrie M. Elwert, as taxpayer of the city of Portland, against the dock commission of the city of Portland to restrain the city from paying the sum of \$40,000 to William Reid as the purchase price of the following described property:

"Beginning at a point on the north line of East Washington street 100 feet west of the west line of Water street, and running thence westerly along the north line of East Washington street to the low-water mark of the Willamette river, a distance of about 159 feet more or less; thence northerly along the low-water mark of the Willamette river to a point 50 feet north of the point of beginning; thence east 159 feet more or less to a point 100 feet west of the west line of Water street; thence south 50 feet to the point of beginning, together with the right to wharf out to the established harbor line of the Willamette river."

It is alleged that Reid has no title to said property, that the payment of any money therefor will be a waste of the funds of the city and impose a great and unnecessary burden upon the taxpayers, and that plaintiff is a large taxpayer and will be especially damaged thereby. The defendants answered by a general denial of the allegations of the complaint respecting the lack of title in Reid, and alleged that the commission had purchased of him all of blocks 1 and 2, as shown on the plat of East Portland, which former municipality is now included in the city of Portland, and that, there being some question raised as to the validity of Reid's title to the south 50 feet of block 2 and the water and wharfage rights adjoining and appurtenant thereto, the commission had by agreement with Reid withheld payment of the sum of \$40,000 of said purchase price until it should be ascertained that neither the plaintiff nor the heirs of Arthur H. Johnson, deceased, had any estate or interest in said property; that a suit is now pending between the city of Portland and the heirs of said Arthur H. Johnson for the purpose of

settling such claims as they may have, if any, in said property; that defendants do not intend to pay said sum of money until final adjudication of the alleged claims of said heirs shall have been had in such court. The defendants by way of cross-complaint allege:

"That defendant city of Portland is the owner in fee simple and in possession of the property described as beginning at a point on the north line of East Washington street 100 feet west of the west line of Water street, and running thence westerly along the north line of East Washington street to the low-water mark of the Willamette river; thence northerly along the low-water mark of the Willamette river to a point 50 feet north of the south line of block 2 in East Portland, according to the duly recorded plat thereof, situate in the corporate limits of the city of Portland, county of Multnomah, state of Oregon, said distance being measured at right angles to said south line; thence east parallel with the south line of said block 2 to a point 100 feet west of the west line of East Water street measured at right angles to said west line; thence south 50 feet to the place of beginning—together with the right to wharf out to the established harbor line of the Willamette river and also all river, water, and wharf rights, and all other rights appertaining or appurtenant to said property; that said property embraces a part of block 2 in said East Portland, all of which is owned by and in the possession of said city of Portland, together with all the river, water, and wharf rights and privileges adjacent or appurtenant thereto, and all other rights thereunto belonging or appertaining; that plaintiff claims some right, title, or interest in or to said property or some part thereof, the exact nature and extent of which is to plaintiff unknown, but whatever the same may be the same is wrongful."

Then follows a prayer that plaintiff's suit be dismissed; that defendants' title to the premises be declared valid and quieted; and that plaintiff be enjoined from asserting any estate, right, or interest therein. The plaintiff answered claiming title in herself by mesne conveyances from James B. Stephens, the original grantee of the United States, and his successors, and by way of separate reply alleged:

"That on the 19th day of May, 1909, one M. W. Parelus, without right or title to any real estate described in the deed except lot 5, block 2, of East Portland, executed a pretended deed attempting to convey to one William Reid lot 5, block 2, together with the premises beginning at the high-water mark of the Willamette river on the western prolongation of the north line of East Washington street, and running thence westerly to the United States harbor line of the Willamette river; thence northerly along the harbor line 50 feet; thence east to the high-water mark of the Willamette river; thence south 50 feet to the point of beginning—which paper is recorded in Book 455, on page 284, Deed Records of Multnomah county, Or.; that on the 10th day of April, 1865, one James B. Stephens filed a plat of the city of East Portland in the office of the county clerk of Multnomah county, Or., which plat is recorded in Book F, on page 116, and said plat is the plat referred to in the deed alleged to have been executed by said William Reid to the city of Portland, and said plat shows block 2 and a scale of distance is set forth on said plat, and no lots are numbered on the blocks of said plat, but a key block is also set

forth upon said plat showing the manner and extent of numbering the lots contained in a block, and that said scale and said key block show that block 2 is 160 feet on the south side of said block and 116 feet on the north side of said block and 200 feet on the east side of said block, and that lots are 100 feet east and west and 50 feet north and south, except such lots as are contained in fractional blocks, in which case lots 1, 2, 3, and 4 are 50 feet from the north line to the south line and such distance from the east line to the west line as there is distance between a point 100 feet west of the east line of said fractional blocks and the western boundary of said fractional blocks, as shown on said plat, in accordance with the scale shown on said plat; that said premises described in the complaint according to the said plat of East Portland would be designated and described as lot 4, block 2, of East Portland; that the Willamette river is a tidal stream, and the ordinary tide is $2\frac{1}{2}$ feet above low water, and the ordinary low water of the Willamette river is zero, and said zero is .96 of a foot above mean sea level at Astoria, and mean sea level at Astoria is 4 feet above mean low water at Astoria, and ordinary high water of the Willamette river is 3 feet above zero; that at the time of the execution of said deed by said Parelus to said William Reid May 19, 1909, the elevation of the west line of lot 5 was 12.4 feet above said zero, and the elevation of the western line of block 2, as shown by the plat, between the south line thereof and a line 50 feet north of said south line, was 8.1 feet, and ever since have been and now are the same elevations as aforesaid, and the water line at zero stage of the river is 195.5 feet west of the west line of lot 5, block 2, and that the water line on May 19, 1909, was, ever since has been, and now is the following distances west of the west line of lot 5, to wit: At 1 foot above zero, 126 feet; at 2 feet above zero, 113.7 feet; at 3 feet above zero, 102 feet; at 4 feet above zero, 92.5 feet."

The defendants filed a supplemental answer setting up the fact that since the original answer the suit begun by the plaintiff against the heirs of A. H. Johnson had terminated in a decree adjudging that the city of Portland was the owner of the property in dispute and forever quieting its title thereto.

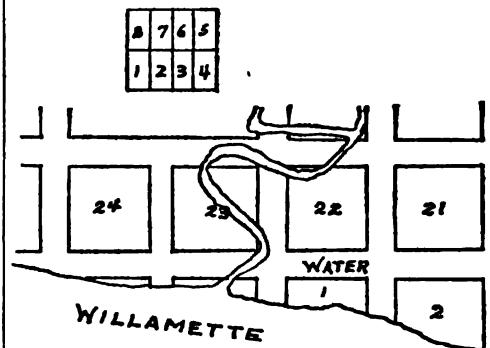
It was also alleged as a bar to plaintiff's claim in this suit and as ground for affirmative relief that in the case of *Carrie M. Elwert v. William Reid*, 70 Or. 318, 139 Pac. 918, 141 Pac. 540, which was finally decided in this court on the 9th day of May, 1914, it was adjudged and decreed that Carrie M. Elwert had no right, title, or interest in lot 5 of block 2, and that the premises lying west of lot 5, and between it and the harbor line of the Willamette river, are pertinent to lot 5; that said William Reid, the predecessor in title of defendant city of Portland, was the owner of the exclusive right of wharfage and possession in and to the same, and that Carrie M. Elwert has no right, title, or interest in and to said real property or any part of said right of wharfage; that her claims thereto were null and void, and that she was by said decree enjoined and restrained from asserting any right to said property; that in May, 1915, Reid relinquished to the city the right to maintain a water pipe across said premises and removed the pipe, and that his alleged easement across

said premises had thereby become extinguished; that about July 7th M. W. Parelus and wife released and quitclaimed to the city of Portland all their interest in said property. By stipulation filed it was agreed that the matter in the supplemental answer should be treated as denied so far as it affected any right of plaintiff.

There was a trial and findings and decree for defendants, and plaintiff appeals.

George S. Shepherd, of Portland (W. W. McCredie, of Portland, on the brief), for appellant. J. F. Boothe and Henry A. Davie, both of Portland (W. P. La Roche, L. E. Latourette, and Boothe & Richardson, all of Portland, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). The decision of this case depends upon the construction of certain conveyances and adjudications of the circuit court of Multnomah county and of this court, which when analyzed indicate to our minds that plaintiff has no standing here. As before stated, the original title to the land lying adjacent to the Willamette river on the east side thereof was in James B. Stephens. On December 28, 1861, Stephens filed a plat of the then city of East Portland in which that part relating to the property in controversy is as follows:



The map did not indicate a subdivision into lots and blocks, but a legend and scale which is shown above on the accompanying diagram indicated that complete blocks were approximately 200 feet square, and that these were subdivided into lots 50 feet north and south by 100 feet east and west. If there existed land upon which the plat could take effect, there would be upon the southerly side of block 2 a complete lot 5 and a fractional lot 4; all depending upon where the line of ordinary high water was at the time the plat was filed. The contention as to whether the alleged lot 4 was below the line of ordinary high water, and therefore not included in the Stephens' donation claim, was first litigated in the case of *Johnson v. Knott*, 13 Or. 308, 10 Pac. 418. It appeared in that case that Stephens had conveyed to Knott's grantors lot 5 in block 2, and the respondents, who

owned and operated a ferry at the foot of L street, now East Washington street, which is immediately south of block 2, drove piling in front of the alleged lots 3 and 4, block 2, in order to sheer their ferryboat into the slip at L street. Subsequent to his conveyance to Knott's grantors, and in 1874, Stephens had conveyed the alleged lots 3 and 4, in block 2, with other realty, to A. H. Johnson, who brought an action against him to recover the possession of the alleged lots. Under instruction of the court, which substantially submitted the question of the right of Stephens to include these lots in his plat, the jury returned a verdict for the defendant Knott, but there were other issues involved which would have justified the verdict even if the evidence had shown that the whole or part of lot 4 was not a part of the shores and waters of the Willamette river. The judgment of the court was that the plaintiff, Johnson, was not entitled to the possession of the property, and, this judgment having been affirmed, we hear of no further contention of Johnson in regard to it; he seemingly having acquiesced in the theory that the property formed part of the banks and bed of the river, and that Stephens had no title thereto. If this were actually the case, the act of 1874 granting overflowed lands upon the Willamette river to the adjoining bank owner operated to vest the title to the alleged lot 4 in Knott, whose title to lot 5 was indisputable; but it is not clear that the jury found, or intended to find, or that there is necessarily included in their verdict a finding, that lot 4 did not exist, and the evidence here tends to show that a portion thereof was above ordinary high water, and in that event the act of 1874 inured to the benefit of Johnson. But whether it is the successors of Knott or the heirs of Johnson who succeeded to the title to lot 4 is immaterial here in view of subsequent conveyances and decrees, as we will presently show. On June 24, 1891, the heirs of Levi Knott mortgaged lot 5 and appurtenances to J. B. Elwert, the mother of plaintiff, and on foreclosure the property was sold to this plaintiff, who received a sheriff's deed March 1, 1896. On October 21, 1905, Carrie M. Elwert entered into a written agreement with H. P. Palmer, whereby she agreed to sell and convey to him lot 5, in block 2, together with all riparian rights thereto for \$3,000. The agreement provided that Palmer might in the name of Carrie M. Elwert prosecute and control any necessary suits to quiet title to the premises, and that "all lands, rights, and privileges owned or claimed by said Carrie M. Elwert between Water street and the Willamette river is also to be conveyed by Carrie M. Elwert to H. P. Palmer." On the theory that the west line of the Stephens donation claim was east of lot 4 and upon lot 5, a conveyance of lot 5 and the appurtenances and riparian rights would include all of the alleged lot 4; but,

evidently to make assurance doubly sure, the contract contained also a description which included all of lot 4, so that Palmer became by this contract the equitable owner of lot 5 and of whatever interest Carrie M. Elwert had in the property between that and the river. The contract was immediately assigned by Palmer to M. W. Parelus, who, in fact, was the real principal in the transaction. On the 26th of October, 1905, Carrie M. Elwert, pursuant to her contract with Palmer, commenced a suit to quiet title to lot 5 and the property included in lot 4, not describing it as a lot, but by metes and bounds; the defendants being P. H. Marley, H. E. Noble, and J. Olson, who in their answer disclaimed any title to lot 5, but claimed title to the alleged lot 4 by virtue of a sale for delinquent street assessments and by a sheriff's sale for delinquent taxes, describing said lot as such as well as by metes and bounds. After this disclaimer by Marley and others of title to lot 5, Carrie M. Elwert, in August, 1906, conveyed to Parelus lot 5, with the appurtenances. The suit continued as to the residue of the property. The plaintiff, Elwert, in her reply to the answer of Marley, and others, denied that any such lot as the alleged lot 4 existed, pleading the case of Johnson v. Knott, supra, to that effect, and alleged that defendants Marley and others, as successors to Johnson by certain tax deeds, were estopped to assert the existence of lot 4, in substance claiming the wharfage and riparian rights on the Willamette river west of lot 5 as appurtenant to that lot. On December 24, 1906, a decree was entered that Carrie M. Elwert is the owner in fee of the property described as commencing at the southeast corner of block 2, East Portland; thence west along the north line of East Washington street to the Willamette river; thence north down said river 50 feet; thence east and parallel with said north line of East Washington street to the east line of said block 2; thence south to the place of beginning—together with the exclusive right of wharfage from said land out to the navigable waters of said river, and is the owner of said right of wharfage in, to, and upon those premises lying below ordinary high-water mark of the Willamette river fronting and abutting upon said lot 5, block 2, East Portland, out to the established harbor line of said river, and is entitled to the undisturbed and immediate possession thereof; that the chief of police's and sheriff's deeds referred to in the answer are null and void; and that the defendants be enjoined from claiming or asserting any right, title, or interest in or to said property. On May 19, 1909, a mandate from the Supreme Court was entered dismissing an appeal and affirming the foregoing decree. On October 23, 1906, H. P. Palmer and wife made a quitclaim deed to M. W. Parelus of the property described as commencing at the southeast

corner of block 2 in East Portland, and running thence westerly along the north line of East Washington Street to the Willamette river; thence down said river 50 feet; thence east parallel with the north line of East Washington street to the east line of said block 2; thence south along the east line of said block 2 to the place of beginning, being fractional lot 5 of said block 2 in East Portland—together with the exclusive right of wharfage from said land and out to the navigable waters of the Willamette river. On May 19, 1909, M. W. Parelius and wife conveyed to William Reid all of lot 5, block 2, in East Portland, and all riparian rights and right of wharfage in and to that portion of the bank of the Willamette river fronting on said lot 5 described as beginning at a point in the north side of East Washington street where the same is intersected by the high-water line of the Willamette river; thence west along the westerly prolongation of the north line of said East Washington street to the harbor line established by the United States; thence northerly along said harbor line to a point west of a point 50 feet north of the place of beginning; thence east to the high-water mark of the Willamette river; thence along said high-water mark to the place of beginning. Under the terms of her contract with Palmer it was the duty of Carrie M. Elwert at once to convey the apparent title thus obtained by this decree to Parelius, his assignee, who by the terms of his contract and the payment of the purchase price was already the equitable owner of the property recovered; but, true to her character as a perennial litigant, which the records of this court abundantly establish, she sought to collect for herself the costs and disbursements of the suit and to appropriate them to her own use, and Parelius was compelled to again go into court and set up his contract and enjoin her from so doing. The court found with the plaintiff. Upon August 5, 1909, J. B. Elwert, plaintiff's mother, began a suit against William Reid and M. W. Parelius to quiet title to the property obtained by the decree in *Elwert v. Marley et al.*, alleging that Carrie M. Elwert held the property in trust for her, and had no right to convey it. This suit, being decided adversely to plaintiff, was appealed to this court. Mrs. J. B. Elwert having died pending the appeal, Carrie and her brother C. P. Elwert were substituted as plaintiffs; and we have Carrie M. Elwert as a substituted plaintiff prosecuting a suit to have Carrie M. Elwert, alleged trustee, declared guilty of a gross breach of trust, and demanding that the transaction involved therein be set aside. The result of this appeal to the Supreme Court was a de-

cree for the defendants affirming the decree of the circuit court, which decree was as follows:

"This cause coming on to be heard upon the motion of the defendants for a decree in accordance with the findings of fact heretofore made and filed herein by the court, and it appearing that the court has heretofore made its findings of fact and conclusions of law in this suit, which are now on file herein, said motion is allowed. It is therefore ordered, adjudged, and decreed that defendant William Reid is the owner in fee simple of lot 5 in block 2 in East Portland, Multnomah county, according to the duly recorded map and plat thereof; that ordinary high-water mark in the Willamette river is entirely within the boundaries of said lot 5 for the whole width thereof; that the premises lying west of said lot 5 and between it and the harbor line in the Willamette river are appurtenant to the said lot 5, and that defendant William Reid is the owner of an exclusive right of wharfage and possession in and of the same; that plaintiff has no right, title, or interest in or to any part of said real property or in or to any part of said right of wharfage and possession, and that her claims thereto are null, void, and of no effect; and that she and all persons claiming or to claim by, through, or under her be and they hereby are perpetually and forever enjoined and restrained from claiming any right, title, or interest in or to said premises or in or to said right of wharfage and possession and from interfering in any way with the possession and right of possession of defendant William Reid therein and thereto. It is further ordered and decreed that the plaintiff's complaint be and the same hereby is dismissed, and that the defendants recover their costs and disbursements herein from the plaintiff, taxed at \$95."

The decree settled all claims of Carrie M. Elwert to the property here in dispute, and, so far as she is concerned, whether suing as a claimant to the property or as a taxpayer, or in any other character, she is estopped from asserting that William Reid, or his grantee, the city of Portland, has no title to the property.

It is evident that the title to the disputed premises was either in the Elwerts or in the heirs of Johnson, and it appears that the city has brought suit to quiet title against the heirs of Johnson, and that they have defaulted. It is evident that Reid's claims upon the property were such that it would have been impolitic for the city to have purchased the other property without acquiring them; and we are satisfied that by acquiring them it extinguished the last vestige of adverse title, inasmuch as it appears here that its title to any possible claim by the heirs of Johnson has been extinguished and quieted by the suit brought by it for that purpose against the heirs of Johnson.

The decree of the circuit court is therefore affirmed.

MOORE, O. J., and BENSON and BEAN, JJ., concur.

BREWSTER v. CROOK COUNTY.

(Supreme Court of Oregon. Sept. 19, 1916.)

1. WATERS AND WATER COURSES — SERVICES OF WATER MASTER — COMPENSATION.

Complaint in action against county, alleging that plaintiff was the duly elected, qualified, and acting water master, and that he rendered services under and by virtue of the order, authority, and direction of the superintendent of the division, is sufficient under L. O. L. § 6621, stating when water masters shall begin work, to show that the work was done on direction of the superintendent.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 306; Dec. Dig. ¶ 217.]

2. PLEADING — MATTER PROVABLE UNDER GENERAL DENIAL.

Defendant county having denied approval of water master's claims for services, a further answer that the claims were conditionally approved, but wrongfully filed contrary to the conditions, is demurrable; such matter being admissible under general denial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 284; Dec. Dig. ¶ 186.]

3. WATERS AND WATER COURSES — SERVICES OF WATER MASTER — "EMERGENCY."

Complaint in action against county on claim for services as water master showing that the master was busy at one point, and it was immediately necessary to supervise headgates at a distant point, and that on another occasion, the master broke his arm and was forced to have an assistant, sufficiently shows an "emergency" within the meaning of section 6620, L. O. L., to entitle him to claim for services of assistants then appointed.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 306; Dec. Dig. ¶ 217.]

For other definitions, see *Words and Phrases*, First and Second Series, *Emergency*.]

4. WATERS AND WATER COURSES — WATER MASTER — COMPENSATION.

L. O. L. § 6619, providing that on approval by the division superintendent the county court shall allow and pay the water master's claim for services, makes it mandatory for the county court to pay a claim so approved.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 306; Dec. Dig. ¶ 217.]

5. TRIAL — INSTRUCTIONS.

Error cannot be predicated upon refusal of an instruction substantially covered by others given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. ¶ 260(1).]

6. WATERS AND WATER COURSES — WATER MASTERS — COMPENSATION — CLAIM.

When the water master performs his work under direction of the division superintendent, he need not attach a copy of the order to his bill for services, under L. O. L. § 6621, whose requirement that the order be attached applies only when the work is done at the request of water users.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 306; Dec. Dig. ¶ 217.]

In Banc. Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

Action by Geo. H. Brewster against Crook

County. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover a balance of \$155 for services as water master in Crook county, and \$177 for the work of assistants for 46 days, claims for which were assigned to plaintiff, Brewster. The cause was tried to the court and jury, and a verdict rendered in favor of plaintiff. From a judgment thereon the county appeals.

Willard H. Wirtz, Dist. Atty., and M. R. Elliott, both of Prineville, for appellant. Jay H. Upton, of Prineville, for respondent.

BEAN, J. This matter was before us in the case of *Brewster v. Springer*, 166 Pac. 484, and the law applicable thereto was plainly enunciated therein in an opinion by Mr. Justice Eakin. In the present case the jury has passed upon the facts so that little remains to be said except to consider the assignments of error upon the trial.

[1, 2] The overruling of the demurrer to the complaint is assigned as error by the defendant. That pleading shows, in effect, that plaintiff is the duly appointed, qualified, and acting water master; that, "under and by virtue of the order, authority and direction of the superintendent of water division No. 2 of the state of Oregon," he rendered services as such water master in said county for 120 days between March 1 and June 30, 1915, and was entitled to receive therefor \$5 per day, the amount of compensation theretofore fixed by the county court of that county; that on different dates plaintiff presented to that tribunal two separate claims for such services, with a true copy of a statement of the time spent by him in such duties, verified by his oath, and that each of said claims was approved by the superintendent of water division No. 2 of the state of Oregon; that the county court allowed and paid \$445 of the amount, leaving a balance of \$155 unpaid. It is urged that the complaint is insufficient, in that it does not show that plaintiff was called upon by the superintendent of water division No. 2 to perform the work, it being claimed by defendant that the complaint merely shows that the water master was, as a matter of law, under the authority of the superintendent. There is no merit in the contention. A reading of the above-quoted part of the complaint clearly shows that the services were performed at the call of the superintendent. Section 6621, L. O. L. The allegation as to the authority of the superintendent for the work was not denied, but, nevertheless, was abundantly proven by the evidence. Defendant denied that either of said claims was approved by the division superintendent, and in a further and separate answer averred, in effect, that the latter indorsed the claims of plaintiff with his approval, with the understanding that if not satisfactory to the county court, they should

not be filed with it, and that plaintiff wrongfully filed the same. A demurrer by plaintiff to the further and separate answer was sustained, and defendant predicates error upon such ruling.

It seems too plain for argument that the allegations of the further and separate answer did not add anything to nor change the denial of defendant that the superintendent approved the claims. If there had been any error or want of approval of the claims by the division superintendent, the defendant could have shown the same under the general denial, and the demurrer was properly sustained. It would have been a simple matter for defendant to have had the division superintendent inform the court and jury by his deposition if there had been a condition or anything lacking in his full approval of the claims. Plaintiff's proof that they were duly approved was not controverted.

[3] As to the assigned claims for the services of assistants, it is urged by defendant that the complaint is deficient, in that the allegations that an emergency existed in the office of the water master, necessitating the appointment of assistants, are mere conclusions of law. In the second cause of action the averment as to the need of such assistance is as follows:

"That on or about the 15th day of March, 1915, and while plaintiff was engaged in the active performance of his duties as water master aforesaid in the vicinity of and east of Prineville, in Crook county, it became and was immediately necessary to supervise the headgates on Squaw creek, in Crook county, Or., and by reason of said condition and necessity an emergency existed in the office of said water master, and under authority and by virtue of the laws of the state of Oregon, the plaintiff, as such water master, appointed one Walt Graham as an assistant water master of the state of Oregon for Crook county, and said Walt Graham thereupon duly qualified as such acting assistant water master, and rendered services as such assistant water master within said Crook county for a period of seven days, at an agreed compensation of \$3 per day."

In the third cause of action such necessity is shown as follows:

"That on or about the 22d day of May, 1915, the plaintiff, as water master aforesaid, was suffering from a broken arm, and was unable to visit and attend to the ditches in the western part of Crook county and to also attend to and look after the duties in the main office of the water master at Prineville, in Crook county, and supervise the work of said office, and by reason thereof an emergency existed in the office of said water master, and plaintiff, as such water master, under the authority vested in him as such water master, appointed one Roy Rannalls as such assistant water master at an agreed compensation of \$4 per day, and said Roy Rannalls thereupon qualified as such assistant water master, as required by law, and thereupon and thereafter rendered and performed services as assistant water master in and for Crook county, Or., for a period of 39 days."

In both instances the facts set forth in the complaint constitute an emergency within the meaning of section 6620, L. O. L. necessitating the assistance. The compensation claimed was approved by the division

superintendent. The demurrer to the complaint was properly overruled.

[4] Counsel for defendant timely submitted a motion for a nonsuit, and also moved for a directed verdict, and predicates error upon the refusal to grant the same. The evidence, which we have carefully examined, tended to show that the services for which the amounts are claimed were duly authorized as provided by the statute, and performed; that a just and true itemized statement of account of the time spent by the water master in the service for the county was kept by that official, and a copy thereof, duly verified, was presented to the county court with the approval of the superintendent, according to the provisions of section 6619, L. O. L. In its wisdom the Legislature saw fit to clothe the superintendent of the water division with authority to appoint a water master and direct him in the rendition of his services. The statute makes it mandatory for the county court of the county in which the work of a water master has been performed and a claim therefor has been properly presented to allow and pay the same. *Brewster v. Springer*, 156 Pac. 433. The testimony supports the allegations of the complaint, and is amply sufficient to be submitted to the jury, and there was no error of the trial court in overruling either the motion for a nonsuit or that for a directed verdict.

[5] The court's refusal to instruct the jury to the following effect is also assigned as error:

"If you find from a preponderance of the testimony in this case that the plaintiff kept a just and true account of the time spent by him in the duties of the office of water master in Crook county, and that he has presented a true copy thereof, verified by his oath, to the county court, sitting for the transaction of county business, and that same was approved by the water superintendent of water division No. 2, then you will find that to be conclusive upon the county court, and they must pay the same, provided also that said work was performed upon the call of the water superintendent of division No. 2."

This requested instruction was given in substance by the trial court in its charge to the jury. The trial court judge thoroughly explained the issues of the case to the jury, and plainly submitted to the latter the following questions: (1) Did the plaintiff perform his work upon the order of the superintendent? (2) Did he present a claim to the county verified by oath? And (3) did the claim have the approval of the superintendent? The jury found these three things in favor of the plaintiff. The charge given embodied, in substance, all the requested instruction, and properly submitted the questions of fact for the determination of the jury.

[6] Error is also predicated upon the instruction of the court to the jury that when the water master performs his work under the direction of the division superintendent, he is not required to attach a copy of the

order of his superior officer to his bill for services. This authority for the rendition of such services is only to be shown in writing, and attached to account for the same when they are rendered upon the written request of one or more water users. Section 6621, L. O. L. This section provides as follows:

"When arrangements are not made for employment of a water master at a monthly rate, as provided in section 6619, the said water master shall begin his work upon written demand being made upon him therefor by one or more water users. Such written demand for his services shall be attached to his bill for services and forwarded with it to the county commissioners of the proper county. Where the said water master is employed by the month he shall begin work and terminate his services as the superintendent of his water division may direct. The division superintendent may, under any condition, call upon the water master for work within his district whenever the necessity therefor may in his judgment arise." *Wattles v. Baker County*, 59 Or. 255, 117 Pac. 417.

The instruction was in strict conformity with the statute, and was not erroneous. The interests of the county are carefully safeguarded in the statute, and it is our guide.

Finding no error in the record, the judgment of the lower court is affirmed.

MACKENZIE et al. v. DOUGLAS COUNTY.
(Supreme Court of Oregon. Sept. 26, 1916.)

Department No. 2. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 159 Pac. 625.

M. E. Crumpacker, of Portland, and J. O. Fullerton, of Roseburg, for appellants. George Neuner, Jr., and Dexter Rice, both of Roseburg, for respondent.

BEAN, J. Passing by the mere disputations assertions which are of little assistance in the construction of a statute, we note that the petition for a rehearing in this case (see 159 Pac. 625) is based largely upon the theory that the court found that the state insurance commissioner was not authorized to audit the accounts of a county of the state for the year 1914 and collect pay therefor from such county. This is not the conclusion indicated by the former opinion. What we held was that the claim, as shown by the record, was not for the services of that official, but for those of an entirely different person; that the audit of the books of Douglas county was not made by a state official or contemplated by the law in question. Neither did the commissioner in any way stand as sponsor for such audit. We simply reassert the substance of our former opinion. We are not aware that we can find

language to express the matter plainer than formerly. However perfectly the learned counsel for plaintiff may expound the statute in question, it is certain that for some reason he misconstrues the memorandum made by the court. All that we find added to the argument in the request for a rehearing is the opinion of the former able Attorney General. He advised the insurance commissioner as follows:

"I would consequently advise that under said chapter 286, it is your duty to audit the accounts of each county annually, and it is the duty of the several counties to pay your deputy making such audit, and that the audits of the lesser governmental units of the county are permissive, but not compulsory."

Suffice it to say in regard thereto that in so far as the case under consideration is concerned, the audit of the accounts for which compensation is claimed does not appear to have been made in accordance with such advice. The Legislature will soon be in session, and if a state officer has been misled by an ambiguous statute, it is in its power to prevent any loss from being suffered.

After a careful examination of the petition herein, and also of that in the companion case of *Berridge v. Marion County*, 159 Pac. 628, we adhere to our former opinion.

MOORE, C. J., and BURNETT and HARRIS, JJ., concur. EAKIN, J., absent.

ANDERSON v. STAYTON STATE BANK.

(Supreme Court of Oregon. Sept. 12, 1916.)

1. **BANKRUPTCY** \Leftrightarrow 168—**PREFERENCE—RECOVERY BY TRUSTEE.**

Where the enforcement of a judgment obtained against a bankrupt works a preference within the meaning of the Bankruptcy Act (Act Cong. July 1, 1898, c. 541, 30 Stat. 544), the trustee in bankruptcy is entitled to recover from the judgment creditor the amount received on the judgment.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 234; Dec. Dig. \Leftrightarrow 168.]

2. **BANKRUPTCY** \Leftrightarrow 302(4) — **PREFERENCE — TRUSTEE'S ACTION TO SET ASIDE—GROUND.**

A trustee in bankruptcy cannot question a judgment against the bankrupt unless he alleges and proves his right to appear as the trustee in bankruptcy, which involves the filing of a petition in bankruptcy, an adjudication, his appointment, and his qualification as trustee of the bankrupt.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 457; Dec. Dig. \Leftrightarrow 302(4).]

3. **BANKRUPTCY** \Leftrightarrow 100(1)—**PETITION—SUFFICIENCY.**

An involuntary petition in bankruptcy, setting forth at least one act of bankruptcy within the definition of Bankruptcy Act, § 3a (U. S. Comp. St. 1913, § 9587), and averring that a judgment was obtained by a bank, and that the judgment creditor attached funds and realized on the judgment in full, was sufficient as against attack by such judgment creditor, the defendant

in the trustee's action to set aside such judgment as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 142, 143; Dec. Dig. ⚡100(1).]

4. BANKRUPTCY ⚡100(1) — ADJUDICATION — SUBPENA—PRESUMPTION.

An adjudication in bankruptcy of itself imports the existence of all the requisite jurisdictional facts, including the service of a subpoena, especially in a collateral attack.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 142, 143; Dec. Dig. ⚡100(1).]

5. BANKRUPTCY ⚡303(3) — ELECTION OF TRUSTEE—RECORD.

A record, which gave the title of the cause in bankruptcy, and recited that at the time and place for the first meeting creditors appeared by one having a majority of claims in number and amount of those presented for approval, who nominated and elected plaintiff as trustee, in the absence of any showing that the trustee was elected wrongfully, sufficiently showed, for the purpose of plaintiff's action as trustee to set aside an alleged preference to the defendant, that plaintiff was selected in full compliance with Bankruptcy Act, § 5b (U. S. Comp. St. 1913, § 9589).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⚡303(3).]

6. BANKRUPTCY ⚡303(3)—TRUSTEE'S BOND—TITLE.

The approval of the bond of a trustee in bankruptcy constitutes, under Bankruptcy Act, § 21e (U. S. Comp. St. 1913, § 9605), conclusive evidence of the vesting of the title of the bankrupt's property in him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⚡303(3).]

7. BANKRUPTCY ⚡303(1) — PREFERENCE — TRUSTEE'S ACTION TO SET ASIDE—GROUNDS.

Under Bankruptcy Act, §§ 60a, 60b, as amended (U. S. Comp. St. 1913, § 9644), authorizing a trustee in bankruptcy to set aside a preference, the trustee in such action must show that the debtor was insolvent at the time of the entry of the judgment; that he suffered the judgment to be entered within four months of the filing of a petition in bankruptcy; that the enforcement of the judgment obtained for the judgment creditor a greater percentage of its debt than any other creditor of the same class; and that the judgment creditor had reasonable cause to believe that the effect of such judgment was to give a preference within the meaning of the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459; Dec. Dig. ⚡303(1).]

8. BANKRUPTCY ⚡303(3) — PREFERENCE — JUDGMENT—TIME.

In an action by a trustee in bankruptcy to set aside an alleged preference, the suffering of a judgment to be entered within four months before the filing of the petition in bankruptcy was established by showing that all the proceedings from the commencement of the judgment creditor's action to the entry of its judgment, including the issuance and return of the execution and the enforced payment of the judgment, occurred within four months before the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⚡303(3).]

9. BANKRUPTCY ⚡351—PREFERENCE—CLASS—NOTES.

Claims against a partnership and claims against one of the partners were not in the same class as the notes signed by such partner and the other partner in their individual names in ad-

justment of a claim against the partnership, in respect to a preference alleged to have been obtained by the holder of such notes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. ⚡351.]

10. BILLS AND NOTES ⚡120 — FORM — JOINT NOTE.

Notes containing the language, "We promise to pay to the order of" the payee, signed by a lumber company and by each of the partners doing business under such firm name, were "joint notes."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 257; Dec. Dig. ⚡120.]

11. BILLS AND NOTES ⚡120—FORM—"JOINT AND SEVERAL NOTE."

Notes executed in adjustment of a claim against a partnership doing business under the firm name and style of a company, after the time for payment had been extended and the firm had paid the interest, signed by each of the partners, were "joint and several notes" within L. O. L. § 5850, declaring certain notes to render the signers jointly and severally liable thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 257; Dec. Dig. ⚡120.]

12. BILLS AND NOTES ⚡92(3) — JOINT AND SEVERAL NOTE—LIABILITY—CONSIDERATION.

Where joint and several notes executed by the partners of a firm originated in a partnership indebtedness to a third party, the extension of time for the payment of such indebtedness granted by the creditor's assignee furnished a sufficient consideration for the liability which the individual partners incurred when they signed such notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 205; Dec. Dig. ⚡92(3).]

13. PARTNERSHIP ⚡178, 185 — JOINT AND SEVERAL NOTE—PAYMENT—FUND.

The individuals constituting a partnership signing joint and several notes were jointly and severally liable, and the payee might look to their individual assets for payment, or to the partnership estate for payment, where the notes arose out of a partnership indebtedness.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 310-313, 319, 337, 338, 346; Dec. Dig. ⚡178, 185.]

14. BANKRUPTCY ⚡309 — PARTNERSHIP — JOINT AND SEVERAL NOTES—CLAIM.

The holder of joint and several notes executed by the individuals composing a partnership in the adjustment of a partnership debt might share with claims against the partnership in bankruptcy and at the same time participate in dividends upon claims against the individuals, on the theory that the notes represented a firm indebtedness and at the same time a primary individual obligation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555-564; Dec. Dig. ⚡309.]

15. BANKRUPTCY ⚡351 — INDIVIDUAL AND PARTNERSHIP LIABILITIES—CLASS.

Such holder would be obliged to share with creditors of the same class holding claims against one of the individual partners, but could compel the payment of its notes in full before any dividends were paid out of the individual estate on pure partnership debts, even though there were no firm assets; the course to be pursued being regulated by Bankruptcy Act, § 5f (U. S. Comp. St. 1913, § 9589), declaring that the net proceeds of partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts, and that the surplus of the property of any partner after paying his individual debts should be added to the partnership assets and applied to partner-

ship debts, and the surplus of partnership property, after payment of debts, shall be added to the assets of the individual partners.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. §351.]

16. PARTNERSHIP §187 — INDEBTEDNESS — PAYMENT.

A partnership debt is primarily the obligation of the partnership, and secondarily the obligation of the individuals composing it, and, therefore, the liability of the individual is contingent, and partnership assets must be exhausted before he is obliged to pay out of his own estate.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 340, 342; Dec. Dig. §187.]

17. PARTNERSHIP §165 — JOINT NOTE — LIABILITY OF PARTNERS AND PARTNERSHIP.

Joint notes, on their face purporting to be the obligation not only of a partnership as such, but also of the individual partners whose names appeared thereon with the name of the firm, were intended to give the holder not only the security afforded by the partnership, but the security of the individual signers; the fact that the notes were joint not necessarily implying that they were the debt of none of the signers except the partnership, and the joint notes of the partners for a debt in no way connected with the partnership, not making them a primary claim against the partnership merely because it was joined.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 801; Dec. Dig. §185.]

18. CONTRACTS §184 — JOINT AND SEVERAL CONTRACT—LIABILITY OF PROMISOR.

A joint and several contract is with each promisor and also with all jointly, with the result that they are all jointly liable, and each individual is liable upon his separate obligation, and they may be sued jointly or severally as the promisee may elect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 789; Dec. Dig. §184.]

19. CONTRACTS §330(4) — JUDGMENT §628 — JOINT CONTRACT—NATURE OF OBLIGATION.

A joint contract is with all the promisors together, with the result that all must be sued jointly if either promisor objects to a suit or action brought against less than all; but, if a judgment is obtained without objection against less than all who are jointly liable, the entire debt is merged in the judgment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1593, 1604; Dec. Dig. §830(4); Judgment, Cent. Dig. § 1144; Dec. Dig. § 628.]

20. EXECUTION §56 — JOINT AND SEVERAL NOTE—JUDGMENT—SATISFACTION.

A judgment against joint and several promisors does not give the judgment creditor any rights for the collection of the debt not possessed by the owner of a judgment against persons who are merely joint debtors, and who have been served with summons, though the judgment debtor may seize the property of all or the property of each if he chooses, and is not obliged to look to one before he calls upon the other for payment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 87; Dec. Dig. §56.]

21. EXECUTION §56 — JOINT NOTE — JUDGMENT—SATISFACTION.

Where all the promisors on a joint obligation are served with summons and a judgment secured against them, the judgment creditor is not obliged to exhaust the joint property before seizing the separate property of the individual promisors, because he may do so as he chooses, since

a joint obligor is liable in solido for the whole debt.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 87; Dec. Dig. §56.]

22. EXECUTION §56 — JUDGMENT §17(4) — JOINT OBLIGORS — SATISFACTION — STATUTES.

Under L. O. L. § 61, prescribing how the plaintiff may proceed when the action is against two or more defendants when a summons is served upon one or more, but not all of them; section 181 providing for judgment against one or more of several defendants, and section 188 providing for judgment against several defendants on the confession of one, plaintiff, though service cannot be obtained on all those jointly liable on a contract, may have judgment against all, and may satisfy it with the joint property of all the promisors, or the individual property of the several promisors who have been served with summons, and is not obliged to exhaust the joint property before calling upon the separate estates for payment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 87; Dec. Dig. §56; Judgment, Cent. Dig. §§ 27, 422; Dec. Dig. §17(4).]

23. BANKRUPTCY §351 — CLAIMS — CLASS.

In bankruptcy a pure partnership creditor is not in the same class as a creditor holding a claim against an individual member of the partnership.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. §351.]

24. BANKRUPTCY §165(1) — CLAIMS — PREFERENCE — "CLASS."

Under Bankruptcy Act, §§ 60a, 60b, as amended, relating to preferences as between creditors of the same class, the term "class" defines those creditors who are entitled to receive out of the bankrupt estate the same percentage of their claims, however much they may have the right to collect from others than the bankrupt, so that in the bankruptcy proceeding of a partnership and both of its members, joint notes signed by the partnership and by each of the partners in the order named, and joint and several notes signed by the partners in adjustment of a partnership debt, belonged to the fourth class of creditors of a partner entitled to the same percentage of dividends, and the enforcement of a judgment on the joint and several notes would work a preference and entitle the trustee to recover from such creditor the amount received on the judgment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §165(1).]

For other definitions, see Words and Phrases, First and Second Series, Class.]

Department 2. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by A. J. Anderson as trustee in bankruptcy of the estate of Roy H. Wassom and M. A. McLaughlin, partners, doing business under the firm name and style of the Salem Lumber Company, and as trustee of the estate of Roy H. Wassom and M. A. McLaughlin individually, against the Stayton State Bank. Judgment of nonsuit, and plaintiff appeals. Reversed and cause remanded.

Claiming that within the meaning of the national bankruptcy act a preference was effected when the defendant received \$730.32 in satisfaction of a judgment against Roy H. Wassom and M. A. McLaughlin, the plaintiff, as trustee in bankruptcy, is attempting

to recover that amount from the defendant. The Stayton State Bank is a corporation and, as its name implies, is doing a banking business. The Salem Lumber Company is a partnership, with Roy H. Wassom and M. A. McLaughlin as the partners composing the firm.

The Gooch Lumber Company sold some lumber to the partnership, with an understanding "as to additional time other than the regular 60-day terms." The seller assigned the invoices for the lumber to the defendant for the reason that the former wished immediately to realize money on the sale. The defendant presented the invoices for payment when they became due. The partnership was not able to pay, but an adjustment was made on March 6, 1914, by the bank extending the time for payment and the firm paying the interest on the account to that date, and by Roy H. Wassom and M. A. McLaughlin signing four joint and several promissory notes for the aggregate sum of \$635, the amount due on the invoices, payable to the Stayton State Bank. The notes having matured and being unpaid, the bank commenced an action on the four notes against Wassom and McLaughlin on July 16, 1914, in the circuit court for Marion county. An attachment was levied on July 18th, on funds which M. A. McLaughlin had to his credit in the United States National Bank of Salem. A judgment was entered on July 30, 1914, against Wassom and McLaughlin for the amount of the notes, attorney fees, with costs and disbursements, and an order was made, directing that the attached funds be applied in satisfaction of the judgment. On the following day, July 31st, an execution was issued on the judgment, and the sheriff promptly returned the execution, together with \$730.32 of the attached funds which he delivered to the clerk; and on August 15, 1914, the county treasurer paid the entire sum to the Stayton State Bank in satisfaction of the judgment. A petition in involuntary bankruptcy was filed on September 12, 1914, against the partnership, and also against Roy H. Wassom and M. A. McLaughlin individually, and they were all adjudged bankrupts. A. J. Anderson was elected trustee in bankruptcy for the bankrupts, and on October 31, 1914, he qualified as such trustee. Wassom has no assets, and the property of the partnership will not meet its liabilities.

The plaintiff alleges that at and prior to the time when the defendant obtained its judgment it had reasonable cause to believe that Wassom, McLaughlin, and the partnership were insolvent "and that the enforcement of such judgment would effect a preference and would cause a diminution of the assets of said bankrupts and each of them to the exclusion of the rights of other creditors of said bankrupts, and particularly of creditors of same class;" and "that defendant knew at the time it received said \$730.32,

and for a long time prior thereto, that the same would constitute a preference." The defendant denies that it had reasonable cause to believe that either the partnership or the persons composing it were insolvent; and the bank alleges that the enforcement of its judgment "will not enable this defendant to obtain a greater percentage of its claim than any other of the creditors of said M. A. McLaughlin of the same class." A trial resulted in a judgment of nonsuit, and the plaintiff appealed.

W. E. Keyes and Frederick S. Lamport, both of Salem, for appellant. S. T. Richardson, of Salem (W. E. Richardson, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). [1, 2] If the enforcement of the judgment, which the Stayton State Bank obtained against Roy H. Wassom and M. A. McLaughlin, worked a preference within the meaning of the Bankruptcy Act, then the trustee in bankruptcy would be entitled to recover from the bank the sum of \$730.32 which it received on its judgment. The plaintiff, however, cannot question the judgment unless he first alleges and proves his right to appear as the trustee in bankruptcy, which involves: (a) The filing of a petition in bankruptcy; (b) the adjudication; (c) the appointment of plaintiff; and (d) the qualification as trustee of the bankrupt. 2 Loveland on Bankruptcy (4th Ed.) § 545.

[3] An involuntary petition in bankruptcy was filed by three creditors. While the petition is not as full as it might be, yet it contains enough to meet the objection of insufficiency made by the defendant. Form No. 118, found in Collier on Bankruptcy (9th Ed.) p. 1228, seems to have been taken as the model for drafting the petition. At least one act of bankruptcy within the definition of section 3a of the Bankruptcy Act is set forth. 30 U. S. Statutes at Large, 546. The petitioners aver, not only that a judgment was obtained by the Stayton State Bank, but also that the judgment creditor attached funds and realized on the judgment in full. The petition challenged here did more than merely to allege the rendition of a judgment, and it is therefore unlike the petition condemned in *Re Pressed Steel Wagon Goods Co.* (D. C.) 193 Fed. 811. The petition contains sufficient allegations to render it invulnerable to attack here, and the defendant cannot take advantage of mere defective allegations. 1 Remington on Bankruptcy (2d Ed.) p. 366.

[4] The defendant is insisting that the adjudication is inoperative because the record does not show the service of a subpoena as required by the Bankruptcy Act. The answer to this objection is that the record does not affirmatively show that a subpoena was not served. There was an adjudication, and this of itself imports the existence of all the requisite jurisdictional facts, especially in

a collateral attack. 1 Remington on Bankruptcy (2d Ed.) pp. 364, 386; Huttig Mfg. Co. v. Edwards, 20 Am. Bankr. R. 349, 160 Fed. 619, 87 C. C. A. 521; 2 Rem. on Bankruptcy (2d Ed.) p. 1651.

[5] The validity of the appointment of the trustee is also challenged. After giving the title of the cause and reciting that, "this being the time and place for the first meeting of creditors in the above matter in bankruptcy," the record of the first meeting of creditors states that creditors appeared by Fred Lamport "who having a majority of claims in number and amount of those presented for approval, nominated and elected Mr. A. J. Anderson of Salem, Or., as trustee." The defendant has not shown that the trustee was selected wrongfully, and the record contains no intimation that the trustee was elected by persons who were not creditors of the partnership. The recital of the appointment sufficiently shows for the purpose of this litigation, especially in the absence of any evidence to the contrary, that the trustee of the partnership estate was selected in full compliance with section 5b of the Bankruptcy Act. 2 Rem. on Bankruptcy (2d Ed.) § 1736.

[6] A certified copy of an order shows that the bond of the trustee was approved, and therefore, in the language of section 21e of the Bankruptcy Act, it "shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt." 30 U. S. Statutes at Large, 552; Collier on Bankruptcy (9th Ed.) 462.

[7] The plaintiff has alleged the requisite facts to entitle him to sue as the trustee in bankruptcy, and he has also offered evidence in support of each of these allegations. It is not enough, however, for the plaintiff to show that he has authority to appear as the trustee of the bankrupt, but he must also allege and prove all the statutory elements of a preference before he can recover from the defendant. 2 Loveland on Bankruptcy (4th Ed.) § 545; 2 Remington on Bankruptcy (2d Ed.) § 1762. We must look to the statute itself for a definition of the acts which are condemned as preferences, and on that account we here set down all that part of section 60 of the national Bankruptcy Act which is material to this controversy and as it now reads:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or register-

ing is required." Act Cong. Feb. 5, 1903, c. 487, § 13, 32 U. S. Statutes at Large, p. 799.

"(b) If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Act Cong. June 25, 1910, c. 412, § 11, 36 U. S. Statutes at Large, p. 842.

An analysis of the quoted statute will reveal that, to establish a preference, the trustee in the instant litigation must show: (1) That the debtor was insolvent at the time of the entry of the judgment; (2) that the debtor suffered the judgment to be entered within four months before the filing of the petition; (3) that the enforcement of the judgment secured by the Stayton State Bank against Wassom and McLaughlin obtains for the bank a greater percentage of its debt than any other creditor of the same class; and (4) that the bank or its agent had reasonable cause to believe that the effect of such judgment was to give a preference within the meaning of the acts of Congress relating to bankruptcy. 2 Loveland on Bankruptcy (4th Ed.) § 545; In re F. M. & S. Q. Carille (D. C.) 199 Fed. 612; Painter v. Napoleon Tp. (D. C.) 156 Fed. 289.

[8] Much is said in the briefs concerning the first and fourth elements of a preference, but it is sufficient here to say that the plaintiff offered enough evidence to entitle him to go to the jury on these two questions. The second element of a preference is established because all the proceedings from the commencement of the action by the Stayton State Bank against Wassom and McLaughlin to the entry of the judgment, including the issuance and return of the execution and the enforced payment of the judgment, with moneys belonging to McLaughlin individually, occurred within four months before the filing of the petition. 2 Rem. on Bankruptcy (2d Ed.) § 1384½; Brandenburg on Bankruptcy (3d Ed.) § 949; Collier on Bankruptcy (9th Ed.) p. 800; 1 Loveland on Bankruptcy (4th Ed.) p. 323. The third essential element of a preference will now require attention.

[9] The defendant contends that there is no evidence of any claim which would be entitled to be paid before or even to share with the judgment obtained against Wassom and McLaughlin. The plaintiff insists that the claim held by the Stayton State Bank did not

stand in a class by itself, but that there are other creditors whose claims are entitled to share with the bank in the funds belonging to the individual estate of M. A. McLaughlin. During the trial the plaintiff offered, but the court refused to receive in evidence, a large number of claims, some of which were against Wassom individually, while the remainder were against the partnership. Three notes owned by the Silverton Lumber Company were received in evidence. Each of these three notes says that, "We promise to pay to the order of the Silverton Lumber Company," and is signed by the Salem Lumber Company, Roy H. Wassom, and M. A. McLaughlin in the order named. The court also received in evidence the four notes upon which the defendant secured its judgment against Wassom and McLaughlin. Each of these four notes states that, "I promise to pay to the order of Stayton State Bank," and is signed by Roy H. Wassom and M. A. McLaughlin. When the judgment of nonsuit was granted, four groups of claims had been brought to the attention of the court: (1) Claims against the partnership; (2) claims against Wassom; (3) the three notes held by the Silverton Lumber Company; and (4) the four notes executed to the Stayton State Bank. The claims belonging to the first two groups were not received in evidence, nor can it be urged that they are in any sense in the same class as the notes given to the Stayton State Bank. The notes representing the third and those falling in the fourth group are in evidence, and the main contest centers around these two groups of claims, with the defendant strenuously urging that the Silverton Lumber Company is not a creditor of the same class as the bank and plaintiff striving to maintain his position that the bank is not a creditor of a class different from the Silverton Lumber Company.

[10, 11] The notes held by the Silverton Lumber Company are joint. 7 Cyc. 658. The instruments executed to the Stayton State Bank are joint and several obligations. 7 Cyc. 656; section 5850, L. O. L.; *Noble v. Beeman-Spaulding-Woodward Co.*, 65 Or. 93, 106, 131 Pac. 1006, 46 L. R. A. (N. S.) 162.

[12-14] This controversy presents a situation where a partnership and both its members are in bankruptcy; the Silverton Lumber Company notes are joint, while the Stayton State Bank notes are joint and several; the joint notes are signed by the partnership and also by the individuals who compose the partnership, but the joint and several notes are signed by the individuals only; the evidence shows that the joint and several notes are founded on a partnership debt, but the record does not disclose the origin of the joint notes; the joint and several notes have been paid with funds belonging to one of the individual signers, while no payments have been made on the joint notes; and therefore the question for discussion is whether the

joint notes are in the same class as the joint and several notes within the purview of the national Bankruptcy Act.

An understanding of the status of the Silverton Lumber Company or joint notes can best be reached by first noticing the different funds which may be made available for the payment of the Stayton State Bank or joint and several notes. The origin of the joint and several notes is found in the indebtedness of the partnership to the Gooch Lumber Company, but the extension of time for the payment of that indebtedness furnished a sufficient consideration for the liability which the individuals incurred when they signed those notes. *Merchants' Bank v. Thomas*, 121 Fed. 306, 57 C. C. A. 374. The individuals, who signed the joint and several notes are jointly and severally liable, and therefore the payee can look to the individual estates of Wassom and McLaughlin for payment, or, if it wishes, the bank may look to the partnership estate for payment, for the reason that the evidence shows that the notes arose from an indebtedness of the Salem Lumber Company to the Gooch Lumber Company. Under all the authorities the Stayton State Bank can elect to share in the partnership assets, since the notes held by it spring from a partnership indebtedness and are signed by the persons composing the firm, or the bank may, if it chooses, look to the individual estates of Wassom and McLaughlin, or either of them, for payment, since they have signed their own names as individuals. In the instant case the bank exercised an indubitable right when it elected to call upon the individual property of McLaughlin for payment. While it is not necessary to decide whether the Stayton State Bank could share in the assets of both the partnership and the individual estates, yet it is not going far afield to say that these notes can share with claims against the partnership and at the same time participate in dividends with claims against the individuals on the theory that the notes in truth represent a firm indebtedness, and at the same time evidence a primary individual obligation. *Ex parte Nason*, 70 Me. 363; *In re Bucyrus Mach. Co.*, 5 N. B. R. 303, Fed. Cas. No. 2,100; *Stephenson v. Jackson*, 9 N. B. R. 255, Fed. Cas. No. 13,374; *In re Bradley*, 2 Biss. 515, Fed. Cas. No. 1,772; *In re McCoy*, 17 Am. Bank. R. 760, 150 Fed. 106, 80 C. C. A. 60; *Winslow v. Wallace*, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179; *Mock v. Stoddard*, 24 Am. Bank. R. 403, 177 Fed. 611, 101 C. C. A. 237; *In re Thomas*, 8 Biss. 139, Fed. Cas. No. 13,886; *Matter of Gray*, 111 N. Y. 404, 18 N. E. 719; 5 Cyc. 417.

[15, 16] While the Stayton State Bank would be obliged to share with creditors of the same class holding claims against McLaughlin as an individual, still the bank can compel the payment of its notes in full before any dividends are paid out of the individual

estate on pure partnership debts, even though there are no firm assets. In re Knowlton & Co., 202 Fed. 480, 120 C. C. A. 610; In re Telfer, 184 Fed. 224, 106 C. C. A. 866; In re Janes, 133 Fed. 912, 67 C. C. A. 216; In re Henderson (D. C.) 142 Fed. 588; In re Hull (D. C.) 224 Fed. 796; Farmers' Bank v. Ridge Ave. Bank, 240 U. S. 498, 36 Sup. Ct. 461, 60 L. Ed. 767. A pure partnership debt is primarily the obligation of the firm, and secondarily the obligation of the individuals composing the firm, and therefore the liability of the individual is contingent, and hence partnership assets must be exhausted before a member of the firm is obliged to pay out of his own estate. To the primary partnership liability the persons composing the partnership have, by signing their names to the Stayton State Bank notes as individuals, added a primary personal liability, so that both the partnership and the persons composing it are primarily liable, and therefore on principle the Stayton State Bank is empowered to look to McLaughlin, if it chooses, for payment of its notes to the exclusion of debts incurred by the partnership standing alone. Moreover, section 5 of the Bankruptcy Act points out the course to be pursued by declaring that:

"(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." 30 U. S. Statutes at Large, p. 548.

[17] The defendant argues that the Silver-ton Lumber Company notes stand in the same relation to the Stayton State Bank notes as a pure partnership debt, and that therefore the former cannot call for dividends out of the individual estate of McLaughlin until the bank notes are first paid in full. If the joint notes occupy the same position as a note signed by the partnership only, then the conclusion contended for by the defendant is inevitable. There is no evidence of the origin of the Silver-ton Lumber Company notes. The defendant urges, however, that prima facie these notes represent a partnership debt because the name of the firm appears as one of the makers of the paper; but by the same token the paper is prima facie the obligation also of the individuals who signed because their names appear in addition to the names of the partnership. 2 Rem. on Bankruptcy (2d Ed.) §§ 2240, 2263. On its face each of the Silver-ton Lumber Company notes purports to be the obligation, not only of the partnership as such, but also of the individuals whose names appear with the name of the firm. It is at least fair to as-

sume that the parties intended that the holder of the notes would have, not only the security afforded by the partnership as such, but the contemporaneous security furnished by the individuals. The fact that the note is joint does not necessarily imply that it is the debt of none of the signers except the partnership. The joint note of Wassom and McLaughlin for a debt in no way connected with the partnership would not make it a primary claim against the partnership merely because the partnership is joint. 2 Rem. on Bankruptcy (2d Ed.) § 2244. On the record as it is presented to us the notes held by the Silver-ton Lumber Company must be deemed to be the joint notes of the partnership considered as such, and of Wassom and McLaughlin regarded as individuals, because that is exactly what the paper purports to be. Hosmer v. Burke, 26 Iowa, 358. The final chapter of this contest presents a conflict between joint and several notes on the one hand and joint notes on the other, and for that reason it will be proper to note some of the characteristics of each kind of obligation, as well as the difference between them.

[18-21] A joint and several contract is with each promisor and also with all jointly, with the result that they are all liable together on the joint obligation, and each individual is liable upon his separate obligation, and they may be sued jointly or severally as the promisee may elect. 9 Cyc. 657. A joint contract, however, is with all the promisors together, with the result that all must be sued jointly if either promisor objects to a suit or action brought against less than all; but if a judgment be obtained without objection against less than all who are jointly liable, the entire debt is merged in that judgment. Ryckman v. Manerud, 68 Or. 350, 136 Pac. 826, Ann. Cas. 1915C, 522. Ordinarily a release of one frees all. 9 Cyc. 654. Although a promisee may sue all or only one of two or more joint and several promisors, nevertheless a judgment obtained against joint and several promisors does not give to the judgment creditor any rights for the collection of the debt which are not possessed by the owner of a judgment against persons who are merely joint debtors and who have been served with summons. The owner of a judgment against persons who are jointly and separately liable may seize the property of all or the property of each if he chooses, and he is not obliged to look to one before he calls upon the other for payment. If all the promisors on a joint obligation are served with summons and a judgment secured against them, then the owner of the judgment is not obliged to exhaust the joint property before seizing the separate property of the individual promisors because he may do as he chooses (Godfrey v. Gibbons, 22 Wend. [N. Y.] 569; West Duluth Land Co. v. Bradley, 75 Minn. 275, 77 N. W. 964; Low v. Adams, 6 Cal. 277; 17 Cyc. 1082), for the

reason that in a joint, as well as in a joint and several, obligation each obligor who is bound at all is liable in solido for the whole debt. 9 Cyc. 653; *Allin v. Shadburne's Executor*, 1 Dana (Ky.) 68, 25 Am. Dec. 121; *Ripley v. Crooker*, 47 Me. 370, 74 Am. Dec. 491; *Dumanoise v. Townsend*, 80 Mich. 302, 45 N. W. 179; *Alpaugh v. Wood*, 53 N. J. Law, 638, 23 Atl. 261; *Gray v. Rollo*, 18 Wall. 629, 21 L. Ed. 927.

[22] Even though service cannot be obtained on all those who are jointly liable on a contract, still our statutes authorize the court to permit the promisee to have a judgment against all, and he may satisfy that judgment with the joint property of all the promisors or the individual property of the separate promisors who have been served with summons, and, furthermore, the judgment creditor is not obliged to exhaust the joint property before calling upon the separate estates for payment. Sections 61, 181, and 188, L. O. L.; *Stivers v. Byrnett*, 56 Or. 565, 571, 108 Pac. 1014, 109 Pac. 386; *Bertin & Lepori v. Mattison*, 157 Pac. 153.

[23] While it is true that a joint claim is burdened with some incidental incumbrances which may hinder its prosecution to judgment, yet, in the final analysis, a joint promise makes each promisor liable for the whole debt, and the liability of the individual is not secondary as in the case of partners. A joint and several debt and also a joint debt are unlike a pure partnership debt because the latter creates a primary charge against the partnership fund and a secondary charge against the separate funds of the persons who compose the partnership, and it necessarily follows that a pure partnership creditor is not in the same class as a creditor who holds a claim against an individual who happens to be a member of the partnership. Neither the Silverton Lumber Company notes nor the Stayton State Bank notes are pure partnership debts, but both groups of notes are unsecured claims against the persons whose names appear as makers, and as such unsecured claims they are entitled to receive dividends from the estate of each promisor. *Board of County Com'rs v. Hurley*, 169 Fed. 92, 97, 94 C. C. A. 362.

[24] Both the Silverton Lumber Company and the Stayton State Bank were creditors of McLaughlin on July 16, 1914, when the action was commenced against Wasson and McLaughlin, and consequently the enforcement of the judgment obtained by the bank will work a preference if the two creditors be-

long to the same class. The meaning of the word "class" as used by the Bankruptcy Act is explained in *Swarts v. Fourth Nat. Bank*, 8 Am. Bank. R. 673, 680, 117 Fed. 1, 54 C. C. A. 387, where the court says:

"While it is true that the Bankrupt Act does not define the word 'class,' nor in terms state what creditors are in the same class, it creates some classes, and specifies others, and it seems to us that the meaning of the word 'class' in the act should, if possible, be derived from the statute itself. Section 64, after directing the payment of certain expenses of administration, creates three classes of creditors: Parties to whom taxes are owing; employes holding claims for certain wages; and those who, by the laws of the States or of the United States, are entitled to priority. Sections 56b, 57e, and 57h provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims, and the general creditors of the estate, constitute the classes of creditors of which the Bankrupt Act treats. Now, if any one of these various classes is taken by itself and examined, it will be seen that each one of the creditors in the same class always receives the same percentage upon his claim, out of the estate of the bankrupt that every other creditor of his class receives. Where the estate is insufficient to pay the claims of different classes in full, the classes receive, out of the bankrupt estate, different percentages of their claims, but creditors of the same class receive the same percentage. The test of classification is the percentage paid upon the claims out of the estate of the bankrupt. * * * Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. Their relations to third parties, their right to collect of others, the personal security they may have through indorsements or guaranties, receive no consideration, no thought. It is the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences." 2 Rem. on Bankruptcy (2d Ed.) § 1387; 1 Loveland on Bankruptcy, § 513.

Both groups of notes belong to the fourth class of creditors of McLaughlin, and therefore the Silverton Lumber Company notes would be entitled to the same percentage of dividends as the Stayton State Bank notes could claim from the individual estate of McLaughlin; and the conclusion follows that both groups of notes are held by creditors of the same class. It was error to allow a nonsuit.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

MOORE, C. J., and BEAN and McBRIDE, JJ., concur.

OCEAN ACCIDENT & GUARANTEE CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 7575.)

(Supreme Court of California. Sept. 8, 1916.)

1. STATUTES §226—CONSTRUCTION—ADOPTION.

Where a foreign statute which has been construed by the courts of the foreign country is adopted, the construction by the foreign courts is also adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. §226.]

2. MASTER AND SERVANT §375(2)—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

Workmen's Compensation Act (St. 1913, p. 293) § 12 (a), declares that liability for the compensation provided by the act in lieu of any other liability shall, without regard to negligence, exist against any employer for any personal injury sustained by his employés by accident arising out of and in the course of the employment, and for the death of any such employé if the injury shall proximately cause death in those cases where, at the time of the accident, the employé is performing services growing out of and incidental to his employment, and is acting within the course of his employment. The engineer of a tugboat, who went ashore at a time when the tug was moored away from its usual berth, so that those debarking therefrom had to cross another steamer, in returning to the tug in the early morning crossed the steamer, to discover that the tug had been moved to its usual berth, and in making his way back to the wharf fell into the bay and was drowned. *Held*, that in such case, though the captain saw the engineer and called to him, he was not acting within the course of his employment at the time, so no recovery might be had under the act, for an employé in going to and returning from his work is not acting within the course of his employment, though his journey takes him over public roads or private ways.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §375(2).]

3. MASTER AND SERVANT §375(2)—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

In such case, a seaman or other employé is entitled to the benefits of the act while using the instrumentality provided by the master to reach the shore from the ship, or, if injured in attempting to embark or debark, where no particular means is provided.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §375(2).]

In Bank. Application by the Ocean Accident & Guarantee Company and others for a writ of review directed against the Industrial Accident Commission of the State of California, and others, to review an award for the death of William J. Slattery, the engineer of a tugboat. Award annulled.

L. A. Redman and Jewel Alexander, both of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. Review to consider an award of the Industrial Accident Commission: William J. Slattery was engineer of

the fishing tug Condare, owned by the Borzone Fish Company. Upon an afternoon in January she was moored in her customary berth—a wharf between piers 23 and 25, on the San Francisco waterfront. The weather was stormy, and the captain of the tug considered it expedient to move his vessel from this wharf to a place alongside of the schooner Crescent City. The Crescent City lay next to the steamer Moana, which last vessel was moored to pier 25, a short distance away from the Condare's usual berth. As thus placed, to go ashore from the Condare necessitated debarking from the Condare to the Crescent City, crossing the Crescent City, climbing onto the Moana, crossing her, and from her reaching the wharf. Slattery knew the position of the Condare, and knew also that it was a temporary location, chosen for protection against the stormy weather. After the tug was thus moored, he went ashore for purposes of his own, unconnected with his employment, and spent the night on shore. It was a Saturday night. It was Slattery's duty to return to his vessel before 4 o'clock upon the following morning. Not having so returned, the captain of the tug went to the boarding house where Slattery spent the night and had him called for duty. It was Slattery's duty to have reported on his vessel without any such summons. Slattery did not know that the tug during the night had been shifted back, as in fact it had, to its own berth. He went to pier 25, safely crossed the Moana and the Crescent City, and discovered that his vessel was not there. He then called from the deck of the Crescent City "What are you doing over there?" Capt. Johnson, of the Condare, hearing the call and recognizing Slattery's voice, replied, "I don't know, Bill, come on over here." Slattery answered, "All right," and, seeking to return to the wharf and thence to his vessel, fell into the bay between the Crescent City and the Moana and was drowned.

This fairly epitomizes the facts, though there are certain statements in the findings of the commission which are in the nature of deductions or conclusions from these unquestioned facts which call for animadversion. Thus it is in terms declared that when Slattery hailed his ship and was told by the captain to "Come on over here" Slattery had "reported for duty, and was directed by his superior to proceed to the boat Condare at its changed position." These statements must be treated as conclusions of law, for as findings of fact they are utterly without evidence to sustain them. The unquestioned facts are that it was Slattery's duty to report to his boat without any instruction, and that he was no more on duty when standing upon the deck of the Crescent City than when he was summoned at his hotel, and that the captain's call to him to "Come on over here" (since it was Slattery's duty to go to his

ship without any instructions), amounted to no more than telling Slattery the location of the ship. Again it is found that the captain of the Condore "caused Slattery to be called at the hotel where said Slattery was staying, but did not leave word nor advise said Slattery with regard to the position of the boat Condore." The evidence establishes without conflict that the captain caused Slattery to be called because Slattery had failed in the performance of his express duty, which was to report to the ship at a given hour, and the fact that the captain did not tell Slattery—a man knowing the usual berth of the ship and familiar with the San Francisco water front—that the Condore was at its usual berth is a circumstance immaterial to this consideration, since there was not the slightest duty upon the captain's part so to tell him. Eliminating, then, from this consideration such declarations as those above noted, which, if they are to be regarded as findings, are findings absolutely unsupported by the evidence, and if they are to be regarded as conclusions of law are conclusions of law erroneously drawn, we are enabled to approach the one real question in controversy, and we do so with the disposition to give to the terms of the act the utmost liberality of construction of which they are legally capable, to the end of effectuating the beneficent purposes of the act itself.

[1-3] So far as affects this question, the employer's liability or nonliability rests upon the construction to be given to section 12 (a) and subdivision 2 of the Workmen's Compensation Act. Stats. 1913, p. 283. That law is as follows:

Section 12 (a). "Liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against any employer for any personal injury sustained by his employes by accident arising out of and in the course of the employment and for the death of any such employe if the injury shall proximately cause death, in those cases where the following conditions of compensation concur: * * * 2. Where, at the time of the accident, the employe is performing service growing out of and incidental to his employment and is acting within the course of his employment as such."

Admittedly the deceased was an employe of the petitioner. Admittedly he met his death while, in the broadest sense, he was such employe. The question is: At the time he met his death was he "performing service growing out of and incidental to his employment and acting within the course of his employment"? It will be noted that section 12 (a) expresses the conditions generally under which compensation for injury shall be paid. It is to be paid when and only when the injury is a personal injury sustained by the employe "by accident arising out of and in the course of his employment." It will also be noted that subdivision 2, having specific reference to compensation in the event of death, does not broaden the right to this compensation beyond the language just quoted, but, if any-

thing, perhaps restricts it, and certainly makes it more specific by the added declaration that, to entitle the representatives of the deceased to recover in the case of death, the employe must not only be "performing a service growing out of and incidental to his employment," but must also be "acting within the course of his employment as such." Therefore it is quite within the meaning of the statute to say that the controlling language found in section 12 (a) is not modified, but merely paraphrased and made more definite, by the language of subdivision 2. Next it is pertinent to call attention to the fact that this language, injury "by accident arising out of and in the course of his employment," is language taken literally from the Workmen's Compensation Act of England, enacted by Parliament in 1897, section 1 of that act declaring that an employer shall be liable "if in any employment to which this act applies personal injury by accident arising out of and in the course of the employment is caused to a workman" L. R. Stats. 60-61 Victoria, p. 53. This language, then, had been for many years upon the English statute books before it was adopted and made a part of the Employers Workmen's Compensation Act of this state, and the courts of England had been called upon, as was inevitable, to construe, this phrase many times before our enactment of it. Under familiar principles, when a statute which has received judicial construction by the courts of one state is adopted and re-enacted by another state, it is so adopted and re-enacted in consonance with the construction put upon it by the courts of the first sovereignty. The common sense of this rule of construction is so apparent that it needs in its support nothing more than the obvious suggestion that if the later lawmakers did not design that the construction put upon any given language should obtain, they would modify and change that language to express their different intent.

We may now with profit consider these English adjudications, and, first, those upon which respondent places reliance. In *Robertson v. Allan Bros. & Co.*, 1 B. W. C. C. 172, the steward of a steamship went on shore in the evening under permission, for his own purposes. He returned late in the evening and proceeded to board his ship by means of the cargo skid or stage which stretched from the ship to the quay. It was a breach of discipline to use the skid, but it was frequently used by members of the crew. In stepping from the skid to the deck he slipped or stumbled, fell down the unguarded hatch into the hold, and died from the effect of the injuries which he sustained. It was not disputed that the accident "arose out of his employment." The question debated was whether it was "in the course of his employment." It was held by the Master of Rolls that in view of all the circumstances the accident occurred in the course of the employment. In *Moore v. Manchester Liners, Limited*, 3 B. W.

O. C. 527, a fireman had gone on shore to procure certain personal necessities. Returning to his ship, he fell off a ladder, which was the only means provided of gaining access from the quay to the ship. The House of Lords held this accident to have befallen the deceased in the course of his employment, Lord Loreburn, L. C., saying:

"In these circumstances it was not, I think, contested that the accident which caused death arose out of the employment; the danger of falling from a ladder which gave the only access from the quay to the ship being, in its nature, incidental to the service of a seaman."

In *Keyser v. Burdick & Co.*, 4 B. W. C. C. 87, a riveter working on a ship at the dock was about to go ashore. Coming on deck, he found that the vessel was being moved to a dry dock, and was already a short distance from the quay. The gangway had been removed. There was no other means of getting ashore than by sliding down a rope, which still held the vessel to the quay. A fellow workman had thus gone ashore in safety. Keyser attempted to follow him. The rope gave way. He was thrown against the quay and injured. The Master of the Rolls said:

"I am satisfied there is no ground for this appeal. The man, when he came on deck, wanted to get ashore, and he found that the vessel was a little away from the quay side, and that the gangway had gone. He saw one of his mates use the rope, and he followed, but he met with an accident. The county court judge found that, in the circumstances, this was a reasonable step to take by the man to get off the ship, when the regular means of exit was closed. We cannot interfere with his findings."

In *Kearon v. Kearon*, 4 B. W. C. C. 435, a seaman was on shore leave. When he returned his vessel was some five or six feet from the pier, the top of the ship's rail being about three feet lower than the quay. No gangway had been provided, but a ladder was used in getting on board. Not seeing the ladder, he hailed the ship, and, receiving no answer, jumped from the pier to the vessel. His leg struck on the rail, and he was permanently injured. There was no question but that the accident occurred in the course of his employment. The proposition debated was whether or not the seaman had taken a wantonly reckless step in his effort to reach the ship, and it was held that he had not. In the cases of *Kitchenham v. Steamship Johannesburg* and *Leach v. Oakley-Street & Co.*, 4 B. W. C. C. 91, two seamen on different ships had been ashore for their own purposes. They were both drowned before reaching their ships. In the *Leach* Case access was obtained to the ship by a ladder extending from the wharf to the ship. As the sailor was mounting this ladder his foot slipped, he fell between the ship and the wharf, and was drowned. Fletcher Moulton, L. J., delivering the judgment, first pointed out that:

"Any accident that occurs during the period of his being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the public, and not as one of

the crew on the ship, and therefore is one which does not 'arise out of his employment,'"

—and the opinion proceeds as follows:

"But if, whether in his hours of leisure or not, it becomes necessary for him, in fulfillment of his employment, to get on board his vessel, an accident occurring in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service in that ship. In the cases before us the accident occurred on the return of the seaman to the ship immediately prior to his actually getting on board. This is the critical moment when the dangers to which he is exposed change from being of the one class to being of the other class, and it will frequently be a difficult task to draw the line between the two. But I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship, as in *Moore v. Manchester Liners, Ltd.*, the accident is rightly said to arise out of his employment; but if the accident is shown to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shown that when the sailor returned to the ship there was a dense fog, and that in trying to find the gangway, which I will suppose was not lighted, he fell into the water and was drowned. I think the accident would arise out of his employment. But if all that is shown is that it occurred during his return to the ship, but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment."

In the *Kitchenham* Case access to the ship was by a gangway. The evidence showed that the sailor on returning to the ship came upon the wharf and walked toward the gangway. It was not shown that he ever reached the gangway. "A splash was heard a little abaft the inboard end of the gangway." Says the court:

"It is for the applicant to prove that the accident arose out of the employment; and, if the evidence is not sufficient to establish this, the claim fails."

And it was held that the evidence failed to establish a case for compensation. In *Jackson v. General Steam Fishing Co., Ltd.*, 2 B. W. C. C. 58, a workman was employed to watch trawlers as they lay in the harbor. His duties compelled him to be on the quay to which the trawlers were moored. In the course of his watch he left the boats and went to a hotel for refreshment. He was absent a short time, had returned to the quay, and, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. He was in the performance of his duty in leaving the quay to go onto the trawler. He used the means provided and at hand, and it was held that he met his accident in the course of his employment. This completes a review of the cases cited and relied upon

by respondent. From them we will turn to petitioner's authorities.

In *Walters v. Staveley Coal & Iron Co., Ltd.*, 4 B. W. C. C. 303, a miner was proceeding to his work along a footpath prepared by his employers for their workmen's convenience. He slipped and sustained injury. There was evidence that the employers knew that the footpath was not safe. The question considered by the House of Lords was: Did the accident "arise out of the employment, and did it arise in the course of the employment"? It was held that there was "no evidence which would have justified a finding that the accident arose out of the employment," and it was declared to be immaterial that the employé was injured upon this footpath prepared for his use by his employers. "since the man was merely going to his employment." In *Gilmour v. Dorman, Long & Co., Ltd.*, 4 B. W. C. C. 279, a workman was injured upon vacant land belonging to his employer, over which for many years he had been in the habit of going to and from his work, by walking along a footpath over the land. The Master of the Rolls holding that the accident did not arise out of his employment, declared:

"I cannot regard the case as in any way different from the case where a man slips on the ice on a public road, a quarter of a mile from his employer's works. It has been repeatedly held that a man is not entitled to the protection of the act when on his way from his home to the works."

Dealing specifically with seamen, *Leach v. Oakley, Street & Co.* has already been discussed. In *Biggart v. Steamship Minnesota*, 5 B. W. C. C. 69, a seaman had gone ashore on leave, for his own purposes. He returned late at night, and found that his ship had been moved to another part of the dock. He proceeded to make his way to the ship along the dock side, on which were many railway lines. He was injured by a train on the docks 200 yards from his ship. Said the Master of the Rolls:

"This appeal seems more hopeless than any we have had to deal with. * * * The accident took place 200 yards from the ship. That was not an accident 'arising out of.'"

Other cases not dealing specifically with ships and their crews, but having a bearing upon the question of what constitutes an injury "arising out of employment" are *Caton v. Summerlee, etc.*, 39 Scott. L. R. 762, where it was held that a workman who, after finishing his day's work, was injured while walking along a private branch railway leading from the employer's colliery to the main line of a railroad, had not met with an accident arising out of or in the course of his employment. In *Leveroni v. Travelers' Insurance Co. (Mass.)* 107 N. E. 349, an employé was killed while crossing a railroad track on private property over which it was necessary for him to pass. The court held that the death did not arise out of the employment, and the fact that the deceased was upon private prop-

erty as a licensee made no difference; that the principle was the same as if he had been killed on a public highway. To like effect is *Byrket v. Lake Shore Ry. Co.*, 29 Ohio Cir. Ct. R. 614, affirmed by Ohio Supreme Court, 75 Ohio St. 625, 80 N. E. 1124, where it was held that an injury sustained by a workman while walking on the railroad tracks owned by his employer, while complying with a direction to report for duty, was not an injury arising out of his employment.

With these authorities before us we think the governing principles of all the decisions are not difficult of discernment. The first of these is that there are excluded from the benefits of the act all those accidental injuries which occur while the employé is going to or returning from his work, and it matters not in this respect whether his journey takes him over public roads or private ways. Second, in the case of vessels, a seaman or other employé is entitled to the benefits of the act if injured while using the instrumentality provided in either reaching or departing from his ship, and in case no instrumentality at all is provided, as in *Kearon v. Kearon, supra*, the injured employé will not be excluded from the benefits of the act if he adopts some perilous means of boarding his ship, as by endeavoring to leap to her deck from the pier. But in the case of an employé seeking to board his vessel, until he has come into such proximity to her as to be using, or immediately about to use, the gang plank, ladder, or other instrumentality "specifically connected with the ship," his accident does not arise out of his employment, this indeed being the precise language of *Moulton, L. J.*, as above quoted in *Leach v. Oakley, Street & Co.*, where he says:

"If the accident is shown to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment."

In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury "growing out of and incidental to his employment," since a necessary part of the employment is that the employé shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employé going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks.

Such, beyond question, is the reasoning of the cases and the meaning of their adjudica-

tions; and, applying this reasoning to the facts in the case at bar, it is too plain to call for lengthy discussion that Slattery, in his progress toward his vessel, had not reached the point where it could be said that he met his death in "performing service growing out of and incidental to his employment."

The award is therefore annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

FAHEY v. PANAMA-CALIFORNIA EXPOSITION. (L. A. 4112.)

(Supreme Court of California. Sept. 6, 1916.)

1. MASTER AND SERVANT ⇨278(3)—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE—APPLIANCES.

In a servant's action for injury by falling from a bridge when a large timber on which he was exerting a leverage was pulled away, evidence held to show that the defendant failed to furnish suitable appliances for the prosecution of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958; Dec. Dig. ⇨278(3).]

2. MASTER AND SERVANT ⇨278(20)—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE—WARNING.

In such action, evidence held to show that the sudden moving of a timber upon which plaintiff was exerting a leverage, without warning to him, causing him to lose his balance and fall from a bridge, was negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. ⇨278(20).]

Department 2. Appeal from Superior Court, San Diego County; W. H. Thomas, Judge.

Action by William Fahey against the Panama-California Exposition. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Eugene Daney, of San Diego, for appellant. Shreve, Reed, Sample & Shreve and Theodore Stensland, all of San Diego, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying its motion for a new trial.

Plaintiff was a day-laborer employed by defendant. He was directed to perform certain work on one of the levels of the "Cabrillo Bridge" in Balboa Park in the city of San Diego. That he fell from the bridge while engaged in that employment, and that he was very severely injured is not denied, but appellant takes the position that in any view of the evidence it fails to support the verdict. Respondent insists that the verdict is fully supported, and that the defendant is properly charged with responsibility upon any one of the three following grounds: First, the place in which plaintiff was directed to work was not a reasonably safe place; sec-

ond, the defendant failed to furnish suitable appliances to plaintiff for the prosecution of the work; and, third, the sudden moving without warning to plaintiff of the timber upon which he was exercising his strength was negligence, on the part of defendant, its servants and agents, sufficient to charge it with responsibility for the injury sustained by plaintiff.

The level upon which Fahey was at work was about 55 feet from the ground. It had been floored during a part of the work, but most of the flooring had been taken away, the plaintiff himself having assisted in the work of removal. There was some testimony that the taking away of the floor was necessary in order that some large pieces of timber 12 by 12 and 16 feet long might be moved along the longitudinal timbers of that level and put in place for the extension of the work. At least one witness testified, however, that this work might have been done just as well and with much greater safety without the removal of the floor. Be that as it may, it appears without conflict that the only floor of that part of the bridge upon which Fahey was called to work was made up of timbers 4 inches wide placed and arranged in parallel pairs, so that the stringers of each pair lay approximately 1 foot apart and the pairs were separated by intervals of about 20 feet. According to Fahey's testimony he was instructed by the engineer to assist in sliding or skidding the 12 by 12 timbers into proper position for attachment to a derrick. Just before the accident he and the engineer were at work moving one of these heavy pieces of wood. A rope was attached to the timber and to a drum or "niggerhead," to which on proper signal power was to be applied. Owing to the position of the timber, it was necessary for the men to move it some distance by hand power and leverage before the pull of the rope from the "niggerhead" could be advantageously applied. Fahey testified that he asked for a "peavy" (a sort of lever commonly used in such work), but was informed that there were none available, and that therefore under instructions from his superior he used as a substitute a 2x6 stick from 4 to 6 feet in length. This he applied as a lever to the 12x12 timber, and was sliding it over when suddenly without warning to him the machinery was started, the huge timber against which he was exerting his strength was pulled away, and as a result he lost his balance and was hurled to the ground.

[1] Appellant's first contention is that the obligation generally resting upon a master to furnish a safe place in which to work does not apply when the danger is only temporary and transitory and arises from the hazard and nature of the work itself and this is known to the servant (citing such authorities as Labatt's Master and Servant, §

269; *Bloomfield v. Worster Construction Co.*, 118 Mo. App. 254, 94 S. W. 304, and *Callan v. Bull*, 113 Cal. 603-605, 45 Pac. 1017). The contention is made that the very nature of the work of constructing this bridge was such that the defendant might not safeguard its workmen more than it did. The obvious answer to this is that defendant had found it necessary, at an earlier stage of the work, to have a floor laid upon that same level of the bridge for the convenience and safety of its workmen, and that without necessity the temporary flooring was in part removed before the prosecution of the very dangerous task at which Fahey was engaged when he received his injury. But appellant reminds us that Fahey himself assisted in taking up the floor, and consequently accepted all risks ordinarily incident to working upon the stringers. However, it is not material whether the place furnished by defendant was or was not a reasonably safe one. Even if appellant's contention be correct, and even if we grant the position that the evidence fails to establish defendant's negligence in furnishing an unsafe place for its workmen, we are compelled to sustain the judgment of the superior court, because there is evidence to support the contentions that Fahey was put to work without proper instrumentalities for the safe prosecution of his task, and that the sudden, unexpected removal of the large timber precipitated him to the ground.

Appellant meets the second contention of respondent by quoting testimony to the effect that there were plenty of canthooks and peavies provided for work on the bridge, and that Fahey might have procured one very easily. But there was plaintiff's own testimony to the effect that Mr. Barton, the man under whose instructions he was working, had ordered him to use the scantling as a lever. It requires no evidence from experts to convince one of ordinary experience that a man using such a lever would be exerting his strength in a different and more perilous direction than that followed by the wielder of a canthook or peavy. It is not material how many suitable appliances defendant owned if Fahey was ordered to use a scantling by way of a substitute for one of them.

[2] While admitting that the machinery was started and the timber was moved by its power without previous notice to Fahey, appellant's counsel insists that plaintiff could not have been surprised, because, according to Fahey's own testimony, the timber was in motion before and at the time of the accident. A glance at the testimony of the plaintiff, however, reveals the fact that he referred to the motion imparted to the timber by the levers, and not its movement by the pulling of the rope attached to the "nigger-head." He testified in part as follows:

"On this occasion before the timber suddenly moved there was not to my knowledge any signal given. I never seen or heard anybody give

a signal. I was signalman at that time, and I should have given a signal; that is, if a signal was necessary. The signal at that time was not necessary because the log I was working on was in motion. Before there was any movement by the power of the engine of that timber I was working on there should have been a signal given by me first. I did not give such signal."

From this testimony it will be seen that, instead of admitting his knowledge that the power of the machinery was being applied, Fahey consistently maintained his position that the sudden removal of the timber on which he was exerting his strength caused the fall which resulted in the injuries for which he sought compensation. That the commonest sort of ordinary care required defendant's servants to give notice before the machinery was set in motion is too obvious for argument. Barton, the engineer, who gave the order to start the machinery, testified that he gave Fahey no warning, although the latter was between him and the man to whom he signaled the instruction to set the machinery in motion. We conclude, therefore, that the judgment and order are supported by proof that defendant failed to supply plaintiff with a suitable appliance for the work at hand, coupled with the negligent starting of the machinery, without warning to Fahey, thus causing him to lose his balance and fall to the ground.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

PEOPLE v. CANFIELD. (Cr. 1904.)

(Supreme Court of California. Sept. 8, 1916.)

1. CRIMINAL LAW — 869(4) — EVIDENCE — ADMISSIBILITY.

Admission of accused's confession to officers of another forgery in which he was implicated is error, tending to prevent fair trial on the charge of forgery.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823; Dec. Dig. — 369(4).]

2. CRIMINAL LAW — 961 — NEW TRIAL — QUESTIONS FOR COURT.

It is for the trial judge, on motion for new trial, to determine as to the prejudicial effect on the jury of evidence erroneously admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2415-2417; Dec. Dig. — 961.]

3. CRIMINAL LAW — 911 — NEW TRIAL — QUESTIONS FOR COURT.

Const. art. 6, § 4½, providing that no new trial shall be granted in a criminal case for erroneous admission of evidence unless the court believes it to have caused a miscarriage of justice, does not take from the trial court the discretion to grant a new trial, but is applicable only in behalf of the state to sustain determination of the court after denial of new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2184; Dec. Dig. — 911.]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Leonard C. Canfield was convicted of forgery. From an order granting new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., Robert M. Clarke, Dep. Atty. Gen., and Tracy C. Becker, Dep. Dist. Atty., of Los Angeles, for the People. Paul W. Schenck, of Los Angeles, for respondent.

MELVIN, J. Defendant, after conviction upon a charge of forgery, moved for a new trial. His motion was granted, and from the order made in that behalf, the people appeal.

Canfield was charged with forging a certain mortgage purporting to have been executed by Justin E. Cook, the owner of the real property described in said mortgage, to secure the payment of a promissory note for \$10,000, payable by Cook to one Helmer E. Rabild, who was the mortgagee named in the instrument. The defendant was also charged in a separate count with the forgery of the name of the notary public appearing upon the purported acknowledgment to the mortgage.

The evidence on the part of the prosecution tended to show that defendant, representing himself as Helmer E. Rabild, sold the note and mortgage to Caroline and Flora B. Schertz; that he was paid by check, which he deposited in a bank, drawing from time to time against the account thus established by means of checks signed, "H. E. Rabild." At all times after his arrest the defendant denied that he was Rabild, or that he had forged or negotiated the mortgage and note. The evidence showed that he did admit that he knew Rabild, who, he said, lived in Monrovia, but to whom he was unable to lead an officer, whom he promised to guide to Rabild's home. During this futile trip he was asked by a Mr. Adams if he had executed a certain other mortgage and had acknowledged it before a notary public named Baly. He replied that he had done so, and was then informed that Baly had been in Honolulu at the date of the alleged acknowledgment. At this juncture the officer in charge of the defendant took him aside and said: "Mr. Canfield, you have heard what Mr. Adams asked you. * * * What is the use of keeping us out all day, staying here? It is late now, and we want to all get back"—and said: "Why don't you tell us the truth about it?" He (defendant) said: "All right, I will tell you the truth about it; take me right back into town." It was also in evidence that Canfield told Adams that there was a man named Rabild; that he and Rabild had worked deals together; and that they had participated in a transaction whereby Rabild had procured \$4,000 upon a purported sale of realty consummated by means of a forged instrument. It is to be noted, however, that at no time did defendant confess that he forged or ne-

gotiated the mortgage set out in the indictment in this case. He denied the allegations contained in said indictment.

In his own behalf defendant introduced evidence by which he sought to establish an alibi. He could not account for every hour of his time—few men can—but the workmen engaged upon a house which defendant was constructing in Los Angeles testified that they were employed on the building nearly all of the time during July, August, and September, and that defendant was there nearly all of the time every day.

It is contended on behalf of the prosecution that the defendant's statement that he had been engaged in the commission of another crime with Rabild was not a confession of guilt of this offense for which he was on trial; that even if it be regarded as such confession, it was given without coercion; that the proof of alleged alibi was so vague as to be of no value; and that the guilt of Canfield was so conclusively established as to render the court's action in granting a new trial an abuse of discretion. It is asserted, therefore, that under section 4½, art. 6, of the Constitution it is our duty to set aside the order granting a new trial.

[1] Canfield's statement regarding another crime was not a confession of the offense charged in the indictment before us, but the introduction of testimony regarding a distinct felony was serious error, which must have tended to prevent him from having a fair trial. *People v. Stewart*, 85 Cal. 174, 24 Pac. 722; *People v. Arlington*, 123 Cal. 358, 55 Pac. 1003; *People v. Elliott*, 119 Cal. 593, 51 Pac. 955. There was some evidence that the statement connecting defendant with the evanished Rabild was obtained by promise of immunity, although the greater part of it would indicate that the district attorney and his associates endeavored most carefully to inform the accused regarding his rights. But one witness called by the prosecution testified that, after the defendant's arrest, and in a conversation which occurred before the admission by him that he had committed another offense, the district attorney said to Canfield "that there was no need of denying the matter, that he was satisfied that he was guilty, and that it would be better for him if he would tell the truth—something to that effect."

[2, 3] It was for the judge of the trial court to say what had been the effect of the evidence upon the jury, and whether or not the defendant, in view of all of the facts, had been given a fair trial. If the motion for a new trial had been denied, the prosecution might then well have invoked in favor of the conviction the section of the Constitution which provides that no new trial shall be granted in any criminal case on the ground that improper evidence has been admitted, "unless, after an examination of the entire

cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Section 4½, art. 6, Constitution of California. But this section of the Constitution was not designed to take from the trial court and transfer to the appellate courts the high discretion vested in that tribunal. The judge, who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. We cannot follow the mental processes of the judge. He may have been profoundly impressed with the influence upon the jury, to Canfield's injury, of the introduction of the evidence tending to prove another offense. Or he may have doubted the identification by the witnesses for the prosecution of Canfield as the man who passed as Rabild in the transactions leading to the sale of the note and mortgage. We can hardly manufacture in fancy an hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge. Surely there is no basis in the case before us for the substitution of the discretion of this court for that of the superior court. We must assume that the learned judge of the trial court acted with a full appreciation of his duties and obligations, with the cited section of the Constitution in mind, and that the conclusion which he reached was not governed by any idle nor any mere technical reasons.

The order granting a new trial is affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

BRODE et al. v. CLARK. (Civ. 1996.)
(District Court of Appeal, Second District, California. July 29, 1916.)

1. NEW TRIAL §163(2) — PRESUMPTION — CHARACTER OF ORDER GRANTING NEW TRIAL.

The trial court's written order, granting defendant's motion for new trial on various grounds, including that of the insufficiency of the evidence to sustain the findings, which sets out certain argument, the opinion of the court upon one question of law involved, must be treated as a general one, and it must be assumed that the court, not having expressly limited its order to other definite grounds, may have granted the motion for insufficiency of evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 331; Dec. Dig. §163(2).]

2. APPEAL AND ERROR §1015(2)—REVIEW—NEW TRIAL.

The appellate court cannot review the action of the trial judge in granting new trial on defendant's motion on the ground of insufficiency of the evidence, where the evidence presents a conflict as to material matters.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3866; Dec. Dig. §1015(2).]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by F. A. Brode and another against S. A. D. Clark. There was judgment for defendant, and from an order granting new trial, plaintiffs appeal. Order affirmed.

P. W. Thomson, of Los Angeles, for appellants. Hammack & Hammack, of Los Angeles, for respondent.

JAMES, J. [1, 2] This appeal is taken from an order granting to the defendant a new trial. The notice of appeal specifies that the appeal was taken from an order entered on the 11th day of September, 1913. There appears not to have been any formal minute order entered, but the court filed a written order which, after directing that a new trial was granted, set out certain argument, evidently the opinion of the court, upon one question of law involved in the case. The motion for a new trial was made upon various grounds, including that of the insufficiency of the evidence to sustain the findings of the court. It appears that there was contradictory evidence as to certain issues presented. Notwithstanding that the written order of court contains a statement of what purports to be the reasons influencing the court in granting the motion, we think the order must be treated as a general one, and that it must be assumed in that case that the court, not having expressly limited its order to other definite grounds, may have granted the motion because of the insufficiency of the evidence. The evidence presenting a conflict as to material matters, this court has no function to review the action of the trial judge.

The ground might also be urged, although we find no suggestion of it here on behalf of respondent, that the notice of appeal does, not on its face, by specifying the 11th day of September, 1913, as the date of the entry of the order granting a new trial, point to the order as shown by the record, which appears to have been filed on October 20, 1913. However, for the reasons first stated, the order should be affirmed.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

FLETCHER COLLECTION AGENCY v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 2100.)

(District Court of Appeal, Second District, California. Aug. 1, 1916.)

1. APPEAL AND ERROR §1011(1)—SCOPE OF REVIEW—FINDINGS OF FACT.

The appellate court is bound by the conclusion of the superior court as to a disputed fact. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. § 1011(1).]

2. JUSTICES OF THE PEACE §159(6)—APPEAL BONDS—WAIVER OF OBJECTIONS TO SURETIES.

Where parties having due notice of time and place of justification of sureties on appeal from a justice failed to appear and object thereto, they waived objection, and affidavits of sureties as to their qualifications are sufficient prima facie justification.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. § 159(6).]

3. JUSTICES OF THE PEACE §164(4)—JURISDICTION OF APPEAL—SUFFICIENCY OF RECORD.

Although Code Civ. Proc. § 975, requires the statement on appeal to the superior court to contain the grounds of appeal, and conceding that a statement is insufficient, the court is not thereby deprived of its appellate jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 624-630, 632; Dec. Dig. § 164(4).]

Action by the Fletcher Collection Agency against Frank A. McDonald and others. Judgment for plaintiff in the justice court, and defendants appealed to the superior court of Los Angeles County, which dismissed plaintiff's motion to dismiss the appeal. On petition for writ of review directed to such order. Order affirmed.

George P. Cook, of Los Angeles, for petitioner. Frank A. McDonald, of Los Angeles, for respondents.

CONREY, P. J. On application of the petitioner a writ of review was issued herein, to determine whether the defendant superior court has regularly pursued its authority in refusing to dismiss an appeal from the justice's court, in an action wherein the petitioner was plaintiff and Frank A. McDonald et al. were defendants. The facts are shown by the return filed herein.

After judgment in the justice's court, the defendants in that action filed notice of appeal on questions of law, and filed their undertaking on appeal. On November 17, 1915, the plaintiff filed exceptions to the sureties on the appeal bond. On November 22, 1915, before 1 o'clock p. m., appellants served on the plaintiff a notice—

"that defendants will justify the sureties on the new appeal bond filed by them in the above-entitled case, and you will take further notice that defendants will file a new appeal bond in the above-entitled action on the 22d day of November, 1915, at the hour of 4:30 p. m., in de-

partment F of the above-entitled court, at the courthouse in the city of Los Angeles, Cal."

The plaintiff and its attorneys did not appear in the justice's court at the time specified. The justice's docket is silent as to justification by the sureties or as to any appearances by either party before the justice's court at the time specified in the notice of justification of sureties. But the undertaking filed on that day contains the statutory form of affidavit on an undertaking, with a certificate showing that it was subscribed and sworn to before the justice of the peace on that same day, November 22, 1915, and an indorsement was made thereon showing the filing of the undertaking on that day.

The papers on appeal having been duly transmitted to the superior court and filed therein, the plaintiff gave notice of motion to dismiss the appeal upon the grounds:

"(1) That the sureties on the underaking on appeal heretofore filed by said defendants did not justify in the manner and form required by law and in accordance with the provisions of section 978 of the Code of Civil Procedure.

"(2) That the statement on appeal filed by said defendants does not state any grounds of appeal, as required by section 975 of the Code of Civil Procedure."

[1] The motion was based upon the papers on file and affidavits. The affidavits were for the purpose of showing, and tended to show, that the notice of justification of sureties was not served until the next morning after the time for justification as specified in the notice. Counter affidavits were filed positively affirming that the notice was served between 12 and 1 o'clock on the 22d day of November. For the purpose of determining the questions raised as to its jurisdiction to entertain the appeal, the superior court considered these conflicting affidavits, and determined that the notice was served on the 22d at the hour named in the appellants' affidavits. Therefore, as to that disputed fact, we consider ourselves obliged to adopt the conclusion of the superior court.

[2] On these facts respondents claim that the failure of the party, excepting to the sufficiency of the sureties, to appear at the time and place mentioned in the notice of justification was a waiver of such justification, and that the affidavit of the sureties before the justice, as shown on the undertaking itself, wherein they made oath that they were residents and householders, and respectively worth the sum specified in the undertaking, etc., establishes a prima facie justification, and that nothing further was required under the circumstances here shown. We think that this contention should be sustained. It is directly supported by the decision in *Bank of Escondido v. Superior Court*, 106 Cal. 43, 39 Pac. 211, and in *Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628.

[3] The other ground upon which petitioner rests his contention that the superior

court exceeded its jurisdiction is that the statement on appeal does not contain the grounds upon which the parties appealing intended to rely, as required by section 975, Code of Civil Procedure. Assuming the statement to be insufficient as specified, it does not result that thereby the court was deprived of its appellate jurisdiction over the case. *Rauer's Law & Collection Co. v. Superior Court*, 26 Cal. App. 289, 152 Pac. 957.

The order of the superior court, refusing to dismiss the appeal, is affirmed.

We concur: JAMES, J.; SHAW, J.

GARRETT v. GARRETT et al. (Civ. 2078.)

(District Court of Appeal, Second District, California. July 29, 1916. Rehearing Denied by Supreme Court Sept. 25, 1916.)

1. APPEAL AND ERROR ¶795(2)—DISMISSAL—NOTICE OF MOTION—SUFFICIENCY.

Under Code Civ. Proc. § 1010, requiring notice of a motion to state the grounds on which it will be made, and section 954, providing that, if appellant fails to furnish the requisite papers, the appeal may be dismissed, a notice of motion to dismiss an appeal on the grounds that appellant has not perfected it in the manner required by law and the rules of the court, that appellant has not filed the requisite papers, that a stipulation contained in the transcript was not signed by the attorneys for the respondent or either of them, and for other and further reasons apparent on the appellant's transcript of record, failing to designate what papers requisite to a consideration of an appeal are omitted from the record, or to show wherein appellant has failed to perfect her appeal, or what further reasons apparent on the record respondent refers to, fails to apprise appellant of the grounds of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3143; Dec. Dig. ¶795(2).]

2. APPEAL AND ERROR ¶715(2)—RECORD—TRANSCRIPT—PROCEEDINGS FOR REVIEW.

Where the transcript on appeal discloses the filing of the notice of appeal with the clerk, its omission to show service thereof is supplied by an affidavit showing proper service by mail.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2965; Dec. Dig. ¶715(2).]

3. APPEAL AND ERROR ¶424—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL—SERVICE.

The appearance of an attorney for an insurance company which has deposited in court the sum of money for which the appellant and respondent have contested and appearance in another suit wherein the respondent was contesting the will of the insured did not constitute him the attorney of record for the respondent so as to require service of a notice of appeal upon him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2152-2154; Dec. Dig. ¶424.]

4. APPEAL AND ERROR ¶426—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL—SERVICE.

Though an attorney of respondent resides in the same city with the attorney for appellant, Code Civ. Proc. § 1012, authorizing service by

mail where the person making the service and the person on whom it is to be made reside or have their offices in different places, does not prevent service by mail on another attorney for respondent residing in another city, equally effective with service on the resident attorney.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2151, 2162-2164; Dec. Dig. ¶426.]

5. INSURANCE ¶712—COMPANIES—BY-LAWS—WHAT LAW GOVERNS.

In the absence of a showing to the contrary, it is presumed that the right of an insurance company located in another state to make by-laws is governed by the laws of that state, with which, as provided in Civ. Code, § 301, they must not be inconsistent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 173-175, 293, 1934; Dec. Dig. ¶712.]

6. INSURANCE ¶781—COMPANIES—BY-LAWS—VALIDITY.

Under Code Iowa, § 1789, providing that the beneficiary named in a certificate may be changed at any time at the pleasure of the assured as may be provided for in the articles or by-laws, a by-law requiring consent of the association to a change of beneficiary is invalid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1947; Dec. Dig. ¶781.]

7. INSURANCE ¶784(1)—CHANGE OF BENEFICIARY—SUFFICIENCY.

Where the by-laws of an insurance company authorize any member to change the beneficiary by indorsement on the certificate of membership, and require a copy of the indorsement signed by the member to be filed with the association, though the member failed to present a copy of the indorsement, a presentation of the original certificate with the indorsement is equally effective, especially where the company in returning the certificate stated that copies had been made, thus waiving the requirement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1952; Dec. Dig. ¶784(1).]

8. INSURANCE ¶784(1)—CHANGE OF BENEFICIARY—SUFFICIENCY.

Where insured had the right at his pleasure to change the beneficiary, and had done all in his power to change the beneficiary, and notice thereof was brought home to the insurer before his death, there was an effectual change, under the rule that equity regards that as done which ought to have been done.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1952; Dec. Dig. ¶784(1).]

9. EXECUTION ¶158(1)—STAY—EFFECT OF ORDER.

An order staying execution for ten days, entered on the day the cause was decided, commenced to run from that date, though judgment was not entered until three days later.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 442-450, 454-459; Dec. Dig. ¶158(1).]

10. APPEAL AND ERROR ¶1179—EFFECT OF TRANSFER OF CAUSE—RESTORATION OF MONEY PAID ON JUDGMENT.

The fact that the trial court, after the money deposited in court had been paid over in satisfaction of the judgment, vacated the order on which it was paid, could not vest the District Court of Appeal with jurisdiction to order a restoration of the fund.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4621-4625; Dec. Dig. ¶1179.]

11. APPEAL AND ERROR §1208(1)—DISPOSITION OF CAUSE—REVERSAL—RESTORATION OF BENEFITS.

A party obtaining through a judgment before reversal any advantage or benefit must restore the amount to the other party after reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4701; Dec. Dig. § 1208(1).]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the Bankers' Life Company against Iva L. Garrett and William Edward Garrett, a minor, cross-defendants. From a judgment for cross-defendant William Edward Garrett, cross-defendant Iva L. Garrett appeals. Reversed, with instructions.

Robert L. Hubbard, of Los Angeles, for appellant. Chas. S. Peery, of San Francisco, and William Ellis Lady, of Los Angeles, for respondent.

SHAW, J. This is a contest waged between the widow and minor son of Edward E. Garrett, deceased, each claiming certain money due as insurance upon his life, and which money the insurance company had paid into court to abide the result of the litigation.

[1] The respondent, William Edward Garrett, pursuant to notice thereof, presents a motion to dismiss the appeal. As grounds therefor the notice specifies the following: First, that the appellant has not perfected said appeal in the manner required by law and the rules of the above-entitled court; second, that appellant has not filed in the above-entitled court, within the time allowed by law or otherwise or at all, the requisite papers on appeal from the judgment herein, from which said judgment said appellant has attempted to or has taken an appeal; third, that the pretended stipulation contained on page 82 of appellant's transcript was never signed by nor agreed to by the attorneys for cross-defendant and respondent, William Edward Garrett, or either of them; fourth, for other and further reasons apparent upon the appellant's transcript of record.

Section 1010, Code of Civil Procedure, provides that the notice of a motion must state the grounds upon which it will be made. Section 954, Code of Civil Procedure, provides that:

"If the appellant fails to furnish the requisite papers, the appeal may be dismissed."

Respondent in his notice does not pretend to designate or point out what papers requisite to a consideration of the appeal are omitted from the record, and it is impossible to determine from the notice wherein appellant has failed to perfect her appeal, or wherein she has failed to file the requisite papers on appeal, or what further reasons apparent upon the record respondent refers to as grounds for the motion. The provision of

the section last quoted is similar to that contained in section 556, Code of Civil Procedure, which provides that a writ of attachment may be discharged when improperly or irregularly issued. It has been held, however, that a notice to discharge a writ of attachment "because the said writ was improperly issued" is insufficient in failing to specify the particular grounds therefor. Says Judge Field, in discussing the sufficiency of a notice of motion in the case of *Freeborn v. Glazer*, 10 Cal. 337:

The provision that the attachment may be discharged on the ground that the writ was improperly issued "does not obviate the necessity of specifying the particular points of irregularity upon which the motion will be made. It is only a provision that, whenever the writ is improperly issued, that fact will authorize the application for its discharge. It is like a great variety of provisions indicating the general ground or reason upon which parties may proceed, or the action of the court may be based, and which are never held to obviate the necessity of specifying the points of objection upon which the moving party will rely."

To the same effect is *Donnelly v. Struven*, 63 Cal. 182, and *Loucks v. Edmondson*, 18 Cal. 203. While these cases involved motions for the discharge of writs of attachment upon the ground that they were improperly and irregularly issued, the principle upon which they were decided is likewise applicable to the provision contained in section 954, to the effect that an appeal may be dismissed if appellant fails to furnish the requisite papers. The notice of motion to dismiss should point out and designate the particular papers claimed by respondent to have been omitted from the record. In our opinion, the notice of the motion is insufficient under section 1010, *supra*, in that it fails to apprise appellant of the grounds of the motion. It is true that the proposed stipulation as to the correctness of the record was not signed by respondent's attorneys; but, as appears from the record, it was certified by the clerk.

[2-4] Respondent insists that the notice of appeal was not properly served. As appears from the record, respondent's attorney resided in San Francisco, and appellant's attorney in Los Angeles. The notice of appeal was served by mail; and, while the transcript discloses the filing of the notice with the clerk, it does not show service thereof. An affidavit presented, however, covers this omission by showing proper service by mail. *Estate of Stratton*, 112 Cal. 513, 44 Pac. 1028; *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986. There is no merit in respondent's contention that Peery, his attorney, had associated with him W. E. Lady, an attorney in Los Angeles, upon whom the service of the notice of appeal should have been made. Lady, as shown by the record, appeared, not as attorney for respondent, who was represented by Charles S. Peery, but as attorney for the Bankers' Life Company, and also in another suit wherein the minor son of deceased was con-

testing his will. This, however, did not constitute him attorney of record for respondent, and his acts, statements, and conduct, as shown by affidavits filed, were of a character well calculated to raise serious doubt in the mind of appellant as to his position in the case. Under these circumstances, and conceding that he did act with Peery, appellant very properly served the notice of appeal upon the latter as to whom there was no question of his being attorney of record for respondent. Moreover, conceding Mr. Lady, who resided in Los Angeles, to be also an attorney of record for respondent, we find nothing in section 1012, Code of Civil Procedure, prohibiting service by mail upon Mr. Peery. The service was equally effective made upon either attorney.

As appears from the findings made and undisputed facts alleged in the pleadings, the Bankers' Life Company, a corporation having its principal place of business in Des Moines, Iowa, and created under the laws of that state as a life insurance company, did, in June, 1903, issue to Edward E. Garrett two certificates of membership in said Bankers' Life Company, by each of which, upon the death of the assured, it agreed to pay to Emma L. Garrett, the then wife of said Edward E. Garrett and named in said certificates of membership as the beneficiary therein, the sum of \$2,000. Some time after the issuance of said certificates of membership, Edward E. Garrett and Emma L. Garrett, his wife, named as beneficiary therein, were divorced. Whereupon the insured, as he concededly had the right to do, changed the beneficiary named in said certificates, substituting for his divorced wife his son, William Edward Garrett, respondent herein. At a later date Edward E. Garrett married Iva L. Garrett, plaintiff herein, and thereafter, on March 10, 1914, he duly executed and indorsed upon each of said certificates of membership the following:

"I, Edward E. Garrett, holder of the within certificates Nos. 130461, 130462, hereby revoke all directions by me heretofore made as to the disposition of the benefit accruing thereunder, and now direct that said benefit shall be paid to Iva L. Garrett, bearing to me the relation of wife."

The certificates so indorsed were duly forwarded to the Bankers' Life Company at Des Moines, Iowa, and received by said company on March 14, 1914, and on March 16, 1914, there was indorsed upon each of said certificates the following, to wit:

"Consented to and acknowledged March 16, 1914. Bankers' Life Company, R. W. B."

On March 15, 1914, after the receipt by said Bankers' Life Company of said certificates of membership, together with the indorsements made thereon by Edward E. Garrett, he died. As found by the court, the law of Iowa touching the right of an assured to change the beneficiary in such certificates is found in section 1789 of the Iowa Code, and is as follows:

"The beneficiary named in the certificate may be changed at any time at the pleasure of the assured, as may be provided for in the articles or by-laws, but no certificate issued for the benefit of a wife or children shall be thus changed so as to become payable to the creditors."

The court also found that by the by-laws of the company it was provided that:

"Any member may with the consent of the association make a change in the beneficiary in his certificate without requiring the consent of such beneficiary. The change proposed shall be indorsed on the certificate of membership, and signed by the member, and shall not be binding until the consent of the association shall be indorsed on the said certificate of membership; a copy of such indorsement signed by the member, and filed with the association."

Further findings are that said Edward E. Garrett did not at any time make or cause to be made a copy of said proposed change of beneficiary, nor file with the Bankers' Life Company a copy of said proposed change which was indorsed upon the certificates, and that the approval of such proposed change by said Bankers' Life Company was made after the death of said Edward E. Garrett and in ignorance of the death of said Edward E. Garrett, and that, pursuant to the order of court, said Bankers' Life Company paid into court the sum of \$4,074 for the benefit of the parties entitled thereto, and as a conclusion of law found that said attempted change of beneficiary was not completed, and the beneficiary named in said certificates was not changed from said William Edward Garrett to the said Iva L. Garrett, and that William Edward Garrett was the beneficiary in and entitled to all the proceeds and benefits of the said certificates. Upon these facts the court erroneously, in our opinion, rendered judgment in favor of defendant William Edward Garrett, from which plaintiff appeals.

[5-7] In the absence of anything to the contrary shown, we must presume that the right of the Bankers' Life Company to make by-laws is governed by the laws of Iowa, with which they must not be inconsistent. Section 301, Civ. Code Cal. The Iowa statute, the existence of which is found by the court, provides that the insured may, not "with the consent of the association," as provided in the by-laws, but "at his pleasure," change the beneficiary named in the certificates. To thus "restrict the right and make it subject to the consent of the company, without which such change could not be made, would, in effect, nullify and destroy the statutory provision. As we construe the statute, the provision that a change may be made "at the pleasure" of the insured, "as may be provided for in the * * * by-laws," refers to the mode or means adopted by the company for effecting the change, which in this case appears to be by an indorsement upon the certificates expressing the intention of the insured. The rules adopted therefor by the company must be reasonable, and not restrictive of the right given by the statute to

the holder of the certificates. That part of the by-law providing that a change in the beneficiary named in the certificate "shall not be binding until the consent of the association shall be indorsed on said certificate," being inconsistent with and restrictive of the right given by the general laws of Iowa, must be disregarded as of no force or effect. Conceding that the provision of the by-laws that "a copy of such indorsement, signed by the member and filed with the association," was not, as found by the court, complied with, nevertheless the original so presented to the association was equally as effective for the purpose to be subverted, which was notice and data for its records, as the copy thereof could have been. Indeed, it appears that the company, on March 16th, in returning the certificates, stated, "Copies have been made for our records," thus waiving the requirement, as it might do. *Marsh v. American Legion of Honor*, 149 Mass. 517, 21 N. E. 1070, 4 L. R. A. 382; *St. Louis Police Relief Ass'n v. Tierney*, 116 Mo. App. 447, 91 S. W. 968; *Hall v. Allen*, 75 Miss. 173, 22 South. 4, 65 Am. St. Rep. 601. To construe the provision otherwise would, in our opinion, be giving weight to the shadow rather than to the substance.

[8] Moreover, equity regards that as done which ought to have been done (1 Pomeroy's Eq. Jurisprudence, § 364), and the insured having the right at his pleasure to change the beneficiary named in the certificates, and having made the indorsement upon the certificates in the manner and form required by the association and forwarded the same to the company, which, as found, received them on March 14th, the day before his death, he had done all in his power to change the beneficiary, and his death following such change, notice of which was brought home to the company prior to his death, was sufficient to and did constitute an effectual change in the beneficiary named. *Supreme Conclave, Royal Adelpia, v. Cappella* (C. C.) 41 Fed. 1; *John Hancock Mut. Life Ins. Co. v. White*, 20 R. I. 457, 40 Atl. 5; *Luhrs v. Luhrs*, 123 N. Y. 367, 25 N. E. 388, 9 L. R. A. 534, 20 Am. St. Rep. 754. In *Heydorf v. Conrack*, 7 Kan. App. 202, 52 Pac. 700, it is said:

"Where a holder of a certificate in a mutual benefit society desires to change the beneficiary therein, and does all that he is required to do by the laws of the society, and then dies before the change is completed, a court of equity will decree the payment of the money the same as if the desired change had been fully completed in the lifetime of the assured."

See, also, *Hirschl v. Clark*, 81 Iowa, 200, 47 N. W. 78, 9 L. R. A. 841, and *Supreme Lodge v. Price*, 27 Cal. App. 607, 150 Pac. 803, to the effect that, where the intended change is brought home to the association during the life of the insured, the beneficiary so designated by him is entitled to recover.

In our opinion, the findings clearly show that the insured in his lifetime changed the beneficiary named in the certificates, sub-

stituting for William Edward Garrett his wife, Iva L. Garrett, notice of which fact was brought to the notice of the company prior to his death, in a manner which substantially complied with all legal requirements; that his right to change the beneficiary was not subject to and did not depend upon the consent of the company; that, if it did so depend, the company must be deemed to have assented thereto upon receipt of the certificates upon which such change was indorsed and signed by the insured, and the fact that such consent of the company was not indorsed thereon until after his death was under the circumstances immaterial.

As stated, the Bankers' Life Company paid into court the fund which constituted the subject of the litigation. On December 12, 1915, the court rendered its decision and judgment in the matter, awarding the money involved to William Edward Garrett, and on the same day the court made an order staying execution for a period of ten days. Judgment was entered on December 15, 1915. On December 23, 1915, the following order was made by the court:

"It appearing that the above-mentioned sum of \$4,074 is now justly due and payable to said William Edward Garrett, I hereby order that it be paid to him by the treasurer of Los Angeles county, Cal., and the county auditor of said county is hereby ordered to allow this demand upon the treasurer of said county for said sum of \$4,074, in favor of said William Edward Garrett in payment thereof, less any moneys paid or due as city and county taxes on said fund. Dated this 23d day of December, 1915. Louis W. Myers, Judge."

Upon this order, made without the knowledge of appellant or her attorney, and other steps duly taken as required in withdrawing money from the county treasury in such cases, the money was paid over to the guardian of said minor. On December 24, 1915, plaintiff and appellant served her notice of appeal herein, followed in due time by the filing of the requisite undertaking. Thereafter, upon the application of the plaintiff to the court, it made an order vacating and setting aside its former order upon the ground that it had been made through inadvertence. No steps, however, were taken by appellant in the trial court to have said fund restored to the county treasury. But she has presented to this court a motion for an order directing the minor, William Edward Garrett, and his guardian, and also Charles S. Peery and W. E. Lady, both individually and as attorneys for William Edward Garrett, to restore and repay into the county treasury of Los Angeles county the sum of \$4,074, being the amount of money deposited with the clerk of the superior court by the Bankers' Life Company to abide the result of this action and so withdrawn pursuant to the order of court above set out, and also requiring said parties to show cause why they should not be adjudged guilty of contempt for having applied for said order,

and, pursuant thereto, withdrawn said money from the treasury of Los Angeles county.

[9-11] The contention of appellant is that the order staying execution did not begin to run until the entry of judgment on December 15th. This for the reason that prior to such time no execution could have issued. Such, in our opinion, is not the legal effect of the order. As we construe it, the ten-day order staying execution commenced to run from its date, to wit, December 12th, and expired on December 22d. On December 23d, when the order for the withdrawal of the funds and payment thereof to William Edward Garrett was made, no appeal had been taken and the time of the stay of execution had expired; hence the court had authority to make the order upon which the money was withdrawn and applied in payment of an existing judgment as to which at the time no appeal had been perfected. In our opinion, the fact that the court, after the money had been paid over in satisfaction of the judgment, vacated and set aside the order upon which it was paid, could not vest this court with jurisdiction to order the restoration of the fund. The rule in such cases, as we understand it, is:

"That a party obtaining through a judgment, before reversal, any advantage or benefit, must restore [the amount] he got to the other party after the reversal." *Reynolds v. Harris*, 14 Cal. 680, 76 Am. Dec. 459; section 957, Code Civ. Proc.; *Bank v. Bank*, 6 Pet. 19, 8 L. Ed. 299.

See, also, *Patterson v. Keeney*, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232.

But conceding, without deciding, that the trial court could have ordered the fund restored, no such order was made.

Our conclusion is that the respondent's motion to dismiss the appeal should be denied; that appellant's motion to have the fund restored and to cite the parties to show cause why they should not be adjudged guilty of contempt for applying for the order pursuant to which the fund was paid should likewise be denied; that the judgment appealed from should be reversed, and the trial court instructed to enter judgment upon the findings for the plaintiff and cross-defendant, Iva L. Garrett; all of which is so ordered.

We concur: CONREY, P. J.; JAMES, J.

THOMSEN v. THOMSEN. (Civ. 1517.)
(District Court of Appeal, Third District, California. July 31, 1916.)

1. DIVORCE \S 252—PROPERTY RIGHTS—ADJUSTMENT.

Under Civ. Code, \S 146, subd. 1, providing that, if divorce be decreed on the ground of extreme cruelty or adultery, the community property shall be assigned to the respective parties in such proportions as the court, from the facts of the case and circumstances, may deem just, it is the duty of the court, where a husband obtained a divorce because of his wife's extreme cruelty, to adjust the property rights

of the spouses, and a judgment giving the wife less than half of the community property is not erroneous because she was a hard worker and by her thrift assisted in accumulating it.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 713-715; Dec. Dig. \S 252.]

2. DIVORCE \S 236—REVIEW—PRESUMPTION—PROPERTY OF SPOUSES.

On appeal it will be presumed that the trial court in dividing the property of the spouses on divorce pursuant to Civ. Code, \S 146, subd. 1, properly exercised its discretion.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 769, 770; Dec. Dig. \S 236.]

3. DIVORCE \S 252—DISPOSITION OF PROPERTY—AUTHORITY OF COURT.

Where the court, on a husband's procuring divorce for extreme cruelty, divides the property of the spouses, it may properly take into consideration the fact that at the time of the marriage the husband was the possessor of several thousand dollars worth of property which was used in accumulating the marital property.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 713-715; Dec. Dig. \S 252.]

4. DIVORCE \S 252—DIVISION OF PROPERTY—EVIDENCE.

Where a husband obtained a divorce on account of his wife's extreme cruelty, and the foundation of the community property was the husband's separate property, which after marriage he had used in accumulating the community property, a division which allowed him 58 per cent. of the title to the property held justified.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 713-715; Dec. Dig. \S 252.]

5. DIVORCE \S 252—DIVISION OF PROPERTY—AUTHORITY OF COURT.

The court under its power to divide community estate may assign to one spouse the whole of a tract of land belonging to the estate; all the property belonging to the estate being treated as one asset or fund composed of separate units to be divided.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 713-715; Dec. Dig. \S 252.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Thomas Thomsen against Ida Amelia Thomsen. From a decree of divorce and decree adjusting the property rights of the parties, defendant appeals. Affirmed.

Light & Crane and Gordon A. Stewart, all of Stockton, for appellant. A. L. Levinsky, of Stockton, for respondent.

ELLISON, Judge pro tem. In this action the trial court granted an interlocutory decree of divorce to the plaintiff on the ground of defendant's cruelty, and made a decree adjusting the property rights of the parties. Upon this appeal the defendant claims that in the decree too much of the property was awarded to the plaintiff.

A brief narrative of some facts disclosed by the record will be sufficient to present the point raised. The plaintiff and defendant intermarried in 1876. At the time of this marriage the plaintiff was possessed of some property. By hard work, economy, and thrift their worldly possessions have increased until

at the time of the trial they owned real and personal property as follows:

A tract of land containing about 60 acres, valued at.....	\$ 5,100.00
Another of about 60 acres valued at	3,780.00
Another of about 40 acres valued at	3,400.00
And other tracts aggregating 408 acres, valued at.....	34,680.00
	<hr/> \$48,960.00
Stock, crops and farming implements	10,000.00
	<hr/>
Total	\$58,960.00
And their indebtedness amounted to about	\$2,500.00

By its decree the court awarded to the plaintiff 107 acres of the land, and the balance of the real estate was ordered divided equally between the parties, and also the growing crops and all personal property and money. It was also decreed that all indebtedness should be paid equally by them.

[1, 2] Counsel for appellant seems to be satisfied with this division of the property with the exception that he claims that his client should have been awarded one-half of the 107 acres of land, and that all of it should not have been awarded to the plaintiff.

Subdivision 1 of section 146 of the Civil Code provides:

"If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just."

This Code section confers upon the trial court a wide latitude for the exercise of its judgment and discretion, and in every case it will be presumed that such discretion has been wisely and properly exercised. It has been said that it is the duty of the court to award to the innocent party more than one-half of the community property when the divorce is granted for cruelty. Thus, in *Eslinger v. Eslinger*, 47 Cal. 64, it is said:

"Section 146 of the Civil Code requires that the community property shall be equally divided between the parties; but the next section makes an exception to the general rule by providing that, if the divorce be granted on the ground of adultery or extreme cruelty, the guilty party shall receive only such portion as the court shall deem just under the facts of the case. The inference is that in the excepted cases the injured party is to receive, as a general rule, more than one-half of the property, and as much more as the court shall deem just. Under the circumstances of this case, we think the court ought to have awarded to the wife three-fourths of the community property."

1. Counsel states that, as the evidence shows the defendant has been a hard-working woman and by her efforts assisted in accumulating the property, she should have been awarded at least one-half of all of it. But this feature of the case is not controlling. Many cases arise wherein all the property has been accumulated entirely by the efforts of the husband, unaided by the wife's labor, and wherein, upon a divorce being granted

to the wife upon the ground of the husband's cruelty, she has been awarded much more than one-half of the common property. In such cases one of the circumstances the court must take into consideration and give due weight to is the important fact that one spouse has been cruel to the other, which cruelty has resulted in disrupting the home and marriage ties.

[3, 4] 2. In finding No. XIV the court finds that at the time of the plaintiff's marriage to the defendant he had \$500 on deposit in bank; that there was due to him from one Hansen \$1,200, which was afterwards collected; that he owned 175 stands of bees, some of which he sold for \$250; two wagons and horse, worth \$200; 65 acres of land which he subsequently sold for \$1,000. (While the findings do not total these findings, it is proper to state that they aggregate \$3,150.) The court finds that all of said sums of money and property were used by the plaintiff after the marriage in the purchase of real estate and farming implements, and that by reason of the use of said money and property and by reason of work and labor done and performed by both spouses, all the lands described in the findings were bought.

It is apparent from the record that the court felt that it could not trace with sufficient accuracy any of the plaintiff's antenuptial holdings into any specific piece of property now owned by the plaintiff so as to declare it to be his separate property; yet it did consider the fact that plaintiff had this property at the time of his marriage, and that it and its increase were intermingled in the common holdings, a circumstance to be considered by it in making a fair and equitable division of the property. With this in mind, and without deciding that any specific piece of land was separate property, the court awarded to the plaintiff the 107 acres of land in severalty. We discover no error or abuse of discretion in so holding and acting. Nor was the amount thus awarded to plaintiff in severalty large in comparison with the total value of the estate. In appellant's brief it is stated that the entire property of the parties had a value of about \$58,156, and that the 107 acres awarded to the plaintiff were worth \$9,560. It thus appears that by the decree the plaintiff was awarded \$33,858, and the defendant \$24,298; or, reduced to a percentage basis, the plaintiff was awarded about 58 per cent. and the defendant 42 per cent. of the entire holdings. The court has found that the antenuptial holdings of plaintiff were used in acquiring this property and were of the value of \$3,150. Allowing interest on this fund for 40 years at 4 per cent., compounded annually (which is certainly low enough), and it would now amount to \$15,330.50. With all these facts before it, the court was fully justified in disposing of the property as it did, and appellant has no just grounds of complaint.

[5] 3. Appellant takes the position that the court must divide the community property in some proportion between the spouses, that the Code so provides, and it has no authority to award all of the 107 acres to the plaintiff, as such act was not a division. In adjusting the property rights of the parties the court may consider all the common property as one asset or fund, composed of separate units, and can often more equitably settle and adjust matters by giving all of designated and described pieces of property to one party than by awarding to each an undivided interest in all. We know of no principle of law or practice that would forbid such a course of action. The court is no more bound to award to each spouse an undivided interest in each piece of land than it is to award to each an undivided interest in each cow or horse.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

BROWN v. CANTY. (Civ. 1507.)

(District Court of Appeal, Third District, California. July 31, 1916.)

APPEAL AND ERROR §516, 522(1)—REVIEW—QUESTIONS PRESENTED.

Where defendant appealed from the judgment without any bill of exceptions or statement, assignments of error that plaintiff, whose title was quieted, had knowledge of his claim by reason of a *lis pendens* filed in action against plaintiff's grantor, and that the court refused to compel the grantor and others to intervene, cannot be considered, though exhibits and orders were incorporated in the record; for neither minute orders nor evidence are part of the judgment roll as defined by Code Civ. Proc. § 670, and so there was nothing to support the assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2332-2310, 2367, 2368, 2370, 2371; Dec. Dig. §516, 522(1).]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Rebecca Brown against D. J. Canty. From a judgment for plaintiff, defendant appeals. Affirmed.

E. A. Williams, of Fresno, for appellant. Burns & Watkins, of Fresno, for respondent.

ELLISON, Judge pro tem. Plaintiff brought this action to quiet her title to a quarter section of land in Fresno county. Her complaint alleged facts showing the legal title to the land to be in her. The defendant, for answer, denied plaintiff's title. He then alleged a certain contract entered into between him and certain other parties, viz., J. E. Hughes, T. E. Braly, and W. J. Hotchkiss, the result of which was that Hotchkiss had purchased the land described in the complaint from the state of California, but had the state make its deed to one Bart-

hold, in trust for said Hotchkiss and this defendant; that plaintiff had full knowledge of defendant's interest in said land at the time she purchased it from Hotchkiss, to whom Barthold had deeded it. He alleged his interest in the land was an undivided four-tenths, and that, notwithstanding plaintiff had knowledge of his claim and interest, she obtained a deed from said Hotchkiss and said Barthold conveying to her said quarter section of land. Judgment went for the plaintiff, and the defendant appeals from the judgment without any bill of exceptions or statement. The complaint states a cause of action, and the findings support the judgment.

The only points relied upon for a reversal are: (1) That defendant having introduced in evidence a *lis pendens* filed in an action entitled *Canty v. Hotchkiss* stating defendant's right therein to this same land (2) this was notice to Mrs. Brown and to the court that defendant claimed an interest in the land, and that the plaintiff knew of his claim when she bought the land from Hotchkiss; and this all being true (3) the court erred in denying defendant's motion to compel Hotchkiss and Barthold to intervene herein in order that the judgment might bind all parties interested in the land; and (4) that no valid judgment could be entered without their presence. But, unfortunately for appellant, the court is unable upon this record to consider any of these suggested matters. Upon this appeal we may only consider such papers and orders as are declared by the Code to constitute a part of the judgment roll. None of the evidence introduced upon the trial by either party is a part of the judgment roll. Therefore we do not know what evidence the plaintiff introduced, we do not know that defendant introduced the *lis pendens* referred to, nor that he made any proof of the existence of the contract set up in his answer, nor that he made any motion for an order that Hotchkiss and Barthold be compelled to intervene (see section 670, Code Civ. Proc.), nor that the court denied any such motion. It is true there are certain exhibits and orders printed in the transcript, but they have no place therein, not being any part of the judgment roll. This is so thoroughly settled that a citation of authority is unnecessary, but one case will be referred to. In *De Pedrorena v. Hotchkiss*, 95 Cal. 636, 638, 30 Pac. 787, 788. It is said:

"There are two minute orders printed in the transcript, from one of which it appears that the default was set aside and defendant allowed to answer upon certain stated conditions, and from the other that the answer filed was stricken out, because defendant had failed to comply with the conditions upon which the default was set aside, and he was permitted to answer. The statute does not make these minute orders part of the judgment roll. Code Civ. Proc. § 670. They are therefore improperly in the record—

there being no bill of exceptions—and we cannot notice the points attempted to be made in regard to them.”

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. LETOLLE. (Cr. 497.)

(District Court of Appeal, Second District, California. July 27, 1916.)

1. CRIMINAL LAW § 369(8)—EVIDENCE—ADMISSIBILITY—OTHER OFFENSES.

In prosecution for incest with one daughter, another daughter of accused could not testify to his sexual relations with her, as tending to show disposition to commit such a crime, such testimony being of a separate offense, and not corroboration of the other daughter, who by her consent became an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823; Dec. Dig. § 369(8).]

2. WITNESSES § 405(2)—CONTRADICTION OF ACCUSED—EVIDENCE—ADMISSIBILITY.

Such testimony was not rendered admissible, where defendant, to show bias, had testified as to trouble with his daughters, by his statement on cross-examination, under his objection, that the only trouble he had with his daughters was over their staying out late at night, that being immaterial, as the daughter testifying was not then a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405(2).]

8. CRIMINAL LAW § 635—RIGHT TO PUBLIC TRIAL.

Under Const. art. 1, § 13, giving persons accused the right to public trial, the public cannot be wholly excluded, though some may be excluded to prevent crowding and disorder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452; Dec. Dig. § 635.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Jack Letolle was convicted of incest, and from the judgment and order denying motion for new trial, he appeals. Reversed.

Guy Eddle, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted and sentenced to imprisonment for the crime of incest committed with his eldest daughter. His appeal is from the judgment and from an order denying his motion for a new trial.

[1] Testimony directly supporting the charge was given by the prosecuting witness, the daughter of the defendant. It was claimed by the defendant that according to her own testimony she had consented to the acts constituting the ground of complaint, and that, she being therefore an accomplice, the conviction cannot be sustained without corroborative evidence tending to connect the defendant with the commission of the offense. The only corroborative evidence found in the record is contained in the testimony of Mary Letolle, a sister of the prosecuting witness, Lucy Letolle, which testimony was ad-

mitted over objections thereto. This witness was called by the prosecution as a witness in rebuttal, and was questioned about trouble between herself and her father at about the time of his arrest. This question was asked by the district attorney:

“About that time and for some time previous thereto, had you had trouble with him with regard to his acts of sexual intimacy with you?”

After an objection had been made and overruled, she answered that question in the affirmative. Evidence was thus placed before the jury not only by the prosecuting witness that the defendant had committed the crime of incest with her, but also by the daughter Mary that defendant had committed a like crime with her. Unless this was corroboration of Lucy's testimony respecting the offense charged in this action, there is no corroboration in the record. The jury may have believed Lucy's testimony as to the defendant's acts, but that those acts were done with her consent, and that she was an accomplice therein; and, in that event, their verdict was necessarily based also upon the testimony of Mary which tended to show the defendant's disposition to commit that kind of a crime by showing that he had committed such a crime with a person other than the one named in the information. The decisions in this state are uniform to the effect that such evidence in prosecutions for crimes of this class is not admissible. *People v. Bowen*, 49 Cal. 654; *People v. Stewart*, 85 Cal. 174, 24 Pac. 722; *People v. Elliott*, 119 Cal. 593, 51 Pac. 955.

[2] It is suggested, however, that the testimony was properly admitted in rebuttal, in that the defendant had opened the door therefor by testifying that he had had trouble with his daughters Lucy and Mary because of their staying out late at night against his wishes, and that that was the only trouble he ever had with his daughters. Examination of the record does not support this view of the defendant's testimony. In order to show animus of the prosecuting witness against him, the defendant testified that he had had trouble with Lucy, and incidentally further testified that he had trouble with both Lucy and Mary, on the subject of their staying out late at night. It was only upon cross-examination and under adverse rulings upon his objections thereto that the defendant stated that he had not had any other trouble with his daughters. As to the daughter Mary, this was immaterial to the case. She had not been a witness, and therefore had given no testimony for or against the defendant. In *People v. Turco*, 156 Pac. 1001, we had occasion to examine the authorities bearing upon the limits of the right of cross-examination of a defendant in a criminal case, and the limits of the right to introduce rebuttal testimony based upon facts elicited by such cross-examination. The principle was recognized that the people have the right, on the

cross-examination of a defendant, to draw out anything which will tend to contradict or modify his testimony given on his direct examination, and that such testimony of the defendant may be met by testimony in rebuttal. In the present case, however, we do not think that the circumstances shown by the record are such as to warrant the application of the rule stated. The testimony of the witness Mary Letolle, to which we have referred, should have been excluded.

[3] At the beginning of the trial in this case the court made an order, which was thereafter enforced, requiring all persons other than those directly connected with the trial to withdraw from the courtroom, and tried the case "behind closed doors." We do not doubt the right of the court to regulate the admission of the public to the courtroom in any appropriate manner in order to prevent overcrowding or disorder, but the right does not exist to wholly exclude the public. Under article 1, § 13, of the Constitution of this state, the party accused in a criminal prosecution is given the right to a public trial. Referring to a similar order made in *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108, the Supreme Court said:

"This was a novel procedure, and has no justification in the law of modern times. We know of no case decided in this country supporting the course of procedure here pursued. It is in direct violation of that provision of the Constitution which says that a party accused of crime has a right to a public trial."

No objection was made by or on behalf of the defendant to this course of procedure by the court, and the point is made for the first time on this appeal. In view of our conclusions upon the first question discussed herein, it seems unnecessary to base our decision upon the proposition that the defendant was deprived of his right to a public trial. See, also, *People v. Swafford*, 65 Cal. 223, 3 Pac. 809, and the comment thereon in 103 Cal. 245.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

GALLO v. GALLO. (Civ. 1513.)

(District Court of Appeal, Third District, California. July 31, 1916.)

1. ADVERSE POSSESSION § 114(1)—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit to quiet title, where defendant claimed by adverse possession, findings against his acquisition of adverse title held warranted.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. § 114(1).]

2. ADVERSE POSSESSION § 13—ESSENTIALS—HOSTILITY.

For possession to be adverse it must be open and notorious with hostile intent, which hostile claim must be communicated to the owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. § 13.]

3. ADVERSE POSSESSION § 94—PAYMENT OF TAXES—RUNNING OF LIMITATIONS.

Under Code Civ. Proc. § 325, declaring that in no case shall adverse possession be considered established unless the land has been occupied and claimed for a period of five years continuously, and the adverse holder or his predecessor has paid all taxes, redemption of land from tax sales is not payment of taxes; for during the period of delinquency there was no payment, and the true owner might have forborne suit for that reason.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 528, 529; Dec. Dig. § 94.]

4. ADVERSE POSSESSION § 85(2) — ADVERSE HOLDING—RELATIONSHIP OF PROCEEDS.

In determining whether a possession was adverse, the close relationship of the parties may be considered.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 501-503; Dec. Dig. § 85(2).]

5. APPEAL AND ERROR § 931(1)—REVIEW—PRESUMPTIONS.

In reviewing findings of fact by the trial court, evidence in support of such findings will be presumed true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8762; Dec. Dig. § 931(1).]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Annie Gallo against A. Gallo. From a judgment for plaintiff, defendant appeals. Affirmed.

Webster, Webster & Blewett, of Stockton, and Farnsworth & McClure, of Visalia, for appellant. A. H. Ashley, of Stockton, and Power & McFadzean, of Visalia, for respondent.

ELLISON, Judge pro tem. Plaintiff brought this action to quiet her title to the northeast quarter of a certain section of land situated in Tulare county, and obtained judgment as prayed for. The defendant appeals. On the trial the plaintiff introduced as evidence of her title to the quarter section a patent from the United States to her husband, Giacomo Gallo, dated August 9, 1897, and a deed from the latter to her, of August 12, 1911, conveying the land. The defendant (who is a brother of said Giacomo Gallo), as a defense alleged that he had obtained title to the land by adverse possession, and made no other claim. Upon this appeal the defendant insists that the findings of the court to the effect that he had not acquired title by adverse possession are not sustained by the evidence, and this is the only question presented.

[1, 2] The record shows that at about the time plaintiff's grantor obtained his patent for the northeast quarter of the section the defendant obtained a patent for the northwest quarter of the same section. Evidently the land was considered of little value at the time. Neither brother lived nor resided upon the land covered by his patent for any long period after obtaining it, and neither has lived on any part of the half section for many

years. (The plaintiff's quarter section adjoins the defendant's on the east, and the two constitute the north half of the section.) The defendant testified that he built a fence on the east side of the land in dispute about 1903, and during the same year inclosed the half section. The fence was of posts and three wires. When he first built the fence he leased the half section to one Goodale for two years at a rental of \$9 per year. "He agreed to pay the taxes and build the fence." He pastured some cattle on it for two years. At some date, not stated, defendant leased the half section to a man, whose name he cannot recall, under a verbal lease for five years. He paid the rent, \$40, for one year and no more, and defendant does not know how long he was on the land, but never saw him after the first year. In 1911 he leased the land to one Howard for five years under a written lease. This action was begun in October, 1912. The defendant never resided on the land in dispute, and never made any use of it except as above stated. The land is in Tulare county, and plaintiff's grantor, during all this time, lived in Stockton, and defendant testified his brother never knew he was leasing the land. He also testified that he had the whole half section assessed to himself and paid all taxes on it for at least 15 years. The evidence as to the payment of taxes is that they went delinquent in 1905, and that no taxes were paid in 1906, 1907 and 1908 until 1909, when the defendant redeemed the land from tax sales.

The witness John Gallo testified that in the year 1908 the defendant told his father (the husband of plaintiff) that he wanted some money for taxes, and his father laughed and said to him: "What rents are you getting from the land?" He said: "Not much." So father said to him: "If you will pay all the taxes, what is left you can keep for your troubles."

It is very clear to us that the defendant did not sustain his plea of adverse possession. The elements required to make out an adverse possession sufficient to constitute a defense under the statute of limitations are clearly stated in *Unger v. Mooney*, 63 Cal. 595, 49 Am. Rep. 100, and need not here be repeated. In said case it is said:

"The adverse character of the possession must in every case be manifested to the owner. The owner must be notified, in some way, that the possession is hostile to his claim, or the statute does not operate on his right. * * * As was said in the case cited in [Trustees of Town of East Hampton v. Kirk] 84 N. Y. [215, 38 Am. Rep. 505] per Andrews, J., 'the object of the statute defining the acts essential to constitute an adverse possession is that the real owner may, by unequivocal acts of the disseisor, have notice of the hostile claim and be thereby called

upon to assert his legal title.' Hence an open and notorious occupation with hostile intent is a necessary constituent of an adverse holding."

The defendant did not personally occupy the land. No one nor all of the persons to whom he leased it ever occupied it for any five consecutive years.

[3] The record does not show that taxes were paid for any one period of five years. Under the decisions construing subdivision 2 of section 325 of the Code of Civil Procedure, it is held that redeeming land from tax sales is not the payment of taxes contemplated by the law as an element of adverse possession.

"If it [the payment of taxes] is an element in the adverse possession tending to show good faith, certainly during those years in which the taxes have not been paid the possession lacks an essential element required in the statute. During all the years in which the delinquency was allowed, the true owner might forbear suit because of his knowledge that the person in possession had not paid taxes, thereby indicating that he was not holding adversely." *McDonald v. McCoy*, 121 Cal. 73, 53 Pac. 427.

[4] The relationship of the parties has a bearing and may well be considered. Two brothers owning adjoining land of little value—far from where they are residing—used only for grazing stock. One brother puts a wire fence around both holdings and leases it for short periods. Such act from a stranger, owning no adjoining land, would have far greater significance, as showing a hostile holding, than when being done by a brother owning the adjoining land.

[5] In considering the case on appeal, it will be presumed that all testimony introduced at the trial tending to support the findings of the trial court was accepted by it as true. The testimony of John Gallo, above referred to, wherein he states that in 1908 the defendant asked his father for money for taxes and the latter said to him, "If you will pay the taxes, what is left you can keep for your troubles," is sufficient in itself to negative all inferences of an adverse and hostile holding, and clearly sufficient to show that plaintiff's grantor was not advised of any hostile claims, but rather points to an understanding between brothers for their mutual benefit. See *Mattes v. Hall*, 28 Cal. App. 361, 152 Pac. 436. Considering the family relationship of the parties, the language used by the District Court of Appeal in *Glowner v. De Alvarez*, 10 Cal. App. 196, 101 Pac. 433, seems not inappropriate for quotation in this connection:

"There are no equities in favor of a party seeking by adverse holding to acquire the property of another."

The judgment is clearly right and is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

Ex parte YEE KIM MAH. (Cr. No. 363.)
(District Court of Appeal, Third District, California. Aug. 1, 1916.)

1. CRIMINAL LAW §90(3)—COURTS—JURISDICTION.

A justice of the peace is without jurisdiction of an offense, where the punishment prescribed is imprisonment in the state penitentiary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 133; Dec. Dig. §90(3).]

2. CRIMINAL LAW §84(1)—JURISDICTION—IMPLIED REPEAL.

The Whitney Act (St. 1885, p. 213) provides that in cities having over 30,000 and under 100,000 inhabitants judicial power shall be vested in the police court held by the city justices, which court shall have exclusive jurisdiction of certain public offenses committed within the city, including all misdemeanors punishable by fine or imprisonment, or both. In 1905 by (St. 1905, p. 706), section 1425, relating to the jurisdiction of justice courts in criminal cases, and providing that such courts shall have jurisdiction of all misdemeanors punishable by fine not exceeding \$500 or imprisonment not exceeding six months, or both, committed within their respective counties, was added to the Penal Code. Code Civ. Proc. § 115, which contained identical provisions, was repealed by St. 1907, p. 682. *Held*, that in view of the enactment and repeal of such sections the provisions of the Whitney Act, relating to cities falling within its provisions, were repealed, and any justice of the county has jurisdiction of misdemeanors committed within the city.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115, 120, 121; Dec. Dig. §84(1); Statutes, Cent. Dig. § 353.]

3. COURTS §41—ESTABLISHMENT—CHARTER.

Prior to the enactment of Const. art. 11, § 8½, police courts could not be established by freeholders' charters.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 162, 181-183; Dec. Dig. §41.]

4. CRIMINAL LAW §84(1)—POLICE COURTS—JURISDICTION.

The freeholders' charter of the city of Sacramento approved in 1911 (St. Extra Sess. 1911, p. 305) creates a police court for the city with jurisdiction of all misdemeanors enumerated by the general laws or ordinances of the city and all crimes cognizable by the justice of the peace. *Held*, that the approval of such charter did not, there being no provision that the jurisdiction of such police court should be exclusive, repeal Pen. Code, § 1425, so as to deprive a justice of the county of jurisdiction over misdemeanors committed within the limits of the city.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115, 120, 121; Dec. Dig. §84(1); Statutes, Cent. Dig. § 353.]

In the matter of the application of Yee Kim Mah for a writ of habeas corpus. Writ discharged, and petitioner remanded.

John Q. Brown, of Sacramento, for petitioner. Lee Gebhart, Hugh B. Bradford, Dist. Atty., and S. F. Otis, Asst. Dist. Atty., all of Sacramento, for respondent.

HART, J. In the justice's court of Riverside township, in the county of Sacramento, the petitioner was charged with and convicted of a misdemeanor growing out of the violation by him of the legislative act en-

titled "An act to regulate the sale of poisons," etc., and, claiming that the judgment of conviction is void because the court before which he was tried was without jurisdiction to try the action against him, he seeks his release from the custody of the sheriff of Sacramento county, by whom he is now being detained by authority of the said judgment of conviction and sentence thereupon imposed upon him, through the writ of habeas corpus.

[1] In the outset it may be observed that, although the act of the violation of certain of whose provisions the petitioner was adjudged guilty prescribes penalties for the first and second convictions thereunder which are within the jurisdiction of justices' or police courts to impose, yet for a third conviction of the same person for the violation of the provisions thereof, the punishment prescribed is by imprisonment in the state prison for not less than one year and not more than five years. It hence follows that, where a person is charged with the violation of the provisions of said act, together with two previous convictions thereunder, jurisdiction to try the person so offending is in the superior court. *People v. Sacramento Butchers' Association*, 12 Cal. App. 471, 478, 107 Pac. 712. It is, however, conceded by the petitioner that the conviction of which he here complains was of what is popularly termed a simple or "high-grade" misdemeanor, of which justices' and police courts have jurisdiction, and this concession necessarily carries with it the further concession that he was not charged with and convicted of a violation of the provisions of the statute with two prior convictions thereunder.

[2] The point made by the petitioner, however, results from the following facts: That, as the petition shows and the demurrer interposed thereto by the respondent admits, the crime of which he was convicted was committed within the limits of the city and the judicial township of Sacramento, said township being co-extensive, territorially, with the municipal limits of said city; that Riverside township, in the county of Sacramento, in which the petitioner was charged with, tried for, and convicted of the offense for which he is now being restrained of his liberty, is not embraced within or a part of the city of Sacramento. In other words, and in brief, the petition shows that the crime of which the petitioner stands convicted was committed within the municipal limits of the city of Sacramento, and that he was charged, prosecuted and convicted in a judicial township territorially independent of and distinct from the said city and township. It is the contention that under the terms of the so-called Whitney Act (St. 1885, p. 213), the police court of the city of Sacramento has sole and exclusive jurisdiction of all misdemeanors punishable by fine or imprison-

ment, or by both such fine and imprisonment, committed within the limits of said city, and that therefore a justice's court whose township or territorial jurisdiction is outside or not embraced within the limits of said city cannot legally acquire or exercise jurisdiction of misdemeanors so committed. It follows, so the argument goes, that the conviction of the petitioner in the justice's court of Riverside township is *coram non iudice* and void.

The Whitney Act, section 1, provides:

"The judicial power of every city having thirty thousand and under one hundred thousand inhabitants, shall be vested in a police court to be held therein by the city justices, or one of them, to be designated by the mayor, but either of said city justices may hold such court without such designation, and it is hereby made the duty of said city justices, in addition to the duties now required of them by law, to hold said police court.

"Sec. 2. The police court shall have exclusive jurisdiction of the following public offenses committed in the city: First, petit larceny. Second, assault or battery, not charged to have been committed upon a public officer in the discharge of official duty, or with intent to kill. Third, breaches of the peace, riots, affrays, committing willful injury to property, and all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment. Fourth, of proceedings respecting vagrants, lewd, or disorderly persons."

The third section invests said court with "exclusive jurisdiction of all proceedings for violation of any ordinance of said city, both civil and criminal, and of an action for the collection of any license required by any ordinance of said city." Said court is also authorized by said act to hear and conduct the preliminary examination of charges of which the superior court has jurisdiction and to commit the offenders to trial in said last mentioned court.

The argument advanced in support of the position that from the foregoing provisions of the Whitney Act the city of Sacramento, as a municipal corporation, derives all the judicial power with which it is invested is, so it is asserted and contended, that the census of the year 1910 disclosed that said city had acquired a population of over 30,000 inhabitants, but still contained less than 100,000 inhabitants, and that said city, therefore, after the said census was taken and upon the official declaration thereof, was automatically shifted into a class which brought it within the scope of the Whitney Act with respect to its judicial power; that said city is still a city having a population of over 30,000 and under 100,000 inhabitants and still subject to the provisions of the Whitney Act regulating the power and jurisdiction of the police courts in cities of that class.

Varying legislation respecting justices' and police courts, their power and jurisdiction, has, from time to time, been enacted since the adoption of the Codes in 1872; but, in deciding the question submitted in this proceeding, it is not necessary to review said legislation or enter into a detailed examina-

tion of the changes and amendments so made in the law with respect to those courts. It is sufficient if we find, as we think we have correctly found, that the provisions of the Whitney Act, even if at any time they were applicable to the city of Sacramento, have been, in so far as they affected the question of the jurisdiction of the police court of said city, superseded by legislation enacted subsequently to the passage of said act.

The Legislature of 1905 (St. 1905, p. 705) added a new section to the Penal Code, numbered 1425, which is now a part of said Code, and which prescribes and regulates the jurisdiction of justices' courts in criminal cases. It is by said section provided, among other things, that said courts shall have jurisdiction of "all misdemeanors, punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment," committed within their respective counties. That section or the precise provisions thereof were embraced within section 115 of the Code of Civil Procedure (see Deering's Pocket Edition, Code Civ. Proc., of year 1906); but the Legislature, doubtless viewing the subject-matter of said section as coming strictly and hence more appropriately within the purview, nature, and purpose of the Penal Code, adopted said section into and as a part of the latter Code in the year 1905, as stated. In 1907, the Legislature, at its regular session, in furtherance of its manifest object of making the provisions of the section a part of the criminal law system of our state, repealed section 115 of the Code of Civil Procedure. Stats. 1907, p. 682.

While it is true, as seen, that the provisions of section 1425 of the Penal Code were, as section 115 of the Code of Civil Procedure, a part of the law of the state and no doubt governed in the matter of the jurisdiction of justices' courts (unless they were or had been superseded by some subsequent enactment) prior to and at the time said section 1425 of the Penal Code was enacted, it is also obviously true that the enactment of said last mentioned section constituted and involved an act of new and independent legislation, or an act no different, in a legal sense, from any other legislative act involving legislation upon a subject upon which there had theretofore been no legislation by the Legislature. The Legislature, in other words, in enacting section 1425, put an entirely new section into the Penal Code, notwithstanding that the identical section had been and then was the law of the state, expressed in the form of a section of another of the four Codes. And in so enacting said section, the Legislature gave vent to its latest utterance or expression upon the subject to which the section relates. The effect of the enactment of the section was therefore to repeal at least so much of the provisions of the Whitney Act as pretended or purported to vest in the police court of the city of Sacramento

"exclusive jurisdiction of * * * all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment," committed in said city, assuming only for the purposes of this case that by the provisions of the Whitney Act the power and jurisdiction of the police court of said city had theretofore been governed and regulated. This is only to say that section 1425 of the Penal Code is now the law which is controlling in the matter of the jurisdiction of justices' courts, and that, unless that section runs counter to some subsequent legislation upon the subject, those courts have jurisdiction of any of the offenses therein enumerated committed anywhere within their respective counties. It follows, of course, subject, however, to the qualification that so much of section 1425 as confers such jurisdiction has not, since its enactment, been repealed either expressly or by necessary implication, that it was within the lawful jurisdiction of the justice's court of Riverside township to try the petitioner for the misdemeanor charged to have been committed by him within the limits of the city of Sacramento, said township being, as seen, as is the city of Sacramento, within the county of Sacramento.

[3, 4] The only legislation to which our attention has been directed or which we have in mind, purporting to prescribe the powers and jurisdiction of the police court of the city of Sacramento, and which has been had since the enactment of section 1425 of the Penal Code, is to be found among the provisions of the freeholders' charter of the city of Sacramento, approved by the Legislature at its extra session in the year 1911. *Stats. & Amend'ts to the Codes, Extra Session, 1911*, p. 305. But the provisions of said charter relating to the powers and jurisdiction of the police court of said city are in no manner or degree repugnant to or inconsistent with the powers and jurisdiction of justices' courts as conferred by section 1425 of the Penal Code. And we think it is very plain that the judicial scheme established by said charter was intended to and does supersede or take the place of any previously established scheme for a police court for said city. Article 12 of the charter of said city contains, among other provisions, the following:

"Sec. 162. There is hereby constituted a police court in and for the city of Sacramento. * * *

"Sec. 164. Said police court shall have jurisdiction: 1. Of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state of California. * * * 3. Of the examination and commitment of persons charged with the commission of any offense that may be prosecuted by indictment or information. 4. Such other criminal jurisdiction as is, or may hereafter be conferred by law upon police courts, justices' courts, or justices of the peace. * * *

The validity of said article of the said charter is not questioned here, nor could it be

successfully. The authority for the establishment of police courts by freeholders' charters is in section 8½, art. 11, of the Constitution. That authority was first conferred by the people through the Constitution by an amendment added to that instrument in the year 1896. Section 8½, art. 11. Prior to the adoption of that amendment courts could not be established by a freeholders' charter, or by a mere concurrent resolution, the means whereby the state legislative body approves such a charter. *Ex parte Sparks*, 120 Cal. 395, 52 Pac. 715. Parenthetically, it may be stated that the said amendment has since been added to by other amendments adopted by the people, which, however, in no way affect the question submitted here.

By the provisions, then, of the charter of the city of Sacramento we must be guided in determining the powers and jurisdiction of the police court of said city, and whether the jurisdiction so conferred is made exclusive as to all misdemeanors cognizable by justices' courts committed within the borders of said city. Under cardinal canons of construction, the article in said charter creating and establishing a police court in said city supersedes or necessarily repeals, so far as the city of Sacramento is concerned, any provisions of any previous section purporting to confer jurisdiction upon said court. It is very clear that the provisions of said charter setting up a police court in said city do not pretend, nor can they reasonably be construed to have been intended, to confer upon the court so established exclusive jurisdiction of all simple misdemeanors committed within the limits of said city. The word "exclusive" is nowhere used in those provisions. It is obvious to our minds that the most that was intended by those provisions of the charter, so far as are concerned misdemeanors committed under the general laws of the state, is that the police court of said city shall have concurrent jurisdiction with the justices' courts of the county of such misdemeanors when they are committed within the limits of said city. This clearly appears to be true from the language of the first subdivision of section 164, viz.:

"Said police court shall have jurisdiction of all misdemeanors enumerated by the general laws * * * and of all other crimes cognizable by justices' courts and courts of justices of the peace"

—clearly meaning, not that thus the several justices' courts of the county of Sacramento shall not exercise the jurisdiction over misdemeanors committed anywhere within the territorial boundaries of the county of Sacramento, including, of course, the city of Sacramento, as provided by section 1425 of the Penal Code, but that, as stated, the police court may also exercise, along with the justices' courts of the county acting upon the authority of the mentioned section of the Penal Code, jurisdiction over "all misdemeanors enumerated by the general laws of the

state" committed within the limits of said city. We can perceive no reasonable ground upon which any other construction can be given the provisions of the charter under consideration.

It will not, of course, be doubted that but for that particular provision of the Sacramento city charter which gives to the police court its jurisdiction over misdemeanors under the general laws, or a like provision in some general law of the state, the police court of said city would not have jurisdiction over such misdemeanors or of "other crimes cognizable by justices' courts," whatever those "other crimes" might be if not coming within the category of misdemeanors; for the powers and jurisdiction of a police court proceed from special legislative grant only, and when a statute or a charter, legally sanctioned by the Legislature, undertakes to establish such a court and to grant to it the requisite powers and jurisdiction for its limited purposes, such court's powers and jurisdiction must be measured by and remain within the terms of the grant.

Our conclusion is, as must be manifest from the views herein expressed, that, if the Whitney Act ever applied to the police court of the city of Sacramento, its provisions, so far as they purport to give that court exclusive jurisdiction of misdemeanors punishable by fine not exceeding \$500 or imprisonment not exceeding six months, or by both such fine and imprisonment, committed within the limits of the city of Sacramento, have been, so far as said city is concerned, repealed or superseded by the more recent legislative mandate on that subject as expressed in section 1425 of the Penal Code; that, moreover, said provisions have been superseded by the provisions of the freeholders' charter of said city, adopted and approved in the year 1911, establishing a police court therein and prescribing and regulating its powers and jurisdiction, and that said charter provisions are not in conflict with or repugnant to any provision of section 1425 of the Penal Code. It follows, of course, that the justice's court of Riverside township did not transcend its lawful authority and jurisdiction in taking cognizance of and trying the case made against the petitioner by the complaint charging him with a misdemeanor under the general law of the state.

Accordingly, the demurrer to the petition is sustained, the writ discharged, and the petitioner remanded.

I concur: CHIPMAN, P. J.

HOPKINS v. SANDERSON et al. (Civ. 1955.)
(District Court of Appeal, Second District, California. Feb. 14, 1916.)

APPEAL AND ERROR §417(2)—NOTICE OF APPEAL—SUFFICIENCY—NAMES OF PARTIES.

In an action wherein plaintiff obtained a judgment against the several defendants named

as composing the board of trustees of a high school district, a notice of appeal bearing the title of the case as against one named defendant, "et al.," without naming them, and stating in the body thereof "that the defendants above named" hereby appeal, was sufficient, in view of the liberal rule of construction which must be applied to such notices, and the fact that the appeal must necessarily be made on the part of all the defendants or none at all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2142; Dec. Dig. §417(2).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action for mandamus by Gwynn E. Hopkins, otherwise known as Mrs. M. P. Hopkins, against Charles L. Sanderson and others, composing the Board of Trustees of the Whittier Union High School District. Judgment for plaintiff, and defendants appeal. Motion to dismiss appeal denied.

See, also, 159 Pac. 1064.

A. J. Hill, Co. Counsel, and Hugh Gordon, Jr., Deputy Co. Counsel, both of Los Angeles, for appellants. M. P. Hopkins, of Los Angeles, for respondent.

JAMES, J. Motion to dismiss appeal for alleged lack of sufficient notice. The respondent, as appears both from the affidavit of her attorney and the certified copies of documents presented by defendants, sued for and obtained judgment of mandamus against Charles L. Sanderson and four other persons mentioned in the title of the suit by name and as composing the board of trustees of the Whittier union high school district. A notice of appeal was given. That notice bore at its head the title of the case in the following form:

"Gwynn E. Hopkins, Otherwise Known as Mrs. M. P. Hopkins, Plaintiff, v. Charles L. Sanderson et al., Defendants."

In the body of the notice it was stated:

"That the defendants above named desire to appeal and do hereby appeal * * * from the whole of that certain order * * * and from the whole of the judgment of the aforesaid superior court; * * * and the defendants hereby request that the transcript of the testimony and evidence taken * * * be made up and prepared."

The point upon which a dismissal of the appeal is asked is that the notice was insufficient to institute an appeal on behalf of all of the defendants who were sued in the action, as they are not named in the title which appears at the head of the notice of appeal. As has already been stated, the defendants compose the board of trustees of the Whittier union high school district and were sued jointly as such. Taking the notice of appeal in its substance, it seems very clear that the intention was made manifest to take an appeal on behalf of all of the defendants. There would be no room for question as to the sufficiency of this notice, had the defendants, after designating the title as they have at the head of their notice of appeal, proceeded to state "that

the defendants in the above-entitled action desire to appeal and do hereby appeal." And in view of the liberal rule of construction which must be applied to such notices in order to effectuate the right of the parties to an appeal, we feel it but reasonable to hold that the language employed by the defendants in the body of their notice, wherein the words are used, "the defendants above named," should be construed as indicating all of the defendants sued in the action and against whom judgment was entered. As sustaining the view that these notices should be liberally construed, we refer to the decision in the case of *Estate of Nelson*, 128 Cal. 242, 60 Pac. 772, in which case the Supreme Court suggests that where a notice of appeal is imperfect in a matter not deemed of vital substance, leave to correct under the permission given by section 473, Code of Civil Procedure, might be taken.

There is hardly any room for the claim in this case that the plaintiff could have been misled by the notice of appeal and left in doubt as to which of the parties intended to seek a review of the judgment awarded to her. The defendants composed an official board and their interest in the action was, in that particular, joint. Necessarily, as plaintiff's counsel himself suggests, the appeal should be on the part of all of the defendants or none at all. Clearly, then, where the plural form was made use of in the wording of the notice of appeal, the intention was apparent that all of the defendants should be affected by the proceedings.

The motion to dismiss the appeal is denied.

We concur: CONREY, P. J.; SHAW, J.

HOPKINS v. SANDERSON et al. (Civ. 1955.)
(District Court of Appeal, Second District, California. July 24, 1916.)

SCHOOLS AND SCHOOL DISTRICTS §63(1) —
ENGAGEMENT OF LIBRARIAN—ACCEPTANCE—
TIME—STATUTE.

Where the board of trustees of a school district made an offer to plaintiff to employ her as librarian, and the notice thereof stated that it was given in conformity with School Code, Cal. § 1617, and that an acceptance thereof was required thereunder within twenty days, and that failure to so accept rendered the position vacant, regardless of whether the school code required such notice of acceptance in case of a librarian, the board could require a notice of acceptance, so that plaintiff, not having accepted within the time limited, was not entitled to the salary attached to the position.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 149, 150; Dec. Dig. §63(1).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action for mandamus by Gwynn E. Hopkins, otherwise known as Mrs. M. P. Hopkins, against Charles L. Sanderson and others,

composing the board of trustees of the Whittier Union High School District. Judgment for plaintiff, and defendants appeal. Reversed.

See, also, 159 Pac. 1063.

A. J. Hill, Co. Counsel, Hugh Gordon, Jr., Deputy Co. Counsel, and Frederick W. Smith, all of Los Angeles for appellants. M. P. Hopkins, of Los Angeles, for respondent.

JAMES, J. The plaintiff herein was awarded in the trial court a writ of mandate to compel the payment to her of certain money which she alleged was due her for three months' services as librarian for the Whittier union high school district. She alleges that she was employed by the board of trustees of said district on the 4th day of June, 1915. This employment was denied on the part of the defendants, and it was alleged affirmatively that there had been an offer made to the plaintiff to employ her in the capacity of librarian, said offer being made with the express condition that notice of acceptance should be furnished within twenty days, and that no such notice was furnished within said time. On behalf of the plaintiff there was introduced in evidence a minute record of the board of trustees of a meeting held on June 4, 1915, wherein the employment of various persons as teachers and in other capacities was recorded, the plaintiff being one of the number mentioned in that minute. Upon this proof plaintiff rested as having made out a prima facie case. In the answer a copy of the document which it was alleged had been sent to the plaintiff, notifying her of her employment as librarian, was set out. An affidavit contradicting the genuineness and due execution of the instrument was filed, raising an issue as to that matter. That notice contained the following provision:

"This notice is in conformity with section 1617 of the California School Code. An acceptance of same is required under provisions of same section, within twenty days. Failure to comply with such provision renders the position vacant."

The original notice was not introduced in evidence. When the defendants sought to prove by an officer of the school board that the notice as alleged had been sent to the plaintiff, it was objected that no demand had been made for the production of the original, and that secondary evidence to establish the fact was not proper to be received. There was considerable argument had at the trial upon the question raised by the objection. However, without objection, the president of the school board was permitted to testify that the board of trustees elected the plaintiff with the proviso, as outlined in a notice which was sent to her, that ratification or acceptance by the employé must be signed and returned within

twenty days, or the office would become vacant. It was, therefore, sufficiently made to appear that the employment of the petitioner as made by the board at its meeting of June 4, 1915, was conditional upon notice of acceptance being received within twenty days thereafter. As we have before stated, it was not contended that there was any such acceptance within the time provided; in fact, the express testimony showed that the plaintiff did not attempt to comply with the requirement until after the twenty days had expired. The board then refused to consider her acceptance as being within time and refused to certify to her employment.

It is said that the offer of employment requiring acceptance within twenty days only applied to teachers, citing section 1617 of the Political Code. That section in its provisions relating to the acceptance of school positions does refer only to teachers when it declares:

"Provided further, that any teacher who shall fail to signify his acceptance within twenty days after such election, shall be deemed to have declined the same. * * *

The trial judge seems to have agreed with this contention, when he found that the employment of the petitioner was completed at the time of the meeting of the board of trustees. In support of such determination the argument is that, as the board of trustees was not required in the case of employes other than teachers to demand that notice of acceptance be given within twenty days, the engagement of such other employes would be complete at the time of the adoption of the resolution selecting them. We are not in accord with the trial court in this conclusion. It was undoubtedly within the right of the board of trustees to require a notice of acceptance to be given on the part of the person proposed to be employed; and whether the section of the school law referred to required it or not, it was without question the belief of the board that the section did so require it, and it was their intent, when the notice of selection was sent to the plaintiff, that the employment should not be completed until the plaintiff had notified the board that she would accept their offer. If such a condition were wholly unauthorized, then where the board did make the condition it would follow, not that the contract of employment was completed at the time the resolution was adopted, but that there was no employment, as it was wholly without the intent of the board at that time so to make it complete. We think the trial judge was in error as to his conclusion, and that the plaintiff, not having accepted the position offered to her within the time limited, was not entitled to the salary attached to the position.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

In re SOALE. (Civ. 2032.)

(District Court of Appeal, Second District, California. July 24, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 1011(1)—PRESUMPTIONS.

A Court of Appeal must assume the facts to be as found by the trial court if supported by the evidence, notwithstanding other evidence to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. \Leftrightarrow 1011(1).]

2. TRIAL \Leftrightarrow 163—MOTION FOR NONSUIT—SUFFICIENCY OF MOTION.

Motion for nonsuit, if in general terms, failing to specify any particular defect in the evidence, should be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 371; Dec. Dig. \Leftrightarrow 163.]

3. ATTORNEY AND CLIENT \Leftrightarrow 44(1), 53(1) — DISBARMENT—DEFENSES.

Under Code Civ. Proc. § 282, subd. 5, requiring attorneys to maintain inviolate their clients' confidences, one alleging unprofessional conduct must prove that she reposed confidence in the accused as an attorney, and that he violated such confidence, and it is a good defense, as to transactions prior to 1911, that the client did not deal with him as an attorney; section 287 as then in force failing to provide for disbarment in such cases.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 62, 74; Dec. Dig. \Leftrightarrow 44(1), 53(1).]

4. ATTORNEY AND CLIENT \Leftrightarrow 53(2) — DISBARMENT—DEFENSES.

Evidence held to show that a client reposed confidence in accused as an attorney, so that his violation thereof rendered him subject to disbarment, though he entered no fee charges, and though the transaction was in ordinary business, the profession of attorney not being confined to appearances in court, but including also general counsel.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 75; Dec. Dig. \Leftrightarrow 53(2).]

5. ATTORNEY AND CLIENT \Leftrightarrow 44(1)—DISBARMENT—DEFENSES—"MAINTAIN INVIOLOATE THE CONFIDENCE."

The phrase "maintain inviolate the confidence," as contained in Code Civ. Proc. § 282, is not confined merely to noncommunication of facts learned in the course of professional employment; for the section separately imposes the duty to "preserve the secrets of his client."

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 62; Dec. Dig. \Leftrightarrow 44(1).]

6. ATTORNEY AND CLIENT \Leftrightarrow 53(2)—DISBARMENT—DEFENSES.

Evidence held to show violation of confidence of client so as to subject attorney to disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 75; Dec. Dig. \Leftrightarrow 53(2).]

7. ATTORNEY AND CLIENT \Leftrightarrow 53(2)—DISBARMENT—DEFENSES.

To sustain accusation in disbarment proceeding for alleged violation of client's confidence, it is not necessary to establish all facts as to ultimate loss on the client's part which might be necessary in action for damages for deceit.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 75; Dec. Dig. \Leftrightarrow 53(2).]

8. ATTORNEY AND CLIENT \Leftrightarrow 61—DISBARMENT PROCEEDINGS—INDEFINITE JUDGMENT.

Where attorney was alleged to have defrauded a client by indirect sale of alleged worthless

bonds, under evidence tending to show that they had some value, the court, in judgment of temporary disbarment, should not make reinstatement depend on payment of the accuser's claim; that being too indefinite.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 84; Dec. Dig. ¶ 61.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Proceedings for disbarment of Wilson H. Soale as an attorney at law. From judgment of disbarment, the defendant appeals. Modified and affirmed.

Gray, Barker & Bowen and Wheaton A. Gray, all of Los Angeles, and Bennett & Cary, of Pasadena, for appellant. Schweitzer & Hutton, of Los Angeles, for respondent.

CONREY, P. J. The Los Angeles Bar Association filed in the superior court of Los Angeles county an accusation, verified by the oath of one Grace A. Hilborn, charging that Wilson H. Soale had violated his oath as an attorney and counselor at law by the commission of certain acts therein described. An answer was filed, denying the facts alleged as showing defendant's misconduct. After trial of the issues thus presented the court found that all of the allegations of the accusation are true, and it was ordered:

"That the accused Wilson H. Soale, be deprived of the right to practice as an attorney at law in the state of California for one year from date hereof, and thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid."

From this judgment he appeals.

In September, 1909, and thereafter during the occurrence of the transactions involved in this case, Mr. Soale as a member of the firm of Soale & Crump, was engaged in practice as an attorney and counselor at law in the city of Pasadena, Cal. At the beginning of these transactions the lady now known as Grace A. Hilborn was Grace Hilborn Jenkins, the wife of one Jenkins. In September, 1909, Mrs. Jenkins went into the office of Soale & Crump and entered into a discussion with Mr. Soale concerning her business affairs and her property. As a result of that discussion, as she was expecting to be absent from Los Angeles county for some time, Mrs. Jenkins executed to Mr. Soale and Mr. Crump, as copartners, a general power of attorney which, among other things, authorized them to convey real property for her and in her name. According to her testimony this was done pursuant to a suggestion by Mr. Soale that she would do well to let them care for the property and look out for it for her. Acting under this employment and authority, an exchange of property was negotiated by which, in return for five acres of land owned by Mrs. Jenkins near Alhambra, she acquired \$1,000 and a house and lot in Pasadena which we will designate as the Summit avenue property. The matters complained of in this proceeding relate to an additional transac-

tion in which Mrs. Jenkins received 4,000 shares of stock of a corporation called the Automatic Car Coupler Company, in exchange for the Summit avenue property.

In January, 1910, Mrs. Jenkins consulted Mr. Soale about obtaining a divorce from her husband, and an agreement was made as to the amount of the fee to be paid to Soale & Crump for their services in that matter. Such is the effect of the testimony of Mrs. Jenkins. The complaint in the divorce action was not filed until some months after the first consultation, and it was during that interval that the transactions occurred which are the subject of the complaint herein.

The Automatic Car Coupler Company appears to have been incorporated in the early part of the year 1909, with a capital stock of 50,000 shares of the par value of \$1 each. It was organized in Pasadena, and its principal business grew out of an automatic car coupler invention which was transferred to the corporation in return for certain shares of the stock. At the same time shares of treasury stock were sold at 10 cents per share, and from time to time during the year 1909 the price was advanced by resolution of the directors of the corporation until they had raised it to par for sales by the company. Mr. Soale was one of the early stockholders. He owned 4,000 shares of stock acquired at 10 cents per share. Soale & Crump also owned 1,000 shares of stock. The 4,000 shares belonging to Mr. Soale are the same shares that were transferred to Mrs. Jenkins in exchange for the Summit avenue property, and under the circumstances to which we shall refer. In November, 1909, Mr. Soale caused the 4,000 shares to be transferred to his son-in-law Lewis Sprague, and left the new certificate with Mrs. Sprague for her husband. Soale received no consideration for this transfer.

Dr. D. T. Bentley, a retired physician residing in Pasadena, was engaged in the real estate business. He was acquainted with Mr. Soale, and occasionally consulted him in regard to legal matters. Mr. Soale informed him that Mrs. Jenkins wanted to trade her Summit avenue property for stock. Thereupon Dr. Bentley called upon Mrs. Jenkins and entered into negotiations with her for the transfer of her property to Sprague in exchange for the 4,000 shares which were represented as the property of Sprague. Thereupon Mrs. Jenkins called upon Mr. Soale and told him of Dr. Bentley's proposition, and that she had told Dr. Bentley that she would do just exactly as Mr. Soale said, and asked him if he knew anything about the automatic car coupler stock. Soale replied that he had stock in the company; that he was surprised that any stock had been offered for sale; that it was a splendid company; had \$500 in the treasury; and that she would be very lucky to get it. He said:

"I have stock in it myself, so I can watch and care for it for you just exactly and take care of it for you. You leave it to me."

A few days later she called at the office, and Mr. Soale told her that the deed was made out and ready for her to sign and the certificate of stock ordered. She signed the deed, and he handed her the certificate. The terms of the transaction were that in exchange for the stock, received at a valuation of \$4,000, Mrs. Jenkins transferred the Summit avenue property at a valuation of \$5,000, but subject to a \$2,000 mortgage, and in addition thereto paid \$1,000. This \$1,000 was paid by checks to the order of Sprague, indorsed by him, and the proceeds received by Soale. The only way in which Mr. Soale paid over the money to Sprague was by using it in payment of bills incurred for the support of Sprague and his family. It seems that Sprague had never been able to support his family, and that Mr. Soale was in the habit of contributing largely to the support of that family by paying its bills along with his own.

During these negotiations Mr. Soale stated to Mrs. Jenkins that he had been looking this thing up, and Lewis Sprague was a man about town who wanted a home and was willing to trade, but did not tell her, and she did not know until long afterwards, that Sprague was Soale's son-in-law, or that any financial or business relations existed between Soale and Sprague. Immediately after the Summit avenue property was conveyed to Sprague, Mr. Soale placed that property in the hands of real estate agents for sale. In placing the property with B. O. Kendall Company, as agents, he gave a price of \$5,000, and stated that "it is a snap, and will not be on the market long until it is sold." The deed by which Mrs. Jenkins conveyed the Summit avenue property to Lewis Sprague was executed on the 2d day of March, 1910, and recorded July 28, 1910. On the same day, and immediately following the record of that deed, there was recorded another conveyance, executed July 28, 1910, whereby Lewis Sprague and his wife conveyed the same property to Wilson H. Soale. A few months later Mr. Soale conveyed the Summit avenue property to a purchaser subject to the existing \$2,000 mortgage, and received a further consideration of \$2,000. He testified that this \$2,000 went to Sprague, his son-in-law; but he further stated that this was done by paying bills amounting to \$2,000 and a great deal more for the sustenance of his son-in-law and his family. They were paid with Soale's checks. "That is the way the business was carried on most of the time they were married. I was disbursing agent for the whole family, and they brought the bills to me."

Dr. Bentley claimed a commission for negotiating the trade in which he acted as agent. When Mrs. Jenkins informed Mr. Soale that Bentley wanted to charge her a commission, Mr. Soale said:

"Never mind; you leave it all to me. I will see Bentley and see what can be done. You leave it all for me."

Later he told her that he had managed to get Dr. Bentley down to \$50, and she paid that amount through Soale to Bentley. Soale paid Bentley an additional sum of \$150 out of the \$1,000 obtained from Mrs. Jenkins in the trade, but did not inform Mrs. Jenkins, and she did not know that anything was being paid to Bentley other than the \$50 paid as above stated.

[1] Many of the facts given in the foregoing statement were denied by appellant in his testimony, but are supported by other evidence. We give them as the facts in the case because the court found that all of the allegations stated in the accusation are true, and it is necessarily implied that the court found these facts in accordance with the testimony of the accusing witness and against the testimony of appellant. Under the well-established rule, a Court of Appeal must assume the facts to be as found by the trial court when those facts find support in the evidence, notwithstanding other evidence to the contrary.

Aside from their contention that some of the facts above stated are not supported by the evidence, counsel for appellant insist that there is no evidence to support the implied finding that the shares of stock transferred to Mrs. Jenkins were not substantially worth \$4,000, or \$1 per share, as they were assumed to be in making the exchange. They further contend that, even if appellant defrauded Mrs. Jenkins in the transaction he was not in that transaction acting as an attorney at law, and could not be said to have violated his oath and duty as an attorney at law by anything that he did therein. Finally they say that the court exceeded its authority in rendering the judgment, which not only ordered that the accused be deprived of the right to practice as an attorney at law in the state of California for one year from the date thereof, but further deprived him of that right "until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid."

[2] Aside from the patent rights transferred to it and possibly a small sum of money in the treasury, the only asset of the Automatic Car Coupler Company in March, 1910, seems to have been a certain contract dated November 1, 1909, made between that corporation and the Electric Traction Supply Company, a Missouri corporation, by which the latter company was given the exclusive right to manufacture and sell the said patented automatic couplings within the United States of America. Certain obligations were entered into by the Missouri company for the payment of royalties, and a minimum amount was named for a series of years commencing with the year beginning November 1, 1910. It was not shown that any business has ever been transacted under

that contract or any income received therefrom. Prior to March, 1910, the Automatic Car Coupler Company had manufactured a limited number of car couplers, which had been given or loaned to certain railway corporations, evidently for advertising purposes. It is stated in the testimony of Mrs. Jenkins that when she consulted Mr. Soale about the proposed exchange involved in this case, he said that the Automatic Car Coupler Company stock was well worth \$1 per share, and perhaps more. He also told her of the contract with the Electric Traction Supply Company, and said that on account of this contract the stock would be as good as 6 per cent. from the 1st of November, 1910; but he also gave her a copy of the contract, and she took it away with her. On behalf of the accuser only one witness was questioned about the value of the Automatic Car Coupler Company's stock, and he did not claim to know anything about its value. Over defendant's objection this witness, J. W. Dubbs, was permitted to say that when he bought stock in the company about one year before March, 1910, he bought it from the company, and paid 10 cents a share. At the close of the case for the prosecution, defendant's counsel moved for a nonsuit; but as it was in general terms and did not specify any particular defect in the evidence, that motion should be disregarded. *Coffey v. Greenfield*, 62 Cal. 602, 608; *Schroeder v. Mauzy*, 16 Cal. App. 443, 450, 118 Pac. 459.

[3] The defendant introduced much evidence to support his claim that the market value of stock in this company was equal to or in excess of the par value, and it is our duty to consider all of the evidence and determine whether as a whole the evidence is sufficient to sustain the implied finding against defendant on this branch of the case; for notwithstanding testimony to the contrary, the finding must be sustained if the record contains evidence which by itself would be sufficient to support such finding. We will refer to defendant's witnesses in the order of the references to their testimony in the brief of his counsel. Karl Elliott was the secretary of the corporation. He knew of sales made early in 1910 at \$1 per share, and one sale at \$1.25 per share. The first stock sold by the company was at 10 cents a share, the next price was 25 cents a share, next 50 cents a share, and late in 1909, 80 cents a share. After that the asked price was \$1, but no sales were made by the company at that price.

Frank R. Bonny was president of the corporation. His regular occupation was that of a conductor in the freight department of an electric railroad. He said that he knew the value of the Automatic stock in March, 1910, and that it was \$1.12½ per share. He sold 200 shares of his stock at that time and at that price. It was much sought after, and still worth \$1 per share even down to

the date of the trial in April, 1913. He knew of other sales as follows: 1,000 shares sold in August, 1909, by the corporation, at 80 cents; 400 shares sold in August, 1909, by the corporation, at 80 cents; 200 shares sold in December, 1909, at \$1, by the witness to Mr. Heiss; 500 shares sold by the witness in November, 1909, at \$1 per share; 250 shares bought by the witness July 15, 1910, at \$1.25 per share; 8,800 shares bought July 1, 1910, by Mr. Goode, at \$1 per share; 3,400 shares bought in March, 1911, by Mr. Goode at \$1 per share. The principal part of Mr. Bonny's stock consisted of 10,000 shares issued to him by the company in return for the patent rights which he transferred to it in March, 1909. He had a few other small transactions in the stock besides those above noted. The following occurred on his cross-examination:

"Q. Did you ever place any of this on the public market for sale? A. No, sir. Q. Do you know whether any of it ever was placed on the market for sale? A. I don't know. Q. All the sales were among your own people and your associates, were they not? A. It was. Q. Officers of the corporation and their associates; all of it was made that way? A. Yes."

E. S. Goode became a stockholder in this corporation in April, 1910, when he purchased between 11,000 and 12,000 shares at \$1 per share. While he asserted that he would not now take less than that amount for his stock, he did not claim that he knew at any time what the stock was worth in the market. On cross-examination this witness admitted that after purchasing the stock in question he made an assignment for the benefit of his creditors and did not list this property as part of his assets. "I bought the stock in my name and transferred it to my wife and nephew, except 50 shares stood in my name. * * * I was trying to buy a controlling interest in the company. Would do it to-day if I could get it."

The defendant Wilson H. Soale, testifying about the stock transferred to Mrs. Jenkins, was asked: "Is that stock worth any money now?" to which he replied: "Certainly; it is worth more than it was traded for." C. M. Gruell, a shipping clerk, testified that the stock was quoted at from \$1 to \$1.13 in the early part of 1910. Cross-examination developed that he had very little actual knowledge of the subject. C. H. Willis testified that the market value of the stock in the early part of 1910 was 80 cents per share. He had bought some of the stock from the company when it was 10 cents per share, and later sold some to Mr. Bonny at \$1 per share. F. H. Norwood, the original patentee of the automatic car coupler, testified that the value of the stock in March, 1910, was 80 cents per share; that shortly before that time he sold some stock to Mr. Bonny at \$1 per share. Norwood also testified that he received 10,000 shares of the stock in consideration of the transfer of his

patent rights to the company. Whether he and Bonny received 10,000 shares each for the transfer of separate patents, or received that number of shares jointly for a joint transfer of patents does not clearly appear. Frank L. Heiss, clothing merchant, testified that the value of this stock on the market in February and March, 1910, was \$1 per share. He bought his stock from Bonny at that price, and knew of other sales at the same price.

On this record was the court justified in determining that the accused violated his oath and his duties as an attorney and counselor at law? One of the stipulations in the statutory oath is that the person admitted will faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability. One of these duties requires the attorney and counselor "to maintain inviolate the confidence * * * of his client." Code Civ. Proc. § 282, subd. 5. In order to support the charges here, it must have appeared that Mrs. Jenkins was Mr. Soale's client, that she reposed confidence in him as a counselor at law, and that he violated that confidence. On behalf of the accused it is contended that in connection with the exchange of Mrs. Jenkins' Summit avenue property for corporation stock, he was not acting in his capacity as an attorney, "because in its nature the act complained of was a personal business transaction, requiring no skill of attorney and no knowledge or understanding of law." The causes for which an attorney may be removed or suspended are stated in section 287, Code of Civil Procedure. Under that section as amended in 1911, this defense could not be maintained; but if the nature of the facts is such as claimed by the accused, that would be a good defense against charges based, as these are, upon transactions occurring in the year 1910. Thus, in the case of *In re Collins*, 147 Cal. 12, 81 Pac. 222, where it clearly appeared that the acts complained of were not done by the respondent in his professional capacity or in connection with any matters in which his duties as an attorney were involved, it was held that:

"To the extent that an attorney may be disbarred for causes which affect his moral integrity in dealings with others of a purely personal character, and transacted in his private capacity, the statute has provided that it shall be done by the court only when he has been convicted of a felony, or of a misdemeanor involving moral turpitude."

[4, 5] It is our opinion, however, that in these transactions Mrs. Jenkins reposed confidence in Mr. Soale as a counselor at law. The evidence does not indicate that he was engaged in business as an agent or broker, or maintained his office for any purpose other than in the course of his profession as an attorney and counselor. She went to him in that office and called upon him for advice and assistance in the conduct of her business af-

fairs, without any notice or suggestion that in accepting the employment he was representing her in any way other than in his professional capacity. The occupation of a lawyer is not confined to appearances for parties in actions in courts of justice. A very large part of the professional work done by them consists in advice given to clients for the general purpose of aiding them in the conduct of their business affairs. At the time of these transactions Mrs. Jenkins was consulting Mr. Soale concerning a proposed action at law, and it appears that she consulted him about her other business affairs indiscriminately and without any attempted classification of the transactions as being partly within and partly without the scope of his professional business. She was entitled to believe that she was under his care as a counselor employed by her. The fact that in this particular transaction he did not enter any fee charges against her does not change the situation at all, for he was entitled to charge such fees if he so desired. We conclude, therefore, that she did repose confidence in him as her counselor at law, and the only remaining question is as to whether or not he maintained inviolate that confidence. The phrase "maintain inviolate the confidence," as contained in section 282, Code of Civil Procedure, is not confined merely to noncommunication of facts learned in the course of professional employment; for the section separately imposes the duty to "preserve the secrets of his client."

[6, 7] Appellant contends that under the evidence in this case it appears that he did not intend to wrong Mrs. Jenkins or to defraud her in any way in the trade, and that even if false representations and concealments occurred which are chargeable against him, no cause of action has been established, since the stock was in fact worth the \$4,000 which it cost her. Some of the circumstances involved, to which we have referred, tend to show that the accused secretly treated as his own property which, by his advice and pursuant to a plan conceived by him, she was induced to transfer to a third person without knowledge of the fact that in reality her property was passing into appellant's hands. The court was entitled to believe, and did believe, these to be the facts; and, this being so, the conclusion is clearly warranted that he considered the transaction as one favorable to himself and to which he believed that she would not consent if she had known his real interest therein. Under these circumstances, it should be determined that a lawyer is violating the confidence of his client, even though in its ultimate result the transaction does not lead to a substantial financial loss on the part of the client. In order to sustain an accusation in a disbarment proceeding in a case of this character, it is not necessary to establish all of the facts with reference to the ultimate loss

on the part of the client which might be necessary in an action brought by her against him for damages on account of the alleged deceit.

[§] Our conclusions, as above stated, are sufficient to require us to sustain a judgment removing or suspending the accused from the right to practice his profession. We have to consider further only the claim that the court exceeded its authority by rendering an indefinite and uncertain judgment suspending the accused, not only for one year from the date of the judgment, but also "thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid." The court found that all of the allegations of the accusation are true. One of these allegations was that the 4,000 shares of stock were worthless. It was also alleged and the evidence shows without question that the value parted with by the accuser amounted to \$4,000. It was held by the Supreme Court of California in the only decision which covers the question that in a disbarment proceeding the accused might be suspended for a period not necessarily limited as a fixed and determinate period of time, but could be for an uncertain time, subject to the right of the accused to relieve himself therefrom by making restitution of a stated amount of money which he had improperly obtained by means of his professional misconduct. In re Tyler, 78 Cal. 307, 20 Pac. 674, 12 Am. St. Rep. 55. In that case the record showed the amount as established by another judgment, and the judgment of suspension was not subject to attack by reason of any uncertainty in the amount which the accused was required to restore. Following that decision, we think the judgment in the case at bar should be sustained in the form in which it was entered, unless it requires to be modified on account of uncertainty in its statement of the amount of the claim of the accuser. If the evidence is sufficient to show that the stock was worthless, that amount would be \$4,000, with interest. The record herein shows that at some time the accuser obtained a judgment against Soale by reason of these same transactions, but that judgment is not before the court, and we do not know either its date or the amount to be recovered as specified therein. We think that the evidence in this case is insufficient to prove that the stock was worthless. That being so, the amount of the claim referred to in the judgment is not ascertained, and the above-quoted final clause thereof is too uncertain to be capable of enforcement.

It is ordered that the judgment herein be modified by striking therefrom the words "and thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid." As thus modified, the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

MUNSON v. BALDWIN et al. (No. 13165.)
(Supreme Court of Washington. Sept. 15, 1916.)

1. EVIDENCE \S 271(11) — OFFER OF COMPROMISE — SELF-SERVING DECLARATION.

In an action for the rent of furniture, the admission in evidence of a letter from plaintiff to a defendant some 12 months after the use of the furniture under the alleged rental contract, stating that what plaintiff said in it he would not consider in any action he might take upon defendant's refusal to accept the proposition, was inadmissible as being an offer of compromise and a self-serving declaration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1084; Dec. Dig. \S 271(11).]

2. WITNESSES \S 414(1) — CORROBORATION — SELF-SERVING DECLARATION.

In an action for the rent of furniture, plaintiff's letter to a defendant, a self-serving declaration, was not admissible to corroborate plaintiff's testimony that he had a previous conversation with defendant in regard to their matters of difference.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1287; Dec. Dig. \S 414(1).]

3. JUDGMENT \S 585(4) — RES ADJUDICATA.

In an action for the rent of furniture, the owner's claim was not barred by his failure to set it up as defense in a former suit, in which the owners of the apartment where the furniture was in use recovered judgment against the owner of the furniture for rentals of the apartment for two months, due under lease thereof by the owner of the furniture, since a judgment is conclusive as to all matters of defense which might and should have been presented in an action only as to facts which negative, or which are inconsistent with, the facts on which judgment is sought.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1084, 1085; Dec. Dig. \S 585(4).]

4. TRIAL \S 143 — CONFLICTING EVIDENCE — QUESTIONS FOR JURY.

Questions of fact as to which the evidence was sharply in conflict should have been submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. \S 143.]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Mark Munson against Pauline P. Baldwin and others. From a judgment for plaintiff, defendants appeal. Judgment reversed, and cause remanded for new trial.

Wm. Hickman Moore, of Seattle, for appellants. Roney & Loveless, of Seattle, for respondent.

MORRIS, C. J. Respondent brought this action to recover upon 13 separate causes of action for the rental value of certain furniture. In the first cause of action it is alleged that, on or about the 20th day of November, 1909, respondent made an oral contract with the appellants to lease to them for an indefinite period all of the furniture and household furnishings belonging to and used in connection with the Monterey Apartments, at Seattle, at a stipulated rental of \$100 per month, no part of which had been paid. Each of the other 12 causes of action is similar in language, save that the rent is alleged to be

due for each of the 12 succeeding months. Several defenses were interposed, among which was a plea of *res adjudicata* to each cause of action. A jury was impaneled, and at the conclusion of the hearing the lower court directed a verdict for respondent, upon which, judgment being entered, the appeal was taken.

[1, 2] The lower court, over the objection of appellants, admitted in evidence a letter written by respondent to appellant Ewing some 12 months after the use of the furniture under the alleged contract. This letter is too long for full publication. It states that it is a proposition for a full settlement of all matters. After so stating the writer says:

"I wish to set before you my side of the question so that you may be able to pass judgment with a more full knowledge than you now have."

Following this is a statement of what respondent contends to be the facts, with argumentative matter in support of such contentions. It also sets forth certain conversations with one Lane who is claimed by respondent to be the agent of appellants in the leasing of the furniture. The letter ends with this statement:

"What I have said to you in this proposition I will not consider at all in any action that I may take upon refusal of yourself to accept this."

In our opinion the admission of this letter was error. First, it was an offer of compromise; and, second, it was a self-serving declaration. It is an established rule of evidence, subject to few exceptions, that a party cannot offer in evidence his own declaration relative to the subject in controversy. The exceptions most often made are where it is necessary to prove a demand, and such a demand is made by letter, or where the letter is in reply to one from the opposite party. This letter falls within neither of these, or within no exception called to our attention. The lower court was of the opinion that the letter was admissible as showing that Ewing's attention was called to the fact that respondent's claim for the rental of the furniture was based upon an agreement made with Lane as appellants' agent, that it was also admissible for the purpose of corroborating respondent's testimony that he had a previous conversation with Ewing in regard to the matters of difference. Neither one of these propositions would make the letter admissible. There was no necessity for offering the letter upon the first point, as Munson had already testified to two conversations with Ewing, in which he stated his claim that he had rented the furniture through Lane for \$100 per month. As to the second point, a witness cannot corroborate himself by his own self-serving declaration. The error in admitting this letter is accentuated when the lower court makes it the basis for an instructed verdict, holding that Ewing's failure to reply to it was a confirmation of the agreement

claimed therein to have been made with Lane; and, having failed to deny such claim when notified, the appellants are now bound by its assertion.

The next error alleged is in directing an instructed verdict. It is argued by respondent that appellants cannot complain of the instructed verdict because they in turn moved the court to take the case away from the jury. For the sake of the argument it may be admitted that when both parties request the court for a directed verdict upon the facts, neither party can thereafter complain that the jury was not permitted to pass upon the facts. Appellant, while asking the court to grant judgment upon the law of the case under their plea of *res adjudicata*, did not submit the facts to the court, but only the question of law involved in such plea.

[3] Upon the question of *res adjudicata*, it is the contention of appellants that respondent's claim for the rental value of the furniture should have been set up as a defense in a former suit in which appellants recovered judgment against respondent for rentals due under the lease of the apartments for the months of October and November, 1909. Whether or not such a counterclaim could have been set up is not now an issue. We are only concerned with the further question, Is the failure to so plead it barred by the judgment in the former case? The rule as generally stated is that a judgment is conclusive as to all matters of defense which might and should have been presented in the action. But this rule bars only those facts which negative or are inconsistent with the facts which sustain the former judgment. When the facts relied upon in the subsequent action are neither inconsistent with nor in direct opposition to the facts involved in the former suit, but are facts which may be equally true with the former facts, then there is no bar. 2 Black on Judgments, § 767. The former suit was upon a lease for the recovery of rentals growing out of respondent's use and occupancy of the building. This suit is for the rental value of furniture which respondent claims appellants obligated themselves to pay subsequent to November 20, 1909. We find no inconsistency with the judgment establishing respondent's liability under the lease and an indebtedness to respondent under a subsequent agreement to pay for the use of the furniture. The defense of *res adjudicata* is therefore overruled.

[4] Coming again to the question of the directed verdict, there was a sharp conflict both as to the rental value of the furniture and the agreement for its payment. This conflict should have been submitted to the jury.

The judgment is reversed, and the cause remanded for a new trial.

FULLERTON, MOUNT, ELLIS, and CHADWICK, JJ., concur.

HULL v. DAVENPORT et ux. (No. 13086.)
(Supreme Court of Washington. Sept. 15, 1916.)

1. MASTER AND SERVANT \Leftrightarrow 101, 102(8)—**DUTIES OF MASTER—SAFE PLACE TO WORK.**

It is the master's duty to exercise reasonable care to furnish a reasonably safe place to work and reasonably safe appliances and to promulgate and enforce rules reasonably calculated to keep the place safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171-178; Dec. Dig. \Leftrightarrow 101, 102(8).]

2. NEGLIGENCE \Leftrightarrow 136(9) — **QUESTIONS FOR JURY.**

What is reasonable care in a given situation, whether as applied to the question of primary negligence or that of contributory negligence, is always a question for the jury whenever upon the evidence reasonable minds might reach different conclusions.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 293-297; Dec. Dig. \Leftrightarrow 136(9).]

3. TRIAL \Leftrightarrow 165 — **EFFECT OF MOTION FOR NONSUIT.**

On a motion for a nonsuit the plaintiff is entitled to the benefit of every inference favorable to his cause of action which can reasonably be drawn from the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 873, 374; Dec. Dig. \Leftrightarrow 165.]

4. MASTER AND SERVANT \Leftrightarrow 286(18)—**INJURIES TO SERVANT—NEGLIGENCE—QUESTIONS FOR JURY.**

Evidence held to make a question for the jury whether the master was negligent in providing an elevator improperly guarded and without warning bells.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1025; Dec. Dig. \Leftrightarrow 286(18).]

5. MASTER AND SERVANT \Leftrightarrow 286(8)—**INJURIES TO SERVANT—NEGLIGENCE—QUESTIONS FOR JURY.**

Custom cannot as a matter of law relieve the master from the positive duty to furnish a reasonably safe place and appliances to work, and promulgate rules, so that, where the question is one of reasonable human conduct, there being no absolute standard, it is always for the jury if on the facts reasonable men might differ.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1014; Dec. Dig. \Leftrightarrow 286(8).]

6. MASTER AND SERVANT \Leftrightarrow 270(11) — **INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE—CUSTOM.**

If employment of signals in elevator operation is not customary, that is mere defensive matter, admissible on the issue of reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 921; Dec. Dig. \Leftrightarrow 270(11).]

7. MASTER AND SERVANT \Leftrightarrow 222(3)—**ASSUMPTION OF RISK.**

It is only where the danger of the act which the servant undertakes is not only open, patent, and obvious alike to man and master and equally appreciated by both, but is so plain that reasonable men could not differ as to its existence, and so imminent that a reasonably prudent man would not undertake the act at all, that the servant assumes the risk in obeying the master's order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 650; Dec. Dig. \Leftrightarrow 222(3).]

8. MASTER AND SERVANT \Leftrightarrow 203(1)—**ASSUMPTION OF RISK.**

The doctrine of assumption of risk should not be extended beyond reasonable limits.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-540, 542, 543; Dec. Dig. \Leftrightarrow 203(1).]

9. MASTER AND SERVANT \Leftrightarrow 289(37) — **INJURIES TO SERVANT—NEGLIGENCE—QUESTIONS FOR JURY.**

When there is room for reasonable difference of opinion whether, in spite of order to use an elevator, the servant appreciated the danger so as to make its use reckless, the question is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1129; Dec. Dig. \Leftrightarrow 289(37).]

10. MASTER AND SERVANT \Leftrightarrow 103(1), 265(3)—**DUTIES OF MASTER—SAFE PLACE TO WORK—PRESUMPTIONS.**

The positive duty to furnish a safe place to work and safe appliances is a nondelegable duty of the master, and if injury occurs through lack of elevator signals, it must be assumed that, if there had been signals, the injury would have been averted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 175, 879, 897; Dec. Dig. \Leftrightarrow 103(1), 265(3).]

11. MASTER AND SERVANT \Leftrightarrow 289(1) — **CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Evidence held not to warrant saying as matter of law that plaintiff servant was contributorily negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1039; Dec. Dig. \Leftrightarrow 289(1).]

Department 1. Appeal from Superior Court, Spokane County; Joseph Sessions, Judge.

Action by Loren S. Hull against L. M. Davenport and wife. From judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Plummer & Lavin and Attwood A. Kirby, all of Spokane (Mack F. Gose, of Pomeroy, of counsel), for appellant. Danson, Williams & Danson and Geo. D. Lantz, all of Spokane, for respondents.

ELLIS, J. Action for personal injuries. Defendants own and conduct a restaurant and hotel in Spokane. Plaintiff was an experienced waiter. At the time of the accident he was, and for a considerable time had been, in defendants' service in that capacity. His duties were those of an ordinary waiter in addition to which he was required to keep his tables stocked with staple supplies such as crackers, sugar and the like. These he secured from the commissary department, located in the basement immediately beneath the restaurant proper and the kitchen, which were on the first floor. At the time of the accident, and for some months prior thereto, defendants had installed a slow-moving hydraulic elevator used indiscriminately for persons and freight, extending from the kitchen immediately adjoining the restaurant to the basement floor. All of the waiters and employes about the restaurant and storeroom, estimated by wit-

nesses at over 100, were accustomed to use this elevator daily. Three sides of the elevator shaft were inclosed by iron lattice work. The other side which faced the kitchen on the upper floor and the storeroom on the basement floor was open, but for a gate which raised and lowered automatically as the elevator was lowered and raised, so that when the elevator was at the kitchen floor the gate would be at the basement floor, and vice versa, barring the entrance to the elevator well on either floor when the car was at the other. The gate and the car would thus meet each other at about half the distance between the two floors. The elevator was operated by means of a chain which extended through the floor of the elevator, by pulling which the elevator was raised or lowered as desired. There was no operator in charge of the elevator. It was operated by the waiters and other employes indiscriminately at any time their work required its use. It was impossible for a person standing in the kitchen to look down this shaft and see if any person was about to enter the elevator at the basement floor. The same difficulty was presented to a person entering the car from the basement to determine whether the elevator was about to be operated by some one on the kitchen floor. Owing to some unexplained mechanical defect, the elevator when lowered would not descend flush with the basement floor, but would stop a foot or 18 inches above the floor level. There was no call bell or other means of signaling from the basement to the kitchen nor from the kitchen to the basement when the elevator was about to be used, nor was any rule or system promulgated or enforced requiring the giving of any kind of warning when a person was about to enter or leave the elevator or about to set it in motion. A call from below could not be heard in the kitchen because of the noise of a steam dishwasher. Plaintiff testified that he did not realize or appreciate the dangers of operating the elevator without signals; that he never thought of it as his mind was fully occupied with his work. On September 27, 1914, plaintiff went to work at about 7 o'clock a. m. He procured a requisition for supplies, went through the dining room to the kitchen, entered the elevator, pulled the chain, and descended to the basement floor, where the elevator, as usual stopped at about 18 inches above the level of the basement floor. After securing the supplies, which he carried in his arms, he returned to the elevator, which was standing as he had left it, looked up to see if any one was about to start it from above, saw nothing to advise him of danger, and stepped upon the elevator. He testified that just at that time one of the boxes in his arms slipped, and his apron also caught, and just as his weight was partly on the elevator it started up, throwing him to the floor of the elevator. The gate as it descended caught

his right foot and dragged his leg between the gate and the elevator floor, causing a comminuted compound fracture of the femur, which has resulted in a permanent shortening of the right leg of about 2½ inches. No instructions nor warning had ever been given him as to the dangers attendant upon the customary use of the elevator. A sign was posted at the elevator in the kitchen reading: "Use the elevator." There was evidence that it was practicable to install a system of bells which would give warning either automatically or otherwise at an expense not exceeding \$5.

The negligence charged was: (1) Failure to furnish a safe place to work; (2) failure so to equip the elevator and to so maintain it that it could not be started at one floor without giving warning to persons entering or leaving it at the other; (3) failure to install any signal system or to promulgate and enforce adequate rules for the giving of warning that the elevator was about to be used. Defendant denied these allegations of negligence, and set up as affirmative defenses assumption of risk, negligence of a fellow servant, and contributory negligence.

At the close of plaintiff's evidence which tended to establish the foregoing facts, defendants interposed a challenge to its sufficiency, which was sustained, and a judgment of nonsuit was entered accordingly. Plaintiff appeals.

[1, 2] The duty of the master to exercise reasonable care to furnish the servant a reasonably safe place to work and reasonably safe appliances and to promulgate and enforce a system of rules reasonably calculated to keep the place safe is well established. What is reasonable care in a given situation, whether as applied to the question of primary negligence or that of contributory negligence is always a question for the jury whenever upon the evidence reasonable minds might reach different conclusions. *Richmond v. Tacoma Ry. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Williams v. Spokane*, 73 Wash. 237, 131 Pac. 833.

[3, 4] It is also elementary that on a motion for a nonsuit the plaintiff is entitled to the benefit of every inference favorable to his cause of action which can reasonably be drawn from the evidence. Measured by these principles we are clear that, both on reason and the better-considered authorities, the evidence was sufficient to take the question of respondents' negligence to the jury. It shows that the respondent had installed this elevator for the use of a large number of employes, approximately 100 using it every day, some of them several times a day. No means whatever were provided for the safe use of the elevator. No system of bells or other warning device was installed. No rule was promulgated or enforced to obviate the danger of attempted simultaneous use of the elevator from the two floors. While there

was evidence that there were two stairways leading from the restaurant floor to the basement, one of these was dark, steep, crooked, and narrow and unfit for use especially in carrying packages. The door to the other was part of the time kept locked, and was locked on the morning of this accident. It plainly appears that employes were not expected to use either of these stairways for the purpose of carrying supplies from one floor to the other. It is clear that, notwithstanding the lack of any provision for its safe use, appellant and other employes were expected to use this elevator for the purpose for which he was using it at the time of his injuries. In a comparatively recent case in which the facts were almost an exact parallel with those here presented, and indeed so far as they present any material difference were more favorable to the employer than those presented here, the Supreme Court of New York held for the employer on the ground that there was a total failure of proof of negligence, Judge McLennan dissenting. *Knickerbocker v. General Ry. Signal Co.*, 133 App. Div. 787, 118 N. Y. Supp. 82. On appeal to the Court of Appeals that court without a dissent reversed the Supreme Court and remanded the case for a new trial. *Knickerbocker v. General Ry. Signal Co.*, 209 N. Y. 404, 103 N. E. 785. The grounds of reversal are well expressed as follows:

"We are of the opinion that the evidence presented a question of fact for the jury. The danger of the attempted simultaneous use of the elevator by different employes on the ground and gallery floors was so obvious that a jury might find negligence on the part of the employer in failing to make any provision whatever by rule or otherwise to guard against it. The fact that a custom had grown up among the men to give some sort of a signal by shaking the cable or by calling out does not relieve the master of the performance of his duty. Of course, the chances of accident would increase as the number of floors increased, but the danger would be no less obvious with only two floors in a factory employing from 200 to 250 men, any one of whom was at liberty to use the elevator at will. It is unnecessary to prove by experts or by the experience of others the necessity of guarding against a danger so obvious that the men themselves, without any requirement of the master, were accustomed to signal. Though knowing of the custom, the employer should have anticipated the likelihood that, through carelessness or inadvertence, an employe might omit to give the signal, and should at least have enforced the custom by a rule, the violation of which might involve some punishment. It is unnecessary to determine what would be the most effective way to guard against the danger, and, of course, the employer would not be guilty of negligence for failing to use the best way. The legal proposition is that the failure of the employer to take any measures whatever to guard against an obvious danger arising from the method of conducting his business presented a question of fact for the jury."

See, also, *Nichols v. Searle Mfg. Co.*, 134 App. Div. 62, 118 N. Y. Supp. 651; *Stokes v. Barber Asphalt Paving Co.*, 134 App. Div. 363, 119 N. Y. Supp. 37; *Coogan v. Æolian Co.*, 87 Conn. 149, 87 Atl. 563.

[6] Respondents contend that the proof

was insufficient to show negligence in that there was no evidence of a general custom or usage of other employers using such elevators to adopt any particular system of rules for warning or any particular system of signal devices; in other words, that the evidence offered no standard by which to measure reasonable care. One case is cited so holding, two judges dissenting, on a state of facts somewhat similar to those here presented. *Zebrowski v. Warner Sugar Refining Co.*, 83 N. J. Law, 558, 83 Atl. 957, 46 L. R. A. (N. S.) 233. But the reasoning in that case seems to us much less sound and convincing than that presented in the more recent New York case above quoted. In the first place, it seems to us that custom cannot as a matter of law relieve the master from the positive duty to furnish a reasonably safe place and reasonably safe appliances and promulgate reasonable rules for their use, looking to the safety of his servants. In this, as in other situations, it is almost impossible to find any two cases in which all the circumstances, surroundings, and conditions are identical. Obviously, therefore, no absolute standard of reasonable care can be fixed either by custom or otherwise. We believe that the better rule is that which this court and the courts generally have adopted, that, where the question is one of reasonable human conduct, it is always for the jury wherever upon the facts of the given case the minds of reasonable men might differ. *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4.

[8] In the second place, if as a matter of fact the employment of signals in the operation of an elevator such as this is not customary, that fact would be a mere matter admissible in defense to be submitted to the jury with the other evidence on the question of reasonable care.

[7-9] Respondents contend that, even assuming that the question of primary negligence was one for the jury, appellant in any event assumed the risk of injury in using the elevator. It is argued that all of the obvious risks, even those of extraordinary danger resulting from the negligence of the master to perform a positive duty, are as a matter of law assumed by a servant in the absence of a complaint to the master and a promise on the master's part to remove the danger. The rule thus broadly stated without qualification is not the law. In the case before us there was a standing order posted at the entrance to the elevator: "Use the elevator." In addition to this there was evidence that the employes had been specifically directed to use it. True, the sign may not have been there that morning, but the order it conveyed had never been countermanded. It is only where the danger of the act which the servant undertakes is not only open, patent, and obvious alike to man and master and equally appreciated by both, but is so plain that reasonable men could not differ as to its existence, and so imminent that a reasonably

prudent man would not undertake the act at all, that the servant assumes the risk in obeying the master's order. The rule is thus tersely stated by the Supreme Court of Ohio:

"The clear result of the best-considered cases is that, where an order is given a servant by his superior to do something within his employment, apparently dangerous, and, in obeying, is injured from the culpable fault of the master, he may recover, unless obedience to the order involved such obvious danger that no man of ordinary prudence would have obeyed it; and this is a question of fact for the jury to determine under proper instructions, and not of law for the court." *Van Duzen, etc., Co. v. Schalles*, 61 Ohio St. 298, 309, 55 N. E. 998, 1000.

See, also, *Waterman v. Skokomish Timber Co.*, 65 Wash. 234, 241, 118 Pac. 36; *Williams v. Spokane*, 73 Wash. 237, 244, 131 Pac. 833; *Rogers v. Valk*, 72 Wash. 579, 131 Pac. 231.

But it may be insisted that the sign was not an order. If it was not, the query arises: What was it there for? It is not claimed that this elevator was used or intended to be used by the public. It was almost wholly used by employes such as the appellant. The doctrine of assumption of risk, whether assumed to be founded in the fiction of an implied contract with pay commensurate with the danger, or whether it be referred to the maxim, "*Volenti non fit injuria*" (3 *Labatt's Master & Servant* [2d Ed.] § 1285), is artificial and harsh at best. It should not be extended beyond its reasonable limits. It must be remembered that the plan of the establishment and the co-ordination of work is that of the master deliberately adopted without consulting the servant. In adopting the plan the master must be assumed to have considered it with a maturity and deliberation not possible to the servant absorbed in the details of his daily duties. Whenever, therefore, there is room for reasonable difference of opinion as to whether the servant so appreciated the danger as to make it reckless to proceed, the question is one for the jury, especially where the servant is proceeding under an order of any kind, however communicated. As said by this court in *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 531, 584, 87 Pac. 819, 820:

"Any other theory in law would be harsh and unjust. Hence, the courts generally have decided that the servant will not be charged with assuming the risk of a place unless the peril is so apparent that there could be no conflicting opinion between men of ordinary prudence and understanding; and when this appears plainly, and then only, it becomes the duty of the court to hold that as a matter of law the risk was assumed."

Respondents cite and mainly rely upon the case of *Danuser v. Sellar & Co.*, 24 Wash. 565, 64 Pac. 783, which is also an elevator case. In that case, however, the master had provided a means of signaling, but the

employes themselves, with the injured man's knowledge, had habitually neglected to use it. The sole negligence charged was the failure on the master's part to enforce the rule for the use of the signals. The injured man not only knew of the continued failure to use the signal, but apparently participated in that failure. In such a case, though the defense is referred to in many cases, as in the case cited, as an assumption of risk, it is really in its essentials a case of contributory negligence. 4 *Labatt's Master & Servant* (2d Ed.) § 1362. That the real basis of the *Danuser* decision rests in the fact that the injured man there evidently approached an open shaft without taking any pains to discover whether the elevator was in position or not, thus making a clear case of contributory negligence, is shown by the closing paragraph of the opinion. In view of the fact that in the case before us there was a standing order to use the elevator, and no means were provided for giving any sort of signal, and in view of the further fact that appellant testified that he did not appreciate or think of the danger because of his absorption in his work, we are constrained to hold that the question whether he assumed the risk was one for the jury.

[10] The question of negligence of a fellow servant is not involved. The positive duty to furnish a safe place to work and safe appliances is a nondelegable duty of the master. It makes therefore not the slightest difference who started the elevator, whether an employe of the respondents or, as suggested by counsel, a delivery man. It must be assumed that had there been some automatic or other signal system, it would have performed its office or a signal would have been given no matter who used the elevator.

[11] Nor do we find that the appellant can be charged with contributory negligence as a matter of law. He was using the elevator at the time of his injury for the purpose for which it was intended and in the only manner in which it could be used. There was no evidence that any added precaution on his part could have saved him from the injury. He testified that he looked up, but could see nothing to indicate that any one was in the act of starting the elevator. If he was justified in using the elevator at all, there is nothing in the evidence to indicate any lack of care on his part in using it in the only way that it could be used.

Upon the entire record we are clear that the case was for the jury upon every issue involved.

The judgment is reversed, and the cause is remanded for a new trial.

MOUNT, FULLERTON, and CHADWICK, JJ., concur.

SHELL v. SVENSSON (No. 13244½.)
(Supreme Court of Washington. Sept. 15, 1916.)

1. EXEMPTIONS — 150 — ACTION — INSTRUCTION.

In an action to recover the value of two cows and their calves and a wagon claimed as exempt, but which had been sold under execution and purchased by the defendant, the judgment creditor, an instruction that if the plaintiff, when the execution was levied, was living in the county with his wife and children, he was a householder and entitled to his exemptions, while not technically correct, might be clearly understood to state that it was necessary that the jury also find that he was a farmer, before he would be entitled to the exemption of the wagon under Rem. & Bal. Code, § 563.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 175-178; Dec. Dig. —150.]

2. APPEAL AND ERROR — 1064(1) — HARMLESS ERROR — INSTRUCTION.

Any error in such instruction was harmless, where on the undisputed evidence the court might have told the jury that the plaintiff was then a farmer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. —1064(1); Trial, Cent. Dig. §§ 475, 525.]

3. EXEMPTIONS — 93 — CLAIM — WAIVER — STATUTE.

Where the plaintiff, after two cows and their calves and a wagon had been seized on execution and noticed for sale, without any express waiver at the time of the levy under Rem. & Bal. Code, § 571, told the sheriff to postpone the sale for a time, because he thought he might be able to pay the judgment, no inference of waiver could be drawn therefrom.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 116, 117; Dec. Dig. —93.]

4. EXEMPTIONS — 119(2) — CLAIM — TIME.

A claim for exempt property may be made within a reasonable time before sale.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 141-145; Dec. Dig. —119(2).]

5. EXEMPTIONS — 125 — CLAIM — RELEASE.

Where two cows and their calves and a wagon were seized on execution against plaintiff and noticed for sale, it was the sheriff's duty, on the filing of plaintiff's affidavit claiming them as exempt, to release them, where no demand was made for an appraisement, as provided by Rem. & Bal. Code, § 573.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 104, 150-153; Dec. Dig. —125.]

6. NEW TRIAL — 104(1) — NEWLY DISCOVERED EVIDENCE — CUMULATIVE EVIDENCE.

A new trial will not be granted on the ground of newly discovered evidence, which is merely cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218, 228; Dec. Dig. —104(1).]

Department 1. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Frank Shell against W. R. Svensson. Judgment for plaintiff, and defendant appeals. Affirmed.

Louis A. Merrick and Eugene H. Beebe, both of Everett, for appellant. E. C. Dalley, of Everett, for respondent.

MOUNT, J. This action was brought to recover the value of two cows and their calves,

and a wagon, claimed by the plaintiff as exempt from execution, which property was sold under execution and purchased by the defendant. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff for \$200. The defendant has appealed.

The facts are as follows: On the 29th of January, 1914, Mr. Svensson obtained a judgment against Frank Shell for \$106.28. On February 24, 1914, an execution was issued upon that judgment, and the sheriff of Snohomish county levied upon the property in question, and other property belonging to Mr. Shell. At the time of the levy the sheriff left the property in the possession of Mr. Shell, who asked the sheriff at that time not to notice the property for sale for a few days, when he thought he might be able to pay the judgment. Afterwards the sheriff noticed the property for sale. After notice and before the sale Mr. Shell made an affidavit, as required by section 572, Rem. & Bal. Code, stating that he was a householder, the head of a family, and a farmer, and claiming two cows and their calves and the wagon as exempt under the statute. The affidavit was filed with the sheriff. No demand was made for an appraisement, and no appraisement was had, but the sheriff proceeded, on the 3d day of April, 1914, to sell the property. The plaintiff in that action, Svensson, purchased the property. Afterwards this action was brought to recover the value of the property as exempt, and resulted in the judgment above stated.

[1, 2] The court instructed the jury to the effect that if they found that at the time of the levy of the execution the plaintiff was living in Snohomish county with his wife and children, then he was a householder and entitled to his exemptions. It is argued that this was error, because the jury might have found that he was a resident of the county and a householder, and not a farmer. While this instruction was not technically correct, it was clearly understood, we think, by all the parties, that it was necessary for the jury to find that the plaintiff was a householder and a farmer, before he would be entitled to his exemption of the two cows and their calves, and the wagon, as provided for in section 563, Rem. & Bal. Code. There was no dispute that the plaintiff was a married man, living in Snohomish county with his wife and children, and was a farmer at the time of the levy of the execution. So it is apparent that whatever error there was in this instruction was entirely harmless, because the court might readily have told the jury that it was not disputed that the plaintiff was a farmer at that time.

[3, 4] The court in another instruction told the jury to disregard a conversation which took place between the sheriff and the plaintiff at the time of the levy of the

execution. This is alleged as error. It is contended by the appellant that the statements made by the plaintiff in this case to the sheriff at the time the levy was made amounted to a waiver of the right to claim the exemption. It is not claimed that there was any express waiver by the plaintiff at the time of the levy of the execution upon his property, as required by section 571, Rem. & Bal. Code, and we think there is no inference of that kind to be drawn from the statements then made. The plaintiff then told the sheriff to postpone the sale for a time, because he thought he might be able to pay the judgment. There was evidently in his mind at that time no idea of waiving his right to claim the exemption. Afterwards he filed the claim for the property as exempt as required by the statute. This court has held that a claim for exempt property may be made within a reasonable time before sale. *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858; *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480.

[5] We have no doubt, under the facts in this case, that it was the duty of the sheriff, on the filing of this claim, to release the property in case no demand was made for an appraisal, as provided for by section 573, Rem. & Bal. Code. The evidence which was stricken was clearly not competent to show a waiver, and there was no error in taking it from the consideration of the jury.

[6] It is next claimed that the court erred in denying the motion for a new trial. This motion was based upon newly discovered evidence. But this evidence was simply cumulative, and the trial court so concluded, and denied the motion. We think there was no error in this.

The judgment is affirmed.

ELLIS, FULLERTON, and CHADWICK,
JJ., concur.

BLANCK et al. v. PIONEER MINING CO.
et al. (No. 13155.)

(Supreme Court of Washington. Sept. 15,
1916.)

1. MINES AND MINERALS §54(2)—SALE OF CLAIM—CONSTRUCTION OF CONTRACT—"INCLUDING."

Where the purchaser of a mining claim agreed that when he should have realized \$55,625, as net profits, he would pay one-half of the additional net profits until the sellers had received an additional sum, the contract providing that the "net profits hereinbefore mentioned shall be construed to mean the net profits of the entire claim computed * * * in the following manner: * * * From the gross amount of gold produced * * * shall be deducted the actual expense of the labor engaged in the mining operations thereon, including the wages of the men and reasonable compensation for any teams used, also cost of board and lodging for men employed," etc.—such contract could not be construed as including in the deductions the

cost of all materials and supplies necessary to enable the men employed to perform their work, "including" being a term of enlargement only when introducing the specific elements constituting the enlargement of the preceding language; the word being used in the sense of its synonyms, "comprising, comprehending, embracing."

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 150; Dec. Dig. §54(2).

For other definitions, see *Words and Phrases*, First and Second Series, Including.]

2. MINES AND MINERALS §54(2)—SALE OF CLAIM—CONSTRUCTION OF CONTRACT.

Where the buyer of a mining claim contracted to pay the sellers from net profits up to a certain amount, such profits to be computed by deducting, from the gross amount of gold produced, among other items, "a charge of twenty-five cents per miner's inch of eleven and one-half gallons for each twenty-four hours of water used in mining," in figuring net profits the buyer was not authorized to charge for any water used more than the amount specified.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 150; Dec. Dig. §54(2).]

3. MINES AND MINERALS §54(2)—SALE OF CLAIM—VALIDITY—SPECULATIVE CONTRACT.

The fact that it was soon demonstrated that the entire claim could not be worked at a profit without the employment of the hydraulic method is not ground whereon equity can base its refusal to enforce as unconscionable the contract of sale, providing the deductions from the gross amount of gold produced that the buyer might make on account of the cost of water used; the contract being speculative.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 150; Dec. Dig. §54(2).]

4. ESTOPPEL §90(2)—ESTOPPEL IN PAID—ACQUISITION IN ACCOUNT.

Where the sellers of the claim did not receive statements from the buyer, showing an increased charge for water used on the claim, by the contract to be deducted from gross production in figuring net profits, until more than half of all the expenses ever incurred for such water had been created, there was no estoppel of the sellers to deny the propriety of the increased charge for water, since the buyers did not rely upon the consent, silence, and acquiescence of the sellers when incurring added expense for water, while full knowledge of the facts is essential to create an estoppel by silence or acquiescence.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 244; Dec. Dig. §90(2).]

5. ESTOPPEL §95—ELEMENTS—SILENCE.

Mere silence without positive acts, to effect an estoppel must have operated as a fraud, must have been intended to mislead, and must have actually misled; the party keeping silent must have known, or had reasonable grounds for believing, that the other would rely and act on his silence.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 285-287; Dec. Dig. §95.]

6. ESTOPPEL §116—BURDEN OF PROOF.

The burden of proving the necessary elements of an estoppel by mere silence, which must have operated as a fraud, rests upon the party invoking the estoppel.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 306; Dec. Dig. §116.]

7. ACCOUNT STATED §6(2)—RENDITION OF STATEMENTS—FAILURE TO OBJECT.

Where the buyer of a mining claim knew that he had no right under the contract of sale to deduct from gross production, in order to ascertain the net profits from which part of the

price was to be paid, more than 25 cents per miner's inch for any water used on the claim, and knew that he had no right to deduct anything for materials and supplies, the rendition to the sellers of the claim of statements of account containing deductions for materials and supplies, though the statements were not objected to by the sellers, did not create an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 31-34, 36-38; Dec. Dig. § 6(2).]

8. MINES AND MINERALS § 54(2)—SALE OF CLAIM—ESTOPPEL.

The rendition to the sellers of such statements of account, though they were not objected to by the sellers, could not operate as an estoppel as against the sellers to dispute the account and rely on their contract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 150; Dec. Dig. § 54(2).]

9. EVIDENCE § 448 — PAROL EVIDENCE AFFECTING WRITING—CONTEMPORANEOUS CONSTRUCTION.

The failure of the sellers to object to the statement could not affect, as a contemporaneous construction, the clear terms of the contract of sale, which was unambiguous and in writing, since a contract cannot be varied by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by E. L. Blanck and others against the Pioneer Mining Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Cornelius D. Murane, of Seattle, for appellants. Lyons & Orton, of Seattle, for respondents.

ELLIS, J. Action in equity for an accounting. The following facts are undisputed: Prior to September 1, 1909, plaintiffs owned a leasehold interest in "Bench claim No. 6 below Good Luck on the left limit of Anvil creek" in the Nome Mining district in Alaska, in the following proportions: C. A. Vogel, one-eighth, E. L. Blanck, one-half, H. B. Ames, three-eighths. Their lease authorized them to extract the gold, paying to the owners of the claim a royalty of 32½ per cent. of the gross output. On September 1, 1909, by written agreement, they sold their interests to defendant Lindeberg for a total consideration of \$70,000, of which \$55,625 was then paid in cash. The balance, \$14,375, was to be paid to plaintiffs in proportion to their respective interests at times, in manner, and under conditions as follows:

"When the party of the second part shall have realized as net profits from the working of said claim the sum of \$55,625 there shall be paid monthly thereafter, to the parties of the first part, one-half of the additional net profits derived from the working of said claim, until the parties of the first part shall have received the said additional sum of \$14,375.

"The net profits hereinbefore mentioned shall be construed to mean the net profits of the entire claim including the Neussler one-fourth interest

and shall be computed and calculated in the following manner: From the gross amount of the gold produced from said claim shall first be deducted the royalty to be paid to the owners, and the only further deduction to be made shall be the actual expense of the labor engaged in the mining operations thereon, including the wages of the men, and reasonable compensation for any teams used, also cost of board and lodging for men employed, cost of all fuel used, and a charge of twenty-five cents per miner's inch of eleven and one-half gallons for each twenty-four hours of water used in mining on said claim."

Defendant was to have exclusive management and control of the mining operations, and agreed to keep a full, true, and correct account of the expenses incurred and of the gold produced, and to allow plaintiffs to inspect and take copies of such account, if desired, at any and all convenient times. Defendant Lindeberg was president and manager of defendant Pioneer Mining Company. He at once took possession of the claim and proceeded to extract the gold from it operating through that corporation. No question is raised as to his right to do so.

Preparatory to sluicing it was necessary to thaw the perpetually frozen gravel containing the gold. This could be done by either of two methods. One by introducing steam through steel pipes called points, in which case high-pressure water was unnecessary, both the thawing and hoisting to the sluice boxes being done by steam, the other by playing a stream of water on the gravel bank, in which case high-pressure water was essential and could be used both for thawing and raising the gravel to the sluice boxes by hydraulic elevators. The latter method eliminated the use of an engine, the expense of fuel for generating steam, and reduced the number of men necessary to perform the work. Prior to the sale plaintiffs had been operating by the former method, and defendants so continued till in 1910, when the Pioneer Mining Company acquired control of the Miocene Ditch Company, whose ditch was high enough to produce a pressure sufficient to make the hydraulic method practicable. Thereafter defendants employed the latter method. Through the Miocene ditch water could be delivered at the mine at a cost of about 50 cents per miner's inch. Defendants operated the mine during the latter part of 1909 and the full mining seasons of 1910, 1911, and 1912. These operations exhausted the claim. It is admitted that the total amount extracted by defendants was \$269,838.86 in gold. Defendants in their accounts, in addition to unquestioned rightful deductions for royalties, low-pressure water and labor expenses, charged as expenses and deducted from this gross output \$11,133.46 for material and supplies, and \$60,296.33 for high-pressure water, charging 50 cents per miner's inch computed at 9 gallons to the inch. The latter item computed at 11½ gallons to the inch would amount to \$47,187.50, and, if computed at 25 cents an inch, would

amount to \$23,593.75. Disputed questions of fact will be considered in our discussion.

Defendants' statement reduced the net profits much below the \$55,625 which, under the contract they were entitled to retain from the first net profits. Plaintiffs insist that in computing net profits, nothing should be deducted for materials and supplies, and for the water used only 25 cents for each miner's inch of $1\frac{1}{4}$ gallons. Such was the final issue. The trial court, adopting the latter view, found that the total net profits were \$80,777.03. This would leave, after deducting the \$55,625, the sum of \$25,152.03, one-half of which under the contract plaintiffs would be entitled to in the proportion of their respective interests. The sum of \$650 prior to suit had been paid to Blanck. The court accordingly entered judgment in favor of Blanck for \$5,638, in favor of Ames for \$4,716, and in favor of Vogel for \$1,572, with interest on these sums. Defendants appeal.

[1] Appellants contend that in the paragraph of the contract above quoted, defining net profits, the clause "the only further deductions to be made shall be the actual expense of the labor engaged in the mining operations thereon, including the wages of the men," etc., must be construed as including in the deductions the cost of all materials and supplies necessary to enable the men employed to perform their work because, as it is argued, the word "including" is a term of enlargement and not a term of limitation, and necessarily implies that something is intended to be embraced in the permitted deductions beyond the general language which precedes it. But granting that the word "including" is a term of enlargement, it is clear that it only performs that office by introducing the specific elements constituting the enlargement. It thus, and thus only, enlarges the otherwise more limited, preceding general language, "the actual expenses of the labor engaged," by making it embrace, not only "the wages of the men and reasonable compensation for any teams used" (which the preceding general language alone would have embraced in any event), but "also cost of board and lodging for men employed, cost of all fuel used, and a charge of twenty-five cents per miner's inch of eleven and one-half gallons for each twenty-four hours of water used in mining on said claim," which the preceding general language otherwise would not have covered. The word "including" introduces an enlarging definition of the preceding general words, "actual cost of the labor," thus of necessity excluding the idea of a further enlargement than that furnished by the enlarging clause so introduced. When read in its immediate context, as on all authority it must be read, the word "including" is obviously used in the sense of its synonyms "comprising; comprehending; embracing." *Neher v. McCook County*, 11 S. D. 422, 78 N. W. 998; *Hibberd v. Slack* (C. C.) 84 Fed. 571; *Brainard v. Darling*, 132 Mass. 218; *State v.*

Montello Salt Co., 84 Utah, 458, 96 Pac. 549. We find no warrant in the contract for including in the deductions from the gross output the cost of materials and supplies, such as shovels, picks, and lumber.

[2] It is equally plain that under the contract appellants were not authorized to charge for any of the water more than "twenty-five cents per miner's inch of eleven and one-half gallons for each twenty-four hours of water used in mining on said claim." The language used is too plain and exact, both as to the charge per inch and in defining the inch, to admit of construction. It is argued that the main object of the contracting parties was to recover the greatest amount of gold at a minimum cost, and that this implied the right to substitute for the steam point method the hydraulic method as a necessary means to attain that end. But the argument is superfluous. The contract itself gave to appellant Lindeberg "the exclusive management and control of said mining operations * * * to be conducted, however, as hereinbefore provided," and it was thereinbefore provided that he should "prosecute diligently and in a minerlike fashion" the work on the claim. Obviously he had the right to choose his own method of operation within the limits of minerlike work. There is, however, neither provision nor implication in the contract that he might add to the contract charge per miner's inch for water, or change the contract definition of the inch, in his deductions to determine the net profits. We are not concerned with the meaning of net profits in the abstract or in other circumstances. By their contract the parties here have defined net profits, fixing therein the charge of 25 cents per inch for water without exception. It is undisputed that the parties knew that high-pressure water would cost more than low-pressure water, yet in their solemn written contract they did not specify the kind of water to be used, nor make any distinction in the charge for water to be deducted, whether high pressure or low pressure were used. The same is true as to the saving of men and fuel resulting from the employment of the hydraulic method. Both parties as practical miners knew that this would result, yet neither saw fit to insert in the contract an increase of the charge per inch for water in that contingency.

[3] But appellants argue, on the theory of specific performance, that since it was soon demonstrated that the entire claim could not be worked to a profit without the employment of the hydraulic method, it would be unconscionable to enforce the contract as plainly written. Such a doctrine would tend to nullify every speculative contract. Here the whole enterprise was speculative. Each party took a chance on the output of the mine. Suppose it had produced in net profits millions of dollars, could respondents claim the right to anything more than one-half of the first \$28,750 of such profits? Of course

not, and the converse is equally palpable. Equity has never presumed to rewrite contracts for parties *sui juris* merely because of disappointed expectations.

"Equity will not relieve against hardship arising from a change in circumstances or the result of subsequent events, where these should have been in contemplation of the parties as possible contingencies, when they entered upon the agreement. And of such nature are the ordinary changes like a rise or fall in values, profit or loss in the undertaking, mistakes of judgment, unforeseen events, which yet were fairly possible contingencies," etc. 6 Pomeroy's Equity Jurisprudence, § 797.

Appellants in their second affirmative defense alleged, in substance, that shortly after their taking possession they learned, and so advised respondents, that the claim could not be worked at a profit except by the hydraulic process; that respondents then "consented to the change of process in mining and the increased cost for water." They further alleged that respondents, after receiving written statements of account showing the amount paid for water and included in the expenses, did not object to any items of expense so included until long after all mining operations were completed; that appellants relied upon the consent, silence, and acquiescence of respondents when incurring the expenses, particularly the added expense for water, and that respondents are estopped to dispute the items of account. The trial court found against appellants on this second affirmative defense, and we are clear that the evidence preponderates in favor of that finding. As to the vaguely pleaded oral modification of the contract, the evidence shows no more than that Blanck and Vogel were informed of the change from the old method of mining to the hydraulic method, and that it would increase the actual cost of water, soon after the change. Lindeberg testified, "So far as I remember Mr. Blanck never objected to our change of method of mining, but rather approved it all," and that Vogel, "expressed his satisfaction." He also testified that in the fall of 1910 or 1911 he had a very short conversation with Ames somewhere in Seattle, in which he told Ames of the change of method. Ames denied this meeting and this conversation in toto. Neither Lindeberg nor any other witness testified that in any of these conversations, or at any other time, either of respondents ever agreed that the actual cost of the high-pressure water should be deducted, instead of 25 cents an inch in determining the net profits as defined in the written contract, or ever consented to any change in that contract, or that such consent was ever requested.

[4-6] The issue is thus reduced to the claim of estoppel because of respondents' alleged failure to object to certain statements of account sent to them, showing charges of 50 cents an inch for the high-pressure water and charges for materials and supplies. But

the evidence shows that neither Blanck nor Ames received any statement including an increased charge for high-pressure water until in August, 1911, and it fairly appears that Vogel, though on the ground, received no such statement till in July, 1911. This was after more than half of all the expense ever incurred for high-pressure water had been created. Clearly appellants did not rely upon the consent, silence, and acquiescence of respondents as to these statements of account when incurring the added expenses for water. Full knowledge of the facts is essential to create an estoppel by silence or acquiescence. *Oliver Ditson Co. v. Bates*, 181 Mass. 455, 63 N. E. 908, 57 L. R. A. 289-291, 92 Am. St. Rep. 424; *Hunt v. Reilly*, 24 R. I. 68, 52 Atl. 681, 59 L. R. A. 206, 96 Am. St. Rep. 707. Respondents knew that appellants had adopted the hydraulic process but they also knew that under the contract Lindeberg had the right to adopt whatever method he pleased. They did not know till they received these statements that deductions above the contract charge for water were being made. Certainly until then they were under no duty to speak. Though the evidence on this point was conflicting, the trial court evidently believed, and so do we, that Blanck at least then did object to these charges. But even assuming that none of the respondents then objected, no estoppel arises. Appellants having proceeded at least till July, 1911, without any possible ground for reliance upon respondents' silence or acquiescence, the presumption must prevail that they continued to use the high-pressure water without such reliance. Mere silence, without positive acts, to effect an estoppel, must have operated as a fraud, must have been intended to mislead, and itself must have actually misled. The party keeping silent must have known or had reasonable grounds for believing that the other party would rely and act upon his silence. The burden of showing these things rests upon the party invoking the estoppel.

"Mere silence on the part of a party will not create an estoppel unless he was under some obligation to speak, and a party invoking such estoppel must show that it was the duty of the other to speak, and that he has not only been induced to act by reason of such silence, but that the other had reasonable cause to believe that he would so act." *Newhall v. Hatch*, 134 Cal. 269, 274, 66 Pac. 266, 268, 55 L. R. A. 673, 687, 688.

Appellants having for so long proceeded without any possible reliance upon respondents' silence, respondents might well have assumed that their attitude was a matter of indifference to appellants, and that no speech of theirs would then influence appellants' future conduct. And in fact, as the evidence fairly shows, Blanck's objections in 1911 were wholly unheeded.

[7, 8] It is true that in the fall of 1909 appellants rendered a statement containing charges for materials and supplies, but no

excess charge for water, and that no objection was made to this statement until Blanck's objection in 1911. But appellant knew that they had no right, under the contract, to deduct more than 25 cents an inch for any water, and no right to deduct anything for materials and supplies. Under the circumstances of this case their rendition of statements of account containing these deductions, though the statements were not objected to, could not create an account stated, nor operate as an estoppel as against respondents to dispute the account and rely upon their contract. *Kusterer Brewing Co. v. Friar*, 99 Mich. 190, 58 N. W. 52; *Gallinger v. Lake Shore Traffic Co.*, 67 Wis. 520, 30 N. W. 790; *Valley Lumber Co. v. Smith*, 71 Wis. 304, 308, 37 N. W. 412, 5 Am. St. Rep. 216.

[9] Some contention is made that the failure to object to the 1909 statement amounted to a contemporaneous construction of the contract as to the charge for materials and supplies. But contemporaneous construction cannot be invoked as against the clear terms of an unambiguous written contract. To hold otherwise would be wantonly to impinge the rule that such a contract cannot be varied by parol evidence.

Upon the whole record we are satisfied that the trial court reached the correct conclusion.

Judgment affirmed.

MOUNT, FULLERTON, and CHADWICK, JJ., concur.

CLAY et ux. v. SCHEELINE BANKING & TRUST CO. et al. (No. 2228.)

(Supreme Court of Nevada. Oct. 2, 1916.)

1. QUIETING TITLE § 34(5)—COMPLAINT—INTEREST OF DEFENDANT.

Neither under Rev. Laws, § 5514, nor independently of it, does a complaint state a cause of action to quiet title, it not alleging that defendants claim an interest in the property adverse to plaintiffs.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 71, 72; Dec. Dig. § 34(5).]

2. APPEAL AND ERROR § 193(1)—OBJECTION NOT MADE BELOW—SUFFICIENCY OF COMPLAINT.

The complaint, though praying that title be quieted against defendant, not containing the necessary allegation of a complaint to quiet title, that defendants claim an interest in the property adverse to plaintiffs, but alleging that defendants were endeavoring to cloud and cast a cloud on said property, and the evidence being such as would be offered in an action to prevent a cloud being cast on plaintiffs' title, defendants were entitled to assume that the action was brought merely to prevent a cloud, as regards the contention that, because defendants did not urge in the trial court that the complaint did not state a cause of action to quiet title, they cannot do so on appeal, and that therefore judgment should be reversed, and one quieting title

in plaintiffs be ordered for want of denials in the answer.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1226, 1230, 1231, 1237; Dec. Dig. § 193(1); *Pleading*, Cent. Dig. § 1355.]

3. APPEAL AND ERROR § 194(1)—OBJECTION IN LOWER COURT — ANSWER — EFFECT OF FAILURE TO OBJECT.

Plaintiffs, not having, till after judgment, questioned that the answer stated a defense to the matter pleaded in the complaint, cannot on appeal urge failure of defendants to demur to the complaint, as not stating a cause of action, and to deny certain of its allegations, as ground for reversing the judgment and ordering one for plaintiffs; as a demurrer to an answer which does not aid the complaint will be sustained to the defective complaint.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1241-1243, 1246; Dec. Dig. § 194(1); *Pleading*, Cent. Dig. § 1375.]

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

Action by Edwin Clay and wife against the Scheeline Banking & Trust Company and another. From an adverse judgment, plaintiffs appeal. Affirmed.

Summersfield & Richards, of Reno, for appellants. James T. Boyd, of Reno, for respondents.

COLEMAN, J. This is an appeal from a judgment in favor of respondents, who were defendants in the district court, by Edwin Clay and Emma V. Clay, his wife, who were plaintiffs in the district court.

In their complaint it is alleged that the plaintiff Emma V. Clay was the owner of certain improved real estate; that the plaintiffs had been, and at the time of filing the suit were, residing upon the property; that plaintiffs filed and had recorded in the proper office their homestead selection, designating the property in question as a homestead. It is also alleged in the complaint as follows:

"That, notwithstanding the fact hereinabove alleged that the ownership of said real property by said Emma Clay as aforesaid, and the declaration thereon by herself and said Edwin Clay of the homestead marked Exhibit A, hereby specially referred to and made a part hereof, the said defendants, Scheeline Banking & Trust Company, a corporation, and C. P. Ferrel, sheriff of Washoe county, state of Nevada, are endeavoring to cloud and cast a cloud upon said real property, in that they and each of them are causing to be sold said real property pursuant to a certain judgment dated the 16th day of March, 1916, wherein said defendant Scheeline Banking & Trust Company recovered a judgment against said plaintiffs, in that certain action entitled *Scheeline Banking & Trust Company, a corporation, plaintiffs, against Edwin Clay and Emma Clay*, for the sum of \$2,004.83, and the interest thereon, pursuant to the terms of said judgment, and notwithstanding the further fact that said defendants have no right, title, interest, claim, or demand in or to said real property or any part thereof, and the said plaintiffs are the owners thereof, seised in fee simple absolute, in the possession, and entitled to the immediate possession of said real property."

The prayer of the complaint is as follows:

"Wherefore plaintiffs pray that the title and ownership to said real property be forever quieted against said defendants and each of them, and that said plaintiffs be declared to be the owners of said real property and the whole thereof, and that said plaintiffs have judgment herein pursuant to law accordingly, and for costs of suit."

Omitting the introductory statements, the answer of the defendants reads:

"Denies that the plaintiffs were residing at the time of the alleged claim of homestead or at any other time on the described premises; denies that the plaintiff claimed the property and its appurtenances set forth in plaintiffs' complaint as a homestead, or that the plaintiffs or either of them were entitled to claim said premises and appurtenances as a homestead, by reason of the declaration of homestead or otherwise, or at all; denies that at the time of the alleged declaration of homestead, or at any other time, the plaintiffs or either of them were actually or at all residing or living upon said described premises, or that they claimed, or intended to claim, or that they were entitled to claim, said premises and its appurtenances or any part thereof as a homestead, or that said premises was or could be claimed as a homestead; denies that said premises was ever used by the plaintiff as a homestead."

The case was tried before the court without a jury, and the court in its findings of fact found that:

"At the time the declaration of homestead was made and filed plaintiffs were not residing thereon, and had not the intention to use, and did not actually use and occupy, the premises described in said declaration as a homestead as required by section 2142 of the Revised Laws of Nevada 1912."

Judgment was entered dismissing the action, and for costs in favor of respondents.

The application to this court to reverse the judgment of the trial court and to order that court to enter judgment on the pleadings in favor of appellants is based upon the idea as set forth in the following language quoted from the brief of counsel for appellants:

"It is admitted in the pleadings, since it is not denied in the answer, that respondents have no right, title, interest, claim, or demand in or to the real property described in the complaint, and that appellants are the owners thereof, seised in fee simple absolute, in the possession and entitled to the immediate possession of said real property, and the respondents are clouding said real property as alleged in the complaint."

In other words, as we understand the contention of counsel for appellants, we are asked to make the order mentioned for the reason that the answer of defendants failed to deny that they had no right, title, interest, claim, or demand in the property in question.

In view of the fact, as appears from the complaint of appellants, that respondents are seeking to satisfy a judgment in favor of one of the respondents and against the appellants, it would indeed be a rather remarkable situation if respondents were aiming to sell property which belonged to respondents, or either of them, instead of property of appellants. We cannot imagine whose property respondents would sell if not the property of appellants. Surely they would not sell

the property rights of respondents. However, if respondents, or either of them, had or claimed an interest in the property (not adverse to appellants), we know of no reason why they might not sell such interest in the property as appellants might have, whether it be an undivided one-half or an equity. As we read the complaint, respondents are seeking to sell whatever interest appellants have in the property, and we know of no way to stop them, so long as the judgment stands upon which the execution was issued.

[1] Plaintiffs' complaint cannot be construed as one to quiet title, either under our statute or independent of statute. Section 5514, Revised Laws of Nevada, relative to actions to quiet title, reads:

"An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim."

Mr. Pomeroy, in his work on Code Remedies (3d Ed.), at section 363, says:

"The nature of the action to quiet title is such that it is impossible to lay down any but the most general rule in relation to its parties defendant. The very object of the proceeding assumes that there are other claimants adverse to the plaintiff, setting up titles and interests in the land or other subject-matter hostile to his. Of course, all these adverse claimants are proper parties defendant, and if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants. Originally, and independent of statute, this particular jurisdiction of equity was only invoked when either many persons asserted titles adverse to that of the plaintiff, or when one person repeatedly asserted his single title by a succession of legal actions, all of which had failed, and in either case the object of the suit was to settle the whole controversy in one proceeding. The action has, however, been greatly extended by statute, especially in the Western states, and is there an ordinary means of trying a disputed title between two opposite claimants."

The court, in *Low v. Staples*, 2 Nev. on page 213, in speaking of the effect of the statutory action to quiet title, as the statute existed at that time, said:

"* * * The old equity jurisprudence of the court is extended, but further than this we do not think it affected."

Thus it will be seen that there is practically no difference in the nature of the action under our statute and as it exists independent of statute, and hence we should have very little trouble in determining if the complaint is good. Whether we look to our statute or the nature of the action as it exists independent of statute to ascertain the essentials of a complaint in an action to quiet title, we find that one of the essentials of a good complaint in such an action is that it must show that the defendants claim an interest in the property adverse to the plaintiffs.

[2] There is no such allegation in the complaint in this case, or anything approaching it; hence the complaint does not state a cause of action to quiet title. But it is said that, as respondents did not urge this point

in the lower court, it cannot be urged here. In view of the record in this case, as made in the lower court, we do not deem it necessary to decide this question, though we might call attention to the fact that section 5045 of the Revised Laws provides what shall and what shall not be waived by failure to demur.

As we read the record in this case, the complaint was drawn and the case tried upon the theory that to permit a sale under the judgment pleaded in the complaint would cast a cloud upon plaintiffs' title, and that, in view of the claim that the property was exempt as a homestead, a court of equity should not permit such a cloud to be cast thereupon, and to prevent it the action was commenced. We are of this opinion for the reason that the complaint does not contain the necessary allegation to constitute it an action to quiet title, but, on the other hand, as appears from that portion of the complaint heretofore stated, it alleges that respondents were "endeavoring to cloud and cast a cloud upon said real property," and the evidence offered was not such evidence as would be offered in an ordinary action to quiet title, but such as would be offered in an action to prevent a cloud being cast upon the title of plaintiffs.

We think that, in view of the nature of the complaint, counsel for respondents had a right to assume that the action was brought, not to quiet title, but to prevent a cloud being cast upon the title of plaintiffs, and therefore was justified in not urging in the trial court that the complaint did not state a cause of action.

[3] But, to go a step further, it seems to us that appellants are in a rather peculiar position, in that they did not demur to the sufficiency of the answer of respondents in the court below, or in any way question that it stated a defense to the matter pleaded in the complaint, until after judgment, but now assert that, notwithstanding this fact, they can take advantage of respondents' failure to demur to the complaint on the ground that it does not state a cause of action.

It is the general rule applicable to pleading that a demurrer runs through the whole series of pleadings, and will be sustained to the first defective pleading. 31 Cyc. 338. Of course, if the answer so aids the complaint as to make out a cause of action against a defendant, the rule would not apply; but such is not the fact in this instance. So it seems that in any event appellants' contention that this court should reverse the judgment and order that judgment be entered in favor of appellants cannot be sustained.

The only reason offered by plaintiffs, either in their complaint or in their evidence, why the property should not be sold, is the claim asserted by them that it is exempt as a homestead. The trial court held that this

claim was not well founded, and this finding is not assailed in this court.

It is ordered that the judgment be affirmed.

NORCROSS, C. J., concurs.

MCCARRAN, J. (concurring in the order). I concur in the order. It would appear from the record in this case that the action had been commenced with a view to establishing a homestead exemption in favor of appellants herein, which exemption, if established, would relieve the property from sale under execution. The matter of the right of appellants to claim a homestead exemption, whether correctly or erroneously decided by the court below, is not involved in the appeal. Counsel for appellants in his oral argument, in response to a question propounded by the court, so asserted. The question involved was one, as we view it, intended to prohibit the respondents from selling the property in question under execution issuing pursuant to a judgment obtained.

Assuming, for argument's sake, that the question was one to quiet title, if the homestead phase of the controversy were abandoned, as we take it to have been, the court might well have granted all of the prayer of appellants' complaint, in fact might have rendered judgment on the pleadings, and hence declared that respondents had no right, title, or interest in or to the real property described in the complaint, and that appellants were the owners thereof, seised in fee simple absolute, and that they were entitled to immediate possession of the premises; and, even if judgment had been rendered in such a form, it would avail nothing in behalf of appellants in the way of preventing the levy of an execution, or the sale of the premises under the execution issued pursuant to the judgment, previously rendered in another case, wherein the appellants here were defendants, and the respondent the Scheeline Banking & Trust Company became a judgment creditor.

If the appeal in this case involved an order of the trial court in its finding and conclusion as to the homestead exemption, I am not ready to say that the findings of the trial court in that respect or a judgment based on such findings could have been affirmed. Definitely as to this, however, I express no opinion. We are referred to no law, and we know of none, in the light of which a suit to quiet title will serve the purpose of an action to prohibit a sale under execution issued pursuant to judgment.

We take it from the position of counsel for appellants, expressed in his oral argument, that they concede that the property in question is not subject to a claim of homestead exemption in behalf of appellants. This being conceded, the property must therefore be such as is subject to sale under the execution, if it be property the title to which is rightfully in the name of the judgment

debtor against whom execution has issued. A decree, even though it had been rendered on the pleadings in this case, could at most but have confirmed title in appellants, the judgment debtors. Would such a decree or judgment deprive the judgment creditor of the right to sell the property under execution, where the former judgment had been duly rendered against the party to whom, in these proceedings, title in fee had been decreed? We are at a loss to find a rule that will support an answer in the affirmative.

LEITNER et al. v. THAYER et al. (No. 850.)
(Supreme Court of Wyoming. Oct. 2, 1916.)

1. CUSTOMS AND USAGES §14—EVIDENCE—EXPRESS AGREEMENT.

The custom among dealers in stallions as to methods of conducting sales and as to warranties given is immaterial in case of a sale with express agreement.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 29; Dec. Dig. §14.]

2. SALES §426—BREACH OF WARRANTY—REMEDY OF BUYER—CONTRACT.

Though contract of sale of a stallion provides that if he proves not to be as warranted, the sellers on return of him will furnish another, yet, it containing nothing obligating the buyers to do so, they may, in case of breach of the warranty, retain him and recover damages for the breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1209; Dec. Dig. §426.]

Error to District Court, Big Horn County; Carroll H. Parmelee, Judge.

Action by Frank A. Leitner and another, partners as Leitner Bros., against William Thayer and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Thomas M. Hyde, of Basin, Frank Hunter, and Geo. W. Farr, both of Miles City, Mont., for plaintiffs in error. C. A. Zaring, of Basin, and W. L. Simpson, of Cody, for defendants in error.

BEARD, J. This is an action on three promissory notes executed by the defendants in error. The petition is in the usual form in three counts. The defendants answered, in the first count of their answer, admitted the execution of the notes, and alleged that the notes were obtained by fraud and misrepresentation, and were wholly without consideration, as would fully appear in the affirmative defenses thereafter set forth. In the second count of their answer they alleged, in substance and so far as material here, that the notes were given as part consideration for the purchase price of a certain stallion. That said stallion was falsely and fraudulently represented by plaintiffs to defendants to be in good health, free from disease, and suitable for breeding purposes, and would get 60 per cent. of mares bred to him with foal, and was a good foal-getter. That said stallion proved to be impotent and

of no value for breeding purposes. The plaintiffs replied, admitting that the notes were given as part purchase price of the stallion; denied the other allegations of the answer, and alleged that they made to defendants no warranty or warranties with respect to the breeding qualities or otherwise of said stallion, save and except as contained in a certain writing called a bill of sale (a copy of which is set out in full in the reply and will be hereinafter referred to); that defendants had failed to return the stallion as provided in said writing, but had kept possession of him. The cause was tried to a jury, which returned a general verdict in favor of defendants, and also answers to certain special interrogatories submitted to it. Judgment was rendered in favor of defendants on the verdict, and plaintiffs bring error.

That the stallion was warranted to be a 60 per cent. foal-getter is not here in dispute. The claim of defendants being that the warranty was verbal and made before or at the time the notes were executed and delivered, and was to the effect that if with good care the horse did not prove to be a 60 per cent. foal-getter, the defendants could return him and receive another horse; and they deny having received any written warranty. The defendants claimed that the only warranty their agent who made the sale was authorized to give was a written warranty, and that a bill of sale, a purported copy of which was admitted in evidence, and which they claimed was delivered to defendants, was the only warranty given. Their contention is that by its terms, if the horse did not prove as warranted as a foal-getter, the only remedy the defendants had was to return the horse at the time and place therein stated and receive another horse. The paper admitted in evidence is as follows:

"Know all men by these presents, that we, Leitner Bros. & Green, of Miles City, Montana, have this day sold to Fenton Percheron Horse Co. of Fenton, Big Horn Co., Wyo., the Percheron stallion named Francois No. 40938 for the consideration of the sum of four thousand dollars the receipt whereof is hereby acknowledged.

"In the event that the above-named stallion, in perfect health, with proper usage, and the mares to him regularly returned and tried or bred, on one full service season's trial does not get with foal fifty per cent. of the mares regularly tried and bred to him, then on return of the said stallion to us at Miles City, Montana, during the first week in the month of April next following the full service season first concluded after the date hereof, in good health and condition, we agree to furnish the above-named purchaser, without further charge, another pure-bred stallion of equal quality, in exchange; but it is expressly provided, as a condition of this warranty, that the tally sheet accompanying and delivered with this bill of sale shall be accurately filled out, with date of each service and trial, to enable identification of all mares bred, and after being so filled out shall be returned to us at Miles City, Montana, by registered letter, not later than July 15, 19—. It is hereby stipulated that a stallion's full

service season shall be considered as the period commencing the first day of May and ending the first day of July.

"In the event the conditions of the above agreement are not faithfully performed, time being of the essence of this contract; or should the above-named stallion hereafter become injured or disabled through accident or disease, or should any changes, additions or alterations be made in this bill of sale, not shown by the duplicate copy of same preserved by us, this warranty shall be null and void and of no effect, and all obligations incurred by us herein shall be considered fulfilled and ended.

"This bill of sale contains all the agreements of warranty or guaranty made by us in the sale of the above-mentioned stallion, and it is expressly provided that we shall not be liable for any claim that may hereafter be made alleging any verbal agreement of ourselves or agent in the sale of said horse.

"In witness whereof, we have hereunto set our hands and seals this 20 day of May, 1909.

"Leitner Bros. & Green. [Seal]"

J. S. Green, the agent of plaintiffs who made the sale, testified as a witness for plaintiffs, and stated that in the bill of sale which he said he delivered to the secretary of the Fenton Percheron Horse Company the words "fifty per cent." read "sixty per cent." in the original, and that the blank date, "July 15, 19—" was July 15, 1909, and that the instrument was signed, "Leitner Bros. & Green by J. S. Green, Agent." The evidence further discloses that the horse company was not formed until the day after the notes were given and the horse delivered.

[1] Complaint is made by counsel for plaintiffs that the court refused to permit this witness to testify as to the custom among dealers in that class of horses as to the methods of conducting such sales and as to warranties given. He was permitted to testify what he did in this instance, and that that was the usual custom of plaintiffs. It was immaterial what the usual or general custom was as defendants were relying upon an express agreement.

[2] Plaintiffs also complain of certain instructions given by the court to the jury as to the authority of the agent to warrant the quality of the horse; and in refusing certain instructions requested by plaintiffs in that respect. But in view of the construction we think must be put upon the contract as claimed by plaintiffs, it is not necessary to discuss those points. It clearly appears from plaintiffs' own evidence that their agent was authorized to sell the horse with a warranty that he would prove to get with foal 60 per cent. of mares regularly bred to him, with the agreement that in the event he failed in that respect, then on the return of said stallion to plaintiffs they would furnish another stallion of equal quality. The evidence abundantly sustains the finding that this horse proved to be a failure as a foal-getter and was worthless for breeding purposes. There is very little difference between the parties as to what the warranty in this case in fact was. In the event the horse proved not to be as warranted, then,

upon a return of the horse to plaintiffs they were to furnish another; but there is nothing in the contract obliging defendants to so return him, nor is there anything therein whereby defendants waived their legal right to retain the property, and when sued for the purchase price to recoup their damages for the breach of warranty. When personal property is sold with a warranty, and the sale is complete, with a subjoined agreement to take back the property if it does not prove as warranted and to exchange it for other property, or to refund the purchase price, the better and more reasonable rule, in our opinion, is that the purchaser in case of a breach of the warranty has the option of either returning the property or to retain it and recover damages for the breach. In *Williston on Sales* it is stated:

"It is not uncommon for warranties expressly to state that the buyer shall have the right to rescind the transaction for breach of warranty, and that on the returning of the goods in such event the buyer shall either be entitled to have his money back or to have other goods instead of those first taken. Conditions are often in such contracts imposed upon the right of rescission, and, if imposed, of course must be observed in order to entitle the buyer to rescission. It has sometimes been contended that such an express provision for rescission amounted in effect to an agreement that this right should be the only right available to the buyer for breach of warranty. No doubt a contract may provide for rescission as a sole remedy. The mere fact, however, that the contract provides that the buyer may rescind the contract and return the goods does not, of itself, exclude the buyer from pursuing other remedies allowed by law for breach of warranty."

While there are some decisions to the contrary, the above statement of the rule in cases like the one here is amply supported by authority, and in our opinion is the correct rule. In a leading case, often cited, *Douglass Axe Manufacturing Company v. Gardner*, 10 Cush. (Mass.) 88, it is held:

"When a seller, in addition to a warranty of property, makes a promise to take it back if it does not conform to the warranty, we cannot hold that such superadded promise rescinds and vacates the contract of warranty. We are of opinion that, in such case, the buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach of the warranty."

That construction of contracts similar to the one we are considering has been approved in the following cases: *Shupe v. Collender*, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; *Love & Co. v. Ross et al.*, 89 Iowa, 400, 56 N. W. 528; *Hefner v. Haynes*, 89 Iowa, 616, 57 N. W. 421; *Hallowell v. McLaughlin Bros.*, 186 Iowa, 279, 111 N. W. 428; *Elwood v. McDill*, 105 Iowa, 437, 75 N. W. 340; *Kemp v. Freeman*, 42 Ill. App. 500; *Cook v. Lantz*, 116 Ill. App. 472; *Moore v. Emerson*, 63 Mo. App. 137; *Birch v. Kavanaugh Knitting Co.*, 34 App. Div. 614, 54 N. Y. Supp. 449; *Mandel v. Buttles*, 21 Minn. 391; *Fitzpatrick v. D. M. Osborne Co.*, 50 Minn. 261, 52 N. W. 861; *Park et al. v. Richardson & Boynton Co.*, 81 Wis. 399, 51 N. W.

572; *Eyers v. Haddem* (C. C.) 70 Fed. 648; *Denver Horse Importing Co. v. Schafer*, 58 Colo. 376, 147 Pac. 367. By the terms of the contract, as plaintiffs concede they were, defendants were given the right, upon returning the horse at a certain time and place, to rescind the contract, and in that event they were bound to receive another horse. Whether the defendants would have had the right to rescind the contract by a return of the horse in the absence of such contract need not be discussed. By the contract they were given that right; but it was not their exclusive remedy. The language of the contract is not that if the horse failed to comply with the warranty, the defendants agree to return him, or that they shall or must return him, but is, "then on return of the said stallion," etc., plaintiffs agree to furnish another. This gave defendants the option to return the horse and take another, or they could keep him and recover damages for the breach of warranty.

There was sufficient evidence to sustain the finding of the jury that the warranty was verbal, and that no written warranty was delivered; and the warranty as claimed by defendants is substantially that which plaintiffs admitted the agent was authorized to make and did make.

Some other matters have been assigned as error, but they do not effect the merits of the case; and, as we hold that the agreement that upon a return of the horse plaintiffs would furnish another did not deprive the defendants of their right to retain him and recoup their damages for a breach of warranty when sued for the purchase price, those assignments of error need not be considered.

The judgment of the district court is affirmed.

Affirmed.

POTTER, C. J., and SCOTT, J., concur.

KELLY v. BOARD OF COM'RS OF BIG HORN COUNTY. (No. 852.)

(Supreme Court of Wyoming. Oct. 3, 1916.)

1. DEEDS \S 208(1, 6) — ACCEPTANCE — EVIDENCE.

In an action based upon an award of arbitrators, and upon a general allegation of damages caused by the location of a road, evidence held insufficient to show that the deed executed by the plaintiff when the arbitration agreement was made, conveying a right of way for the road, was ever delivered to and accepted by the county.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 625, 630, 631; Dec. Dig. \S 208(1, 6).]

2. CONSTITUTIONAL LAW \S 291 — DUE PROCESS OF LAW—TAKING OF PROPERTY.

Where the title to a right of way for a road was acquired by proceedings to locate the road, and an opportunity was given to the owner to present his claim for damages in the manner

prescribed by statute, his property was not taken without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 870-876; Dec. Dig. \S 291.]

3. COUNTIES \S 114—AGREEMENTS OF COUNTY ATTORNEY—EFFECT.

Where a county board did not authorize an arbitration agreement entered into by the county attorney, nor ratify such agreement, it was not binding upon the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 174, 175; Dec. Dig. \S 114.]

4. EMINENT DOMAIN \S 315 — ACTION FOR DAMAGE—REVIEW—CONFLICTING EVIDENCE.

In an action for damages from the location of a county road over plaintiff's land, the evidence being conflicting, and sufficient to sustain the judgment for defendant, it will not be reversed on the evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. \S 829-838; Dec. Dig. \S 315.]

Error to District Court, Big Horn County; Charles E. Winter, Judge.

Action by Patrick Kelly against Board of County Commissioners of Big Horn County, Wyo. Judgment for defendant, and plaintiff brings error. Affirmed.

W. L. Walls, of Cody, and C. A. Zaring, of Basin, for plaintiff in error. W. S. Collins, of Basin, and E. E. Lonabaugh, of Sheridan, for defendant in error.

SCOTT, J. This proceeding in error is to reverse and vacate that certain judgment made and entered in the district court of Big Horn county in favor of the county, defendant there and defendant in error here, wherein the court failed to assess and award damages to the plaintiff there, and plaintiff in error here in a specified sum alleged to be the value of a certain right of way for a public road over and across his premises. The case was tried to the court without the intervention of a jury, and judgment was rendered in favor of the defendants, and the plaintiff brings error.

1. The evidence tends to show that before the case was commenced a question had arisen between the parties hereto with reference to the value of the proposed right of way across and over the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 17, township 52 N. of range 104. On May 16, 1910, the county and prosecuting attorney of Big Horn county without precedent authority and Patrick Kelly, as administrator, attempted to agree upon a method of settlement for a right of way and interest thereon at 8 per cent. per annum from the date of such agreement, in words and figures, as follows:

"This agreement made and entered into this 16th day of May, A. D. 1910, by and between the board of county commissioners of the county of Big Horn, Wyoming, party of the first part and Patrick Kelly, as administrator of the estate of Mary Kelly deceased, party of the second part: Witnesseth: That whereas Patrick Kelly, as administrator of the estate of Mary Kelly, deceased, is the owner of and has a legal estate in the following described real estate, in

Big Horn county, Wyoming, as follows, to wit: Northeast quarter of southwest quarter of section seventeen, township fifty-two (52) N. R. 104 W. N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ -17-52-104 W.; And whereas the party of the first part wished to obtain from the party of the second part a right of way over and across said land for a public road, as now surveyed and platted as per map of U. S. R. S. now on file in the office of the county clerk of said county and marked map S-891 and S-1093 and in accordance with the plat and survey hereto attached and made a part hereof: Now therefore it is agreed by and between the parties hereto:

"First. The party of the second part now and here delivers to the party of the first part a quitclaim deed for the right of way surveyed, platted and as mentioned in the above agreement and the plat and map S-891 as above mentioned and as shown in said deed.

"Second. The party of the first part agrees to pay to said party of the second part, for said right of way as conveyed, a sum or sums of money, if any may be found to be due and payable by the award of the arbitrators hereinafter set forth.

"Third. It is mutually agreed and determined by the parties hereto that for the purpose of fixing and determining the cash value of the lands required for said right of way, for damages sustained by reason thereof and for any other damages in any manner sustained by the party of the second part, or his heirs by reason of said right of way, there shall be appointed a board of arbitration, consisting of three freeholders, of the county of Big Horn, Wyoming, in the manner following:

"The party of the first part to select one person, the party of the second part to select one person, and those two persons so selected shall select a third person, which said board shall within three days after being thus selected meet together at some convenient place upon the land above described over which the right of way passes, and thereupon proceed to view and examine into the matter of damages by reason of said right of way, and thereupon to make an award of their findings under oath of all damages, if any are found, by reason of said premises and to fix and determine the amount thereof. It is further agreed that such finding and award shall be final, subject to the right of appeal to the district court by either party hereto.

"It is further agreed that the selection of the two arbitrators shall be made at once upon the signing of this agreement and that at the same time a deed as above mentioned shall be made executed and delivered to said first party, by said second party. Their agents may at once take possession of said right of way for all purposes.

"That said arbitrators shall take into consideration in arriving at their award, the benefits, if any, to said land by reason of the location of said road."

Thereafter the county and prosecuting attorney, on his own motion, on or about May 17, 1910, and Patrick Kelly met and selected A. J. Martin and George T. Beck, and they appointed Joseph M. Howell as a third arbitrator. The first and last of the above-named persons, on view of the property, agreed to assess the damages in the sum of \$1,500, and, having theretofore taken the oath, they then made their report, and on May 23, 1910, filed it, together with said agreement and their report thereon with the board of county commissioners who never allowed or approved, but long after rejected, a bill based on the said arbitration. Prior thereto, and on May 11, 1910, the board of county commis-

sioners approved and proceeded under chapter 168 to lay out a road embracing the same ground, upon petition and under different and independent proceedings and sections of the statute, and, having decided to lay out and open the road, made publication under section 2524, Compiled Statutes 1910, and which section reads as follows:

"If the board of the county commissioners shall determine to establish, lay out or alter any road, they shall appoint a day, not less than thirty days after such determination, on or before which day all objections to the establishment, alteration or vacation of the proposed road, and claims for damages by reason thereof, shall be filed with the county clerk"

—and in said notice prescribed the time, place, and manner of publication and giving notice to the parties interested, and requiring, under section 2526, that:

"No objections or claims for damages shall be filed or made after the noon of the day fixed for filing the same, and if no objections or claims for damages are filed, on or before noon of the day fixed for filing the same, they shall be disregarded, and not considered, and shall be deemed to have been waived and barred."

Kelly did not appear before the board in any manner to establish his claim other than by filing the award as a claim against the county other than as a claim under the award and which the board rejected. The power to arbitrate the question by Metz was not based upon precedent authority so to do, nor upon an action pending, but upon ratification, if at all based upon subsequent conditions. There was no action pending under section 4928, Compiled Statutes 1910, at the time of the attempt to enforce the award, or prior thereto under section 4939, which section reads as follows:

"In all cases the party enforcing an award shall produce satisfactory proof to the court of the due execution of the submission or arbitration bond, and that the party neglecting or refusing to obey the award was furnished with a true copy thereof, at least ten days before the term at which the application to enforce the award was made."

Under section 4928 the right to have arbitration is granted in all cases where a controversy between the parties exists, except when the title or right to possession of real property are either or both involved. The giving of the bond under section 4929 by each party may be waived by the parties and the arbitration be proceeded with without such bond. It was so held in *Railway Co. v. Burke et al.*, 54 Ohio St. 120, 43 N. E. 282; *Conner v. Drake*, 1 Ohio St. 166; *Com'rs of Montgomery County v. Carey*, 1 Ohio St. 463; *Greer v. Canfield*, 38 Neb. 175, 56 N. W. 883.

Patrick Kelly was acting in his representative capacity as administrator. There is no showing in the record here of any authority preceding or otherwise granted, or attempted to be granted, him by the court having jurisdiction of the probate of the estate to sell and convey an easement or right of way through, over, and across any land belonging

to the estate of which he was executor. An arbitration and award rests in the submission of the parties, whether such arbitration and award arises in the course of an action or upon agreement or contract of the parties. The former is statutory, while the latter is a common-law agreement, based upon a consideration to submit the subject-matter of the award to arbitrators. The ratification of a preliminary agreement to submit a controversy to arbitrators presupposes the existence of a valid agreement so to do; in other words, there must be something to ratify, else there will be no ratification. A municipal corporation authorizes binding itself to a certain line of conduct in a certain manner. To illustrate, the directors or trustees of the corporation must be in session and organized for business in order to transact, or delegate power to transact business for itself. In 10 Cyc. at page 1069, it is said that:

"A corporation, like a natural person, may ratify, affirm, and validate any contract made or act done in its behalf which it was capable of making or doing in the first instance"

—but if it had no power to make the contract, there can be no ratification. Id. 1070. Nor can the officers ratify a contract which they had no power to make. Id. 1070. And this is usually done by a board of directors, or trustees. They may, when sitting together as a board by a solemn act, such as a resolution or a vote passed and entered upon their records, ratify any contract which they had power to make. Informal and irregular acts may be so ratified, but it must be done by the directors, and when acting as such within the realm of their authority. 10 Cyc. at page 1073. It will thus be seen that a corporation acts with limited powers and in a certain way. There is no proof here that the board of county commissioners of Big Horn county especially authorized its county and prosecuting attorney to act for it, nor is there any proof of ratification. The attorney had a telephone communication with the chairman of the board, but no communication with the commissioners while acting as a board for precedent authority. The statute is special in its nature with reference to the assessment of damage in laying out a road. It provided an easy method of arriving at the damages in such a case, and did away with a regular suit for that purpose. Section 2526, Comp. Stat. 1910, provides:

"No objections or claims for damages shall be filed or made after the noon of the day fixed for filing the same, and if no objections or claims for damages are filed, on or before noon of the day fixed for filing the same, they shall be disregarded, and not considered, and shall be deemed to have been waived and barred."

Such a statute, in my opinion, is exclusive, and any attempt of the county to depart from the statute would be ultra vires. It was so held in *Parat v. Bayonne*, 40 N. J. Law, 333, 335, and also appears in 39 N. J. Law, 559, where it is further said:

"The city, by its charter, was authorized to take lands by condemnation under the right of eminent domain. The mode prescribed for appraising the value of lands taken, and damages, was by a board of commissioners of assessments, to be appointed by the common council, whose duty it was, not only to appraise the value of the lands taken, but also to make the assessment of the cost of the improvements upon property benefited."

In the case before us the duty of the appraisers who are appointed at the succeeding term after laying out the road to appraise the same is prescribed by section 2530, Compiled Statutes 1910, which reads as follows:

"The said appraisers shall, within ten days after receiving notice of their appointment, meet at some convenient place, on the line of said proposed or altered road, and take and administer to each other, an oath or affirmation to faithfully and impartially discharge their duties. They shall then view the ground, so far as they shall deem it necessary, and fix the amount of damages sustained by each claimant, after allowing for all benefits that may accrue to each claimant, by reason of the location or alteration of the said proposed road. They, or a majority of them, shall as soon as practicable, after performing their said duties, make a report in writing to the county clerk of their doings, stating that they were so sworn or affirmed as aforesaid, before performing their duties and fixing the amount of damages, if any, sustained by each claimant, after allowing and deducting for benefits, and where they have disallowed claims for damages, they shall so state in their report, and they shall immediately transmit their report, when made, to the county clerk. They shall, whenever they can conveniently do so, notify the claimants or their agents, of the place of their meeting and may hear such evidence as they may deem necessary in determining the amount of damages fixed by them. They are hereby authorized to administer oaths to each other and to such witnesses as they may hear. If any one of them shall fail or refuse to perform his duty, the other two appraisers shall serve and shall appoint a suitable and disinterested elector in his place, who shall be within easy access, and he shall be sworn or affirmed in like manner as the other two appraisers, and the facts of such appointment and qualification shall be stated in said report to the county clerk. The said appraisers shall each receive for his compensation such reasonable sum as the board of county commissioners shall allow."

We are therefore of the opinion that Kelly can take nothing by reason of the alleged contract between himself and Metz.

Something is said in the pleadings about the payment to Kelly by the county of \$535 personally and \$123 to his wife. Kelly claims that this payment had reference to the right of way upon the school section, and not upon land in section 17 here involved. As there is a dispute as to what this payment was for and the evidence is conflicting, we do not consider it necessary to further discuss the purpose of its payment or its final destination. The action is based on an award, and in any event called for proof in order to enforce the award in accordance with section 4939, above quoted. Without such proof the plaintiff could not recover as upon a statutory award. Arbitration and awards under written agreements between the parties are

sometimes upheld as agreements, though they would fall under the requirements of a statute. It follows that as on an award the action must fail. By the amended petition in the case the plaintiff claimed and alleged damages by reason of the taking of the property independent of the arbitration award, and evidence was introduced on the trial by both parties upon the question of such damages. That evidence is conflicting; the testimony on the part of the defendant being to the effect that the benefits to the land of the plaintiff from the location of the road exceeded the damages, and we think it sufficient to sustain a finding in favor of the defendant as to such damages. Hence upon the theory that the plaintiff might have been entitled to recover damages in this action, notwithstanding his failure to file a claim therefor as prescribed by the statute, but without deciding that the circumstances excused him from filing the claim, or that a recovery might be had in the action upon a proper showing of damages, it is clear that in view of the conflicting evidence the judgment would have to be affirmed upon the issue presented by the general allegation of the petition aforesaid and the denial thereof.

The judgment will be affirmed.

POTTER, C. J. (concurring). As I understand the record in the case, there had been some proceedings toward the establishment and location of a road across certain land of the plaintiff and his wife, and the plaintiff had brought a suit to enjoin the construction of the road against the engineer in charge of the construction, alleging that in constructing it the defendant in the suit was departing from the line of the road as laid out by the county commissioners through the plaintiff's lands, and that the commissioners had not paid plaintiff for the road on the line upon which it was being constructed, and refused to pay him for the same. That suit was commenced on May 2, 1910, and an order of injunction granted on May 3, 1910. Thereupon the county attorney was directed by the county board to view the proposed road and right of way, and he afterwards filed a report, recommending the building of the road on the line being followed by the engineer in constructing it, and that a right of way therefor be secured from Kelly, and stating that the road on the proposed line would be more benefit than damage to Kelly's land. In the meantime, on May 9, 1910, a petition for the location of the road along that line was filed, and at a meeting of the board on May 12, 1910, the report aforesaid of the county attorney was considered, and also said road petition, and an order was entered that notice of the proposed location be published according to law; and upon that petition the road was established and located by proceedings under the statute, the regularity of which does not seem to be questioned here.

On May 18, 1910, while the injunction suit was still pending, the county attorney went to Cody for the purpose of reaching a settlement of the case, if possible, and then entered into the arbitration agreement with Kelly. Before making that agreement he had a conversation with the chairman of the county board, and told him that there was a chance to settle the Kelly road case, and that arbitration had been suggested, and that he had been advised by the government engineer, the defendant in the suit, that work on the road would stop unless something was done immediately about the Kelly right of way, and he then asked said chairman about the advisability of arbitration, and was told by the latter to go ahead and do whatever he thought best. The county board was not then in session, and the matter of the arbitration and settlement was not brought up or considered at any board meeting, but the only authority of the county attorney in making the agreement and proceeding under it by appointing an arbitrator for the county was the direction of the chairman as aforesaid to do whatever he thought best.

After the making of the arbitration agreement, the arbitrators met and assessed the damages, and their report was filed, as stated in the opinion delivered by Justice SCOTT, but no action was taken by the board thereon. Thus the road was finally located and established without any action by the county board upon the report of the arbitrators under the arbitration agreement, or without recognizing that agreement in any manner; and the plaintiff filed no claim for damages, as provided by statute, in the proceedings by which said road was established and located. But some time after the final location of the road the plaintiff filed a claim against the county based upon the arbitration award, and that claim was disallowed by the county board.

[1] Thereafter the present action was brought, also based upon the award, and upon a general allegation of damages caused by the establishment and location of the road, that allegation being as follows:

"That the lands so taken and used by said defendant for said county road, together with the damage sustained by said plaintiff by reason of the construction of said road, are of the reasonable value of \$1,500, and plaintiff further alleges that he has been damaged by said defendant by reason of the construction of said road through his said lands in the sum of \$1,500, no part of which has been paid."

It appears that the road was to be known as the "Shoshone Reservoir Highway," that the Reclamation Service of the United States government was interested in the construction of the highway, and that the defendant in the injunction suit brought by the plaintiff was an engineer in that service; and there are some things in the record indicating that the government of the United States was assisting in the construction of the road.

It appears also that on the date that the

arbitration agreement was entered into the plaintiff executed a deed conveying a right of way for the road, but we find no competent evidence in the record showing a delivery of the deed. The deed is not in the record in this case, but it seems to have been filed for record and recorded in Big Horn county. It is contended that the acceptance of the deed constituted a ratification by the county of the arbitration agreement, and bound the county to pay the award. But we find nothing in the evidence to show an acceptance of the deed by the county, or what officer of the county, if any, ever had possession of it, or left it with the county clerk to be recorded. The only item of evidence concerning that matter is an entry in the receiving book kept in the office of the county clerk, showing the receipt of the deed for record, and in the column headed "From whom received" the words "Big Horn County." But that is too indefinite, standing alone, to justify this court in holding that the deed had been delivered to and accepted by the county, even if an acceptance of the deed could be held to amount to a ratification of the arbitration agreement, a question unnecessary, in my opinion, to decide. A former county clerk, who made the entry, testified that he had no knowledge or recollection as to who left the deed for record, but that he would judge from the entry that it was handed to him by some official of the county. That testimony, of course, is insufficient to show that the official who left the deed for record was one authorized to accept it for the county, assuming the correctness of the judgment of the witness that the entry shows the deed to have been left for record by a county official.

[2] Title to the right of way was acquired by the proceedings in locating the road, and opportunity was given to the plaintiff to present his claim for damages in the manner provided by statute. It cannot be held, therefore, that plaintiff's property was taken without due process of law, as contended by plaintiff's counsel.

[3, 4] The county board not having authorized the arbitration agreement, nor ratified it, the agreement cannot be held binding upon the county. Under the general allegation of damages because of the location of the road, if it be conceded that such damages might be recovered in an action of this kind under the circumstances of the case, a question unnecessary to be decided, the evidence is conflicting, and, as stated in the opinion by Justice SCOTT, it would be sufficient to sustain a finding against the plaintiff and in favor of the county. For these reasons the plaintiff failed to establish a case entitling him to a judgment, and I concur in affirming the judgment in favor of the defendant.

BEARD, J., concurs in this view of the case.

BUTLER v. STATE. (No. A-2623.)

(Criminal Court of Appeals of Oklahoma. Oct. 3, 1916.)

(Syllabus by the Court.)

INTOXICATING LIQUORS — 236(5) — OFFENSES — EVIDENCE — STATUTES — CONSTRUCTION — "PRIMA FACIE EVIDENCE."

Under section 6, c. 28, Sess. Laws 1913, declaring that the keeping in excess of a certain amount of intoxicating liquors "shall be 'prima facie evidence' of an intention to convey, sell, or otherwise dispose of such liquors," it is error to charge that "the keeping in excess of one gallon of spirituous liquor constitutes prima facie evidence of intent to convey, sell, or otherwise dispose of such liquor, and places upon the defendant the burden of raising a reasonable doubt of his guilty intent to so convey, sell, or dispose of such liquor," since the statute only means to make such evidence competent and sufficient to establish the unlawful intent, unless rebutted or the contrary proved; yet it does not make it obligatory upon the jury to convict after the presentation of such proof. Whether or not such evidence is sufficient to overcome the presumption of innocence of a defendant, and to establish his guilt beyond a reasonable doubt, when all the evidence, including the presumptions is considered, is for the determination of the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 309; Dec. Dig. ¶ 236(5).]

For other definitions, see Words and Phrases, First and Second Series, Prima Facie Evidence.]

Appeal from County Court, Pottawatomie County; Hal Johnson, Judge.

George Butler, convicted of a violation of the prohibitory law, appeals. Reversed.

Mark Goode, of Shawnee, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. On information charging that he did have in his possession 2 gallons of whisky and 80 bottles of beer with the unlawful intent to sell the same, George Butler was convicted in the county court of Pottawatomie county, and his punishment fixed at a fine of \$493.30, and confinement in the county jail for the term of four months. From the judgment rendered on the verdict he appealed by filing in this court on January 5, 1916, a petition in error with case-made.

The evidence shows that in serving a search warrant against the place where the defendant Butler lived with his family in the negro part of the city of Shawnee the sheriff and his deputies found there intoxicating liquors as charged in the information.

The defendant, as a witness in his own behalf, testified that he had resided in Shawnee with his family for 17 years, and that the liquor seized was for his own personal use and the use of his wife; that he did not intend to sell, barter, give away, or otherwise furnish said liquor.

Of the numerous assignments of error it is only necessary to consider the one that the court erred in instructing the jury. It

appears that the court gave the following instruction:

"You are instructed that under the law of this state the keeping in excess of one gallon of spirituous liquor constitutes prima facie evidence of intent to convey, sell, or otherwise dispose of such liquor, and places upon the defendant the burden of raising a reasonable doubt of his guilty intent to so convey, sell, or dispose of such liquor.

"Given and excepted to by defendant.

"Hal Johnson, Co. Judge."

The Attorney General has filed a confession of error, based upon the giving of this instruction and citing the cases of Havill v. State, 11 Okl. Cr. 483, 148 Pac. 683; Caffee v. State, 11 Okl. Cr. 485, 148 Pac. 680; Willson v. State, 11 Okl. Cr. 510, 148 Pac. 823; Sellers v. State, 11 Okl. Cr. 588, 149 Pac. 1071.

We think the confession of error is well taken and should be sustained. The term "prima facie evidence," as used in the statute, is such evidence as, in the judgment of the law, is sufficient to establish the fact, if it be credited by the jury, and evidence of such possession is sufficient to establish the unlawful intent, unless rebutted or the contrary proved; yet it does not make it obligatory upon the jury to convict after the presentation of such proof. Whether or not such evidence is sufficient to overcome the presumption of innocence of the defendant and to establish his guilt beyond a reasonable doubt, when all the evidence, including the presumptions, is considered, is for the determination of the jury. For the reasons stated, we are of the opinion that the instruction complained of is erroneous and prejudicial.

It follows that the judgment should be, and the same is hereby, reversed, and a new trial granted.

PURDY v. WINTERS' ESTATE et al.

(Supreme Court of Oregon. Oct. 27, 1916.)

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Will E. Purdy against the Estate of H. D. Winters, deceased, and Agnes Butts (now Agnes Hecker), administratrix of the estate of H. D. Winters, deceased. Judgment for the defendants, and plaintiff appeals. Appeal dismissed.

C. M. Idleman and J. P. Winter, both of Portland, for the motion. Will E. Purdy, pro se.

MOORE, C. J. This is a motion to dismiss an appeal. A judgment in a former action between these parties, rendered in favor of the defendants, was affirmed on appeal. Purdy v. Winters' Estate, 156 Pac. 285. When the mandate went down, the plaintiff commenced another action, wherein the complaint set forth substantially the charges made in the former action. A demurrer to the complaint herein was sustained, and the

action dismissed without prejudice, from which latter judgment the plaintiff again appeals.

Believing that the questions here involved have been fully litigated and finally determined by this court, the appeal should be dismissed; and it is so ordered.

RUIZ v. STATE. (No. 416.)

(Supreme Court of Arizona. Oct. 17, 1916.)

Appeal from Superior Court, Yuma County; O. J. Baughn, Judge.

Genera Ruiz was convicted of grand larceny, and appeals. Affirmed.

Timmons & Harris, of Yuma, for appellant. Wiley E. Jones, Atty. Gen., and Clement H. Coleman, Co. Atty., and T. D. Molloy, Deputy Co. Atty., both of Yuma, for the State.

FRANKLIN, J. Genera Ruiz was convicted of the crime of grand larceny and appeals to this court.

The transcript of the record was filed here on June 12, 1916. Nothing further in the prosecution of the appeal has been done, and no attempt made to show why the judgment of conviction should be disturbed. The record presented discloses that appellant had the benefit of a fair and impartial trial, and we perceive no legal grounds for reversing the judgment of the trial court.

Affirmed.

ROSS, C. J., and CUNNINGHAM, J., concur.

NICHOLS v. STATE. (No. A-2625.)

(Criminal Court of Appeals of Oklahoma. Sept. 30, 1916.)

(Syllabus by Editorial Staff.)

INTOXICATING LIQUORS §236(7)—OFFENSES—EVIDENCE—SUFFICIENCY.

In a prosecution for having possession of intoxicating liquors with intent to sell same, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 309; Dec. Dig. §236(7).]

Appeal from County Court, Pottawatomie County; Hal Johnson, Judge.

Leo Nichols, convicted of a violation of the prohibitory law, appeals. Affirmed.

Mark Goode, of Shawnee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Leo Nichols, was convicted in the county court of Pottawatomie county on a charge that he did have possession of intoxicating liquors, to wit, whisky, with intent to sell the same, and his punishment assessed at confinement

in the county jail for 60 days and a fine of \$250.

From the judgment and sentence entered on the verdict he appealed by filing in this court on January 6, 1916, a petition in error with case made.

The evidence shows that Gus Mitchell, deputy sheriff, and two or three other deputies, in serving a search warrant against the Old Herald Building in the city of Shawnee, found the defendant there in possession of certain intoxicating liquors, which he attempted to destroy in the presence of the officers. No evidence was offered on behalf of the defendant. From a careful examination of the record it appears that this appeal is wholly destitute of merit. The evidence of guilt is conclusive, and no material error is apparent.

The judgment and sentence appealed from is therefore affirmed.

CANTRELL v. STATE. (No. A-2537.)

(Criminal Court of Appeals of Oklahoma. Sept. 29, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §376, 1169(11) — EVIDENCE—REPUTATION.

It is error prejudicial to the rights of the person on trial for the court to permit evidence of the general reputation of such person for the commission of the same or similar crimes to the one charged. The law is that the prisoner at the bar can be tried only for the crime charged against him, and not upon his reputation for having committed other crimes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836-839, 841, 843; Dec. Dig. §376, 1169(11).]

2. CRIMINAL LAW §938(1), 945(1), 1156(3) — NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

An application for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the court, and when a motion of this kind is made, upon a showing that strong evidence of this character has been discovered, the court should grant a new trial. The law contemplates that this discretion should be exercised in the interests of fairness and justice. A failure to properly exercise the same will warrant this court in reversing the judgment and ordering a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306, 2312, 2313, 2315, 2317, 2324-2327, 2336, 3069; Dec. Dig. §938(1), 945(1), 1156(3).]

Appeal from Superior Court, Muskogee County; H. C. Thurman, Judge.

Jones Cantrell was convicted of violating the prohibitory law, and appeals. Reversed.

Crump & Crump, of Muskogee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Jones Cantrell, was convicted at the March, 1915, term of the superior court of Muskogee county on a charge of unlawfully conveying intoxicating liquor from one place in Mus-

kogee county to another place therein, and his punishment fixed at a fine of \$500 and imprisonment in the county jail for a period of six months.

[1] There are two assignments of error fatal to this judgment. The first is based upon the proposition that the court erroneously admitted testimony prejudicial to the rights of the plaintiff in error, in this: That he permitted the sheriff of Muskogee county, J. F. Ledbetter, to testify on behalf of the state that he knew the reputation of the plaintiff in error to be that of a bootlegger. It is a doctrine as old as free government that men who are placed upon trial charged with the violation of criminal statutes are to be tried for the offense alleged against them, and are not to be tried upon a reputation for having committed similar or kindred offenses. The issue in a criminal case is single, and is always based upon the question: Is the defendant at the bar guilty of the offense charged against him in the information? and not, Has he the reputation of being guilty of similar or other offenses against the laws of this country? In *Kirk et al. v. State*, 11 Okl. Cr. 203, 145 Pac. 307, we say:

"It is a fundamental principle of criminal law that the character of the defendant cannot be impeached or attacked by the state, unless he puts his character in issue by introducing evidence of good character.

"Says Bishop: 'Bad character is never admissible in evidence against a defendant as ground for presuming guilt. This doctrine is absolute; thus the evidence of stealing a horse cannot be reinforced by showing that the defendant is an associate of horse thieves.' 1 Bishop's New Cr. Proc. par. 1112.

"And we hold the fact that an offense has been committed cannot be proved by common rumor or general repute. It appears that the jury were instructed, over the defendants' objection: 'That the testimony touching the general reputation of these defendants as to being bootleggers is to be considered by you only touching the credibility of these two defendants, and for no other reason or purpose.' The question presented is whether such evidence is competent and admissible to impeach the credibility of the defendants as witnesses. In general, it may be said that a defendant, by availing himself of the statutory privilege of becoming a witness in his own behalf, has voluntarily changed his status from defendant to witness, and consequently may be cross-examined within the usual boundaries, and thus be discredited and impeached. *Buxton v. State* [11 Okl. Cr. 85] 143 Pac. 58. Our statute provides (section 5046, Rev. Laws 1910) that a witness may be discredited by showing on cross-examination his conviction of a criminal offense.

"In the case of *Hendrix v. State*, 4 Okl. Cr. 611, 113 Pac. 244, it is held that: 'For the purpose of affecting the credibility of a witness, he may be asked as to whether or not he has ever been convicted of a violation of the prohibitory liquor law of the state.'

"In the absence of any further specific provision in our Code of Criminal Procedure, the common-law rule prevails (section 5543, Rev. Laws 1910); and, when it is sought to impeach a witness by general reputation, the inquiry and the answer must be as to his general character or reputation for truth and veracity in the community in which he resides. In other words,

where the purpose of testimony is to impeach a witness for want of veracity, the testimony, to be competent, must be confined to witness' general character or reputation for truth in the community in which he resides. To impeach him on this inquiry the testimony must show that his general reputation for truth is bad. *Knobe v. Williamson*, 17 Wall. 586, 21 L. Ed. 670.

"If it were the law that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the state would doubtless be hard to answer; but the law is otherwise. It is the law that a defendant in a criminal case is presumed to be innocent until the contrary is proved by competent evidence beyond a reasonable doubt. Whether the law in this respect is wise or unwise, whether it accords with human reason and experience, whether it affords too great protection to the criminal, or too little to society, are not questions with which we have to do. It is not the province of the courts to change and relax the rules of evidence in order to facilitate convictions in a particular class of offenses. Until the lawmaking power intervenes and prescribes differently, the same rules of evidence must govern the trials of defendants in this class of offenses that govern in all other criminal trials.

"It follows that evidence of the general reputation of the defendants as to being bootleggers was incompetent to impeach the credibility of the defendants as witnesses, or for any other purpose. Its admission was therefore prejudicial to the substantial rights of the defendants."

[2] The next proposition is based upon an assignment to the effect that the court erred in overruling the motion for a new trial, based upon the ground of newly discovered evidence. The motion for a new trial sets out that the plaintiff in error, after the trial, discovered witnesses, to wit, G. W. Brown and B. F. Hembree, whose testimony he could not with reasonable diligence have found before the trial. Witness Brown filed an affidavit in which he sets forth the facts concerning the charge, and says that a negro placed the grip of intoxicating liquor in the cab and told the driver to take the grip to the Frisco depot; that witness left town within a few days, and did not hear of the trial until after the plaintiff in error had been convicted, and upon hearing that he had been convicted, and upon learning the facts as set forth on behalf of the plaintiff in error to the effect that he got in the cab as it came up town from the Missouri, Oklahoma & Gulf depot, and that the grip was in the cab when he got in the same, and that he knew nothing about it. Witness recalled the facts and volunteered the information. Hembree filed an affidavit to the effect that he was on Main street the day plaintiff in error was arrested in the cab; that plaintiff in error and one Addington was standing on the sidewalk talking when the cab came by, and plaintiff in error got in same to go up town; that he never mentioned these facts to plaintiff in error until after his conviction. The plaintiff in error, as his defense, contends: That he was on Main street when he

got into the cab to drive up town. That the cabman was coming from the Missouri, Oklahoma & Gulf depot. He was standing on Main street, and as the cabman came by he asked him if he was going up town, and said if he was he would go with him. He got in the cab and was riding to town when the driver let the team run into a telephone pole, and broke some of the harness; that the sheriff, J. F. Ledbetter, was standing on the corner, and walked out to the cab, saw the grip, examined it, and found it contained whisky, and arrested the plaintiff in error. That he knew nothing about the grip, did not know whose it was, and did not know what was in it, and had nothing to do with it. The plaintiff in error, at the time of his arrest, told the sheriff that he did not own the whisky, and had nothing to do with the same. The motion for a new trial should have been sustained on the ground of newly discovered evidence.

For the errors indicated, the judgment of the trial court is reversed, and the cause remanded for a new trial.

DOYLE, P. J., and BRETT, J., concur.

INCORPORATED TOWN OF SALLISAW v. PRIEST. (No. 6420.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 26, 1916.)

(Syllabus by the Court.)

1. EMINENT DOMAIN §136—PROCEEDINGS—MEASURE OF DAMAGES—EVIDENCE.

The measure of damages in condemnation proceedings where private property is taken in the exercise of the right of eminent domain under the statutes of Oklahoma is the market value of the property actually taken, at the time it is so taken, and for the impairment or depreciation of value done to the remainder. And in ascertaining the amount of damages it is proper, among other things, to consider the inconvenience and annoyance likely to arise in the orderly exercise or conduct of the enterprise which interferes with the use and proper enjoyment of the property by the owner and which sensibly impairs its value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 363-366; Dec. Dig. §136.]

2. EMINENT DOMAIN §203(1) — CONDEMNATION—EVIDENCE.

It was not error in an appeal from an award of commissioners in a condemnation proceeding to admit testimony relating to the effect of the location and orderly operation of the enterprise for which the land was taken, as they exist at the time of the trial. The jury are not confined to the consideration of the facts as they existed at the time the land was taken, but may consider the subject in the light of the facts as they exist at the time of the trial.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. §203(1).]

3. EVIDENCE §488 — OPINION EVIDENCE — VALUE OF LAND.

"The question of the value of property does not ordinarily involve a question of science or skill upon which only an expert possessed of technical training can speak; and where the val-

ue of farming land is in issue intelligent persons living in the vicinity of the property involved who are acquainted with the market value of similar property in the locality and of the particular property in question may give their opinion as to its value."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2273; Dec. Dig. ¶488.]

4. APPEAL AND ERROR ¶971(2)—DISCRETION—OPINION EVIDENCE—QUALIFICATION.

The question of opinion evidence is addressed very largely to the sound discretion of the trial court, and its ruling that the witness is sufficiently qualified will not ordinarily be disturbed unless it clearly appears that this discretion has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. ¶971(2).]

5. EMINENT DOMAIN ¶205—CONDEMNATION PROCEEDINGS—DAMAGES—EVIDENCE—SUFFICIENCY.

The damages assessed by the jury were not excessive under the proof.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 544; Dec. Dig. ¶205.]

Commissioners' Opinion, Division No. 5. Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Condemnation proceedings by the Incorporated Town of Sallisaw, Okl., against John F. Priest. Judgment for defendant, and plaintiff brings error. Affirmed.

J. H. Jarman and Curtis & Pitchford, all of Sallisaw, for plaintiff in error. Luther Kyle and McCombs & McCombs, all of Sallisaw, for defendant in error.

HAYSON, C. This was a proceeding instituted by the incorporated town of Sallisaw, Okl., to condemn certain land for the purpose of locating the septic tank and disposal plant for its sewer system; said land being owned by John F. Priest defendant in error. From the appraisal made by the commissioners appointed by the court to appraise the land John F. Priest, defendant in error, filed his objections, and demanded a trial by jury for the purpose of assessing the damages to his property. The cause came on for trial in the district court of Sequoyah county, and the jury returned a verdict for defendant in error for the sum of \$2,000. From the judgment and order overruling the motion for new trial the incorporated town of Sallisaw, Okl., plaintiff in error, appeals setting up eight assignments of error.

From a complete and thorough examination of the record, and the authorities applicable, we conclude that all the assignments of error are without merit. They will be taken up and considered as follows: First, the second assignment of error; second, the third and fourth assignments of error; third, the sixth and seventh assignments of error; and, fourth, the first and eighth assignments of error. The fifth assignment of error is wholly without merit and will not be discussed.

[1] In the second assignment of error the

plaintiff in error complains of the following instruction given by the trial court and excepted to by plaintiff in error:

"Gentlemen of the jury, you are instructed that the measure of damages in this case is the fair and market value of the land of the defendant actually taken by the plaintiff at the time taken; and the actual damages, if any, to the crops growing on said lands of defendant, if any were so growing, caused by the plaintiff in carrying out the purposes for which said land was taken, as shown by the evidence, and also the difference, if any, in the fair market value of the remainder of defendant's farm as a whole just before and just after the locating of the sewerage tank and other improvements placed thereon by the plaintiff, as shown by the testimony, the value of the land taken and depreciation in the market value of the remainder, and the value of the crops destroyed and injured, if any, added together constitute the compensation of damages to which defendant, Priest, is entitled in this procedure."

The instruction is substantially correct, and is sustained by the great weight of authority. The only element the court might have included in the instruction which was omitted was that the jury should not consider any benefits derived from the location and operation of the enterprise for which the land was taken, but, as there is no contention in this case that the land was benefited by the location and operation of such enterprise, the instruction as given is substantially correct.

In *Blincoe v. Choctaw, Oklahoma & Western Railroad Co.*, 16 Okl. 236, 83 Pac. 903, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689, in commenting upon an instruction very similar to the one under consideration the court quoted with approval the following excerpt from the case of the *Grand Rapids R. R. Co. v. Chesebro*, 74 Mich. 474, 42 N. W. 69:

"The damages in such a case must be such as to fully make good all that results, directly or indirectly, to the injury of the owners in the whole premises and interests affected, and not merely the strip taken"—citing a large number of authorities, among them *Grand Rapids & I. R. Co. v. Heisel*, 47 Mich. 393, 11 N. W. 215.

To the same effect are the following cases: *Chicago, Rock Island & Pacific R. R. Co. v. Hock*, 118 Ill. 587, 9 N. E. 205; *Hannibal Bridge Co. v. Schaubacker*, 57 Mo. 582; *Kansas City, E. & S. R. Co. v. Merrill*, 25 Kan. 421; *Revell v. City of Muskogee*, 36 Okl. 529, 129 Pac. 833; *Idaho-Western R. Co. v. Columbia Conference of E. L. A. S.*, 20 Idaho, 568, 119 Pac. 60, 38 L. R. A. (N. S.) 497; *Raleigh, C. & G. R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5, L. R. A. 1916A, 1079; *Arkansas Valley & W. R. Co. v. Witt*, 19 Okl. 262, 91 Pac. 897, 13 L. R. A. (N. S.) 237.

[2] In the third and fourth assignments of error plaintiff in error states that the trial court erred in permitting the introduction of testimony pertaining to the unsanitary condition of the septic tank or disposal plant, and in permitting the introduction of testimony with reference to the alleged effect at

the disposal or outfall from the disposal plant upon the water in the creek or branch below said plant, all of which was done over the objection of the plaintiff in error. These assignments, in view of the record in this case, are both without merit. The court properly instructed the jury as to the measure of damages and as to the time such damages were to be assessed. The evidence pertaining to the effect or results of the orderly operation of the septic tank and disposal plant up to the day of the trial was proper evidence for the jury to consider in determining what damages, if any, the defendant in error sustained to the remainder of his farm by reason of the location and orderly operation of the septic tank and disposal plant. The evidence in this case clearly establishes that on the land taken by plaintiff in error there was located a living spring of water which flowed across the land of defendant in error. Just what damages the defendant in error would sustain by reason of the location and operation of the septic tank and disposal plant at the time the appraisers made the appraisal was largely a matter of speculation. The appraisers may have overestimated it, or may have underestimated it. But at the date of the trial, when the plant was in complete operation, and, as the evidence discloses, had been in operation for some time, the detriment to the remainder of the farm of the defendant in error, if any, was no longer a matter of speculation, but was a matter that could be clearly ascertained from the testimony of witnesses produced before the jury. This view of the law is sustained by ample authority. In the case of *Arkansas Valley & Western Railway Co. v. Witt*, reported in 19 Okl. 202, 91 Pac. 897, 18 L. R. A. (N. S.) 237, the court quoted with approval excerpts from the following cases:

"In *Hayes v. Ottawa, Oswego & Fox River Valley R. Co.*, 54 Ill. 873, the court says, in estimating the damages and benefits to result from the construction and use of a railroad over land which has been condemned for that purpose under an act of 1852, the jury are not confined to the consideration of the state of facts as they existed at the time the land was taken, but may consider the subject in the light of the facts as they exist at the time of the trial.

"In *St. Louis, O. H. & C. R. v. Fowler* [142 Mo. 670] 44 S. W. 771, the Supreme Court of Missouri say: 'The damages and benefits to the remaining land after an appropriation of a railroad right of way should be estimated according to the condition of things, and the rights of the parties as they exist at the trial.'

"In *Wichita & W. R. Co. v. Kuhn* [38 Kan. 104] 16 Pac. 75, the Supreme Court of Kansas say: 'On an appeal from an assessment of damages done to a farm by reason of the appropriation of a right of way through it by a railroad company, and where it is shown at the time of the trial that the railroad is completed across the farm, it is then competent and proper to assume that the railroad was constructed as contemplated at the time of the condemnation proceedings, and all damage that is apparent which will result to the injury of the farm, such as stopping the flow of surface water, forming stagnant pools along the side of or along the right

of way, and the like, are elements of damage proper to go to the jury.'

"In *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258, the court say: 'Where an assessment of damages for right of way precedes the building of a railroad, the presumption is that it will be built with skill and proper precaution; but, if the road has been completed through the land at the date of the trial, the jury may consider the state of facts that existed, and from the light of the actual construction determine what the damage has been, embracing all past, present, and future damages which the location of the road may reasonably produce.'

With reference to the scope of the evidence in this class of cases, *Garber, J.*, in this case, 19 Okl. 262, 91 Pac. 897, 13 L. R. A. (N. S.) 237, lays down this rule:

"In determining the damages to private property caused by the exercise of the right of eminent domain for a right of way for railroad purposes, testimony showing the excavations, embankments, and obstructions to the natural flow of surface water necessarily caused by the construction of the road is properly admitted for the purpose of showing in what way and to what extent the remaining portion of the uncondemned tract has been damaged by reason of the construction of the road."

Also:

"Under the statutes of Oklahoma, damages in condemnation proceedings for railroad right of way purposes are not limited to the real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by the appropriation of his land and by reason of such railroad."

To the same effect are the following cases: *St. Louis, El Reno & Western Railway Co. v. Oliver et al.*, 17 Okl. 589, 87 Pac. 423, 10 Ann. Cas. 748; *Blincoe v. Choctaw, Oklahoma & Western Railroad Co.*, 16 Okl. 286, 83 Pac. 903, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689; *Revell et al. v. City of Muskogee*, 36 Okl. 529, 129 Pac. 833; *Wichita Falls & N. W. Ry. Co. v. Munsell*, 38 Okl. 253, 132 Pac. 906; *Brown v. Weaver Power Co.*, 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912; *Idaho-Western Railway Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod et al.*, 20 Idaho, 568, 119 Pac. 60, 38 L. R. A. (N. S.) 497; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Hadley et al.*, 179 Ind. 429, 101 N. E. 473, 45 L. R. A. (N. S.) 796; *McLaughlin v. City of Hope*, 107 Ark. 442, 155 S. W. 910, 47 L. R. A. (N. S.) 137; *Raleigh, Charlotte & Southern Railroad Co. v. Mecklenburg Manufacturing Co.*, 166 N. C. 168, 82 S. E. 5, L. R. A. 1916A, 1079.

There being no contention by plaintiff in error that the septic tank and disposal plant was not at all times conducted in an orderly manner up to the date of the trial, we must assume in the light of the authorities that they were conducted by the plaintiff in error in such manner as was contemplated at the time the land was condemned.

[3-5] In the sixth and seventh assignments of error the plaintiff in error claims that the trial court erred in permitting several witnesses to testify as to the value of the farm from which the land condemned was taken

without requiring such witnesses to show themselves qualified to give such testimony, and that the trial court erred in refusing to strike such testimony of such witnesses. Upon a careful examination of the record, in the light of the decisions of our own court, and the great weight of authority, we find no error was committed by the trial court in his rulings relative to the testimony of such witnesses. These witnesses were all farmers. All testified in their direct testimony that they were acquainted with the land in question and the market value of land in that vicinity. While it is true that under the skillful cross-examination of counsel for plaintiff in error some of these witnesses seemed to contradict their direct testimony in some particulars, yet they come squarely within the rule as announced in the following cases, and the weight of their testimony became a question for the jury: *Wichita Falls & N. W. Ry. Co. v. Harvey et ux.*, 44 Okl. 321, 144 Pac. 581; *Wichita Falls & N. W. Ry. Co. v. McAlary*, 44 Okl. 326, 144 Pac. 583; *Idaho-Western Railway Co. v. Columbia Conference, etc.*, 20 Idaho, 568, 119 Pac. 60, 38 L. R. A. (N. S.) 497; *Raleigh, C. & S. R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5, L. R. A. 1916A, 1079.

As it does not appear there was any abuse of discretion upon the part of the trial court with reference to his rulings on the testimony of these witnesses, his rulings thereon will be permitted to stand.

In the first and eighth assignments of error, in which it is claimed the trial court erred in overruling the motion for a new trial filed by the plaintiff in error, setting out a large number of reasons therefor, we will discuss but one; i. e., "that the damages assessed were excessive." There was much conflict in the testimony. The jury might, under the evidence have assessed the damages anywhere from \$300 to \$15,000, but assessed the damage at \$2,000. There is ample evidence to sustain the verdict, and from the record in the case we cannot say the damages assessed are excessive, and the verdict will not be disturbed.

PER CURIAM. Adopted in whole.

SARTAIN v. WALKER et al. (No. 7660.)
(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 26, 1916.)

(Syllabus by the Court.)

1. TRIAL \S 139(1) — DIRECTED VERDICT — ERROR.

When the evidence offered by the plaintiff is sufficient to make a prima facie case, it is reversible error on the part of the trial court to sustain a demurrer thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341; Dec. Dig. \S 139(1).]

2. TRIAL \S 156(3)—PROVINCE OF COURT—DEMURRER TO EVIDENCE.

It is a well-settled rule that a demurrer to the evidence admits all the facts which the evidence tends to prove or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 356; Dec. Dig. \S 156(3).]

3. TRIAL \S 156(3) — PROVINCE OF COURT — DEMURRER TO EVIDENCE.

The decision of a case by the court upon a demurrer to the evidence is entirely unlike either the decision of a case by the jury upon the evidence or the decision of a case by the court upon a motion for a new trial; for, where the court sustains a demurrer to the evidence, the court must be able to say that admitting every fact that is proved which is favorable to the plaintiff, and admitting every fact that the jury may fairly and legally infer from the evidence favorable to the plaintiff, still the plaintiff has utterly failed to make out some one or more of the material facts of his case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 356; Dec. Dig. \S 156(3).]

4. TRIAL \S 168 — PROVINCE OF COURT — DIRECTED VERDICT.

Court may direct verdict where facts undisputed or of such conclusive character that court in sound judicial discretion would be compelled to set aside verdict returned in opposition to it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 341, 376-380; Dec. Dig. \S 168.]

5. TRIAL \S 178 — PROVINCE OF COURT — DEMURRER TO EVIDENCE.

Question is whether there is enough competent evidence to reasonably sustain verdict. All evidence in conflict with evidence against which action is to be taken must be eliminated, leaving solely the evidence favorable to party against whom such action is leveled. Incompetent testimony received over objection should be eliminated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 401-408; Dec. Dig. \S 178.]

6. TRIAL \S 139(1) — PROVINCE OF COURT — PEREMPTORY INSTRUCTION.

Peremptory instruction should only be given where all reasonable minds would draw the same conclusion and that such conclusion would be against material averments of plaintiff's petition. It is error to direct a verdict where there is a controverted question of fact before jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341; Dec. Dig. \S 139(1).]

7. APPEAL AND ERROR \S 927(5)—TRIAL \S 156(3)—PROVINCE OF COURT—DEMURRER TO EVIDENCE—REVIEW.

It is the settled rule that a demurrer to the evidence admits every fact which the evidence in the slightest degree tends to prove and all inferences or conclusions that may be reasonably and logically drawn from the evidence. This court will consider as withdrawn all the evidence which is most favorable to the party demurring. If the inference to be drawn from the evidence is a reasonable one, although not a necessary one, the court will not invade the province of the jury by taking from it the right to pass on the facts to be deduced from such inference. A demurrer to the evidence not only admits the truth of the evidence of the demurree, but also all the facts which the evidence in any degree tends to prove, and is a waiver of all the evidence of the demurrant which conflicts with that of his adversary and of inferences from his own evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3748; Dec. Dig. \S 927(5); Trial, Cent. Dig. \S 356; Dec. Dig. \S 156(3).]

Commissioners' Opinion, Division No. 4. Error from District Court, Tulsa County; Conn Linn, Judge.

Action by W. P. Sartain against P. G. Walker, Jr., Fred H. Mott, Louis E. Hoham, and L. L. Hutchinson. Judgment in favor of defendants, and plaintiff brings error. Reversed and remanded.

Robert J. Boone, of Tulsa, and W. J. Crump, of Muskogee, for plaintiff in error. A. A. Hatch, W. D. Abbott, and Frederic A. Peek, all of Tulsa, for defendants in error.

DAVIS, C. The parties will be mentioned here as in the court below. This action was begun in the district court of Tulsa county, Okl., on November 5, 1913, by the plaintiff filing the following petition, omitting caption and mere formal parts:

"The plaintiff, W. P. Sartain, for his cause of action against the above-named defendants, states:

"That on the 2d day of April, 1913, he was the owner in fee of the southeast quarter (S. E. $\frac{1}{4}$) of section fourteen (14), township fifteen (15) north, range fifteen (15) east, in Muskogee county, state of Oklahoma; that, being such owner at that time, he entered into a written contract with the said defendant P. G. Walker, Jr., who was acting in his own behalf and as agent for and in behalf of the above-named codefendants; that by the terms of said contract he was to furnish to the said defendants, or to the said defendant P. G. Walker, Jr., their agent and representative, as aforesaid, a gas and oil lease on said land for the term of five (5) years from the date of said lease, and the said defendants were to pay him and did pay the said plaintiff the sum of one hundred (\$100.00) dollars in cash at the time of the execution of said contract, and was to pay him the further sum of nineteen hundred (\$1,900.00) dollars on the acceptance of said lease, and was to execute to the said plaintiff a note for the sum of two thousand (\$2,000.00) dollars, due in sixty (60) days thereafter, signed by all of said defendants, said parties to have five (5) days from the receipt of abstract and papers at Exchange National Bank of Tulsa, Okl., in which to examine title and approve said lease; a copy of said contract is hereto attached, marked Plaintiff's Exhibit No. 1; the original is held subject to the order of the court and the inspection of the parties; that afterwards, in compliance with said contract, he, together with his wife, executed said lease according to the terms of said contract, and sent the same to the Exchange National Bank at Tulsa, Okl., together with a blank note to be signed by said defendants in the sum of two thousand (\$2,000.00) dollars, and thereby complied with the terms of the contract executed and described hereinbefore; a copy of said lease is hereto attached, marked Plaintiff's Exhibit No. 2; the original is held subject to the order of the court and the inspection of the parties.

"Plaintiff further states that he furnished the defendant with an abstract of title showing that he was the owner of said land in fee simple unincumbered, and that he had a right to let and lease the same, as specified in the contract aforesaid.

"Plaintiff states that the said defendants neglected, failed, and refused to accept said lease or to execute the note aforesaid, or to pay the nineteen hundred (\$1,900.00) dollars as specified in said agreement, and that they still neglect, fail, and refuse to execute said note, pay said nineteen hundred (\$1,900.00) dollars, and accept the lease.

"Wherefore plaintiff is damaged in the sum of

thirty-nine hundred (\$3,900.00) dollars, for which he prays judgment and for all proper relief."

To this petition the following exhibits were attached, made a part thereof, and asked to be considered therewith:

Plaintiff's Exhibit 1.

"Haskell, Oklahoma, April 2, 1913.

"This agreement made and entered into this, the 2d day of April, 1913, by and between W. P. Sartain, of Haskell, Okl., party of the first part, and P. G. Walker, of Tulsa, Okl., party of the second part witnesseth: That for and in consideration of four thousand (\$4,000.00) dollars, to be paid by second party to the first party, and hereinafter stipulated, one hundred dollars (\$100.00) of which amount has been paid to first party, the receipt of which is hereby acknowledged, and the commencing of a well on the southeast quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) of section fourteen (14), township fifteen (15) north, range fifteen (15) east, within ninety (90) days from this date, the first party hereby agrees to execute a regular form of lease to the above-described land and deposit same with abstract of title in the Exchange National Bank of Tulsa, Okl., subject to examination of title by second party. And upon acceptance of title by second party the said Exchange National Bank is to deliver said lease to second party upon the payment of one thousand nine hundred and no/100 dollars (\$1,900) to the credit of first party and the execution of a 60-day note to first party for two thousand and no/100 dollars (\$2,000), signed by P. G. Walker, Jr., Fred H. Mott, Louis E. Hohman, and L. L. Hutchinson; said second party to have 5 days from the receipt of abstract and papers at Exchange National Bank for examination of title and acceptance of same, and the payment to be made on acceptance of title. And first party further agrees to correct any defects of title, if there be any, within a reasonable time, and to waive the conditions of payment herein agreed to until such defects, if any, are corrected.

"W. P. Sartain.

"P. G. Walker, Jr.

"State of Oklahoma, County of Muskogee—ss.:

"I, William E. Combs, a notary public in and for the above-said county and state, hereby certify that the above and foregoing agreement is a true and correct copy of a certain agreement made and entered into on the date as shown by above copy, by the parties whose names are subscribed thereto.

"In witness whereof I have hereunto set my hand and affixed my seal as such notary public this 3d day of April, 1913.

"[Signed] Wm. E. Combs, Notary Public.

"My commission expires December 29, 1913."

Plaintiff's Exhibit 2.

"Haskell, Oklahoma.

"Agreement made and entered into the 2d day of April, A. D. 1913, by and between William P. Sartain and Maggie E. Sartain (his wife), of Haskell, Okl., parties of the first part, lessors, and P. G. Walker, Jr., of Tulsa, Okl., party of the second part lessee, witnesseth: The said parties of the first part, for and in consideration of the sum of one dollar in hand well and truly paid by the said party of the second part, and other valuable considerations, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part to be paid, kept, and performed, have granted, demised, leased, and let, and by these presents do grant, demise, lease, and let, unto the party of the second part his successors or assigns, for the sole and only purpose of mining and operating for oil and gas, laying pipe lines, building tanks, power stations, and structures thereon to

care for said products, all that certain tract of land situate in Muskogee county, state of Oklahoma, described as follows, to wit: The southeast quarter (S. E. $\frac{1}{4}$) of northwest quarter (N. W. $\frac{1}{4}$) of section fourteen (14), township fifteen (15) north range fifteen (15) east—said to contain 40 acres, more or less, as per the United States government survey (section 14, township 15 north, range 15 east, containing 40 acres, more or less).

"In consideration of the premises the party of the second part covenants and agrees:

"First. To deliver to the credit of parties of the first part, heirs and assigns, free of cost in the pipe line to which wells are connected, the equal one-eighth part of all oil and gas produced and saved from the leased premises.

"Second. To pay parties of the first part one-eighth part of the gas from any well where gas only is produced in paying quantities and marketed off the premises.

"Third. To locate all wells so as to interfere as little as possible with growing crops, and to pay a reasonable amount for any damage to such crops caused by the operation of this lease.

"Fourth. To start a well on said premises within 90 days from date hereof or forfeit all rights in and under this agreement.

"Party of the second part agrees to offset all producing wells.

"It is agreed the completion of such well shall be and operate as a full liquidation of all rents under this provision during the remainder of the term of this lease. All payments falling due under this agreement may be made direct to William P. Sartain or deposited to his credit in International Bank of Haskell, Okl.

"The party of the second part shall have the right to discharge any incumbrance on said premises, and shall have a lien thereon for the amount so paid, together with all costs and expenses incurred; also the right to use gas, oil, and water from or on said premises for the purpose of operating same; also the right to remove at any time all machinery and fixtures placed on said premises. No well shall be drilled nearer than 200 feet to any building now on said premises unless by mutual consent of both parties.

"Parties of the first part shall have the privilege of free gas for domestic purposes in one house on said premises; care being taken not to waste.

"It is agreed that this lease shall remain in force for the term of five years from date hereof, or as long thereafter as oil or gas is produced in paying quantities from said premises by said lessee, his successors or assigns, and, further, upon the payment of one dollar, at any time, by the lessee, his successor or assigns to the lessors, their heirs or assigns, this agreement may be surrendered for cancellation, by paying all rentals due at the time, and, if the lease has been recorded, to execute a release of and deliver the same to lessor, their heirs or assigns, after which all payments and liabilities thereafter to accrue shall cease and determine.

"All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators and assigns.

"Signatures:

"[Signed] William P. Sartain.
"Maggie E. Sartain.

"State of Oklahoma, County of Muskogee—ss.:

"Before me, a notary public in and for said county and state, on this 2d day of June, 1913, personally appeared W. P. Sartain and Maggie E. Sartain, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

"[Seal] [Signed] W. E. Combs, Notary Public.

"My commission expires December 29, 1913."

To this petition defendants filed the following demurrer:

"Come now the defendants P. G. Walker, Jr., and L. L. Hutchinson and demur to the petition of the plaintiff herein filed for that said petition does not state facts sufficient to constitute a cause of action against these defendants and in favor of the plaintiff.

"[Signed] A. A. Hatch,
"Attorney for Defendants."

The demurrer was duly presented to the court and heard and considered and overruled by the trial court on March 24, 1914, and on April 20, 1914, there was filed by the defendants the following answer:

"I. The defendants P. G. Walker, L. L. Hutchinson, and A. A. Hatch, and the defendants Louis E. Hohman and Fred H. Mott, by their attorney, W. D. Abbott, for answer to the petition of the plaintiff, W. P. Sartain, hereinbefore filed, state that they deny each, every, all, and singular the allegations in said petition contained, except such as are hereinafter expressly admitted, and deny that they are indebted to the plaintiff in the sum of thirty-nine hundred dollars (\$3,900.00), or in any other sum. The defendants, further answering, state that they admit the execution of the agreement dated April 2, 1913, a copy of which is attached to the petition by the defendant Walker, as the agent of and for and on behalf of himself and all of the defendants, and admit that defendants agreed to pay for an oil and gas mining lease covering the land described in the petition said sum of one hundred dollars (\$100.00), which was paid as in the petition alleged, and in addition thereto agreed to pay the plaintiff the said sum of nineteen hundred dollars (\$1,900.00) and to execute a note for two thousand dollars (\$2,000.00) for the balance of the agreed purchase price, said sum of nineteen hundred dollars (\$1,900.00) to be paid and said note for two thousand dollars (\$2,000.00) to be executed and delivered on approval and acceptance of said lease and the title thereto by the defendants. The defendants further state that at the same time and place, and as a part and parcel of the same transaction, and as a part of the consideration for the execution of said contract, the defendants and the plaintiff caused to be drafted and written the oil and gas mining lease to be furnished defendants by plaintiff under the contract aforesaid, and that the same, both in form and substance, was by the parties hereto agreed upon and stipulated to be the oil and gas mining lease which should be furnished by plaintiff to the defendants. And at said time and place, and upon the execution of said contract by plaintiff, Sartain, and defendant Walker, the plaintiff, Sartain, duly executed and acknowledged said lease, which, together with the copy of the said agreement, was left in the possession of one ——— Hayes, an officer of the ——— Bank of Haskell, Okl., by the plaintiff and defendants under an agreement on the part of all parties hereto that the said lease should be duly executed and acknowledged by Maggie E. Sartain, the wife of the plaintiff, and that thereupon the said Hayes should forward to the Exchange National Bank at Tulsa, Okl., the said lease, together with an abstract of title to the land, for examination and acceptance by the defendants.

"The defendants further state that the written agreement aforesaid provided that the abstract of title to the oil and gas mining lease above mentioned should be subject to examination by the defendants, and the entire transaction should be subject to the acceptance of the title to the said land and the said lease by the said defendants. It was therein further provided that the defendants should have five days

from the receipt of the abstract and the lease by the said Exchange National Bank in which to examine the title and to accept the same, and that payment for the said lease should not be made until the said title was accepted. It is further provided in the said contract that the plaintiff should correct any defects in the title, if any there should be, within a reasonable time, and would not require payment of the sum therein specified until such defects should be corrected.

"Defendants, further answering, state that they admit that thereafter the plaintiff caused to be forwarded to the said Exchange National Bank an oil and gas mining lease, a copy of which is attached to the plaintiff's petition as Exhibit No. 2, but state that the said oil and gas mining lease was not the oil and gas mining lease prepared and agreed upon at the time the contract was executed, and was not the lease which was signed and left in the possession of the said Hayes as above stated, but that after the same had been delivered to the said Hayes for the purposes above specified the said oil and gas mining lease was by the plaintiff changed and altered in a material respect and without the knowledge or consent of the defendants, in this, to wit: The last sentence of the fourth paragraph therein was inserted and interlined as follows: 'The party of the second part agrees to offset all producing wells.'

"The defendants, further answering, state that at the time said lease was prepared and executed by the plaintiff and left with the said Hayes by the parties hereto for the purposes aforesaid, the clause above quoted was not embraced therein, and it was expressly agreed by and between the plaintiff and the defendants as a material part of the consideration for said transaction that the said clause should not be contained in the lease aforesaid, and that these defendants would not have entered into the contract aforesaid had they known said lease would contain said clause. The defendants state that by reason of the alteration of the said lease by the addition of said clause the plaintiff breached the said contract, and on account of which the defendants refused to accept the said lease, and refused to pay the additional sum of nineteen hundred dollars (\$1,900.00), and refused to make, execute, and deliver the promissory note representing the balance of the consideration, and the defendants state that the plaintiff failed and refused, and still fails and refuses, to tender or deliver the lease agreed upon by the parties.

"Wherefore defendants pray judgment and for their costs herein expended.

"II. For a second and further defense these defendants incorporate the matters and things heretofore alleged in their first defense as though fully set out herein, and state that within the time limited within which the abstract should be examined and the title accepted as provided in said written contract these defendants caused the said abstract and title to be examined by their attorney, and there was found to be a prior, outstanding unreleased departmental oil and gas mining lease covering the land aforesaid, and thereupon the defendants refused to accept the said lease and the said title, and so notified the plaintiff, who expressly refused to procure a release of the said oil and gas mining lease, and declared the said sum of one hundred dollars (\$100.00) heretofore paid him by the defendants as a part of the purchase price to be forfeited, and thereby rescinded the said contract and agreement.

"Wherefore defendants pray judgment and for their costs herein expended.

"III. The defendants for their further answer and cross-petition incorporate herein all matters and things alleged in their first and second defenses as above stated, as though fully set out herein, and state that by reason of defaults on

the part of the plaintiff as set out in said first and second defenses the plaintiff became bound to pay and return to these defendants the said sum of \$100 paid him by them as above set forth; that the plaintiff has failed and refused to pay or return said sum to these defendants or any part thereof, and there is now due and owing to these defendants from the plaintiff the said sum of one hundred dollars (\$100.00), together with interest thereon at the legal rate since the date of said written agreement, to wit, April 2, 1913.

"Wherefore the defendants pray judgment against the plaintiff in the sum of one hundred dollars (\$100.00) and for their costs herein expended."

To this answer the plaintiff filed the following reply:

"Comes the plaintiff, W. P. Sartain, by his attorneys, and for reply to the first paragraph to the answer of the defendants denies each and every material allegation therein set forth.

"Second. And for reply to the second paragraph of the defendants' answer he also denies each and every material allegation therein set forth.

"Third. And for answer to the third paragraph and cross-petition set forth in defendants' answer he denies each and every material allegation therein set forth.

"Wherefore he prays judgment and for all proper relief."

Mr. W. J. Crump, on behalf of the plaintiff, made the following opening statement in the cause to the jury selected, impaneled, and sworn to try the issues joined in the case:

"May it please the court and gentlemen of the jury:

"As has already been stated to you, the plaintiff brought this suit against the defendants Mr. Walker and his codefendants for a breach of a contract regarding an oil and gas mining lease.

"I will state to you now that the contract which was entered into by the plaintiff was not signed by each of these defendants. That contract was signed by the defendant Walker alone, but the plaintiff alleges in his petition that the contract was made by Walker with the plaintiff for the use and benefit of the defendant Walker and his codefendants that are sued in this case with him, and there will be no controversy, I will state to you, about that proposition. Each of the defendants in the answer filed by them admit that that is true; that this contract was executed by him for the use and benefit of themselves; that was understood at the time it was entered into, but it was made for convenience, or some reason, to the defendant Walker, by the plaintiff, Sartain. There won't be any controversy about the contract that was entered into, or who it binds, for the reason that the defendants admit in their answer that Mr. Walker for himself and his codefendants did enter into the contract for the breach of which the plaintiff has sued on in this case.

"The proof on the part of the plaintiff will be: There were a number of issues that might have been in this case that are out of the way by reason of the answer filed by each of the defendants in the case. The defendants admit the execution of the contract, and they do not claim that they carried out the contract; they allege certain reasons why they did not do it.

"The proof on the part of the plaintiff will be, however, that the plaintiff, at the time of the execution of this contract, was the owner in fee simple of the land in controversy; that he furnished an abstract of title. That, however, is not denied in the answer, but those are the facts, that he did furnish the abstract of title,

and that the defendants refused to take the lease in keeping with the contract made by the plaintiff to the defendant Walker for himself and his codefendants. In fact, it is not denied by the answer; perhaps there will be no proof of it.

"It is alleged in the petition, and not denied in the answer, or, if it is, it is by way of a general denial—anyway, it will not be seriously contended, I take it—that the defendants were to pay the plaintiff \$4,000 for an oil and gas mining lease on a piece of land, an 80 acres which is down here in Muskogee county not very far, I think, from Haskell. I don't know just where it is. Anyhow, it is down in that country somewhere. They agreed to pay \$4,000 for this lease. At or about the time of the execution of this contract regarding the lease, the defendant Walker, either Mr. Walker or the codefendant, Mott, paid the plaintiff \$100 on contract. The contract provided—there will be no dispute about that, I take it—that the defendants were to pay on the approval of the title and the delivery of the lease an additional \$1,900, making \$2,000 in money which was to be paid. The defendants then were to execute a note for \$2,000 due, I believe, in 60 days after date; anyhow, no very great while thereafter. The defendants do not claim that they paid the other \$1,900 or that they executed the note for the \$2,000.

"The proof will be on the part of the plaintiff that after he had made this contract with the defendant Walker for himself and the other defendants that he could have sold this lease to other parties for the same amount that he sold it to these defendants. After they refused to take the lease, however, and after he was advised of the fact or learned that they had refused to take the lease and would not take it, in keeping with their contract, then he was never at any time after that able to sell it for as much as the defendants had agreed to pay for it and as he could then and after that have sold it to other parties. To be perfectly frank with you, however, he did sell the lease finally on the land, after the defendants refused to take it, for \$2,000, and, while we sue for \$3,900, I will state to you we shall expect at the hands of this jury, if the proof warrants it, will be a verdict for \$1,900, and 6 per cent. interest from the date of the refusal of the defendants to comply with the contracts they entered into.

"If, after you have heard all the testimony and the instructions of the court, we are entitled to that under the law and under the evidence, we shall expect a verdict; if you do not think so conscientiously, we do not want it."

And Mr. A. A. Hatch, on behalf of the defendants, made the following opening statement to the jury:

"May it please the court and gentlemen of the jury:

"As Mr. Crump has told you, this is a suit for damages for a claim that the plaintiff makes for a breach of a contract. The defendants, as the proof will show, deal in oil properties, and are oil producers. They buy leases and develop them.

"Mr. Sartain, the plaintiff, is the owner of this land and a hotel keeper at Haskell; and some time in April, 1913, the plaintiff and defendants entered into a contract whereby the plaintiff agreed to lease the land described in this petition to the defendants for oil and gas mining purposes. That contract contained certain provisions. One provision was that he should furnish them an abstract showing a clear title to the land. At the time they entered into this contract, and as a part of the contract, they drew the lease that the plaintiff was to furnish the defendants, and at the same time the contract was signed the lease was signed by Mr. Sartain. The lease then, after it having been signed, to-

gether with the contract, was left with a Mr. Hays, the cashier of a bank at Haskell, for the purpose of having the lease signed by Mrs. Sartain and to be forwarded, with the abstract of title and the contract, to the Exchange National Bank at this place.

"The proof will show that at the time this contract was signed by Mr. Sartain and Mr. Walker, and the lease that was drawn and signed, it was agreed that that should be the lease that he was to give; that that particular lease contained all the provisions that were to be in the lease that the defendants were to take from the plaintiff.

"The proof will show that after the lease had been signed by Mr. Sartain, and this contract and the lease left with Mr. Hays for the purpose of having Mrs. Sartain sign the lease and then being sent to the Exchange National Bank, the lease was changed; that a clause was put in the lease which Mr. Walker and Mr. Mott told Mr. Sartain at the time the lease was being prepared that they would not accept the lease with that clause in it. The clause that was inserted in the lease after Mr. Sartain had signed it and it had been left with Mr. Hays was this: 'The party of the second part agrees to offset all producing wells.' That was the clause that was put in the lease after it had been agreed between the parties as to what the lease should be and after it had been distinctly understood that the defendants would not accept the lease with that clause in it.

"I might say the proof will show that after the lease had been signed, after the contract and lease had been signed and left with Mr. Hays, as I stated, for the purpose of Mrs. Sartain's signature, Mr. Mott and Mr. Walker left Haskell and came back home. After they had left, this clause, as I stated, was inserted in the lease.

"The next day or two—I don't know, but just a day or two after this—the lease, together with the abstract and the contract, was sent to the Exchange National Bank for the defendants to examine the abstract and pass upon the title. The defendants were informed that the lease was at the Exchange National Bank, and the defendants then informed me, as their attorney, to get the abstract, as was the custom, and examine the title. I went to the bank, and the bank delivered me the abstract. It was examined, and in the examination of the title it was found that the title was not perfect; that there was an outstanding lease against the land. That was reported to Mr. Sartain, and the abstract returned to the bank, and the title disapproved. Mr. Sartain, after he had been informed that there was an outstanding lease, that the title was not perfect, not acceptable, he refused at the time to perfect the title, and I will say here that his contract provided that he should perfect the title. But as that may be, about two months afterwards, or perhaps a little over, he did inform the defendants that he had perfected the title, that he had got a release of this old lease, and again returned the abstract to the Exchange National Bank. That was something over two months after the contract had been made, and the contract at the time it was made was to be closed within five days if the title was perfect.

"After that, then, when the parties went to investigate the matter further, they found that the lease that he offered was not the lease that had been agreed upon that the plaintiff had agreed to furnish the defendants, and for that reason also the lease was rejected as not complying with the contract that was entered into on the 2d day of April, 1913.

"Then it will be shown in evidence that the plaintiff did not comply with the terms of his contract, for that in the first place he did not furnish a clear title within a reasonable time as his contract provided; second, that he did not furnish or tender the lease that was agreed upon; that the lease that he did tender was not the

lease, but a different lease than was agreed upon. "There is one other question also in the case. There was \$100 paid to the plaintiff by the defendants at the time the lease and contract was made at Haskell, as I have described. We contend we are entitled to the recovery of that \$100 that was paid."

The evidence offered to the court and jury on the part of the plaintiff was and is substantially as follows:

It was agreed between the parties that the southeast quarter of the northwest quarter of section 14, in township 15 north, range 15 east, containing 40 acres, was allotted and patent issued to Jack Hawkins. The plaintiff offered in evidence the deeds from Jack Hawkins and wife to George F. Bucher covering the southeast quarter of the northwest quarter of section 14, township 15 north, range 15 east, and also offered in evidence deed from George F. Bucher and wife to W. P. Sartain, the plaintiff, conveying the same lands. All of these instruments were duly recorded in the office of the register of deeds for Muskogee county (the county in which the land was located).

William P. Sartain, the plaintiff herein, testified as follows:

"My name is W. P. Sartain, and I am the plaintiff in this case, and reside at Haskell, Okla. I know all of the defendants except Mr. Hohman. After the execution of the contract, a copy of which is set out in my petition herein, it was sent to the Exchange National Bank in Tulsa by the International Bank of Haskell. Mr. T. O. Hays is an officer in the International Bank at Haskell, and the contract and lease (copies of which are attached to my petition) and a note for \$2,000, together with the abstract of title and a draft for \$1,900, were sent by the International Bank to the Exchange National Bank in keeping with my contract with the defendants. The lease, contract, and papers were all sent to the Exchange National Bank on the 7th of April, 1913, and were returned to the International Bank on the 14th of April. About two weeks after the papers were returned to the International Bank at Haskell I received a letter from Mr. Walker returning the old departmental lease. This letter was received, I think, the next day after I received the papers from the International Bank at Haskell. At the time the papers were returned, and in fact at no time until after I had received the letter from Mr. Walker, was there any reason given by the defendants or the Exchange National Bank as to why they had not carried out their contract. Mr. Mott paid me \$100 on the contract at the time of its execution, which was on April 1st or 2d. After I made the contract with Mr. Walker for himself and his codefendants, I had an opportunity to lease this 40 acres of land to other persons for the amount the defendants were to pay, and in fact I could have made a better lease to Ern Moss. After the defendants failed to keep their contract and the papers were returned to me, and I ascertained definitely that they would not carry out their contract, I then sold a lease on the land for \$2,000, being \$1,900 less than the total amount I was to obtain from the defendants. At the time that the contract, a copy of which is attached to my petition, was drawn, Mr. Mott and Mr. Walker, two of the defendants, together with myself and Mr. T. O. Hays and W. M. Combs, were present at the International Bank at Haskell on about the 2d day of April, 1913. Mr. Mott and Mr. Walker and myself had gone into the bank to get Mr. Hays to typewrite the contract and lease for us. The contract, which is set up in the petition, was

drawn by defendant Walker, and we signed same. Mr. Hays was writing out on the typewriter the lease which was to be signed by myself and wife. Mr. Mott, one of the defendants, dictated to him what should be put therein, except one clause. When we got down to that part of the lease with reference to drilling, I insisted that a clause be inserted reading as follows: 'Party of the second part agrees to offset all producing wells.' Mr. Walker remarked that the law would make us offset all producing wells. I then replied to him that if the law provided for it it would not hurt to go into the lease. They then made no further objections, and that was all that was said about it. Shortly thereafter, and before the lease was completed, they left the bank in a hurry to catch the noon train for Tulsa, as it was nearly train time when they left."

During the examination of the witness W. P. Sartain herein the following proceedings were had:

"Mr. Hatch: I now offer in evidence Defendants' Exhibit 1.

"Mr. Crump: We object, for the reason it is not proper at this time; it is not proper cross-examination to introduce that; he can have it identified and marked; then it may be offered when he comes to prove his side of the case.

"The Court: It might not strictly be proper at this time, but then it will expedite matters; then the other parties can go into detail when they inquire about the lease in detail. Go ahead; you can introduce it.

"Mr. Crump: Exception."

And thereupon Mr. Hatch read Defendants' Exhibit 1 to the jury, which is identical with Plaintiff's Exhibit 1, supra.

Again reviewed with the witness Sartain on cross-examination, the witness admitted writing Defendants' Exhibits 2 and 3. Thereupon the following proceedings were had:

"Mr. Abbott: I believe that is all. We offer in evidence Defendants' Exhibits 2 and 3.

"Mr. Crump: No objection to either of them, if the court please."

Which said Defendants' Exhibits 2 and 3, so offered and received in evidence, are in the words and figures as follows, to wit:

Defendants' Exhibit 2.

"Case No. 3792. District Court.

"Haskell, Okla., 6-6, 1913.

"Mr. P. G. Walker, Jr., Tulsa, Okla.—Sir: Your letter was received yesterday. Was surprised when you said you had returned the papers and lease.

"Now you made the contract with me in good faith yourself and Mr. Mott, and as soon as I signed the contract you seemed to be satisfied. As to the lease being changed after you left that is a mistake, for Mr. Mott dictated the lease and Mr. Hays wrote it, with the exception of the offset clause where Mr. Mott and yourself said that the statutes provided for that, and if you could show me that in the statute it would do no harm in the lease.

"I have done just what I agreed to do in regard to clearing the title, which cost me about \$100.00 with abstract down to date.

"You caused me to turn down a drilling contract which was a good proposition because I had promised to make you a proposition, and did make you one which yourself and Mr. Mott accepted. I made my word good and I thought I was dealing with men that would do what they said they would do.

"Yours respectfully, W. P. Sartain."

Defendants' Exhibit 3.

"Case No. 3792. District Court.

"J. W. Brady. Ben C. Taylor, Notary Public.

"Brady & Taylor, Lawyers.

"Haskell, Oklahoma, June 2, 1913.

"Messrs. P. G. Walker and Fred H. Mott, Tulsa, Okl.—Gentlemen: In compliance with the agreement made between yourselves and W. P. Sartain, of this place, on the 2d day of April, 1913, relative lease on the southeast quarter of the northwest quarter of section 14—15—15, we are today forwarding through the International Bank of Haskell to the Exchange National Bank of Tulsa complete abstract of land, together with lease properly acknowledged, with instructions to deliver the same to you upon the condition of your performance of the agreement made at that time.

"We have experienced some difficulty in securing release of the old departmental lease on the land, which has occasioned some delay, but have finally gotten everything straightened out and hope the same will be satisfactory with you.

"Please call at the bank at once and attend to this matter, as the bank has instructions to hold same for five days.

"Yours very truly, William P. Sartain."

"The lease, which is set out as Defendants' Exhibit 1, was signed by me partially in two places. At first I started to write my name W. P. Sartain, but, noticing that it was written William P. Sartain the body of the instrument, I erased the W. P. Sartain, and wrote it in full, William P. Sartain. The defendant Walker knew that this departmental lease was on this land at the time he made the agreement with me at Haskell. We had before us at that time a certified copy of the old departmental lease which was examined by both Mr. Walker and Mr. Mott. Mr. Walker told me that he had bought the lease from Mr. Kemp in some way, I don't know how, whether it was a division in the drilling contract, or how, but anyhow he was to have that lease assigned to him. After I ascertained that the defendants desired to get a release of this old departmental lease, I obtained a release signed by Mr. F. O. Hays, as secretary of the Coody Oil Company, which is a release of that old departmental lease, and is same one that is objected to by the defendants. There were no other objections made by them as to the title. The defendants never at any time before or soon after their refusal to comply with the terms of their contract made any objections to the offset provisions of the lease."

The witness examines Exhibit D and identifies it as being the same instrument which he and the defendants Walker and Mott had before them at the time of the transactions hereinbefore stated, that is, the certified copy of the old departmental lease which was thereupon offered and received in evidence as Plaintiff's Exhibit D. Plaintiff's Exhibit C was just prior thereto offered and received in evidence:

Plaintiff's Exhibit C.

"Case No. 3792. District Court.

"Release.

"The undersigned Coody Oil Company, lessee in a certain oil and gas mining lease executed by Jack Hawkins and Mollie Hawkins, lessors, in favor of the undersigned lessee, dated 13th day of July, 1907, hereby release, relinquish, and surrender all right, title, and interest in and to the foregoing lease on the following described land, to wit: The southeast quarter (¼) of the northwest quarter (¼) of section 14, township 15 north, range 15 east, of the Indian

meridian, containing 40 acres, more or less—said land being located in the county of Muskogee and state of Oklahoma.

"Signed and sealed this 22d day of May, A. D. 1913.

"[Seal.] Coody Oil Company,
By F. O. Hays, Secretary.

"Acknowledgment of Corporation.

"State of Oklahoma, County of Tulsa—ss.:

"Before me, the undersigned, a notary public in and for said county and state, on this 22d day of May, 1913, personally appeared F. C. Hays, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its secretary, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

"[Seal.] John Schmits, Notary Public.

"My commission expires January 26, 1915."

Indorsements:

"Compared indexed 72949 release of oil and gas lease from — to —.

"State of Oklahoma, County of Muskogee.

"I hereby certify that this instrument was filed for record in my office on the 24th day of May, 1913, at 11 o'clock and — minute a. m., and is duly recorded in Book 243 at page 393, C. H. Eberle, Register of Deeds. By J. W. Maloney, Deputy. [Seal]"

Plaintiff's Exhibit D is the departmental lease mentioned in Plaintiff's Exhibit C, and in the evidence offered on behalf of plaintiff.

There was never any development for oil and gas under the departmental lease which is Plaintiff's Exhibit D, nor did the lessee or any one for him under that lease undertake to drill a well or do anything at all toward the development of the property, nor did the company take charge of the property or go into possession of it in any way, and Mr. Walker knew at the time that he took this lease from me that there had been no development on the land under this departmental lease. Mr. Kemp had some connection with the Coody Oil Company, I do not know what, but personally he had no departmental lease on that land. At the time of the execution of the contract in question Mr. Walker and myself discussed this departmental lease with reference to whether it was a valid contract or void, and Mr. Walker said that he did not think it was of any value; that it was null and void from the fact that the Coody Oil Company had never developed the land according to the terms of the lease. After I received the information that the defendants objected to taking this lease because of that old departmental lease being of record, I took up the matter with Mr. Kemp in an endeavor to procure the release which has been offered as Plaintiff's Exhibit C. At first Mr. Kemp was out of the state, and I therefore had to wait a while in order to get the release. I understood that his wife had died, and that he was away on that account, and for that reason it took more time to get this release canceled of record than it would have otherwise. It was executed on the 22d day of May, 1913, and I sent it to the Exchange National Bank, to—

gether with all the papers, on the 2d day of June, 1913; the delay being occasioned by the fact that my abstract had to be brought down to date after the release was sent to me at Haskell. Thereupon the plaintiff produced and caused to be sworn W. E. Combs, who testified as follows:

"My name is W. E. Combs, and I live at Haskell, Okl. I am the cashier of the International Bank, and was acting as such cashier on the 2d day of April, 1913. I was present at the time the contract which is attached to plaintiff's petition was executed. I believe that Mr. Walker wrote the contract. I don't know who dictated it, but do know Mr. Walker wrote the contract himself. I was present at time the lease from Sartain to Walker was being prepared. It was being written by Mr. Hays. The lease was dictated by Mr. Mott and Mr. Sartain. I heard Mr. Mott and Mr. Sartain talking about this provision that was in the lease, 'Party of the second part agrees to offset all producing wells.' I heard Mr. Sartain say that he would like to have that in the lease, and Mr. Walker said it would not be necessary to put that in, that the statutes provided that all offset wells should be drilled, and Mr. Sartain replied that, if the statutes said that, it wouldn't hurt to put it in there. Mr. Walker and Mr. Mott left to catch a train which was due at that time. When Mr. Sartain said that if the law provided that they should drill offset wells it would not hurt to put it in there, and that he wanted it in, neither Mr. Walker nor Mr. Mott said anything more than that such a provision was unnecessary. I was present when Mr. Sartain signed the lease. He did not sign it at the time it was finished, I think, but signed it the afternoon of the same day. Sartain's name was written in the body of the lease as William P. Sartain, and he had started to sign the lease as W. P. Sartain, and changed it to comply with the way his name was written in the lease. The change was made and the lease was signed all at the same time. The contract which was signed by Sartain and the defendant Walker, this lease, and the abstract of title and a note for \$2,000, were sent by me, as cashier of the International Bank of Haskell, to the Exchange National Bank of Tulsa on the 7th day of April, 1913; that is, this is the date I sent them out the first time. The papers were returned to us by the Exchange National Bank, except the original contract, but we had a copy of that in our files. The only reason given by the bank for returning it was their notation 'Refused.' I again sent the papers to the Exchange National Bank, after having the abstract brought down to date again, together with a release of the old departmental lease. I believe this was sent out about June 2, 1913. The papers were returned to me about the 8th or 9th of June, I believe."

Whereupon the plaintiff called F. C. Hays as a witness in his behalf, who testified as follows:

"My name is F. C. Hays. I am secretary of the Coody Oil Company, and as such secretary I am the custodian of the minute book and by-laws of the corporation. I have in my hand the minute book and by-laws of the Coody Oil Company, and at the request of counsel here read section 3 of article 8 and section 6 of article 9:

"Section 3 of article 8: 'He may sign as president, vice president, or president pro tempore all certificates of stock, all orders on the treasurer, all bonds, notes, indentures, and leases, and other instruments of writing. The president is authorized to give or receive, make or take, buy or sell leases for gas or other mineral substances. The vice president, president pro tempore, and secretary and treasurer shall have the same power and authority during the time

the president, vice president, or president pro tempore is present or during his or their absence.'

"Section 6 of article 9: 'The secretary, either in the presence or during the absence of the other executive officers, is authorized and empowered to give or receive, make or take, buy or sell leases for gas or other mineral substances.'"

Thereupon the plaintiff, to further maintain the issues on his behalf, produced and caused to be sworn T. O. Hays, who testified as follows:

"My name is T. O. Hays. I reside at Haskell, Okl. I am president of the International Bank. I prepared the lease which is known as Defendants' Exhibit 1. This lease was dictated to me by Mr. Mott, who sat by my side while I was writing on the typewriter. He dictated most all the terms and clauses that went into it except one clause reading as follows: 'Party of the second part agrees to offset all producing wells.' As to this clause being in the lease, it occurred in this way: Mr. Walker and Mr. Sartain were at a little table drafting a contract under which this lease was to be delivered or accepted, and Mr. Mott and myself were sitting at the typewriter, he being by my side, and we were drawing the lease. The question came up when we got down about midway of the lease as to the offset wells. I turned to Mr. Mott and spoke to him about it, and Mr. Mott and Mr. Walker were talking about it, as well as Mr. Sartain. While they were sitting over there they had not finished their contract for the delivery of the lease or acceptance. Mr. Walker said that the law provided for the offset wells, and, as I remember, Mr. Sartain wanted it in the lease. He said, 'If the law provides for the offset wells, it won't hurt the lease to put it in there.' I was merely drafting the lease according to the ideas of both sides. That was my interest in the lease. I had nothing whatever at stake. They just came in and requested me to draw the lease for them. After Mr. Sartain said that, if the law provided for offset wells it wouldn't do any harm to put it in, Mr. Walker or Mr. Mott made no further objections. Mr. Walker said the law provided for the offset wells. Mr. Walker signed his contract, and he and Mr. Mott walked to the front of the bank and said they had to catch their train, which came through Haskell at that time about 12 o'clock. At that time I had not finished the lease on the typewriter, but did finish it after they left. The provision in the lease about the offset wells was put in before the lease was finished and came in regular rotation on the form. I finished the lease up in keeping with the agreement the defendants and Mr. Sartain had, as they had stated it to me, at least, as I understood it."

Thereupon the plaintiff rested his case.

The defendants then demurred to the evidence of the plaintiff for the following reasons:

"(1) That the same is not sufficient to warrant a judgment in plaintiff's favor under the issues defined by the pleadings.

"(2) The proof fails to show complete performance of the things required to be performed by the plaintiff under the terms of his contract.

"(3) Because, it being shown there never was any agreement reached as to the offset clause, performance or tender of performance could not have been made, and it is impossible to be made.

"(4) Because this suit alleges a full performance of the terms of the contract, and seeks to recover the full contract price, and, it appearing that the property upon which the oil and gas mining lease was given has been resold, a recovery of the full contract price cannot be changed to one for damages, for the reason that

the damages to which the plaintiff might be entitled under this state of facts, were the action properly brought, are not alleged and set out in the petition."

The demurrer was sustained by the court, to which ruling the plaintiff excepted.

On April 21, 1915, the plaintiff, Sartain, filed his motion for new trial in the court below on the following grounds:

"(1) Errors of law occurring at the trial and excepted to by the plaintiff at the time.

"(2) The court erred in sustaining the demurrer of the defendant to the evidence of the plaintiff at the close of the plaintiff's testimony.

"(3) That the court erred in overruling the plaintiff's motion for permission to reopen the case after the demurrer had been interposed and before finally passed on by the court, and in not permitting the plaintiff to introduce evidence offered by him.

"(4) The court erred in rendering judgment herein against plaintiff and in favor of the defendants."

On May 12, 1915, the court entered an order denying the plaintiff's motion for new trial and allowing time for case-made. On July 9, 1915, the court made an order extending the time for presenting, settling, and signing of the case-made, which was entered of record. The case-made was settled and signed on July 31, 1915, and filed in the office of the clerk of the district court for Tulsa county, Okla., on August 28, 1915. Petition in error was filed in this court on September 10, 1915, with case-made attached, with a waiver of summons in error for all parties, and entry of appearance by attorneys for the respective parties.

The assignment of errors are as follows:

"I. The said court erred in overruling the motion of plaintiff in error for a new trial.

"II. The court erred in overruling the plaintiff's objection to defendants' question to the witness W. P. Sartain as follows: 'Q. When was this contract, this deal that you made with the defendants to deliver them this lease, made?'

"III. The court erred in overruling the plaintiff's objection to the defendants' question to the witness W. P. Sartain as follows: 'Q. They were there when the lease was drawn, weren't they?'

"IV. The court erred in overruling the plaintiff's objection to the introduction in evidence of Defendants' Exhibit 1.

"V. The court erred in overruling the plaintiff's objection to defendant's question to the witness W. P. Sartain as follows: 'Q. Wasn't he holding the land under that lease?'

"VI. The court erred in overruling the plaintiff's objection to defendants' question to the witness, W. P. Sartain as follows: 'Q. I am asking you if at any time you had any conversation with him. I am giving you all the latitude in the world.'

"VII. The court erred in overruling the plaintiff's objection to the defendants' question to the witness W. P. Sartain as follows: 'Q. I understand that it was something pertaining to that; I want to know what it was, and I would like to have the jury know.'

"VIII. The court erred in refusing to instruct the jury, at plaintiff's request, that the following remark of counsel in the presence of the jury should not be considered by them, to wit: 'Mr. Hatch: I want to be fair with the witness; I have tried to get the witness to tell the truth about this, and he had dodged me every time he could.'

"IX. The court erred in sustaining defendants'

objection to plaintiff's question to the witness reading as follows: 'Q. You may state now whether you ever informed or notified the Coody Oil Company, either through Mr. Kemp or other officers, that because of their having failed to comply with terms of the departmental lease that the lease was null and void and that you considered it at an end?'

"X. The court erred in refusing to permit the plaintiff to prove by the witness W. P. Sartain that he notified Mr. Kemp, either president or vice president of the Coody Oil Company, that he considered the departmental lease null and void from and after the time of such notice, for the reason that the lessee in the lease had not drilled a well or had not commenced one, and had not complied with the terms of the lease, and that this notice was given to the Coody Oil Company by and through its representative some time prior to the conclusion of the contract between plaintiff and the defendant P. G. Walker.

"XI. The court erred in refusing the request of plaintiff to reopen the case for the purpose of offering further proof as follows: By the defendant Walker that he wrote to the plaintiff certain letters, and then after the letters are identified by said defendant Walker to introduce the letters which will show that the defendants at no time raised any question about the title or gave any reason for not taking the lease and complying with the contract, except that their attorneys had disapproved of the title on account of the departmental lease which has been introduced in evidence.

"XII. The court erred in sustaining the defendants' demurrer to the evidence."

[1-7] Did the trial court err in sustaining the defendants' demurrer to plaintiff's evidence at the close thereof? The court had previously overruled the defendants' demurrer to plaintiff's petition, as we have already seen. Plaintiff substantially proved by competent evidence the averments of his petition and the statements of his counsel in the opening statement on behalf of plaintiff to the jury. The demurrer admitted this competent evidence as true and raised a question of law. There were issues of fact squarely raised, joined, and presented by the pleadings. It was a suit, the subject-matter of which, under our Code of Civil Procedure, entitled either side to a jury as a demandable right. The court should have overruled the demurrer of the defendants to the plaintiff's evidence and proceeded to hear the entire case, and should have submitted the same to the jury under proper instructions as to the law.

"Did the court err in sustaining the demurrer to the plaintiff's evidence? In other words, was the evidence offered by plaintiff sufficient to make a prima facie case? If so, the court erred in sustaining a demurrer thereto; otherwise not. In considering the evidence with a view to determining this question, let us consider for a moment what is admitted by defendants' demurrer in order to determine the probative force to be given to the evidence adduced by the plaintiff.

"It is a well-settled rule that a demurrer to the evidence admits all the facts which the evidence tends to prove or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence. 6 Enc. of Pl. & Pr. p. 441; K. O. R. Co. v. Oravens, 48 Kan. 650, 23 Pac. 1044; Mo. Pac. R. R. Co. v. Goodrich, 88 Kan. 224, 16 Pac. 439; Wolf v. Washer, 82 Kan. 538, 4 Pac. 1036; Christie v. Barnes, 83 Kan. 818, 6 Pac. 599.

"In *Brown, Administrator, v. Atchison, T. & Santa Fé Railway Co.*, 81 Kan. 16, 1 Pac. 610, the court says: 'But the decision of a case by the court upon a demurrer to the evidence is entirely unlike either the decision of a case by the jury upon the evidence or the decision of a case by the court upon a motion for a new trial; for, where the court sustains a demurrer to the evidence, the court must be able to say that, admitting every fact that is proved which is favorable to the plaintiff, and admitting every fact that the jury might fairly and legally infer from the evidence favorable to the plaintiff, still the plaintiff has utterly failed to make out some one or more of the material facts of his case.' * * *

"In *Myers v. Presbyterian Church of Perry*, 11 Okl. 551, 69 Pac. 876, the court said: 'A demurrer to the evidence not only admits the facts as proven to be true, but admits such facts as may be reasonably and rationally inferred from the facts proven. If there is evidence fairly tending to establish each material averment of the petition, it is error to sustain a demurrer to plaintiff's evidence—citing *Jafray v. Wolf*, 1 Okl. 312, 33 Pac. 945; *Edmission v. Drumm-Flato Commission Co.*, 13 Okl. 440, 78 Pac. 958; *Johnson v. Hays*, 6 Okl. 582, 55 Pac. 1068.

"Let us turn to the evidence and see 'if there is evidence fairly tending to establish each material averment of the petition.' If so, this case must be reversed; otherwise not. The proof adduced by plaintiffs shows that they were the owners of a tract of land in Oklahoma; that defendants were the owners of a tract of land in Missouri; that, relying on certain false and fraudulent representations made by defendant to plaintiffs, they mutually agreed to and did exchange said lands, together with warranty deeds therefor; that the lands in Missouri were shortly thereafter ascertained by plaintiffs not to be as represented and a part thereof wholly worthless; that thereupon plaintiffs promptly notified defendants to that effect, and offered to rescind the trade and reconvey the lands to defendants; that said lands had been kept by them in statu quo—is sufficient to prove a prima facie cause of action, and a demurrer to the evidence, sustained by the trial court, was error." *Clark et al. v. O'Toole et al.*, 20 Okl. 319, 94 Pac. 547; *Ziska v. Ziska et al.*, 20 Okl. 634, 95 Pac. 254, 23 L. R. A. (N. S.) 1, note; *Conklin v. Yates et al.*, 16 Okl. 266, 83 Pac. 910; *Shawnee L. & P. Co. v. Sears*, 21 Okl. 13, 95 Pac. 449; *Scully v. Williamson*, 28 Okl. 20, 108 Pac. 395, 27 L. R. A. (N. S.) 1069, Ann. Cas. 1912A, 1265; *St. L. & S. F. R. Co. v. Jamieson*, 20 Okl. 654, 95 Pac. 417; *Plotner v. Chillon & Chillon*, 21 Okl. 224, 95 Pac. 775, 129 Am. St. Rep. 776; *Belcher v. Whitlock*, 6 Okl. 691, 56 Pac. 23; *Jansen v. City of Atchison*, 16 Kan. 358; *Kansas Pacific Ry. Co. v. Conse*, 17 Kan. 571; *Waterson v. Rogers*, 21 Kan. 529; *Rowland v. Shaw*, 29 Kan. 438.

"Court may direct verdict where facts undisputed or of such conclusive character that court in sound judicial discretion would be compelled to set aside verdict returned in opposition to it." *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 145; *Guss v. Federal Trust Co.*, 19 Okl. 133, 91 Pac. 1045; *Metropolitan Ry. Co. v. Fonville*, 19 Okl. 283, 91 Pac. 902; *Jackson v. Kincaid et al.*, 4 Okl. 554, 46 Pac. 587; *Chaddick et al. v. Lindsay*, 5 Okl. 616, 49 Pac. 940; *Fliersheim Merc. Co. v. Gillespie*, 14 Okl. 143, 77 Pac. 183; *Frick v. Reynolds et al.*, 6 Okl. 638, 52 Pac. 891; *Harris et al. v. M. K. & T. Ry. Co.*, 24 Okl. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858; *Baker v. Nichols & Shepard Co.*, 10 Okl. 635, 65 Pac. 100; *Cooper v. Flesner et al.*, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

"Question is whether there is enough competent evidence to reasonably sustain verdict. All evidence in conflict with evidence against which action is to be taken must be eliminated, leav-

ing solely the evidence favorable to party against whom such action is leveled." *Cooper v. Flesner et al.*, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

"Incompetent testimony received over objection should be eliminated." *Clinton National Bank v. McKennon*, 26 Okl. 835, 110 Pac. 649; *Frick v. Reynolds et al.*, 6 Okl. 638, 52 Pac. 891; *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170, 8 Pac. 112; *Gillett v. Insurance Co.*, 53 Kan. 108, 36 Pac. 52.

"Peremptory instruction should only be given where all reasonable minds would draw the same conclusion and that such conclusion would be against material averments of plaintiff's petition." *A. V. & W. R. Co. et al. v. Benson*, 26 Okl. 306, 109 Pac. 219.

"It is error to direct a verdict where there is a controverted question of fact before jury." *Farmers' State Bank et al. v. Spencer*, 12 Okl. 597, 73 Pac. 297.

"Error where evidence fairly tends to support all necessary averments of petition." *Hanna v. Mosher et al.*, 22 Okl. 501, 98 Pac. 358.

"Improper when there is a material disputed question of fact." *Brown v. Baird et al.*, 5 Okl. 133, 48 Pac. 180.

"Error when there is a material controverted question of fact upon which reasonable minds might fairly differ." *Lane v. Choctaw, etc., R. R. Co.*, 19 Okl. 324, 91 Pac. 883.

"Where demurrer is sustained, it is equivalent to an instruction to jury to find for demurring party." *Gruble v. Ryus*, 23 Kan. 195.

It is true that in this state a demurrer to the evidence is a statutory proceeding, being authorized by section 5002, Rev. Laws 1910. But—

"it is the settled rule that a demurrer to the evidence admits every fact which the evidence in the slightest degree tends to prove and all inferences or conclusions that may be reasonably and logically drawn from the evidence." *William Cameron & Co. v. Henderson*, 40 Okl. 648, 140 Pac. 404; *St. Louis & S. F. R. R. Co. v. Snowden*, 149 Pac. 1084.

Hence, as stated in the case supra, the vital question in the case at bar is:

"Does the evidence in the slightest degree tend to prove that the defendants were liable to the plaintiff?"

This court has gone to the extent of holding, where there was any conflict in the plaintiff's evidence that would make any part of it unfavorable to plaintiff or sustain the defense, that in passing upon the demurrer to the evidence the court should consider such evidence as being withdrawn. This court in the case of *Ziska v. Ziska*, 20 Okl. 634, 95 Pac. 254, 23 L. R. A. (N. S.) 1, said:

"This court will consider as withdrawn all the evidence which is most favorable to the party demurring." *Miller v. Marriott*, 149 Pac. 1165.

The court further said in *Miller v. Marriott*, supra:

"If the inference to be drawn from the evidence is a reasonable one, although not a necessary one, the court will not invade the province of the jury by taking from it the right to pass on the fact to be deduced from such inference."

"A demurrer to the evidence not only admits the truth of the evidence of the demurree, but also all the facts which the evidence in any degree tends to prove, and is a waiver of all the evidence of the demurrant which conflicts with that of his adversary and of inferences from

his own evidence." 7 Standard Ency. Procedure, p. 5, and authorities cited.

"Where the question of a variance between the pleading and proof is first raised by a demurrer to the evidence, it will not be regarded as fatal, when it appears that the party objecting was neither surprised, misled, nor prejudiced thereby." Collier v. Monger, 75 Kan. 550, 89 Pac. 1011.

In this case it seems clear to us, in the light of the evidence and of the foregoing authorities, that every material allegation of the plaintiff's petition has been proved by competent evidence.

For the reasons stated, we hold the trial court committed reversible error in sustaining the demurrer of the defendants to the plaintiff's evidence and in dismissing the petition and cause of action, and in rendering judgment that plaintiff take nothing by his suit, and in taxing the costs against the plaintiff, and the judgment of the lower court herein is reversed, and the cause remanded to the district court of Tulsa county, Okla., with directions to said court to reinstate said petition and cause of action, to set aside the judgment and order overruling the plaintiff's motion for a new trial, and to enter an order sustaining the same, and to set aside the final judgment or journal entry rendered by the court herein, to grant the plaintiff a new trial, and to permit plaintiff to amend his petition touching the \$2,000 received by plaintiff for a lease on the lands in question after the defendants had failed, neglected, and refused to close up their contract with plaintiff for the oil and gas lease in question and conformably to our law relating to and governing the procedure on amendments, and for such other proceedings as may be proper under the law and in the light of this opinion.

PER CURIAM. Adopted in whole.

KING v. SHULTS et al. (No. 7668.)
(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR 336(1)—PARTIES—NECESSARY PARTIES.

All parties to a judgment, who appear from the record to have a substantial interest in sustaining or reversing the judgment, order, and decree of the trial court, or whose interests might be affected by a reversal, and new trial in the lower court, are necessary parties to an appeal, and this is not a question resting in the discretion of the appellate court, but is a fundamental question of jurisdiction; and, where such parties are not brought into this court, either as plaintiffs or defendants in error, the appeal must be dismissed for want of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868-1874; Dec. Dig. 336(1).]

Commissioners' Opinion, Division No. 4. Error from District Court, Okfuskee County; Geo. C. Crump, Judge.

Action by Annae King against James M. Shults and others. There was a judgment for defendants, and plaintiff brings error. Dismissed.

Lafayette Walker, of Holdenville, for plaintiff in error. Rossiter & Wright, of Okemah, for defendants in error.

MATHEWS, C. This action was brought in the district court of Okfuskee county for the possession of a certain tract of land and to quiet title. The defendant James M. Shults answered, claiming title in himself, and asked that his title be quieted. Barnogee Parnosky answered, claiming to hold a valid mortgage against said land, executed by the defendant Shults. The Prairie Oil & Gas Company answered, claiming to be the owner of a valid oil and gas lease upon the premises in controversy. The name of C. W. Brewer is signed to the answers of the first two defendants named above, and Rossiter & Wright answer for said Oil & Gas Company, and at the commencement of the trial Mr. Wright announced that "we appear for the Prairie Oil & Gas Company." The journal entry of judgment has the following recitation:

"Comes the defendant James M. Shults, by C. W. Brewer, his attorney, and comes D. Replogle, guardian aforesaid, by his attorney, C. W. Brewer, and comes the Prairie Oil & Gas Company by its attorneys, Rossiter & Wright."

The case-made and notice of settlement of case-made were served upon Attorney C. W. Brewer, who accepted service, signing his name, "C. W. Brewer, Attorney for defendants," but the written suggestion of amendments made by him were signed by "C. W. Brewer, Atty. for James M. Shults and D. Replogle, Guardian." Summons in error was not served upon the said Prairie Oil & Gas Company or any of their representatives. The Prairie Oil & Gas Company now files its motion to dismiss this appeal for the reasons that neither the case-made, notice of time and place of settlement of same, nor summons in error have been served upon it or waived by it. The trial court found that the said Prairie Oil & Gas Company was the owner of a valid oil and gas lease on the land in controversy. It deaigned its title thereto through its codefendant, James M. Shults. The court further found that the title to the land was in said Shults. The validity of its lease is dependent upon the validity of Shults' title, and it is therefore plainly apparent that a reversal of the judgment would materially affect the interest of the Prairie Oil & Gas Company. It was made a party in the trial court, and there set up its interest in the land, and the court found that it had a substantial interest therein, and it is certainly a necessary party to this appeal.

Appellant had actual notice that Rossiter & Wright were appearing for the Prairie

Oil & Gas Company and Brewer for the other two defendants. The answers of the respective parties are so signed. One of the members of the firm of Rossiter & Wright made a verbal statement in open court that his firm appeared for the Prairie Oil & Gas Company, and the journal entry of judgment recites that fact, and it therefore follows that the service of the case-made, etc., upon C. W. Brewer was ineffective as far as the Prairie Oil & Gas Company was concerned.

For these reasons the appeal should be dismissed.

YATES v. YATES. (No. 8236.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

DIVORCE \S 178—**RIGHT TO APPEAL**—**ESTOPPEL**.

Plaintiff instituted an action for divorce and alimony. The trial court refused plaintiff a divorce, but granted defendant a divorce upon his cross-petition, and at the same time allowed plaintiff alimony. The defendant paid the alimony to the clerk, and the same was paid over to the attorney for plaintiff. *Held*, after having voluntarily accepted the alimony money paid in on the judgment, plaintiff is estopped from further prosecuting her appeal from said judgment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 564; Dec. Dig. \S 178.]

Commissioners' Opinion, Division No. 4. Error from Superior Court, Pottawatomie County; Leander G. Pitman, Judge.

Action by Georgia Bell Yates against J. W. Yates. Judgment for defendant, and plaintiff brings error. Appeal dismissed.

H. H. Smith, of Shawnee, for plaintiff in error. Baldwin & Carlton and W. T. Williams, all of Shawnee, for defendant in error.

MATHEWS, C. This was an action for divorce and alimony. Upon the trial being had, the court refused plaintiff's prayer for a divorce, but granted a divorce to defendant upon his cross-petition. The court also allowed plaintiff alimony in the sum of \$500, and the further sum of \$150 for her attorney, and provided that the amount theretofore allowed for temporary alimony be deducted from the amount therein allowed, and that the balance be paid to the clerk for the use and benefit of the plaintiff. The plaintiff took an appeal from the overruling of her motion for a new trial, and the same was perfected and filed in this court.

Defendant has now filed a motion to dismiss this appeal, and as a basis therefor files an affidavit made by the court clerk of Pottawatomie county, to the effect that on December 28, 1915, after the court had rendered his decree in this cause, the defendant paid into the hands of said clerk the sum of \$450, for the use of the plaintiff, and that on December 30, 1915, the plaintiff

through her attorney was paid out of said money the sum of \$145.50, being the balance due on said alimony judgment. After having voluntarily accepted the money paid in on the judgment for her use and benefit, it follows that she is estopped from prosecuting her appeal from the judgment.

The appeal should therefore be dismissed.

FREEMAN v. LANGLEY et al. (No. 7775.)
(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1001(1) — **REVIEW** — **VERDICT**.

Where a question of fact is submitted to a jury under proper instructions of the court and the jury renders a verdict upon the evidence thus presented to them, this court, upon appeal, will not disturb the verdict of the jury, where there is any evidence tending to support the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3928-3933; Dec. Dig. \S 1001(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Adair County; John H. Pitchford, Judge.

Action by John Freeman against S. J. Langley and another. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Helton & Pitchford, of Stilwell, for plaintiff in error. E. B. Arnold, of Stilwell, for defendants in error.

HOOKE, C. The plaintiff in error instituted a suit in the lower court to recover a judgment against the defendants in error upon a promissory note executed to T. P. Tuck & Co., and after its execution alleged to have been assigned to the said John Freeman before maturity and for valuable consideration, and without notice of any equities existing between the defendants in error and of said Tuck & Co. The note was negotiable in form, and if the plaintiff, Freeman, purchased the same before maturity for a valuable consideration and without any notice of intervening equities between the makers and the original payee, he was entitled to recover the amount sued for in this case. The answer of the defendant admitted the execution of the note, but denied that the plaintiff was the holder thereof, or was an innocent purchaser for a valuable consideration before maturity, and further alleged the violation of the contract between the makers and the payee upon conditions arising subsequent to the execution of the note.

There are no exceptions here to the instructions of the trial court, and the only error urged on behalf of the plaintiff in error is that the evidence does not reasonably support the verdict. This question was presented to the jury under the instructions of the

court, and the jury, under the evidence presented to them, decided the same adversely to the plaintiff in error. This court, in the case of *Cavanagh v. Johannessen*, 156 Pac. 289, held:

"The Supreme Court will not weigh the evidence to determine whether it would have reached a different conclusion."

Also in the case of *Postoak v. Lee*, 149 Pac. 155, it is held:

"That [if] there is any evidence reasonably tending to support the judgment [this court] will affirm the same."

In the case at bar one of the defendants in error testified that after the maturity of the note, and before the institution of the suit thereon, he saw the note in question, and that the same at that time had not been assigned by the payee to the plaintiff, and while the testimony of the plaintiff in error refutes this testimony of the defendant in error, yet this question of the assignment and the date thereof was one of the material questions presented under the instructions of the court to the jury. And the jury heard the witness testify, and, after considering this evidence, rendered a verdict in favor of the defendants in error; and, inasmuch as there is some evidence which supports this verdict, and as the same was approved by the trial court, we will not disturb the same upon appeal.

The judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

COSDEN v. BOARD OF EDUCATION OF CITY OF TULSA. (No. 8401.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS ~~§ 65~~—PUBLIC SCHOOLS—BOARD OF EDUCATION—POWER OF.

By virtue of section 3, art. 6, of chapter 219 of the Session Laws of 1913, the board of education of cities of the first class in this state possess the power and authority to sell and convey real estate, and said board may exercise this power without the necessity of making any finding of the reason or necessity which induces the exercise of its discretion.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 162-167; Dec. Dig. ~~§ 65~~.]

Commissioners' Opinion, Division No. 3. Error from District Court, Tulsa County; Conn Linn, Judge.

Action between the Board of Education of the City of Tulsa and J. S. Cosden. There was a judgment for the former, and the latter brings error. Affirmed.

E. R. Perry, J. W. Woodford, and Poe, Hindman & Lundy, all of Tulsa, for plaintiff in error. Rice & Lyons, of Tulsa, for defendant in error.

HOOKER, C. From the agreed statement of facts upon which this case was tried in the lower court it appears: That the board of education of the city of Tulsa sold the real estate involved here to one J. S. Cosden on May 6, 1916, he being the highest bidder, for the sum of \$50,000, and that the said board at a meeting called for that purpose authorized the conveyance of said real estate to the purchaser, and thereafter tendered to him a warranty deed therefor. The said sale was made pursuant to a notice published for 5 days next before the day of sale in a daily paper. That the purchaser of said property paid a part of the purchase price and refused to pay the rest, fearing that the board of education of said city did not possess the authority to sell and convey said real estate to him, and in order to determine the right and authority of the board to sell and convey said real estate, this case is presented to this court.

The general law is that the right to sell, lease, or otherwise dispose of public school land depends upon express constitutional or statutory provisions, and deeds and other conveyances of such land must be construed and determined with reference to the statutory provisions on the subject. In order, therefore, to determine the power of the board of education of the city of Tulsa with reference to the sale of its real estate, we must examine the Constitution of the state and the acts of the Legislature subsequent thereto to find, if we can, any grant of power conferred upon the board by either the Constitution or the Legislature, or if there is any limitation upon the right of the board of education to deal with its property of this character as its judgment deems proper and wise.

By reference to the Session Laws of 1913, we find that the Legislature attempted to enact a general school law applicable to all the schools of the state which was intended to, and which, did, supersede and repeal all conflicting laws.

By reference to article 6 of chapter 219 of the Session Laws of 1913, we find that:

"1. Each city of the first class * * * shall constitute an independent district and be governed by the provisions of this article. * * *

"3. The public schools of each city or town organized in pursuance of this article shall be a body corporate, and shall possess the usual powers of corporations for public purposes, by the name and style of the board of education of the city or town of — of the state of Oklahoma, and in that name may sue or be sued, and be capable of contracting or being contracted with, of holding and conveying such personal and real estate as it may come into possession of, by will or otherwise, or as is authorized to be purchased by the provisions of this article.

"4. Any city of the first class or town is hereby authorized and required, upon the request of the board of education of such city or town to convey to such board of education all property within the limits of any such city heretofore purchased by any such city for school purposes

and now held and used for such purposes, the title to which is vested in any such city or town."

The further provisions of this act it is useless to give here, further than to say that the purpose of the article 6, aforesaid, seems to indicate an intention upon the part of the Legislature to create in each city an independent district and to make the board of education of each city of the first class independent of the governing body of the city.

The length of term for which members of the board of education hold office and the general powers conferred upon them by the act aforesaid indicate that the Legislature deemed that the public welfare could be better subserved and the interests of the public schools of the state more efficiently advanced by granting to boards of education of cities of the first class powers and rights which were denied the governing bodies of the other school districts referred to in the act.

By reference to the provisions of the act conferring upon the board of education the authority "of holding and conveying such personal and real estate" we find no limitation nor any word of expression calculated to abridge the general right of conveying the property as the judgment of the board might dictate. Had it been the intention of the Legislature to make this right dependent upon a condition, it would have been so expressed in the act. It can well be said that the Legislature recognized that many reasons might justify the board of education of cities of the first class in moving the schools from one location to another in order that more ground might be provided for the accommodation and pleasure of the school children with the least expense to the public, and, realizing also that school buildings should be accessible to the pupils, the Legislature evidently intended to provide a general law that would apply to all cases of this character, and therefore it conferred the authority to convey real estate upon the board of education in cities of the first class without any limitation or restraint. This view is strengthened by the limitations imposed in the act of 1913 upon the governing body of common school and consolidated districts.

We are of the opinion that this statute, and this statute alone, is sufficient authority to authorize the board of education of the city of Tulsa to convey this real estate to the plaintiff in error independently of any limitation, nor was it necessary for the board to make any finding of the reason or necessity which induced the exercise of its discretion to confer upon it the authority to convey the same.

The judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

MISSOURI, K. & T. RY. CO. v. JAMES.

(No. 6882.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 26, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL \S 6—RIGHT TO—DISCRETION OF TRIAL COURT.

Trial courts are vested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever in the opinion of the trial court, the party asking for a new trial has not probably had a reasonably fair trial, and has not, in all probability, obtained or received substantial justice, although it might be difficult, in many instances, for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them.

[Ed. Note.—For other cases, see New Trial; Cent. Dig. \S 9, 10; Dec. Dig. \S 6.]

2. APPEAL AND ERROR \S 933(1)—GRANTING OF NEW TRIAL.

As the granting of a new trial only places the parties in a position to have the issues between them again submitted to a jury or court, the showing for reversal should be much stronger where the error assigned is the granting of a new trial than where it is the refusal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3772; Dec. Dig. \S 933(1).]

3. APPEAL AND ERROR \S 977(3)—GRANTING OF NEW TRIAL.

The granting of a new trial being so much within the discretion of the trial court, this court will not reverse an order of such court granting a new trial, unless error is clearly established in respect to some pure, simple, and unmixed question of law. The Supreme Court will not reverse the ruling of the trial court granting a new trial unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple and unmixed question of law, and that except for such error the ruling of the trial court would not have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3862; Dec. Dig. \S 977(3).]

4. DEATH \S 91—NEW TRIAL \S 41(3)—ACTIONS—WRONGFUL DEATH—INSTRUCTIONS.

The giving of this instruction by the court on its own motion to the jury upon the trial of this cause was, we think, erroneous, highly prejudicial to the substantial rights of the plaintiff, preventing him from having a fair and an impartial trial under the Constitution and laws of our state, and would have constituted reversible error, and therefore the trial court's action, in the exercise of that sound discretion vested in him under the law as to the matter of granting or refusing a motion for a new trial, in correcting the reversible error thus committed by him, and in granting the plaintiff's motion for a new trial, and in setting aside the judgment theretofore rendered, was eminently right, just, and proper, is free from reversible error, and will not be disturbed by this court on appeal.

[Ed. Note.—For other cases, see Death, Cent. Dig. \S 90-101; Dec. Dig. \S 91; New Trial, Cent. Dig. \S 71; Dec. Dig. \S 41(3).]

Commissioners' Opinion, Division No. 4.
Error from District Court, Pontotoc County;
Tom D. McKeown, Judge.

Action by Gipson James against the Missouri, Kansas & Texas Railway Company. Judgment for defendant, but the trial court granted plaintiff a new trial and set the judgment for defendant aside. Defendant brings error. Affirmed.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. Geo. W. Burris, of Stonewall, and C. C. Williams and J. W. Dean, both of Ada, for defendant in error.

DAVIS, C. We will mention the parties to this action throughout this opinion as they were designated in the trial court. The plaintiff, Gipson James, sued the defendant railway company in the district court of Pontotoc county, Okl., to recover the sum of \$3,000 for the alleged negligent killing of his son, Lavin James, on a public highway crossing in said county on October 12, 1912, at about 11 o'clock p. m. Plaintiff further alleged in his petition that his son was 17 years of age at the time of his death, and was living with plaintiff. A trial to a jury resulted in a verdict against the plaintiff and in favor of the defendant on September 24, 1913, and on the same day the trial court rendered judgment on said verdict that the plaintiff take nothing by reason of the matters and things in this suit, and that the defendant have and recover of and from the plaintiff, Gipson James, all of its costs in this behalf laid out and expended. The court gave in his charge to the jury instruction No. 14, on his own initiative or motion, which is as follows:

"The court instructs the jury that the testimony of the inheritance of the allotment of the deceased by the plaintiff is admitted in this case for your consideration in determining whether the value of said allotment so inherited was, at the time of his death, in excess of, or equal to, any money that the deceased was contributing to the plaintiff from said allotment, and if you find from said evidence that the value of the inheritance was equal to or exceeded the amount that the plaintiff would have received as a contribution from the deceased from this source alone, until he arrived at his majority, then the plaintiff would not be entitled to recover in damages for any loss sustained, if any."

On September 25, 1913, the plaintiff filed the following motion for a new trial, omitting caption and mere formal parts:

"Comes now the plaintiff and moves the court to vacate and set aside the verdict and judgment rendered herein on the 24th day of September, 1913, and to grant a new trial, for the following causes, which affect materially the substantial rights of said plaintiff:

"First. Irregularity in the proceedings of the court by which the plaintiff was prevented from having a fair trial.

"Second. Error of law occurring at the trial, and duly excepted to at the time by the plaintiff.

"Third. That the verdict is not sustained by sufficient evidence and is contrary to law.

"Fourth. Error of the court in allowing the introduction of testimony on behalf of the defendant over the objection of the plaintiff, which was duly excepted to by the plaintiff.

"Fifth. Error of the court in giving instructions Nos. (7), (8), (10), (11), (14), and (15), excepted to by plaintiff.

"In support whereof, plaintiff respectfully prays the court to grant this motion and set aside and vacate the verdict and judgment herein and grant a new trial in this cause."

And thereafter, and on, to wit, the 31st day of January, 1914, came on for hearing the motion of the plaintiff for a new trial, and after argument of counsel the court took the matter under advisement. And on April 6, 1914, the court entered the following journal entry:

"Now, on this 6th day of April, 1914, the same being one of the regular judicial days of the February, 1914, term of said court, the motion of the plaintiff for a new trial in the above-entitled action having been heretofore, on the 31st day of January, 1914, argued and submitted to the court and by the court taken under advisement, being under consideration, and the court, being fully advised in the premises, finds: That said motion for a new trial should be granted upon the fifth ground thereof, for the error of the court in giving to the jury of its own motion instruction No. 14, which is as follows: 'The court instructs the jury that the testimony of the inheritance of the allotment of the deceased by the plaintiff is admitted in this case for your consideration in determining whether the value of said allotment so inherited was at the time of his death in value in excess of, or equal to, any money that the deceased was contributing to the plaintiff from said allotment, and if you find from said evidence that the value of the inheritance was equal to or exceeded the amount that the plaintiff would have received as a contribution from the deceased from this source alone until he arrived at his majority, then the plaintiff would not be entitled to recover in damages for the loss thus sustained, if any'—and that said motion should be overruled on all other grounds, and said judgment of September 24, 1913, be set aside.

"It is therefore considered and ordered by the court that the motion of the plaintiff for a new trial be, and the same is hereby sustained, upon the ground and for the reason hereinabove set forth, and that said motion be, and the same is hereby, overruled as to all other grounds, to which action of the court in sustaining said motion the defendant at the time excepted. And thereupon, upon motion of the defendant, and good cause having been shown to the court, the defendant is granted an extension of time of 90 days from this date in which to prepare and serve case-made for appeal to the Supreme Court of Oklahoma, plaintiff to have 10 days thereafter to suggest amendments, said case-made to be then settled upon 5 days' notice in writing, from either party for that purpose, and petition in error to be filed in the Supreme Court within 180 days."

The sole question here for our determination, and the only one that we shall consider, is the question as to whether or not the trial court erred in sustaining the motion of the plaintiff for a new trial on the ground set forth in said journal entry, supra, and in setting aside the judgment of the court rendered on the verdict of the jury returned in the cause at the trial, from which the defendant appealed. In Cyc. vol. 13, at page 364, under the head of damages for death by wrongful act, it is said:

"The rule seems to be well recognized that it cannot be shown in mitigation of damages that plaintiff or beneficiary acquired property by

descent from deceased, or received a sum of money for insurance upon his life."

In the footnotes under the above rule cited from Cyc. we find that, of all the states there given as following the rule, Texas alone follows the other rule and permits inheritance of property to be shown in mitigation of damages. This question came before the Supreme Court of Washington in the case of *Rochester v. Seattle R. & S. Ry. Co.*, 75 Wash. 559, 135 Pac. 209, and it is there said:

"Expectation of inheritance is not properly one of the elements of loss to children in a case of this kind [damages for death caused by wrongful acts] and should not be allowed to enter into the question in any way whatever."

In this case it was an action brought for a minor child for death of its father, just the reverse to the case at bar, but it seems that the principle should be the same in either case.

[1-3] In the exercise of that broad discretion given to the trial courts in passing upon motions for new trials, the learned trial court in this case has said by his order that error was committed in giving the instruction herein complained of by the plaintiff, and which error affected the material rights of the plaintiff. Now, if this were an appeal from the verdict of the jury in favor of the plaintiff, and which verdict had been approved by the trial court on motion for a new trial, this court would be loathe to disturb that verdict, unless the record disclosed some error in the court's view of some pure and unmixed question of law during the trial of said cause which affected the rights of one litigant party or the other, but, being an appeal, as it is, from an order of the trial court, made in the exercise of that enlarged degree of discretion with which the trial courts have been invested by the oft-repeated decisions of this court, this court will certainly not reverse that order unless it finds that the lower court has abused that discretion. This court in the case of *St. Louis & S. F. Ry. Co. v. Wooten*, 37 Okl. 444, 132 Pac. 479, say:

"Beginning with the early opinions of the Oklahoma Territorial Supreme Court, it has been held in an unbroken line of decisions that, in the matter of granting a new trial, the discretion of the trial court is very wide; indeed, that it is so extensive that its action in doing so will not be set aside on appeal unless it clearly appears that in granting the new trial it has taken an erroneous view of some pure, unmixed question of law, and that this erroneous view resulted in the order. *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113. Since statehood this rule has been followed in a multitude of decisions; the latest, perhaps, being the case of *Hughes v. C. R. I. & P. Ry. Co.* [35 Okl. 482] 180 Pac. 591, written by Justice Williams, and handed down February 18, 1913. The syllabus of that case is as follows: "Trial courts are invested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever, in the opinion of the trial court, the party asking for the new trial has not probably had a reason-

ably fair trial, and has not, in all probability, obtained or received substantial justice, although it might be difficult in many instances for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them. Following *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113." * * *

"Some criticism has been made as to the extent to which this doctrine has been carried; but to a man who has been a student of, and observed, trials it needs no defense. No appellate court, be it ever so wise or experienced, can get as correct an idea from a cold, mute record of a court proceeding as to whether or not a losing litigant has had a reasonably fair trial, and as to whether or not justice has prevailed, as can the trial judge who conducts the proceedings, sees and hears the parties, the witnesses, their manner of testifying, and what they say, and how they look and act while saying it. To the trial judge the human element of the case appears; the personal equation enters in. As * * * said by Chief Justice Dunn in *Hogan et al. v. Bailey*, 27 Okl. 15, 110 Pac. 890: "The trial court has a higher function under our jurisprudence than to act merely as a moderator or umpire between contending adversaries before a jury. Not only is it charged with the duty of seeing that the course and conduct of the trial gives to each of the litigants a fair opportunity to present his cause and to have the facts weighed in the light of proper instructions declaring the law relative thereto, but it is the imperative, abiding duty of the court, after the jury has returned its verdict and awarded to one or the other success in the controversy, where the justness of the same is challenged as in this case, to carefully weigh the entire matter, and, unless it is satisfied that the verdict is responsive to the demands of justice, to set the verdict aside and grant a new trial. Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but, unless that conclusion meets the affirmative, considerate approval of the mind and conscience of the court, it should not, where challenged, be permitted to stand."

"As has been seen, this record throws no light whatever as to the reasons in the mind of the trial judge, causing him to grant a new trial in this case. For us to attempt to assign any particular reason why he did so would be but a mere speculation. The verdict evidently, for some reason, did not meet his approval."

The above case was one instituted by plaintiff to recover damages for personal injuries. The trial resulted in a verdict in favor of the defendant, and a new trial was granted the plaintiff, and, so far as procedure is concerned, is exactly similar to the case at bar. While the trial court in granting the new trial did not specify any particular reason for granting the same, as was done in the case at bar, yet, we think, from the broad language of the court in the decision above is to be found sufficient justification for the trial court in granting the new trial in the case at bar.

"As the granting of a new trial only places the parties in a position to have the issues between them again submitted to a jury or court, the showing for reversal should be much stronger where the error assigned is the granting of a new trial than where it is the refusal. *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113.

"The granting of a new trial being so much within the discretion of the trial court, this

court will not reverse an order of such court granting a new trial, unless error is clearly established in respect to some pure, simple, and unmixed question of law. *Citizens' State Bank v. Chattanooga State Bank*, 23 Okl. 767, 101 Pac. 1118; *National Refrigerator & Butchers' Supply Co. v. Elsing*, 29 Okl. 334, 116 Pac. 790; *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113; *Weller v. Western State Bank*, 18 Okl. 478, 90 Pac. 877.

"The Supreme Court will not reverse the ruling of the trial court granting a new trial unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that except for such error the ruling of the trial court would not have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial. *Hogan v. Bailey*, 27 Okl. 15, 110 Pa. 890; *Duncan v. McAlester-Chocataw Coal Co.*, 27 Okl. 427, 112 Pac. 982; *Chapman v. Mason*, 30 Okl. 500, 120 Pac. 250; *Linderman v. Nolan*, 16 Okl. 352, 83 Pac. 796; *Jacobs v. Perry*, 29 Okl. 743, 119 Pac. 248."

[4] No one, except the jurors themselves, can say for a certainty what effect the instruction complained of had upon them in their deliberations. They might have concluded from the testimony and from the instruction given on the measure of damages for death of the minor son, that the plaintiff was entitled to recover, say, \$2,000; also, that the land shown to have been inherited was worth the sum of \$2,000, but under the instruction of the court, in that event, the jury was precluded from finding a verdict for plaintiff, but without the instruction on the question of inheritance they would have found for the plaintiff.

The giving of this instruction by the court on its own motion to the jury upon the trial of this cause, was, we think, erroneous, highly prejudicial to the substantial rights of the plaintiff, preventing him from having a fair and an impartial trial under the Constitution and laws of our state, and would have constituted reversible error, and therefore the trial court's action, in the exercise of that sound discretion vested in him under the law as to the matter of granting or refusing a motion for a new trial, in correcting the reversible error thus committed by him, and granting the plaintiff's motion for a new trial, and in setting aside the judgment theretofore rendered, was eminently right, just, and proper, is free from reversible error, and will not be disturbed by this court on appeal.

For the reasons stated herein the judgment of the trial court appealed from, in which said court sustained the plaintiff's motion for a new trial, granted and ordered a new trial and set aside the judgment theretofore rendered, is affirmed in all things, and said court is directed to proceed with the trial of said cause in due course and according to law.

PER CURIAM. Adopted in whole.

DAVIS et al. v. MIMERY. (No. 6638.)
(Supreme Court of Oklahoma. March 21, 1916.
Rehearing Denied Sept. 28, 1916.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT §12, 37, 40—EFFECT OF DISMISSAL—STATUTE.

(a) Section 5126, Rev. Laws 1910, gives the plaintiff the right, upon the payment of costs, to dismiss his action at any time before a petition of intervention or answer, praying for affirmative relief against him, has been filed. (b) While the clerk should make some record of the dismissal when the same is filed by the plaintiff, yet the mere filing of the written dismissal acts automatically to dismiss the action, and it does not take an order of the court to render the same effective. (c) But the dismissal does not become effective unless the costs are paid.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 27, 67, 68, 72, 73; Dec. Dig. §12, 37, 40.]

2. EJECTMENT §29 — ABATEMENT — FORMER SUIT PENDING.

An action was instituted in the federal court to cancel a certain deed. While this action was pending, an action in ejectment against the same parties was instituted in a state court for the recovery of possession of the same tract of land. *Held*, as the federal court had not taken jurisdiction of that phase of the matter, that the said ejectment action could be maintained in the state court.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 117, 119; Dec. Dig. §29.]

3. EJECTMENT §84(1)—ACTIONS—EVIDENCE—ADMISSIBILITY.

After the issues in an ejectment action had been made up, defendants obtained a deed from plaintiff for the land in controversy. Upon the introduction of this deed during the trial, plaintiff attacked the same upon the alleged ground that the same was procured through fraud. Defendants urged that evidence could not be received as to said fraud because no fraud had been pleaded. *Held*, the admission of the same was proper under the circumstances.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 230; Dec. Dig. §84(1).]

4. APPEAL AND ERROR §1173(1)—REVIEW—DETERMINATION.

Under the Code, the Supreme Court has full power to render such judgment as the facts warrant, and may reverse as to one defendant and affirm as to another, unless the rights of the defendants are so interwoven and their interests so united that the judgment affects all alike.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562, 4567, 4569, 4656; Dec. Dig. §1173(1).]

Commissioner's Opinion, Division No. 4. Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action by Mimeo against J. O. Davis, and another, and Bob Owens. There was a judgment for plaintiff and defendants appeal. Affirmed as to the first named defendants, reversed as to the last.

The parties will be designated as in the trial court. One Mimeo, a Seminole Indian woman, instituted this action against the defendants in the district court of Seminole county. Her petition embraced two counts; the first being an action in ejectment for the

possession of a certain tract of land and for damages for its detention, and the second count being an action for the cancellation of a deed to said tract of land. She alleged in her petition that the tract of land in controversy was her allotment, and that defendants had been in the wrongful possession of the same since January 24, 1907. Defendants answered by general denial, and that they were owners of said land by virtue of a deed from plaintiff. Defendants further set up that in July, 1908, in the Circuit Court of the Eastern District of Oklahoma, the United States, as guardian of the estate of plaintiff and in her behalf, filed an action, seeking the cancellation of the deed herein sought to be canceled and for the same reasons, and that the parties and subject-matter in said action in the said federal Circuit Court and in the action at bar were the same, and that said action in the federal court was still pending and undisposed of, for which reasons they asked that this action be abated. To this answer plaintiff replied by general denial. Afterwards the following instrument was filed, and by the clerk spread upon the minutes:

"Sept. 27th, 1913.

"Wewoka, Okla. Mr. R. H. Chase, Clerk of the Dist. Court, at Wewoka: This is to demand of you that you dismiss the suit of Mimeo v. J. O. Davis but not as to Malcolm Henry, at my costs in full settlement of all trouble and liability between us. Mimeo (her X mark)."

When the case was called for trial on the 11th day of December, 1913, the plaintiff asked permission of the court to withdraw the aforesaid dismissal. The defendants interposed an objection to the withdrawal of said dismissal, for the alleged reason that the same was filed on October 3, 1913, at a time when court was not in session, and that the same effectively dismissed said action, and defendant Davis stated that he appeared specially for the purpose of resisting said motion, and claimed that the court had no jurisdiction since the dismissal. The motion to withdraw the dismissal was sustained by the court. Plaintiff introduced deed to her allotment, embracing the land in controversy, and produced evidence as to the rental value of the land, and it was agreed that she was an enrolled half-blood Seminole. The defendants introduced deed from plaintiff to them for the land in controversy, dated January 24, 1907. They also introduced a certified copy of the suit filed in the federal court for the purpose of canceling the aforesaid deed given by plaintiff to defendants. They next introduced deed from plaintiff, Mimeo, to defendant Davis, embracing 80 acres of the land in controversy, being the surplus allotment of the said Mimeo, this deed being dated September 27, 1913. A written agreement of the same date was also introduced, wherein for a consideration of \$25 in cash and other considerations the said Mimeo agreed to dismiss her action against defendants. Plaintiff contested said last-named deed and written agreement upon the

ground of alleged fraud in inducing the said Mimeo to sign the same and the claim that she had been overreached. This was the principal controversy at the trial, and much evidence was introduced upon both sides thereon, but it is unnecessary to review the same here. Before the close of the testimony the plaintiff dismissed her second cause of action, and the defendants entered a disclaimer as to land embraced in the homestead allotment of the said Mimeo. The cause was tried to a jury and a verdict by them returned in favor of plaintiff for the possession of the land and \$260.75 damages for its detention. The motion for a new trial was overruled, and the defendants prosecute this appeal.

T. S. Cobb and J. O. Davis, both of Wewoka, for plaintiffs in error. John W. Willmott, of Wewoka, for defendant in error.

MATHEWS, C. (after stating the facts as above). [1] The first assignment of error to be considered is the ruling of the court in permitting the plaintiff to withdraw her dismissal filed on October 3, 1913. It has been held by the court that section 5128, Revised Laws 1910, gives the plaintiff the right, upon the payment of costs, to dismiss his action at any time before a petition of intervention or answer, praying for affirmative relief against him, has been filed. While the clerk should make some record of the dismissal when the same is filed by the plaintiff, yet the mere filing of the written dismissal acts automatically to dismiss the action, and it does not take an order of the court to render the same effective. *Long v. Bagwell*, 38 Okl. 312, 133 Pac. 50; *Stuart v. Hicks*, 153 Pac. 143; *Harjo v. Black*, 153 Pac. 1137. But in the case at bar the plaintiff did not pay the costs as the statute requires when she attempted to dismiss her action and for that reason her attempted dismissal did not become effective, and therefore the court retained jurisdiction of the case. In the case of *Harjo v. Black*, 153 Pac. 1137, on this subject, it is said:

"But the filing of the stipulation by plaintiff is not all; for the statute requires that the costs be paid. * * * It cannot be said, therefore, that the mere filing of the stipulation automatically dismissed the suit. Until the costs were paid it remained upon the court docket, as though the stipulation had not been filed. The court was not divested of jurisdiction over the action until a compliance with the statute."

[2] Defendants next urge that, owing to the fact that the federal court had first assumed jurisdiction of this cause, involving the same parties and subject-matter, this fact precluded plaintiff from prosecuting an action in another court for the same purpose. It will be noted that plaintiff's petition embraced two counts or causes of action. The first was an action in ejectment and for damages, and the second sought the cancellation of the first deed given by plaintiff, Mimeo, to defendants Davis and Henry.

When defendants introduced a certified copy of the said petition filed in the federal court by the United States attorney, the plaintiff then dismissed her second cause of action, and the court announced that the trial would proceed upon the ejectment action. It is defendants' contention that as the federal court had first acquired jurisdiction, it had power to grant complete relief, and could not be divested by the district court of Seminole county of any part of its jurisdiction. It was held in the case of *Heckman v. U. S.*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820, that when the United States undertakes to represent the allottee of lands under restrictions and brings a suit to cancel prohibited transfers, such an action precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property. In the case of *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584, it is said that the jurisdiction of the circuit court could not be defeated or impaired by the institution of subsequent proceedings in the state court involving the same legal question. This rule also applies to state courts, and it is elementary that the court first acquiring jurisdiction maintains it over courts which attempt subsequently to take cognizance of the same matter. This rule is absolutely necessary to prevent inextricable conflict and confusion, but we do not believe the case at bar comes within the rule. The case then pending in the federal court which defendants claim had first acquired jurisdiction of this matter was a very peculiar one. It seems to have been a case of wide scope, and had for its object the cancellation in one suit of an immense number of deeds given by Indians conveying restricted allotments. From an examination of the petition introduced in evidence herein by the defendants, it is evident that the only object of that suit was to cancel the deeds, leases, and like instruments obtained from restricted Indians, and the deed mentioned in the case at bar was included in the list sought to be canceled, but the petition in said federal suit did not ask for relief beyond that, and even after said suit had been prosecuted to a successful termination it would still leave the defendants in possession of the land and the damages plaintiff would be entitled to for its retention not adjudicated. The petition there said nothing about the defendants being in possession of the land in controversy, or about the plaintiff being entitled to damages for its retention. The federal court was not taking jurisdiction of that phase of the matter, but had for its only object the cancellation of the deed, and for that reason we see no good reason why this action in ejectment and for damages could not be maintained.

[3,4] Plaintiff's action was one in ejectment and for damages for retention. Defendants' answer thereto was in effect a general denial. At the trial it was shown that

defendants had procured two deeds to the land in controversy. The first deed was obtained on the 24th day of January, 1907, but the court properly ruled that said deed was void because the restrictions of plaintiff, Mimey, had not been removed at that time. The second deed was dated the 27th day of September, 1913, long after this action had been instituted and the issues made up, and defendants relied solely on this deed to defeat plaintiff's action. Plaintiff attacked this deed upon the ground that it was procured through fraud. Defendants here complain of the court's action in permitting evidence to be introduced to prove this fraud, because plaintiff had not alleged fraud in her pleadings. It is true, as a general rule, that in order to prove fraud it must first be pleaded, but it would be an anomaly to say that plaintiff will not be permitted to attack a deed thus obtained through fraud after the issues have been made up, because the fraud had not been pleaded. Under the conditions presented in this case we believe the ruling of the court in admitting the evidence was correct, and that the same was amply sufficient to sustain the verdict of the jury.

The evidence in this case shows that the plaintiff Mimey was a very ignorant, illiterate Indian woman. The defendants obtained possession of her allotment in 1907 under a void conveyance, and after this action was brought to recover possession, which she had for a long time been deprived of, and pending the action, she was induced to make another deed thereto, and also sign away her right to damages while the land was detained from her. In the execution of the second deed, the evidence plainly shows she was overreached and imposed upon. It appears that she was an old woman, alone, unable to speak or understand English, and she was induced by another Indian woman, who was paid a fee of \$25 by defendants for her services, and who was able to speak intelligently both the Indian language and English, to sign the second deed for a mere pittance of its actual value by being told that she would lose her suit anyway, and that she should take what she could get.

During the trial the plaintiff dismissed as to some of the defendants, and the final judgment was against defendants, Davis, Henry, and Owens. It is admitted that there was no evidence in the record fixing liability on the said Owens, and that he ought to be relieved from the effect of the judgment. Upon this point the defendants contend that the judgment is joint and indivisible, and as it must be reversed as to the said Owens, it must be reversed as to the other defendants also. The defendants have cited a long list of authorities to support their contention, which have no force in this state, as the common law rule upon this point has been expressly abrogated by statute. Section 5124, Revised Laws 1910, reads as follows:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or proceed in the cause against the defendant or defendants served."

Section 5236, Revised Laws 1910, relates to the jurisdiction of the Supreme Court, and is as follows:

"The Supreme Court may reverse, vacate or modify judgments of the county, superior or district court, for errors appearing on the record, and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. * * *"

The above two statutes, construed together, make it evident that the action of the Supreme Court on the point involved here is governed by statute, and not by the common law, and has full power to render such judgment as the facts warrant, and may reverse as to one party and affirm as to another. *Outcalt v. Collier*, 8 Okl. 473, 58 Pac. 642; *Louisville, New Albany & Chicago Ry. Co., and Toledo, St. Louis & Kansas City Ry. Co. v. Treadway*, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794.

However, even if the defendants were correct in their statement of the law that a joint judgment, if reversed as to one of the defendants, must be reversed as to all, yet it would have no application here because the judgment rendered by the trial court was not a joint judgment, but a joint and several judgment. *Richardson v. Painter*, 80 Kan. 574, 102 Pac. 1099, 188 Am. St. Rep. 224.

Of course it will be conceded that where the rights of the defendants are so interwoven, and their interests so united that the judgment of necessity affects all alike then the action of the court upon appeal should be the same as to all the defendants. But the judgment in the case at bar as shown before was joint and several. In the case of *Hamilton v. Prescott*, 73 Tex. 585, 11 S. W. 548, it was said:

"We think the conclusion to be deduced from these apparently conflicting cases is that this court, when it finds error in the proceedings of the lower court as to any party to the judgment and not as to another, and that a proper decision of the case as to one is not dependent upon the judgment as to the other, will reverse in part and affirm in part. But where the rights of one party are dependent in any manner upon those of another, it will treat the judgment as an entirety, and where a reversal is required as to one it will reverse the judgment as a whole." *Heintz v. Thayer*, 92 Tex. 658, 50 S. W. 929, 51 S. W. 640; *Chicago, R. I. & G. Ry. Co. v. Young & Ball* (Tex. Civ. App.) 107 S. W. 127; *Sturgis, Cornish & Burn Co. v. Miller*,

79 Neb. 404, 112 N. W. 595; *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955; *Enos et al. v. Capps*, 12 Ill. 255; *Wescott v. Bridwell et al.*, 40 Mo. 146; *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238; *Eddings v. Boner*, 1 Ind. Terr. 173, 38 S. W. 1110.

We recommend that the judgment as to Bob Owen be reversed, with instructions to dismiss the action as to him, and affirmed as to defendants J. O. Davis and Malcolm Henry.

PER CURIAM. Adopted in whole.

PALMER v. WICHITA FALLS & N. W. RY. CO. et al. (No. 7814.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT — 101, 102(5), 265(5) — INJURIES TO SERVANT — APPLIANCES — CARE.

An employer has discretion concerning the tools and appliances which he will furnish his employes, providing the tools and appliances so furnished are sound and perform the work which they are designed to do; mere proof that he is using tools and appliances of a certain kind, if an accident happens in the use of them, does not tend to show negligence unless it is coupled with some evidence—not mere speculation—that they were not properly performing their function.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 180, 881, 898; Dec. Dig. — 101, 102(5), 265(5).]

2. MASTER AND SERVANT — 265(5) — INJURIES TO SERVANT — PRESUMPTION OF NEGLIGENCE.

The fact that an employe is injured in the course of his employment carries with it no presumption of negligence on the part of the employer, but such negligence is an affirmative fact for the injured employe to establish by the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 881, 898; Dec. Dig. — 265(5).]

Commissioners' Opinion, Division No. 1. Error from District Court, Dewey County; T. P. Clay, Judge.

Action by Thomas D. Palmer, as administrator of the estate of E. M. Canary, deceased, against the Wichita Falls & Northwestern Railway Company and the Missouri, Kansas & Texas Railway Company. There was a judgment for defendants, and plaintiff brings error. Affirmed.

H. W. Patton and Chas. R. Alexander, both of Woodward, for plaintiff in error. C. C. Huff, of Dallas, Tex., and Adams & Smith, of Taloga, for defendants in error.

RUMMONS, C. This case was commenced under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), to recover for injuries alleged to have been received by plaintiff's intestate and for the death of intestate, ensuing from such injuries. Such injuries were alleged to have occurred to plaintiff's intestate while engaged in the em-

ploy of the defendants in interstate commerce.

The evidence at the trial shows that plaintiff's intestate was employed by the Wichita Falls & Northwestern Railway Company, at Trail, Okl., as a section hand, and that at the time the injuries were received by him he was engaged, with other employes of the railway company, upon a bridge over the South Canadian river, in protecting such bridge from logs and driftwood carried down against it by a flood in such river. Plaintiff's intestate and other workmen had been employed at such work for several days before the night on which the accident occurred. On the night of the accident plaintiff's intestate, with other employes was upon the bridge engaged in pulling upon a long rope, one end of which was looped over the end of logs washed against the piling sustaining the railroad bridge. Their duties consisted in pulling upon the rope after it was attached to the end of the log, so as to raise that end of the log out of the water and permit the other end of the log to swing into the current of the stream and go under the bridge. When a log was so lifted and swung into the stream and passed under the bridge, the rope would catch upon the bridge, and the end looped around the log would slip off and the rope be recovered. On one occasion, while plaintiff's intestate and his coemployes were pulling upon the rope to lift the end of the log, the noose attached to the end of the log slipped off, causing the plaintiff's intestate and the other employes pulling upon the rope to fall. Plaintiff's intestate fell across a rail upon the bridge, and several other employes fell upon him, inflicting the injuries complained of, which eventually resulted in his death. There was evidence more or less at conflict as to the seriousness of the injuries received by plaintiff's intestate by reason of this fall, and whether or not such injuries resulted in his death. At the conclusion of the evidence of plaintiff the defendants demurred thereto, which demurrer was sustained by the court, and the jury directed to find a verdict for the defendants.

[1] Under several assignments of error plaintiff complains of the sustaining of the demurrer to his evidence and of the direction of a verdict for the defendants. We have carefully examined the record in this case, and are unable to say that the trial court

erred in sustaining the demurrer to the evidence and in directing a verdict for the defendants. There is no evidence that the rope used in the work of plaintiff's intestate was defective, nor is it claimed that the injury resulted from any defect in the rope. It is, however, suggested that other appliances might have been used by the defendants, which would have prevented the injury resulting to plaintiff's intestate. While this may be true, yet the employer has the right to select the tools and appliances with which his employes shall work, and if the tools and appliances so selected are reasonably safe and ordinary care is used by the employer in the selection of reasonably safe tools and appliances of the kind determined to be used, the employer incurs no liability. *Phoenix Printing Co. v. Durham*, 32 Okl. 575, 122 Pac. 708, 38 L. R. A. (N. S.) 1191.

[2] There is no evidence in the record as to what occasioned the slipping of the rope from the log at the time the fall of plaintiff's intestate occurred. No witness saw the employe whose duty it was to attach the rope to the log, and there is no evidence that the rope was negligently attached. The fact that a servant is injured in the course of his employment raises no presumption of negligence on the part of the master, and there must be evidence sufficient to establish primary negligence in the master before the servant can recover for injuries sustained in the course of his employment, nor can a recovery be had for negligence upon conjecture. There must be evidence of facts or circumstances from which the fact that the negligence of the master is the proximate cause of the injury is necessarily implied before a recovery can be had for injuries sustained by the servant. *Chicago, R. I. & P. Ry. Co. v. Duran*, 38 Okl. 719, 134 Pac. 876; *Smith v. Acme Milling Co.*, 34 Okl. 439, 126 Pac. 190; *St. L. & S. F. Ry. Co. v. Fick*, 149 Pac. 1128. There being no evidence in this record of any facts or circumstances from which the negligence of the defendants would be necessarily implied, if the court had submitted the case to the jury, a verdict could have been returned for the plaintiff only upon conjecture. The trial court, therefore, committed no error in taking the case from the jury.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

ALLEN v. PENDARVIS. (No. 7684.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

*(Syllabus by the Court.)***1. FRAUD \S 20 — ACTIONS — RIGHT TO RECOVER.**

In an action to recover damages for fraud and deceit, in order to entitle plaintiff to recover it is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff to take the action from which the injury ensued. If without the fraudulent representations the party injured would not have acted, then such representations contributed to induce the action, notwithstanding that other equally powerful motives, without the existence of which the party injured would not have acted, may at the same time have influenced such action.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 17, 18; Dec. Dig. \S 20.]

2. FRAUD \S 65(4)—ACTIONS—INSTRUCTIONS.

An instruction which advises the jury, "If you find from the evidence that the plaintiff was induced to buy the bank stock in question by or through the agency of some other influence than any representations made to him by the defendant at the time of the sale, then the plaintiff cannot recover, and your verdict shall be for the defendant," is erroneous.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 72, 73; Dec. Dig. \S 65(4).]

Commissioners' Opinion, Division No. 1. Error from District Court, Garfield County; James B. Cullison, Judge.

Action by W. H. Allen against E. A. Pendarvis. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Parker & Simons, of Enid, for plaintiff in error. H. J. Sturgis and H. G. McKeever, both of Enid, for defendant in error.

RUMMONS, C. This cause was commenced in the district court of Garfield county to recover damages for fraud and deceit perpetrated by the defendant in error upon the plaintiff in error, hereinafter styled, respectively, defendant and plaintiff, in the selling of certain shares of bank stock in the Garfield Exchange Bank of Enid, Okl.

The evidence on behalf of the plaintiff was to the effect that about the time of the purchase by him of the shares of stock he was a bookkeeper in the Oklahoma State Bank at Enid; that he was desirous of obtaining a better position; that a mutual acquaintance of plaintiff and defendant, Floy Horney, was at the same time employed in the Garfield Exchange Bank, of which the defendant was assistant cashier. Horney brought plaintiff and defendant together. Defendant advised plaintiff that he had five shares of stock for sale, which he would sell for a premium of \$50 per share, or \$150 per share. Plaintiff asked defendant what he thought about the investment in the stock of the bank, to which defendant replied:

"I believe it would be a good investment for you, Harry. It would be a good investment for a young man like you. I am glad to see a

young man wanting to go into a position like that. It will give him something to work for."

Plaintiff asked defendant if it was a good bank, to which defendant replied:

"Yes, sir; it is a good bank."

Plaintiff asked defendant if the bank was paying dividends, and he said:

"No; the bank hasn't been paying a dividend for some time. The reason is because there is a lot of bad paper there that was left there by Ferguson, and we have got that all cleaned up now, and I don't see any reason why we should not pay a dividend by the first of the year of 15 per cent."

It further appears from the testimony of plaintiff that his proposition to buy the stock of defendant was conditioned upon his obtaining a position in the Garfield Exchange Bank; that defendant saw the president of the bank and arranged for him to secure a position in that bank, which was done. Plaintiff bought the five shares of stock for \$750, giving therefor his note with his father as surety, which note was subsequently paid. It appears from the evidence on behalf of the plaintiff that the Garfield Exchange Bank had a large amount of bad paper and was heavily involved at the time of the sale of this stock, and on May 27, 1914, nearly two years after the sale of the stock, closed its doors and was taken charge of by the bank commissioner. Plaintiff testified he relied upon the representations of the defendant as to the condition of the bank. The defendant denied making any representations as to the bad paper in the bank having been cleaned up, or as to the conditions of the bank, and testified that the only conversation concerning the transaction was about the price of his shares of stock and the possibility of the plaintiff securing a position in the bank. Horney, who was present during most of the conversation, testified that the only thing that he remembered to have been said, except as to the price of the stock and the position desired by the plaintiff, was the statement by defendant that he thought the stock would be a good investment for the plaintiff. The case was tried to a jury, resulting in a verdict for the defendant, upon which judgment was rendered, and the plaintiff prosecutes this proceeding in error to reverse such judgment.

[1, 2] Plaintiff makes several assignments of error, but we think there is only one error complained of which would warrant a reversal of this cause. The court instructed the jury as follows:

"The jury is instructed that, if you find from the evidence that the plaintiff was induced to buy the bank stock in question by or through the agency of some other influence than any representations made to him by the defendant at the time of the sale, then the plaintiff cannot recover and your verdict shall be for the defendant."

The giving of this instruction is assigned by plaintiff as error. We think this assign-

ment is well taken. From the evidence of plaintiff it is apparent that he was actuated in the purchase of this stock by a desire to get a better position than the one he was then occupying, and from this instruction the jury was authorized to find for the defendant, if the plaintiff was induced to buy the bank stock by or through the agency of some other influence than any representations made to him by the defendant at the time of the sale. This instruction advised the jury that they must find for the defendant unless the plaintiff acted solely upon the alleged false representations made to him by the defendant. This is not the law. In an action like this, in order to entitle the plaintiff to recover, it is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff to make the purchase from which the injury ensued. If the representations contributed to the formation of the conclusion in his mind to buy, that is enough, although there may have been other inducements operating at the same time and aiding and leading him to that determination. A true test in such cases may found in the inquiry whether the plaintiff would have bought the stock if the false representations had not been made. If he would, then the false representations did not contribute to the purchase; for he would have bought without them. But, if he would not have bought without the representations, then they contributed to the purchase and the party making them is responsible for the damage which the plaintiff suffered, notwithstanding that other equally powerful motives may have influenced his mind at the same time in the same direction and without the existence of which he would not have come to the conclusion to buy. If the plaintiff would not have bought the stock except for the representations alleged to have been made by the defendant, then he would be entitled to recover if such representations were in fact made, were material, and were false, even though he would not have bought the stock unless he was able to secure a position in the bank. 12 R. C. L. p. 353, § 112; Tooker v. Alston, 159 Fed. 599, 86 C. C. A. 425, 16 L. R. A. (N. S.) 818; Dime Sav. Bank v. Fletcher, 158 Mich. 162, 122 N. W. 540, 35 L. R. A. (N. S.) 858; Buchanan v. Burnett, 102 Tex. 492, 119 S. W. 1141, 132 Am. St. Rep. 900; Shaw v. Stine, 21 N. Y. Super. Ct. 157.

The plaintiff was entitled to have the jury determine from all the evidence in the case whether or not he was induced by the alleged false representations to part with his money, and we think this instruction excluded that consideration from the jury.

The giving of this instruction constitutes prejudicial error, and this cause should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

EUREKA PUB. CO. v. FIRST NAT. BANK OF STIGLER. (No. 7608.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR — 1236 — SUPERSEDEAS BOND—SURETIES ON LIABILITY.

In a case appealed to the Supreme Court, where a supersedeas bond has been given staying execution, and the judgment here is against the appellant, this court, by virtue of the provisions of chapter 249, Session Laws 1915, will enter judgment against the sureties on such bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4784; Dec. Dig. § 1236.]

Commissioners' Opinion, Division No. 4. Error from District Court, Haskell County; W. H. Brown, Judge.

Action between the First National Bank of Stigler, a corporation, and the Eureka Publishing Company. There was a judgment for the former, and the latter brings error. The judgment being affirmed, the successful party moved for judgment against the sureties on the supersedeas bond. Motion sustained.

See, also, 159 Pac. 508.

Holley & Means and A. L. Beckett, all of Stigler, for plaintiff in error. Clark & Foster, of Stigler, for defendant in error.

EDWARDS, C. On appeal to this court the judgment rendered in the lower court was affirmed. A supersedeas bond had been given staying the execution. A motion has been filed herein for judgment against the sureties on such supersedeas bond. By virtue of the provisions of chapter 249, Sess. Laws 1915, as construed in Long v. Lang, 152 Pac. 1078, the motion is sustained.

Judgment is therefore entered in this court in favor of the First National Bank of Stigler in the sum of \$1,172.55, with 10 per cent. interest from January 8, 1915, for \$22.25 costs taxed in the lower court, and all costs in this court.

PER CURIAM. Adopted in whole.

WILCOX v. WOOTTON. (No. 7345.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 773(2) — BRIEFS — DISMISSAL.

Where plaintiff in error fails to file briefs in the Supreme Court in compliance with the rules and orders of the court, his appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108; Dec. Dig. § 773(2).]

2. APPEAL AND ERROR — 1236 — SUPERSEDEAS BOND—SURETIES.

In a case appealed to the Supreme Court, where supersedeas bond has been given and ap-

proved staying execution and the judgment here is against the appellant, this court, by virtue of the provisions of chapter 249, Sess. Laws 1915, will enter judgment against the sureties on such supersedeas bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4784; Dec. Dig. ¶ 1236.]

Commissioners' Opinion, Division No. 2. Error from County Court, Greer County; R. M. Thacker, Judge.

Action by V. R. Wootton against T. S. Wilcox. There was a judgment for plaintiff, and defendant brings error. On motion to dismiss and for judgment against the sureties on supersedeas bond. Motion sustained.

Percy Powers and E. M. Stewart, both of Mangum, for plaintiff in error. S. D. Williams, of Wynnewood, and Wylie Snow, of Mangum, for defendant in error.

BRUNSON, C. On the 9th day of November, A. D. 1914, a trial was had in this case in the court below, which resulted in a verdict and judgment against the plaintiff in error in the sum of \$183.55. A motion for a new trial was filed and overruled, and the case is here on appeal from said judgment.

[1, 2] A motion is filed in this court by the defendant in error, asking that the appeal be dismissed because no brief has been filed by the plaintiff in error. No brief has been filed by the plaintiff in error in compliance with the rules of this court, and no excuse is offered why the same has not been done, and for that reason the motion is sustained, and the appeal is dismissed. In said motion it is also asked that, in the event the appeal is dismissed by this court, judgment be rendered against the sureties on the supersedeas bond filed and approved in the trial court, staying execution on the judgment so entered in said cause. On appeal to this court from said judgment a supersedeas bond was filed and approved in the trial court, the same being executed by the plaintiff in error as principal, and Loyd Cox, M. A. Johnson, W. A. Fitzgerald, L. W. Lee, and J. F. McMillan as sureties, to stay said judgment. By virtue of the provisions of chapter 249 of the Session Laws of 1915, as construed in the case of Long v. Lang, 152 Pac. 1078, and Butts v. Rothschild Bros. Hat Co., 159 Pac. 245 (not yet officially reported), the motion for judgment against the said sureties on the supersedeas bond is sustained.

Judgment is therefore entered in this court against Loyd Cox, M. A. Johnson, W. A. Fitzgerald, L. W. Lee, and J. F. McMillan in the sum of \$183.55, together with interest thereon at the rate of 6 per cent. per annum from and after the 9th day of November, A. D. 1914, and all costs of this action.

PER CURIAM. Adopted in whole.

ELLIOTT v. COGGSWELL (No. 6035.)
(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ¶ 1236 — SUPERSEDEAS BOND—SURETIES ON—LIABILITY.

Where the supersedeas bond is filed, and on appeal to this court the judgment of the lower court is affirmed, on motion of appellee judgment will be entered in this court against the sureties on the appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4784; Dec. Dig. ¶ 1236.]

Commissioners' Opinion, Division No. 4. Error from County Court, Tulsa County; Conn Linn, Judge.

Action by L. S. Coggs well against W. E. Elliott. There was a judgment for plaintiff, and defendant brings error. The judgment was affirmed, plaintiff moves for judgment against the sureties on the supersedeas bond. Motion sustained.

See, also, 155 Pac. 1146.

Schaeffer & Kerrigan, of Tulsa, for plaintiff in error. Randolph, Haver & Shirk, of Tulsa, for defendant in error.

MATHEWS, C. On September 4, 1913, defendant in error recovered a judgment in the county court of Tulsa county against plaintiff in error in the sum of \$140, with interest and costs. Plaintiff in error perfected his appeal from said judgment to this court, and on the 27th day of October, 1913, a supersedeas bond in the sum of \$300, signed by Thomas J. Walsh and A. Campbell as sureties, was filed in said county court and duly approved. On March 7, 1916, the judgment of the trial court was, in all things, affirmed by this court. Defendant in error now asks for judgment against said sureties which is allowed.

Judgment is therefore entered in this court against the said Thomas J. Walsh and A. Campbell, sureties on said supersedeas bond, in the sum of \$140, with interest thereon at the rate of 10 per cent. per annum (being the rate said judgment bears) from the 4th day of September, 1913, and for costs, for which execution may issue.

PER CURIAM. Adopted in whole.

LEIGHTON v. CROWELL et al. (No. 7474.)
(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

PLEADING ¶ 343—JUDGMENT ON—DEFENSE.

Where the petition states a cause of action and the answer does not allege new matter, it is error for the court to render judgment for the defendants on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. ¶ 343.]

Commissioners' Opinion, Division No. 3. Error from District Court, Woods County; W. C. Crow, Judge.

Action by Elton L. Leighton, as administrator of the estate of John S. Wagner, deceased, against George W. Crowell, J. A. Stine, and G. E. Nickel. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Charles R. Alexander, of Woodward, for plaintiff in error. E. W. Snoddy, of Alva, for defendants in error.

RITTENHOUSE, C. On April 12, 1904, George W. Crowell, was appointed administrator of the estate of John S. Wagner, deceased, and executed a bond in the penal sum of \$12,000, with J. A. Stine and G. E. Nickel as sureties, conditioned upon the faithful performance of his duties as administrator. It is alleged in the petition that the administrator did not faithfully perform his duties; that in May, 1904, he converted the property of said estate into cash which he commingled with his individual money and used for his own profit and benefit; that he made no report to the court, nor has he rendered an exhibit under oath showing the amount of money received and expended by him; nor has he paid over the proceeds from said property to the persons entitled thereto; that in August, 1911, the heirs of John S. Wagner, deceased, filed a petition, setting forth the defaults and mismanagement of the said estate by the defendant George W. Crowell, and on November 9, 1911, a citation was duly issued and served, upon him in the same manner as a summons in a civil action, requiring him to appear at a time certain and then and there show cause why an attachment should not be issued to compel him to render an account and report, and requiring such report to be made at said time and place; that on March 11, 1912, the heirs filed a duly verified petition, setting forth the facts of the mismanagement of the estate, and asking that the defendant George W. Crowell be removed and his letters of administration revoked, which was set for hearing April 22, 1912, and a citation issued, citing him to appear on said day and show cause why he should not be removed and his letters of administration revoked. Upon hearing the evidence, the court made an order, removing him and revoking his letters of administration; that on September 9, 1912, the plaintiff, Elton L. Leighton, was duly appointed administrator of said estate, and qualified and entered upon the duties of such office as the successor of George W. Crowell; that on November 16, 1912, he filed an account thereof with the court, whereupon the court appointed a time and place for the hearing of the same, which report was served upon George W. Crowell, and he was given due and legal notice of the hearing and settlement of such report. At this hearing he did not appear, and the court found that there

was due and payable from George W. Crowell, to said estate the sum of \$6,739.50 with interest which he was ordered to deliver to the plaintiff and in default thereof the plaintiff was authorized to institute this action; that in January, 1913, a citation was issued and duly served upon George W. Crowell, reciting the amount found due, and commanding the said George W. Crowell to pay said sum to the plaintiff; that no part has ever been paid, and there is due from the defendants, George W. Crowell, J. A. Stine, and G. E. Nickel, to the plaintiff, the said sum so found due. The defendants filed a general denial; no reply was filed. A motion for judgment on the pleadings in favor of the defendants was sustained, and it is assigned as error: (1) That the judgment upon the pleadings was contrary to law; (2) that the answer does not state facts sufficient to constitute a defense to the plaintiff's petition. The petition alleged facts, if true, sufficient to show that the county court had jurisdiction of the parties and of the subject-matter, and in entering judgment of January 4, 1913, fixed the liability of the former administrator and his sureties, and, when so fixed, the defendants cannot go behind such judgment or inquire into the merits. It was held in *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125, that:

"Sureties may show in defense, when sued upon administrator's bond for a breach thereof by the principal in not paying over a sum found due by the probate court and decreed by such court to be paid, that the bond was not made, or that such decree was not made, or that, if made, the same has been obeyed, or that it was obtained by fraud or collusion; but they cannot show that the court has erred in making the decree, or that no assets ever came into the possession of the administrator, although the court had so found and adjudged."

See, also, *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679; *Power v. Bermester*, 12 N. Y. Supp. 25.¹

In the instant case judgment was entered upon the pleadings; and, as the answer did not contain any new matter, but merely a denial of the allegations already set forth in the plaintiff's petition, it was not necessary for the plaintiff to reply to the answer. *Wilson v. Fuller*, 9 Kan. 176; *Mackey v. Briggs*, 16 Colo. 143, 26 Pac. 131; *Netcott v. Porter et al.*, 19 Kan. 131; *Barnes v. Davis et al.*, 30 Okl. 511, 120 Pac. 275.

It therefore follows that the court erred in rendering judgment on the pleadings, and the judgment should be reversed, and the cause remanded for a new trial upon the merits.

PER CURIAM. Adopted in whole.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 58 Mun. 607.

JOHNSON v. JOHNSON et al. (No. 6127.)
(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD §107—SALES—COLLATERAL ATTACK.

Where, in an action in ejectment, the plaintiff in order to prove title to herself assailed the validity of the record of the county court, appointing for her a guardian, who as such, pursuant to an order of the court, had subsequently sold and conveyed the land in controversy to one of the defendants, *held*, that such was a collateral attack, and that the record, being one of a court of general jurisdiction, as to probate matters could not be impeached by any evidence or allegation that the guardian appointed by the county court was himself, at the time of such appointment, a minor.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 117; Dec. Dig. §107.]

2. GUARDIAN AND WARD §17 — APPOINTMENT OF GUARDIAN—COLLATERAL ATTACK—PRESUMPTION.

The appointment of a guardian for a minor by the county court imports general jurisdiction in the court so to do, and, the record thereof being regular upon its face, it will be inferred, from the fact that such appointment was made, that all the facts necessary to vest the court with jurisdiction to make the appointment, including the determination of the proper qualifications of the guardian appointed, had been found to exist before such appointment was made.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 19; Dec. Dig. §17.]

Commissioners' Opinion, Division No. 2.
Appeal from District Court, Craig County;
Preston S. Davis, Judge.

Action in ejectment by Emma Johnson (née Bussey) against J. E. Johnson and others. A demurrer was sustained to plaintiff's reply, from which ruling plaintiff appeals. Affirmed.

Edgar Anderson, of Claremore, and W. T. Hutchings, of Muskogee, for plaintiff in error. Holtzendorff & Holtzendorff, of Claremore, for defendant in error Patton.

BURFORD, C. This was an action in ejectment brought by Emma Johnson to recover certain real property in Craig county. The petition was in the usual form. The Deming Investment Company disclaimed. The defendant Patton answered that his co-defendant, J. E. Johnson, the husband of the plaintiff, had theretofore been appointed plaintiff's guardian by the county court of Craig county; that after such appointment he had regularly sold and conveyed the land in controversy under order and confirmation of the county court to J. H. Frogge, who had in turn conveyed the land to the defendant Patton; that the defendant was without knowledge of any defect in the proceedings; and that the same were regular upon their face. Copies of the various orders of appointment and the proceedings relative to the sale were attached to the answer. Reply-

ing, the plaintiff alleged that all the proceedings set up in the defendant's answer were void for the reason that her husband, J. E. Johnson, who had been appointed her guardian, and who effected the sale of the land in controversy, was at the time of the appointment himself a minor, and was therefore incapable of becoming or acting as her guardian. To this reply a general demurrer on behalf of the defendant Patton was sustained, the court, however, granting time to the plaintiff to bring proper proceedings in the county court of Craig county to set aside the judgment of that court. This the plaintiff refused to do, and, standing upon her demurrer, brings the cause here for review.

[1, 2] There is no question of fraud raised in the briefs, the sole propositions involved being whether or not it was competent for the plaintiff to allege and prove in the action that her guardian was at the time of his appointment a minor, and, if so, whether or not a minor could properly become the guardian of another minor in this state. The latter proposition, under the conclusions we have reached, is not before us for decision.

It seems clear under the decisions of this court in *Baker v. Cureton*, 150 Pac. 1090, *Hathaway v. Hoffman*, 153 Pac. 184, and *Scott v. Abraham*, 159 Pac. 270, No. 7859, not yet officially reported, that the allegations by the plaintiff as to the minority of a guardian could not properly be entertained in this action, and therefore the demurrer was properly sustained. The cases above cited clearly set forth the principle that the county courts in this state, in the exercise of their powers in probate, are courts of general jurisdiction, that their records, regular upon their face, cannot ordinarily, in an action of ejectment, be impeached by evidence aliunde the record, and that in appointing guardians, where the record is regular upon its face, this court will presume that every jurisdictional fact was determined by the trial court, and became a part of its judgment. In *Hathaway v. Hoffman* and *Scott v. Abraham*, supra, it was sought to be proved that the minors were not actual residents of the county in which their guardian was appointed at the time of such appointment. It was said in *Hathaway v. Hoffman*, supra:

"The record of the county court being silent as to the residence of these minors at the time this appointment was made, it is but fair to presume, in aid of the jurisdiction of the court to make the appointment, that the court before making it took evidence, as was its duty to do, and found the facts to be that their residence at that time was in Atoka county."

So in the case at bar it was the duty of the court to determine whether or not the guardian appointed was a person qualified to accept the appointment. Having appointed him, and the record being regular upon its face, this court must assume that the county court determined that the person appointed was qualified to become the guardian of the minor

plaintiff. If the court erred in his conclusions in this regard his ruling was subject to review upon appeal, but clearly such judgment of the county court is not subject to review upon collateral attack in ejectment. Judgment affirmed.

PER CURIAM. Adopted in whole.

COPELAND v. COPELAND. (No. 7546.)
(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

DIVORCE \S 303(2)—CUSTODY OF CHILDREN—
CARE OF PARENTS.

When in an action for divorce a decree has been rendered granting the husband a divorce and awarding him the exclusive care, custody, and education of their minor son, and directing that the actual custody of said child be placed with the husband's parents, and according the wife the privilege of visiting said child twice each month without the hearing of and without interference from any person, and directing the husband's parents to treat her as a guest during the period of her visits, and when the right of visitation has not been accorded the wife according to the spirit and intent of the decree, the court has the authority to modify its order and place said child a portion of the time with the parents of the wife, they being in every way suitable, so that her right of visitation may be enforced.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 795; Dec. Dig. \S 303(2).]

Error from Superior Court, Pottawatomie County; Leander G. Pitman, Judge.

Suit for divorce by Jack Copeland against Oble Copeland. There was a judgment for plaintiff, and the husband was granted exclusive care and custody of a minor child of the marriage. The order was subsequently modified, and plaintiff brings error. Affirmed.

S. F. Bailey, of Maud, and Edward Howell, of Shawnee, for plaintiff in error. H. H. Smith, of Shawnee, for defendant in error.

HARDY, J. Plaintiff in error was granted a decree of divorce from defendant in error in the district court of Pottawatomie county on the 26th day of October, 1914, and was awarded the exclusive care, custody, and education of their minor child, Darrell Gaston, with directions that the actual personal custody of said child should be with the father and mother of plaintiff in error, Mr. and Mrs. J. B. Copeland, granting to defendant in error the privilege of visiting said child at their home twice each month without the hearing or presence of any one and without interference, and directing the said Mr. and Mrs. Copeland to treat defendant in error kindly and as a guest during the period of her visits.

On March 29, 1915, there was filed in the trial court a motion to modify the order theretofore made so as to place the custody

of said child one-half the time with the parents of defendant. Much testimony was taken at the hearing, at the conclusion of which the court modified the order theretofore made, and awarded the custody of said child during the months of June and December to the parents of defendant, and for the remainder of the year the custody of said child was to continue as before. It is from this order that error is prosecuted.

The entire case is presented in this court upon the theory that, the custody of this child having been placed with the father and mother of plaintiff, and no change having been shown in the condition of plaintiff or his parents, the court was without authority to modify the decree under the rule announced in *Stanfield v. Stanfield*, 22 Okl. 574, 98 Pac. 334. This contention requires a review of the evidence taken at the hearing. No attempt was made to show that plaintiff was an unfit person or that there had been any change in his condition, nor that the paternal grandparents were unsuitable, except as hereinafter pointed out. Evidence was introduced to show that Mr. and Mrs. R. L. Bristow, the father and mother of defendant, were in every way suitable; that they were peaceable, moral, industrious, law-abiding citizens; that Mr. Bristow was engaged in the mercantile business, and enjoyed the confidence and respect of those who knew him. Mr. Copeland was about 70 years of age and his wife was about 65. All their children were grown and were married, and they were rearing a girl about 14 years old. Mr. Bristow was 47 and his wife 44, and they had a family of seven children of various ages. Plaintiff was earning \$45 per month as a clerk in a grocery, while Mr. Bristow was paying defendant as a clerk in his store \$50 per month. After the litigation was commenced and the custody of the child was awarded to plaintiff with the privilege to defendant of visiting it, said child was taken to the home of Mr. and Mrs. Copeland. There is some controversy as to whether this was before or after the rendition of the final judgment. The trial court evidently took the view that this was after the former decree, and while the child was thus at the home of the Copelands, defendant, in company with her mother, Mrs. Bristow, visited the home of the Copelands for the purpose of being with her child. While there Mr. Copeland remained in her presence, not permitting her to visit the child alone, and, according to the evidence of defendant, was mad during the entire time, treating her discourteously, swearing and using vile language, and stating to her in the presence and hearing of the child and of her mother that she (defendant) ought not to have married his son, that she was not worthy of him, did not have any friends, and ought not to be allowed to see the child, and that this course of conduct and man-

ner of talking was continued during the period of the visit. When they first arrived at the home of the Copelands Mrs. Bristow remained sitting in the buggy and asked defendant to bring the child to the buggy so she could see it, and Mr. Copeland refused to permit this to be done. At another time when defendant visited their home she stayed all night, and while at the evening meal requested the child to sit in her lap during the meal. Mr. Copeland interfered and forbade the child doing so and when she attempted to take the child in her lap told her if she could not behave to leave the house. The child told defendant in the hearing of Mrs. Bristow that Mr. and Mrs. Copeland had told it not to like its mother. The third time she attempted to visit the child she arrived at the Copeland's late one evening and was refused permission to stay that night. Upon this occasion she left with the child, going to various places, and was finally found in California. There was evidence tending to show that she was accompanied by a man named Campbell with whom she occupied the same room at a rooming house for as many as two nights. While there she became sick and underwent an operation. Plaintiff, learning of her whereabouts, caused her to be arrested upon a charge of kidnapping. She then returned to Oklahoma without requisition papers and presented to the court her motion to modify the final order theretofore made, with the result stated.

The authority of the court to modify the order did not depend solely upon whether there has been any change in the circumstances of the person to whom the custody of the child had previously been awarded, but the court was authorized to inquire into the conditions existing and determine whether its order as to the right of visitation accorded the mother had been complied with, and, if not, to enforce said order by placing the child where such right could be enjoyed in accordance with the spirit of the order. The welfare of the child is an element which may always be considered in determining the right to its custody. Section 3331, Rev. L. 1910; *Jamison v. Gilbert*, 38 Okl. 757, 135 Pac. 342, 47 L. R. A. (N. S.) 1133.

In *Allison v. Bryan*, 26 Okl. 520, 109 Pac. 934, 30 L. R. A. 146, 138 Am. St. Rep. 988, the custody of an illegitimate child had been awarded to the father without the privilege of visitation being accorded to the mother. Thereafter, upon application to the court, the father was required to produce the child twice each month at the town of Norman in order that the mother might see the child alone and in the absence of any other person. Allison refused to comply with this order, and was adjudged guilty of contempt and appealed. In the discussion of the case this court, after reviewing a number of authorities, said:

"From the foregoing it will be seen that under practically every and all conditions the parent, in some instances the father, and in others the mother, while losing the right of custody of their children, have in every instance received at the hands of the court recognition of their right of visitation. It is true the foregoing cases, other than the opinion of this court, present those only in which the question arose between parents of legitimate children, but the underlying reason for the rule was in each instance that the one accorded the right was a parent, and that it was in accord with humanity and right living and the best interest of the child that it be not estranged."

The court quotes the language used in *Allison et al. v. Bryan*, 21 Okl. 557, 97 Pac. 282, 18 L. R. A. (N. S.) 931, 17 Ann. Cas. 468, which was a case where habeas corpus had been sued out for the same child, and the custody held properly to belong to the father, where it was said:

"We would not have it understood, however, that in thus declaring the law we hold he should not see his mother, be with her, or be permitted to enjoy her society, nor she his. Not at all. Under the judgment rendered in this case in the lower court provision was made for the father to visit the child, and the successful respondents should not be deaf to the common promptings of humanity which dictate that the child and the mother be granted the utmost possible latitude for social communion consistent with the new duties placed upon all. In case of sickness or accident the mother should be promptly notified, and, if she desires, permitted to attend, care for, and nurse."

The trial court evidently entertained the view that its order permitting the mother to visit the child had not been complied with, and that the grandparents with whom the child was living were attempting to poison its mind against her, and were depriving her of the privilege of enjoying communion with the child according to the spirit and purpose of the original decree. Counsel say that by her conduct she forfeited her right to the custody of the child, and because no change has been shown in the condition existing at the time of the first order the modification thereof was void. This is saying, in effect, that the affection of this mother for her child counts for naught, and that its welfare depends upon the financial condition of the person in whose custody it was placed, and will not be affected by being deprived of association with its mother and of the love which she entertains for and yearns to bestow upon it, but will be best subserved by permitting a continuance of the conduct of its grandparents, who, according to defendant's claim, insult and taunt her in the presence of the child, and teach it not to like her.

The original decree directed that defendant be given the privilege twice each month of visiting the child and having it with her during the entire day out of the presence of and without interference from any person, and that she be treated as a guest during such visit. That this order has not been obeyed is manifest, in that during her visit the grandparents have not permitted her communion with the child to be out of their

presence and without interference by them as directed, and the court, looking to the best interest of the child in making provision for communion with the mother so that its love for her might not be estranged, and that she should not become an object of aversion and hatred, had the right to modify its order and give such further direction as was necessary to effect its purpose. The child was the legitimate offspring of a lawful marriage between the parties and was of tender years, and, though the mother may have erred, her sin did not dry up the wellsprings of mother love and forfeit all right upon her part to visit with and enjoy the association of her own offspring. Neither does the law so declare, but recognizes this right, so long as the welfare of the child will not be endangered thereby. It was said in *Allison v. Bryan*, supra, that "It was in accord with humanity and right living and the best interests of the child that it" be not estranged, and, according to the language used in *Allison et al. v. Bryan*, 21 Okl. 557, 18 L. R. A. (N. S.) 931, 17 Ann. Cas. 468, the "common promptings of humanity dictate that the child and the mother be granted the utmost possible latitude for social communion consistent with the new duties placed upon all."

There is nothing in the evidence that makes it apparent the moral or physical welfare of the child will be endangered by a compliance with the modified order. The maternal grandparents are morally fit and financially able to do as well by the child as the paternal grandparents, and entertain an affection for the child similar to that possessed for their own, and the defendant may there enjoy that association with the child without interruption, which is her right by nature, and is dictated by the common promptings of humanity, and was accorded her by the original decree, but denied her by the acts of the paternal grandparents. Neither can the fact, as already stated, that she was adjudged not suitable to have the exclusive custody of the child, prevent the court from making the modification. In *Haley v. Haley*, 44 Ark. 429, the Supreme Court of Arkansas said:

"The privilege of visiting accorded to the mother is a plain dictate of humanity, in the absence of any reason to suppose that the privilege would be abused to the injury of the boy. There was none in this case. The charges of immorality against the mother were not sustained. She is shown to be an industrious, hard-working woman, and a good woman, by all the witnesses, except the defendant. But had it been otherwise the permission to visit would not be necessarily erroneous. The court should regard the maternal instinct in the veriest trull that walks the streets, taking proper care that it does not lead to corruption of the offspring. It is the strongest and holiest sentiment of humanity, the freest from selfishness or impurity, and often the last hope of redemption for fallen natures."

There was ample evidence to warrant the court in modifying the original decree, and the order appealed from is affirmed.

BLACK et al. v. GEISSLER et al.
(No. 8421.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

(*Syllabus by the Court.*)

1. CONSTITUTIONAL LAW §42 — CONSTITUTIONALITY OF STATUTES—DETERMINATION OF QUESTION.

The Supreme Court will not pass upon the constitutionality of an act of the Legislature, nor of any of its provisions, until there is presented a proper case in which it is made to appear that the person complaining by reason thereof has been or is about to be denied some right or privilege to which he was lawfully entitled or who is about to be subjected to some of its burdens or penalties.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. §42.]

2. TAXATION §452—COLLECTION — INJUNCTION.

Section 4881, Revised Laws 1910, which authorized the issuance of an injunction to restrain the illegal levy and collection of a tax, has been modified in respect to matters of taxation by section 7 of chapter 107, Session Laws 1915, where an effectual remedy has been provided in such cases.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 806, 807; Dec. Dig. §452.]

3. TAXATION §453—COLLECTION—REMEDIES.

It was within the power of the Legislature to enact said section 7, and the remedy therein provided is plain, speedy, and adequate, and is exclusive.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 809; Dec. Dig. §453.]

4. INJUNCTION §16—EXISTENCE OF OTHER REMEDY.

By section 1, c. 117, Session Laws 1915, p. 205, any person aggrieved at the action of the board of county commissioners in allowing and ordering paid any claim against the county may appeal from the decision of the county commissioners to the district court upon filing a bond as therein required, and such remedy is plain, speedy, and adequate, and equitable relief by injunction against the apprehended action of the commissioners in the premises cannot be had.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. §16.]

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Suit by Arthur H. Geissler against R. W. Black, and others. A demurrer to the petition was overruled, and certain defendants bring error. Reversed, and cause dismissed.

S. P. Freeling, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for plaintiffs in error. Parker & Simons, of Enid, for defendants in error.

HARDY, J. Arthur M. Geissler filed suit in the district court of Oklahoma county seeking an injunction against the board of county commissioners, the members of the excise board, the county assessor, the county treasurer, and county registrar seeking to restrain them from performing certain acts devolved upon them by chapter 24, Session Laws 1916, p. 33, commonly known as the "Registration Law." Defendants filed demurrer to the peti-

tion, which was overruled, and defendants bring error.

The petition alleged that plaintiff was a resident, citizen, and taxpayer of Oklahoma county, and, after setting out the names of the defendants and the offices respectively filled by them, alleged that the board of county commissioners, unless restrained, would allow and pay out large sums of money upon the order of the county registrar for supplies furnished upon his order for carrying into effect the provisions of said act, and would incur additional expense and let other contracts for supplies, and that the county excise board would include same in the estimate for taxes of the county, which taxes would be collected by the county treasurer—all of which would be done without any authority of law.

[1] The power of the Legislature to enact laws requiring the registration of voters is frankly conceded, as it well may be, for it is expressly conferred by section 6, art. 3 (section 48, Wms. Ann.) Constitution, and was upheld in *Pond Creek v. Haskell*, 21 Okl. 711, 97 Pac. 338; but the plaintiff seeks to have said act declared unconstitutional because its operation in the enforcement thereof would offend in various particulars against the provisions of both the state and federal Constitution. Plaintiff does not show that he will be affected in any way by the act, except that he will be required to pay the tax that would result from the enforcement thereof, and urges that, notwithstanding he has not been deprived of his right of suffrage, nor said right been interfered with, his interest as a taxpayer authorizes him to challenge the validity of the entire legislation.

In *Insurance Co. of North America v. Welch*, 154 Pac. 48, it was said:

"This court will not pass upon the constitutionality of an act of the Legislature nor of any of its provisions until there is presented a proper case in which it is made to appear that the person complaining is entitled to the benefits of said act or about to be subjected to some of its burdens or penalties."

In *Wiley v. Sinkler et al.*, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84, the Supreme Court had under consideration the right of a voter to question the constitutionality of a state law requiring registration as a prerequisite to the right to vote. The plaintiff had brought an action in the Circuit Court of the United States for the District of South Carolina against the board of managers of a general election at a ward and precinct of the city of Charleston to recover damages for wrongfully and willfully rejecting his vote for a member of the House of Representatives of the United States for the state of South Carolina, and the court held that, without an allegation that plaintiff had registered under the law, his petition did not state a cause of action, and that because it was not alleged that he was ever registered, or ever made any application to be registered,

and, so far as appeared, might have been entitled to apply for registration, the plaintiff was not in a position to impugn the constitutionality of the act upon the grounds urged, which were that it required a longer residence in the county than was required by the Constitution of the state, and otherwise unreasonably impeded the exercise of the constitutional right of voting.

The rule announced in the above decisions is one of sound public policy, and is supported by cogent reasons. Litigants who appeal to the courts should have a personal interest in the question involved, and be entitled to the benefits of any decree that may be rendered therein, or subject to its burdens, and especially in matters of public interest affecting the state at large, where the Legislature seeks to declare a rule of public policy before the enforcement of such a law is enjoined, there should be presented a case involving the very question which it is sought to have adjudicated by some person who has been denied some benefit or privilege to which he is lawfully entitled, or who is about to be subjected to some of its burdens or penalties, and in which upon the rendition of judgment actual relief may be awarded. If the rule were otherwise, parties having no personal interest in such questions could appeal to the courts and interfere with the enforcement of every measure of public interest because of some objection thereto, although not personally affected thereby. The classes of persons who are said to be affected by the act are not complaining in this proceeding, and plaintiff's right, if he has such, must then depend upon his interest as a taxpayer.

[2-4] Section 4881, Revised Laws 1910, authorized the issuance of an injunction to restrain the illegal levy and collection of a tax, and this right was recognized by the territorial Supreme Court in the case of *Kellogg v. School Dist.*, 13 Okl. 285, 74 Pac. 110, and has been recognized by this court in the case of *Weatherford Mill. Co. v. Duncan*, 42 Okl. 242, 140 Pac. 1184.

Plaintiff therefore says that under this statute and the decisions cited his right to maintain this action is established, and this contention is sound if section 4881 has not been modified by subsequent legislation. At the regular session of the Legislature of 1915 there was passed an act amending the tax laws of the state, and this act is found as chapter 107, Session Laws 1915, where the Legislature, in addition to prescribing remedies by appeal from the action of the assessor in making the assessment or the equalization as made by the county board of equalization, and making provision for an appeal from the action of the state board of equalization, further provided by section 7 of said act as follows:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved

person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of * * * such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

The tax which plaintiff apprehends he will be compelled to pay had not been levied at the time of the filing of this suit. The law did not levy the tax, but same can only result from inclusion of the amount thereof in the estimate of the county commissioners and the levy to be made in pursuance thereof by the excise board. The apprehended tax then is one whose illegality arises by reason of some action from which the law provides no appeal, and is embraced within the terms of said section 7, and plaintiff's remedy was to await the actual levy of said tax, and then to pay same at the time and in the manner provided by law, and to give the officer collecting it notice that such tax was paid under protest, specifying the grounds of complaint, and that suit would be brought against the officer to recover the amount so paid. The procedure provided by this act furnishes plaintiff with a plain, adequate, and speedy remedy for the correction of any error in the assessment or equalization of his property and for the recovery of any taxes which may be illegally assessed against him, and where such a remedy exists equity will not interfere by injunction with the levy and collection of the revenues of the state government. *Smith v. Board of Com'rs*, 26 Okl. 819, 110 Pac. 669; *Garvin County v. Lindsay Bridge Co.*, 32 Okl. 784, 124 Pac. 324; *Fast et al. v. Rogers, County Treasurer*, 30 Okl. 289, 119 Pac. 241; *Harris et al. v. Smiley*, 36 Okl. 89, 128 Pac. 276; *Turner et al. v. Ardmore et al.*, 41 Okl. 660, 130 Pac. 1156.

Plaintiff does not urge any equitable grounds for interference other than the alleged unconstitutionality of the law under which the tax will be imposed, and we have just seen that section 7 of chapter 107, Session Laws 1915, provides an adequate and speedy remedy for relief in such cases.

In *Tennessee v. Sneed*, 98 U. S. 69, 24 L. Ed. 810, the Supreme Court of the United

States had under consideration the statutes of Tennessee which were very similar to section 7 now under consideration, and which required the payment of all taxes to the collecting officer and to give notice to the comptroller that same was paid under protest, if the party conceived same to be unjust or illegal, or against any statute or clause of the Constitution of the state, and authorized the bringing of suit to recover such taxes at any time within 30 days, and not thereafter, and made provision for the payment of any judgment that might be rendered in favor of the plaintiff in said suit. In sustaining such statute the court said:

"If we assume that prior to 1873 the relator had authority to prosecute his claim against the state by mandamus, and that by the statutes of that year the further use of that form was prohibited to him, the question remains whether an effectual remedy was left to him or provided for him. We think the regulation of the statute gave him an abundant means of enforcing such right as he possessed. It provided that he might pay his claim to the collector under protest, giving notice thereof to the Comptroller of the Treasury; that at any time within 30 days thereafter he might sue the officer making the collection; that the case should be tried by any court having jurisdiction, and, if found in favor of the plaintiff on the merits, the court should certify that the same was wrongfully paid and ought to be refunded, and the Comptroller should thereupon issue his warrant therefor, which should be paid in preference to other claims on the treasury. This remedy is simple and effective. A suit at law to recover money unlawfully exacted is as speedy, as easily tried, and less complicated than a proceeding by mandamus. Every attorney knows how to carry on the former, while many would be embarrassed by the forms of the latter. Provision is also made for prompt payment of the amount by the state, if judgment is rendered against the officer on the merits.

"We are not cited to any statutes authorizing suits to be brought against a state directly, and we know of none. In a special and limited class of cases the United States permits itself to be sued in the Court of Claims; but such is not the general rule. In revenue cases, whether arising upon its internal revenue laws or those providing for the collection of duties upon foreign imports, it adopts the rule prescribed by the state of Tennessee. It requires the contestant to pay the amount as fixed by the government, and gives him power to sue the collector, and in such suit to test the illegality of the tax. There is nothing illegal or even harsh in this. It is a wise and reasonable precaution for the security of the government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs. We think there is no ground for the assertion that a speedy and effective remedy is not provided to enforce the claim set up by the plaintiff."

The enactment of section 7 was but another step in the policy of the state to require all complaints by taxpayers to be settled without resort to the courts except where expressly authorized until after the tax is paid and to pursue the remedy provided by statute, which will interfere to the least extent with the enforcement of the revenue laws of the state. Such a remedy as is pro-

vided by section 7 was said in the Sneed Case, supra, to be adequate and speedy, and in many other cases where provision has been made under the laws of this state affording an aggrieved taxpayer a remedy whereby he may have corrected errors in assessments or equalization of his property such remedy so afforded has been held to be adequate and to justify a denial of the right of the taxpayer to appeal to equity for an injunction restraining the collection of the tax complained of. *Williams v. Garfield Ex. Bank*, 38 Okl. 539, 134 Pac. 863; *Board of Com'rs v. Tinkler*, 152 Pac. 1119, and cases cited; *Mellon Co. v. McCafferty*, 289 U. S. 134, 36 Sup. Ct. 94, 60 L. Ed. 181.

The Legislature may prescribe the form of remedy to be pursued in such cases, and may change the same, provided that the aggrieved taxpayer is left an effectual remedy or one is provided for him, which is all that is necessary, and when such remedy is provided same is exclusive. *Tennessee v. Sneed*, supra; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273.

We are cited to a number of cases holding that the interest of a taxpayer is sufficient to entitle him to test in equity the validity of a law which proposes taxation of his property, but these decisions can hardly be persuasive in view of the fact that the Legislature has expressly enacted that such action may not be sustained, and has provided an effectual remedy in lieu thereof; and its authority to enact such legislation has been upheld by the highest court in the land. Such being true, a review of the cases is not necessary, nor is any effort required to distinguish them from cases cited holding the contrary view.

Should claims for said alleged illegal expenses be presented to and allowed by the board of county commissioners, the plaintiff would have an adequate remedy in the premises by an appeal from the action of the board to the district court, upon giving bond as required by section 1, c. 117, Session Laws 1915, p. 205, amending section 1640, Rev. Laws 1910. Having a complete and adequate remedy at law under this section, plaintiff was not entitled to relief by injunction against any apprehended action of the board of county commissioners in the allowance of said claims. *Smith et al. v. Board Com'rs*, 26 Okl. 819, 110 Pac. 669; *East et al. v. Rogers*, 30 Okl. 289, 119 Pac. 241; *Garvin County v. Lindsay Bridge Co.*, 32 Okl. 784, 124 Pac. 324; *Turner et al. v. City of Ardmore et al.*, 41 Okl. 660, 130 Pac. 1156.

From the foregoing it is apparent that the court committed error in overruling defendants' demurrer to plaintiff's petition, and the judgment is accordingly reversed, and the cause dismissed. All the Justices concur.

PHOENIX INS. CO. OF HARTFORD v.
NEWELL et al. (No. 7293.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

1. TRIAL \S 143—DIRECTED VERDICT—CONFLICT IN EVIDENCE.

Where there is a conflict in the evidence, it is not error for the court to refuse to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 342, 343; Dec. Dig. \S 143.]

2. APPEAL AND ERROR \S 1002—REVIEW—VERDICT.

Where there is evidence, though in conflict with other evidence in the case, sufficient to reasonably sustain the verdict rendered, this court will not disturb such verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3985-3987; Dec. Dig. \S 1002.]

3. PRINCIPAL AND SURETY \S 123(1)—LIABILITY OF SURETIES—NOTICE OF PRINCIPAL'S DEFAULT.

Where an agent, who has given a bond with sureties to secure the payment to his employer of money collected by him as agent, appropriates the money collected by him as such agent, and his employer is informed by such agent of such wrongful appropriation by such agent, and such agent promises to make restitution of such money so appropriated, such agent is guilty of an offense involving moral turpitude; and where the employer, after knowledge of such wrongful act on the part of such agent, continues such agent in its employ and does not notify the sureties on said bond of such wrongful act, the sureties are exonerated from liability for all money collected by such agent after knowledge of such wrongdoing of the agent came to the employer.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. \S 304-309; Dec. Dig. \S 123(1).]

Commissioners' Opinion, Division No. 1. Error from County Court, Garvin County; W. R. Wallace, Judge.

Action by the Phoenix Insurance Company of Hartford against D. M. Newell, R. H. Grimmatt, and another. There was a judgment against the defendant Newell, and in favor of the other defendants; and plaintiff brings error. Affirmed.

Scothorn, Caldwell & McRill, of Oklahoma City, for plaintiff in error. Lydick & Eggerman, of Shawnee, and William Beatty, of Wanette, for defendants in error.

COLLIER, C. This is an action brought by the plaintiff in error against the defendants in error upon a bond executed by D. M. Newell, principal, and R. H. Grimmatt and Geo. M. Southgate, as sureties. Hereafter the parties will be designated as they were in the trial court.

The uncontradicted evidence is that said bond was executed by the defendants on the 20th day of July, 1907, and was conditioned for the faithful accounting and payment to the plaintiff of such moneys as might come into the hands of the said Newell as agent of the plaintiff; that said agent did not

promptly render an account and pay over the moneys collected by him as agent; that said agent did not keep the company's money separated from his own; that he used his own money and the company's money together; that he did business with the merchants and took goods from them in payment of the premiums; that prior to 1911, the said agent informed the investigating agent of the plaintiff of the fact that he had used the money collected by him as above stated; that he told him that he had collected it, or part of it; that he had used the money; checked it out on something else, and would pay the balance when he could; that the plaintiff did not notify said sureties as to such default of their principal, and, after having knowledge of said default of their said agent, continued said agent in its employ; and that the said agent was in default in the amount claimed. The evidence was in conflict as to the time that the knowledge of the default sued for came to the knowledge of the plaintiff.

Among other instructions, the court instructed the jury as follows:

"You are instructed to find in favor of the plaintiff and against the defendant D. M. Newell for the amount sued for, and you are further instructed to find for the plaintiff and against the defendants R. H. Grimmatt and George M. Southgate for the amount you find the defendant D. M. Newell due the plaintiff, unless you find that it became known to the Phoenix Insurance Company that default was being made by its agent, D. M. Newell. When the agent of the company is appointed for an indefinite time and under bond to account and pay over money at stated periods of time, and he fails to perform at some of those times his duties relative to this matter, whether he can be afterward trusted with additional funds at the risk of the sureties upon his bond consistently with good faith and fair dealing, without first giving notice to the sureties, depends upon the apparent cause of his failure. If the corporation or supervising officer knew that it results from dishonest practices or intentions, such as a conversion of money committed to his custody, it is the duty of the corporation or its agent to notify the sureties; if, on the other hand the circumstances do not point to moral turpitude, but to lax habits of business, mere negligence, procrastination, want of diligence or punctuality, rather than a want of honesty, the principal may continue the agent in its employ, treating his successive failures in promptness as breaches of contract only, and relying on the bond for protection should ultimate loss occur; and, if you believe that the plaintiff in this case knew that the defendant D. M. Newell, was not acting honestly, and that the plaintiff acquiesced in his dishonest practices, and that he was guilty of moral turpitude in the handling of the funds which came into his hands, and that it was not indolence, carelessness, inattention to business, and a disposition of procrastination, you will find for the defendants R. H. Grimmatt and George M. Southgate, and against the plaintiff."

The jury returned a verdict against the principal in the bond in the sum of \$258.68 and in favor of the said sureties. Timely motion for a new trial was made by the plaintiff, overruled and excepted to, and judgment entered in accord with the verdict.

To reverse the judgment rendered, the plaintiff prosecutes this appeal.

The errors assigned are: (1) Overruling plaintiff's motion to direct the verdict; (2) giving instruction No. 1; (3) that said judgment is not sustained by sufficient evidence, and is contrary to law; (4) that the verdict of the jury and judgment rendered are contrary to law; (5) overruling plaintiff's motion for a new trial.

[1] There is no appeal from the judgment rendered against the principal in the bond, and therefore the only question involved in this appeal is as to the liability of the sureties.

"The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough * * * evidence to reasonably sustain a verdict, should the jury find in accordance therewith." *Chestnutt-Gibbons Groc. Co. v. Consumers' Fruit Co.*, 44 Okl. 318, 140 Pac. 591.

Applying the above-stated, well-settled rule to the instant case, we are of the opinion that the court did not err in refusing to direct a verdict against the sureties, as well as the principal in the bond.

[2, 3] It is a well-settled rule of law that where an agent, under bond to account for money, appropriates the money to his own use without authority of the obligee in the bond, he is guilty of embezzlement, and where this misconduct on the part of the agent is known to the obligee in the bond, and the said obligee continues said agent in his employ without notice to the surety, that the surety is relieved from the obligation, from the time such obligee in the bond ascertained such criminal action on the part of the agent, as to all moneys that came into the hands of the agent subsequent to the ascertainment of such facts by the obligee in the bond. *Chicago Crayon Co. v. Rogers*, 30 Okl. 299, 119 Pac. 630. We are of opinion that instruction No. 1, given by the court, correctly states the law.

The pivotal questions with which we have to deal are: Was the principal in the bond guilty of acts involving moral turpitude, and did the obligee in the bond continue such principal in its employ after knowledge of such wrongdoing on the part of the agent came to the obligee, and were the sureties apprised of such wrongdoing of their principal by the obligee in the bond, and was the money sought to be recovered of said sureties in this action collected by the agent after knowledge of said wrong appropriation of said agent came to its knowledge?

The most important of the foregoing questions is, Was the said agent guilty of moral turpitude in appropriating to his own use the moneys that came into his hands by virtue of his employment as agent of the obligee in the bond? We are of opinion that this ques-

tion must be answered in the affirmative. The evidence of the principal in the bond was that he used the money collected by him as agent, checked it out on something else; that he used the premiums collected for his own use and benefit, and promised restitution as soon as he was able. Certainly such principal was guilty of embezzlement. Section 2676, R. L. 1910, provides:

"A distinct act of taking is not necessary to constitute embezzlement, but any fraudulent appropriation, conversion or use of property, coming within the above prohibitions is sufficient."

The above prohibition is embraced in section 2675, R. L. 1910, and is:

"That if any clerk or servant of any private person * * * fraudulently appropriates to his own use, * * * any property of any other person which has come into his [hands or] control * * * by virtue of his employment as such clerk or servant, he is guilty of embezzlement."

That the obligee in the bond, after having knowledge of the wrongdoing of the agent, continued to employ said agent, and that the agent continued to collect premiums, and that the obligee in the bond did not advise the sureties of the wrongdoing of the agent, and that the moneys sought to be collected in this action were collected by the agent after the knowledge came to the obligee in the bond of the appropriation of money of the obligee by the agent, though the evidence is in part in conflict, the preponderance thereof is sufficient to authorize the jury to answer the said questions in the affirmative. Where the evidence, though in conflict, reasonably supports the verdict rendered, that this court will not disturb the verdict is so well established as not to require the citation of authorities in support thereof.

There is no evidence as to whether or not a part of the premiums collected belonged to the agent as his compensation; but, if it be admitted that such is the case, if he converted the whole fund to his own use, he is guilty of embezzlement. *Wallis v. State*, 54 Ark. 611, 16 S. W. 821; *Territory v. Meyer*, 3 Ariz. 199, 24 Pac. 183; *State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144; *Foster v. State*, 2 Pennewill (Del.) 111, 43 Atl. 265; *Clark v. Com.*, 97 Ky. 76, 29 S. W. 973; *Com. v. Fisher*, 113 Ky. 491, 68 S. W. 855; *Com. v. Smith*, 129 Mass. 104; *People v. Hanaw*, 107 Mich. 337, 65 N. W. 231; *Campbell v. State*, 35 Ohio St. 70; *People v. Civile*, 44 Hun (N. Y.) 497.

The third and fourth assignments of error are covered by the authorities cited, and conclusion reached in reviewing the second assignment of error.

The court did not err in refusing to grant a new trial.

This cause should be affirmed.

PER CURIAM. Adopted in whole.

HIGGINS v. WATERS. (No. 4937.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

(Syllabus by the Court.)

1. INDIANS — LANDS — ALLOTMENT — COMMISSION.

The Commissioner of the Five Civilized Tribes, the Commissioner of Indian Affairs, and the Secretary of the Interior are primarily vested with the duty of allotting lands in the Indian Nation to the members of said tribes who show themselves entitled thereto, and the action of said Commissioners or the Secretary of the Interior in making such allotments will not be reviewed or questioned in the courts unless it clearly appears that they have committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they, themselves, were chargeable with fraudulent acts, and that as a result thereof the patent was issued to the wrong party.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. —13.]

2. INDIANS — LANDS — ALLOTMENT — COMMISSION.

The courts will not disturb decisions by the allotting powers based purely upon findings of fact from the testimony submitted, where there is no fraud nor apparent error of law in such decisions.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. —13.]

3. INDIANS — LANDS — ALLOTMENT — COMMISSION.

Record examined, and the findings of fact and conclusions of law approved.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. —13.]

Commissioners' Opinion, Division No. 4. Error from District Court, Washington County; R. H. Hudson, Judge.

Action by Vinita Higgins, a minor, by Robert L. Higgins, her guardian, against John W. Waters, a minor. Judgment for defendant, and plaintiff brings error. Affirmed.

Sherman, Veasey & Davidson, of Tulsa, for plaintiff in error. John O. Starr, of Vinita, and John A. Goodall, of Stilwell, for defendant in error.

MATHEWS, O. The parties will be designated as in the trial court. This is an action for the purpose of establishing a trust in certain lands described in the petition. Both parties to this action are duly enrolled citizens of the Cherokee Nation, and this action was brought by Robert L. Higgins as guardian for Vinita Higgins, a minor, against John W. Waters, also a minor, to charge the lands in controversy with a trust in her favor for the alleged reason that there was no evidence before the Secretary of the Interior to sustain the findings of the said Secretary in a certain contest then pending before the Interior Department, involving the right of each of said parties to have said lands allotted to them, it being there held that the said plaintiff was not in possession of said land, and was not entitled to have the same allotted to her.

It appears that on August 21, 1907, upon

the application of the mother of the defendant, the Commission to the Five Civilized Tribes allotted the lands in controversy to defendant. On October 1, 1907, the guardian of plaintiff made application at the same office to have said lands allotted to plaintiff, and said application was refused. On the same day a contest was filed against defendant, and on the 20th day of February, 1910, the Commissioner of the Five Civilized Tribes rendered his opinion adversely to plaintiff's contention. An appeal was taken to the Commissioner of Indian Affairs, and on September 27, 1910, that office handed down its ruling, sustaining the action of the honorable Commissioner of the Five Civilized Tribes. An appeal was then taken to the Secretary of the Interior, and the decision of the said Commissioner there duly affirmed on May 26, 1911. On July 1, 1913, the plaintiff herein, who was the unsuccessful contestant aforesaid, filed her petition in the district court of Washington county wherein it was alleged that both plaintiff and defendant were duly enrolled citizens of the Cherokee Tribe of Indians, and that the lands in controversy was a portion of the lands of said nation, and subject to allotment among the citizens of said nation under the act of July, 1902; that on the 12th day of November, 1906, said plaintiff purchased the improvements on the land in controversy, and at once went into possession of the same and had at all times since said date been in the lawful and undisturbed possession thereof, and was entitled to select the same as her allotment; that on the 21st day of August, 1907, while plaintiff was in possession thereof, the mother of defendant was permitted to file on said lands for said defendant; that plaintiff contested said filing before the several Departments of the Interior and an adverse ruling in each instance was made against plaintiff. Plaintiff then further states her case as follows:

"That one of the material issues of fact in said contest case was as to whether or not this plaintiff was in possession of said land at the time of defendant's filing thereon, as aforesaid, and upon the evidence before said Secretary, a copy of which evidence is attached hereto and made part hereof, as aforesaid, said Secretary found as a fact that this plaintiff was not in possession of said land at the time of defendant's filing thereof; that in making said finding of fact said Secretary of the Interior fell into a gross misapprehension of the facts established by said evidence, and that there was no evidence before said Secretary that this plaintiff was not in possession of said land at said time; that by reason of this gross mistake of fact, said land was awarded to this defendant by said Secretary of the Interior, and a patent therefor issued to defendant, when, under the facts and law of said contest case, said patent should have been to this plaintiff."

The case was submitted to the trial court upon the evidence which had been adduced in the contest before the Interior Department, and a judgment was rendered for the defendant, and the cause is now here on appeal.

[1] The Commissioner of the Five Civilized

Tribes is vested with legal authority to hear contests and to determine conflicting rights of claimants to have certain lands allotted to them in the Indian Nation, and the offices of the Commissioner of Indian Affairs and the Secretary of the Interior are the proper forum for appellate supervision in such matters, and the action of these departments is final, except in certain particulars, succinctly stated in the case of *Bell v. Mitchell*, 39 Okl. 544, 185 Pac. 1136, Ann. Cas. 1915D, 780, as follows:

"It is the law that where the department has erred in a matter of law, or the losing party before the department had fraud practiced upon him, or the department has committed such gross error that its finding of fact practically amounts to fraud, its action is not final and conclusive upon the court, and that the party who had been wronged by its action may obtain relief. *Rector v. Gibbon*, 111 U. S. 276, 4 Sup. Ct. 606, 28 L. Ed. 427; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Garrett v. Walcott*, 25 Okl. 574, 106 Pac. 848. But the action of the department in its decision in contest cases should not be set aside or disturbed for slight reasons, or merely because of a preponderance of the evidence. See *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800. The Commission to the Five Civilized Tribes was vested with authority to hear contests and to determine conflicting rights of applicants to allot land in the Indian Territory, and it is only in exceptional cases, and under unusual and extraordinary circumstances, that the action of the department should be disturbed."

Again, in the case of *Harnage et al. v. Martin et al.*, 40 Okl. 341, 136 Pac. 154, we find the proposition stated as follows:

"If the Secretary of the Interior in rendering his decision assumed a fact established which was necessary to the rights of the prevailing party, but which there was wanting any evidence to support, the error committed by him was one of law, and plaintiff may have it reviewed by a court of equity in a proceeding brought to avoid the effect of the decision of the Secretary of the Interior."

It is said in *Baltz v. Mitchell*, 41 Okl. 96, 137 Pac. 666:

"The courts will not disturb decisions by the Department of the Interior based purely upon findings of fact from the testimony submitted, where there is no fraud nor apparent error of law in such department decisions." *Garrett et al. v. Walcott et al.*, 25 Okl. 574, 106 Pac. 848; *Robinson v. Owen et al.*, 30 Okl. 484, 119 Pac. 995; *Alluwee Oil Co. v. Shuffin et al.*, 32 Okl. 808, 124 Pac. 15; *Summers v. Barks et al.*, 36 Okl. 337, 127 Pac. 402; *Johnson et al. v. Riddle*, 41 Okl. 759, 139 Pac. 1143; *Jones et al. v. Fearnow et al.*, 156 Pac. 309.

[2, 3] The only proposition presented in plaintiff's brief is that the defendant was in actual and exclusive possession of the land, and had the lawful right to its possession, at the time of the defendant's selection, to wit, August 21, 1907, that there was no evidence whatever to the contrary, and that the land should have been awarded to the plaintiff.

In order to properly decide this proposition it will be necessary to review the evidence, but before doing so we deem it appropriate that we first set out the decision of the Commissioner of Indian Affairs upon the contest between the parties before that department,

which, leaving out the introduction, is as follows:

"It appears of record that both the parties hereto were duly entitled to allotment of tribal lands, and that, the land in contest having been set apart to John W. Waters on application made by his mother, August 21, 1907, when Robert L. Higgins applied for the same land on October 1, 1907, at the Cherokee land office, his application was denied, and he thereupon filed his complaint herein, duly verified, alleging that when the land was selected for the contestee the contestant was in possession thereof and owned certain valuable improvements thereon, but the contestee never owned any improvements on the land, nor was in possession of any part of it. Contestant appeals, charging error in your findings of fact and conclusions of law.

"The land had been held and improved by one Edwards, whose application for enrollment as a citizen by intermarriage was denied. At the hearing contestant produced a bill of sale from Edwards dated November 12, 1906, purporting to convey to him as guardian the improvements on the land, for a consideration of \$1,500, and containing this sentence: 'In the event that Congress makes a law that the white adopted citizens of the Cherokee Nation can hold their allotments by paying for them, then this bill of sale is to be null and void, otherwise to remain in full force and effect.'

"Higgins also produced two rental contracts whereby he assumed to let the land to one J. A. Jeter for the years 1907 and 1908 at \$200 a year, and three receipts, signed by W. S. Edwards, acknowledging payments by Higgins of \$100 on January 1, 1907, \$100 August 1, 1907, and \$200 June 27, 1908. Edwards and Higgins testify that the former was to receive \$200 from the rents annually for ten years and that the payments mentioned were made by Jeter to Edwards direct, in compliance with that contract. Jeter corroborates their statements. He has been cultivating the land for several years as Edwards' tenant, and continued on without change, professing to recognize Higgins as his landlord, but doing no business with him whatever.

"Counsel argue ingenuously that this transaction was a bona fide sale of improvements, vesting the ownership in contestant and carrying with it the right of possession of the land, subject only to the possibility of becoming null and void at some future time if a certain event should happen, which in fact did not happen. They suggest that the land was selected for contestee through a violation of the regulations by failure to inquire respecting the ownership of the improvements. This point is not borne out by the record. Contestee's father testifies that he and his wife who made the application, visited and looked at the land, and inquired about it of the people in the neighborhood. It was well known that it had long been held by a noncitizen, there was no record or publication of any sale of the improvements, and it lay open to be filed upon by any qualified person.

"The distinction insisted upon between this case and the cases of *Phillips v. Brown* and *Phillips v. Bird*, is found to be a distinction without a difference. In those cases no consideration was to be paid to the vendor of improvements unless the land should be awarded to the vendee. In this case the vendee pays nothing from his own means or resources whatever, and the vendor asserts that if the land should not be awarded to the vendee, he would not look to him for payment, but to the person who should obtain it. In fact the vendee's relation to the land has been merely nominal, while the vendor's has remained practically unchanged.

"The claim that the paper transaction described was anything more than an arrangement to control the allotment falls before Edwards' assertion, March 19, 1907, when he applied for the appraisal of his improvements, that when he

was starting on a trip to Texas he got Higgins to file one of his children on the land, contingent on his being able to buy it himself, and his testimony given March 5, 1909, that as late as July or August, 1907, he was still trying to get some one to file on the land, with a view to buying it from the allottee, having an understanding with Higgins that if he succeeded, they would 'rescind the trade, and if not this trade will go on.'

"Your conclusion is that the contestant has failed to establish that the transaction whereby he claims to have gained the ownership and possession of the land in controversy contained the elements of good faith necessary to vest in him a proper right as against the prior application of the contestee. To controvert this proposition counsel for appellant discuss at length the principle of 'the condition subsequent,' the doctrine of fraud and bona fides, the prevalence of the written instrument over verbal modifications. They insist that in this case there is no question but either party could go into court and enforce the contract of sale; that as the bill of sale is plain and unambiguous, it is the best evidence of the intent of the parties, and of the amount the purchasers agreed to pay for the improvements. Such confidence is hardly justified by the facts of record in your office and revealed by contestant's testimony. Higgins would have a very strong defense against any attempt by Edwards to enforce such a contract. The consideration stated in the bill is \$1,500. Higgins testified March 25, 1907, about four months after the date of the bill: 'I didn't pay him anything. We was to appraise the improvements by disinterested parties, and I was to give him whatever the actual value was. He put the consideration in there, inasmuch as he said there ought to be a consideration in there. * * * I am still willing to do that, but I don't want to have to pay more than it is worth. * * * Looking over it carefully with another party, we estimated that \$250 or \$300 would be worth all the improvements. The fencing is pretty well broken down, and there is a little log house, rather sorry house. I had a disinterested party make an estimate, and he thought \$300 would be about right.'

"Higgins also testified, and your records show, that in a separate contest the 20 acres, which contained the house, barn, and wells, apparently all the improvements covered by the bill of sale, except part of the fence, had been lost to Higgins or to Edwards, and awarded to one Jane Hill. In view of these conditions, it cannot be maintained that: 'Higgins was responsible to Edwards for \$200 every year; if the tenant failed to pay or threw up the lease, Higgins was obliged to pay the \$200 just the same'—for ten years. But whether enforceable or not by the parties themselves against each other, such a document cannot defeat established rights of third parties, unless it appears that it represents actual facts, vital reality. Here counsel adduce the principle that fraud must be proved by clear, explicit, and convincing evidence. But contestant has not shown such conditions as to make that proof incumbent on the defense. The doctrine stated in the case of *Hy-Yu-Tse-Mil-Kin v. Philomene Smith et al.*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039, applies exactly, as follows: 'Upon the attacking party rests the burden of proof. * * * It is the duty of these contestants to affirmatively show such a state of facts as will necessitate the canceling of the allotments already made. It was not even incumbent upon the defendant to enter an appearance; had they not done so, it would have been no less the duty of these contestants to present the requisite showing of superior rights.'

"In the present case contestant has so clearly shown by his own testimony that the bill of sale was purely fictitious and his occupancy of the land purely nominal that he can take no advantage of the rule quoted from the Assistant At-

torney General's opinion of January 24, 1907, to the effect that citizen purchasers from intermarried claimants 'acquire as secure right to their holdings as if they had originally segregated the same from public domain, and are entitled to take such lands in allotment, providing their occupancy antedates the application of any other person to select the same tract.' Rather he is barred by this concluding sentence of the same paragraph: 'But the right of no citizen to file an application to select, should be stayed or suspended merely for the benefit of the non-citizen; otherwise the latter and not the law will create the preference right and control the allotment.'

"Waters and his wife viewed the land in controversy. They knew, and it was publicly known, that it was held by a noncitizen. It was unoccupied in the sense of the law. They filed upon it for their child, a Cherokee citizen entitled to allotment. They complied with all the requirements stated to them at your land office. They were ready, and are ready, to pay to the noncitizen occupant the appraised value of his improvements. Their rights cannot be set aside by reference to a paper transaction to which (though it may in part antedate their filing) there were no correspondent facts. That alleged contract can at best be interpreted merely as an executory agreement. The tenor of the testimony throughout is convincing that it was held by the parties themselves, till the contestee filed upon the land, as incomplete and voidable or modifiable at any time. When Edwards applied for appraisement March 19, 1907, he represented the alleged sale as altogether contingent, its terms as yet unsettled. On March 5, 1909, Edwards testified, 'I allow Higgins what Jeter pays me,' and, being asked whether, when he was trying to get some one to file on this land (in the summer of 1907), Jeter had paid him any rents for which he had given Higgins credit, he answered, 'Yes; he did, in the fall of 1907.' At the hearing May 25, 1909, Higgins could not remember whether the receipt dated January 1, 1907, had been given or sent to him before or after March 2d, but on June 4, 1907, in the Jane Hill Case, when asked if the tenant paid him the rent he answered, 'I am to get the rent this year.'

"In the opinion of this office the agreement in question was not sufficiently executed to pass title between the parties. Your decision is accordingly affirmed. You will please notify the parties in interest of this action, and contestant of his right of further appeal.

"Very respectfully,

"[Signed] F. H. Abbott,

"Assistant Commissioner."

We have carefully read all the evidence introduced before the Commissioner of the Five Civilized Tribes in this contest, and we find the above review of the same by the honorable Commissioner of Indian Affairs to be fair and accurate, and his deductions therefrom fully supported by the evidence. The evidence shows conclusively that plaintiff, Higgins, had never been in actual possession of the land in controversy, and the only claim she had upon the land or improvements thereon was based upon a conditional and contingent sale to her by one W. S. Edwards, an intermarried citizen, who had placed the improvements on the land and rented the same to one Jeter, and plaintiff, by virtue of this arrangement with Edwards, claims that she thus acquired the ownership of said improvements and was in possession of the land by tenant. But the

honorable Commissioner found that such ownership of the improvements and possession of the land did not exhibit the elements of good faith necessary to segregate the land from the claims of bona fide allottees, and we concur in his conclusion therein. His reasons are fully set out in his opinion, copied above, reviewing the evidence. It covers the case fully. All the deductions therein are fair and warranted by the evidence.

We recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. ROGERS.
(No. 6638.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Sept. 26, 1916.)

(Syllabus by the Court.)

1. NEGLIGENCE \S 136(9) — PROVINCE OF COURT AND JURY—DIRECTED VERDICT.

In cases involving negligence, when a given state of facts is such that reasonable men may fairly differ upon the questions as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered one of law for the court. Where, from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence or contributory negligence, such questions are properly for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 293-297; Dec. Dig. \S 136(9).]

2. NEGLIGENCE \S 136(10) — PROVINCE OF COURT—DIRECTED VERDICT.

There was conflicting evidence in the case as to whether or not the defendant was primarily negligent, and this given state of facts was such that reasonable men might fairly differ upon the question as to whether there was primary negligence on the part of the defendant or not, and hence the question of primary negligence on the part of the defendant was a question of fact to be considered, found, and determined by the jury in the light of all the accompanying facts and circumstances touching this question in evidence before them upon the trial of this cause, under proper instructions from the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 298-300; Dec. Dig. \S 136(10).]

3. MASTER AND SERVANT \S 101, 102(1)—INJURIES TO SERVANT—DUTY OF MASTER.

It is necessary that you go into the facts of each individual case to ascertain whether or not negligence existed. In the case at bar the defendant owed the plaintiff the duty to furnish him with a reasonably safe place within which to work and with reasonably safe appliances to work with. In the case at bar the defendant failed to perform that duty. In the case at bar the plaintiff received an injury resulting from such failure on the part of the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 178, 179; Dec. Dig. \S 101, 102(1).]

4. MASTER AND SERVANT ¶221(6), 288(2, 14)
—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a master promises to remedy a defect, the servant does not assume the risk of injury therefrom by remaining in his employment for a reasonable time after such promise. The question whether plaintiff assumed the risk by remaining at work in a dangerous place is for the jury. Where plaintiff had complained to his foreman that premises were unsafe, and the foreman promised to refer the matter to the master mechanic, and later informed plaintiff that the master mechanic had promised that the defect should be remedied, the questions whether the master mechanic was informed of such complaint and promised to remedy the defect, and his authority to make the promise were for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 644, 1070, 1084; Dec. Dig. ¶221(6), 288(2, 14).]

5. SERVANT'S CASE—EVIDENCE.

In this case the plaintiff had knowledge of the danger involved, had advised the defendant thereof, and the defendant had promised the plaintiff to remedy the matters complained of. The plaintiff gave the names of the parties to whom complaint was made and the names of the officers who promised to make the corrections, and defendant failed to offer any testimony whatever denying that said promises were made or even attempted to dispute the same.

6. MASTER AND SERVANT ¶103(1) — **INJURIES TO SERVANT—CARE.**

It is the duty of the master to furnish his servant with a reasonably safe place to work and with reasonably safe tools and appliances with which to work, taking into consideration the nature and character of the work to be performed and the dangers therefrom, and this duty cannot be delegated by him so as to relieve him of liability for injuries resulting from its violation.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. ¶103(1).]

7. MASTER AND SERVANT ¶293(8) — **INJURIES TO SERVANT—INSTRUCTIONS.**

Instructions Nos. 3 and 7, given by the court, in which the jury are told "that it was the duty of the defendant railway company to use reasonable and ordinary care to provide a safe place within which its employes were to work and to use reasonable and ordinary care to provide suitable and proper implements with which such employes were to work," etc., *held* proper under the facts proven in this case, and under the law as laid down by this court in *Frederick Cotton Oil & Mfg. Co. v. Traver*, 36 Okl. 717, 129 Pac. 747, *Choctaw Elec. Co. v. Clark*, 28 Okl. 399, 114 Pac. 730, and *Great Western Coal & Coke Co. v. Malone*, 39 Okl. 693, 136 Pac. 403.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1150; Dec. Dig. ¶293(8).]

8. MASTER AND SERVANT ¶203(1), 227(1) — **INJURIES TO SERVANT — "ASSUMPTION OF RISK"—CONTRIBUTORY NEGLIGENCE—"ASSUMED RISK."**

"Assumption of risk" and "contributory negligence" are not synonymous. The defenses of "assumed risk" and "contributory negligence" are separate and independent, the former arising out of contractual relations, and the latter not. "Assumed risk" and "contributory negligence" are distinct doctrines of law. The instructions examined as to this question, and

held to be sufficient and proper under the facts of this case.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 538-540, 542, 543, 688; Dec. Dig. ¶203(1), 227(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Assumption of Risk*; *Contributory Negligence*.]

9. COMPROMISE AND SETTLEMENT ¶8(3) — **MISREPRESENTATIONS—RELIEF.**

The plaintiff was advised by Mr. Brady, the claim agent, that the physicians of the company had reported the injury as merely a skin wound, and that it was not permanent. He was advised by Dr. Tye and Dr. Border, physicians of the company, that the injury was merely a skin wound, and not permanent. He was advised by Dr. Tye that he would have a good leg and would be able to perform labor to the extent and in the capacity he did prior to the injury. The plaintiff was a mere employe of the company. He had no knowledge of medical science. He could not judge of the effect of a burn as to its permanency or its temporary character. He relied upon the statements of the company's physicians to the effect that he would have a good leg, and, believing and relying upon such statements, executed the release in question. In such cases innocent misrepresentations made in good faith and under an honest belief at the time made that they are true, on the one hand, and relied and acted upon in good faith and under an honest belief of their truth, on the other hand, as well as statements made which are intentionally false and relied upon by the party executing a release, may equally be made the basis of relief from such releases.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 19, 21-24; Dec. Dig. ¶8(3).]

Commissioners' Opinion, Division No. 4. Error from District Court, Stephens County; Frank M. Bailey, Judge.

Action by Emmett Rogers against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff, Emmett Rogers, brings this action seeking to recover of the defendant, the Chicago, Rock Island & Pacific Railway Company, the sum of \$20,150, alleging that on the 11th day of December, 1910, while plaintiff was in the employ of the defendant company in the capacity of caretaker of certain locomotives of the defendant company in the yards of the defendant company at Mangum, Okl., he was requested to build a fire in the fire box of a certain locomotive engine; that at said time said locomotive was outside of the roundhouse and unprotected in any way from the wind; that the defendant furnished for the building of such fire certain waste and combustible oil which plaintiff was requested to use in the starting of said fire, and that while in the performance of his duty, and on account of the combustible character of the material used and furnished to him in building said fire, and on account of the unprotected condition of said engine from the weather and strong wind, and on account of no blower being furnished to plaintiff with which to start said fire,

and while acting with care and caution, a certain gust of wind swept through said cab of said locomotive while the plaintiff was in the act of building said fire, blowing the burning oil and waste against plaintiff, thereby setting fire to plaintiff's clothing, from which he received severe and serious burns and injuries to his right limb; that such injuries were caused and occasioned by reason of the carelessness and negligence of the defendant in failing to use reasonable and ordinary care to furnish a safe place within which plaintiff should work; that by reason of such injuries plaintiff has suffered great mental anguish and impairment of his earning capacity and loss of time and money expended in securing necessary medical attention and services—all to his great hurt and damage in the sum prayed for, to wit, \$20,150.

The defendant answers, and denies the allegations of the plaintiff's petition not specifically admitted, and admits that the plaintiff was the employé of the defendant company, and further says that, if plaintiff was injured, it was by reason of his own negligence and carelessness, and that the defendant was in no wise negligent and careless, nor is it liable in any degree for the injuries complained of by plaintiff, and that, if such plaintiff was injured, it was occasioned by the risk incident to plaintiff's work, and was assumed by plaintiff. The defendant further says that, if the plaintiff was injured, that such injury has been fully adjusted, adjudicated, and settled between plaintiff and the defendant by reason of a certain release contract entered into between the plaintiff and defendant; wherefore the defendant prays the judgment of the court.

The plaintiff, replying, denies the allegations of the defendant's answer not specifically admitted, and says that, while plaintiff did execute such release agreement, such release agreement was signed and executed by reason of false and fraudulent representations of the defendant company's agents and physicians, and that such representations caused plaintiff to mistake the nature of his injuries, and that the consideration therefor was greatly inadequate, and that other considerations formed a part and parcel of such agreement, and that same have not been fulfilled and have not been performed by the defendant, and that such release agreement is therefore invalid and in no wise binding on the plaintiff.

This cause was tried to a jury on the 14th and 15th days of November, 1913, resulting in a verdict in favor of the plaintiff and against the defendant for \$1,001, upon which verdict judgment was duly entered to reverse, which this proceeding in error was brought by the defendant.

K. W. Shartel, of Oklahoma City, C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, and J. G. Gamble, of Des Moines,

Iowa, for plaintiff in error. Bond, Melton & Melton, of Chickasha, for defendant in error.

DAVIS, C. (after stating the facts as above). The parties will be designated as in the court below. The questions presented for our consideration are:

"(1) That said court erred in overruling the motion of the plaintiff in error for a new trial.

"(2) The court erred in overruling the demurrer of the plaintiff in error to the evidence of the defendant in error.

"(3) The court erred in refusing to give to the jury a peremptory instruction to return a verdict in favor of the plaintiff in error, as requested in defendant's requested instruction No. 1.

"(4) The court erred in refusing to give defendant's requested instruction No. 4.

"(5) The court erred in refusing to give defendant's requested instruction No. 5.

"(6) The court erred in refusing to give defendant's requested instruction No. 6.

"(7) The court erred in giving instruction No. 8 of its charge to the jury.

"(8) The court erred in giving instruction No. 6 of its charge to the jury.

"(9) The court erred in giving instruction No. 7 of its charge to the jury.

"(10) The court erred in giving instruction No. 11 of its charge to the jury."

[1] The errors assigned and complained of by the defendant supra, 2 to 10, inclusive, are set forth and contained in the motion for a new trial. The question then is: Did the trial court err in overruling the defendant's motion for a new trial containing these specifications of error supra? Let us see.

"In cases involving negligence, when a given state of facts is such that reasonable men may fairly differ upon the questions as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered one of law for the court. Where, from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence or contributory negligence, such questions are properly for the jury." *Missouri, K. & T. Ry. Co. v. Shepherd*, 20 Okl. 626, 95 Pac. 243; *Harris v. Missouri, K. & T. Ry. Co.*, 24 Okl. 341, 108 Pac. 758, 24 L. R. A. (N. S.) 858; *St. Louis & S. F. R. Co. v. Loftis*, 25 Okl. 496, 106 Pac. 824; *Sans Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153; *St. Louis & S. F. Rd. Co. v. Copeland*, 23 Okl. 837, 102 Pac. 104; *Mean v. Callison*, 28 Okl. 737, 116 Pac. 195.

[2] There was conflicting evidence in the case as to whether or not the defendant was primarily negligent, and this given state of facts was such that reasonable men might fairly differ upon the question as to whether there was primary negligence on the part of the defendant or not, and hence the question of primary negligence on the part of the defendant was a question of fact to be considered, found, and determined by the jury in the light of all the accompanying facts and circumstances touching this question in evidence before them upon the trial of this cause, under proper instructions from the court. The trial court therefore commit-

ted no error in overruling the defendant's demurrer to the plaintiff's evidence, and in refusing to give the jury a peremptory instruction to return a verdict in favor of the defendant as requested in defendant's instruction No. 1, and in submitting the cause to the jury.

[3-6] We will consider specifications of error numbered 2 and 3, that the court erred in overruling the demurrer of the defendant to the evidence of the plaintiff, and that the court erred in refusing to instruct the jury to return a verdict for the defendant, together. Counsel cite several authorities defining negligence, and then argue that no primary negligence was shown in this case. We think, and the jury found by their verdict, under the instructions of the court, that the plaintiff established that there was primary negligence on the part of the defendant by a fair preponderance of the evidence. The authorities cited by counsel define the law of negligence, but the facts involved in such cases are entirely different from the facts of the case at bar. It is necessary that you go into the facts of each individual case to ascertain whether or not negligence existed. In the case at bar the defendant owed the plaintiff the duty to furnish him with a reasonably safe place within which to work and with reasonably safe appliances to work with. In the case at bar the defendant failed to perform that duty. In the case at bar the plaintiff received an injury resulting from such failure on the part of the defendant. Counsel reasons by analogy and attempts to compare the building of a fire in a locomotive with the building of a fire in a cookstove or under a wash boiler. There is a marked distinction between building a fire in a cookstove and in a locomotive. There is a difference in the construction of a stove and a locomotive and a difference in the volume of the fire to be made. The fire box of a locomotive cannot be reached with the hand. It is several feet from the engine cab, and the fire must pass through a hole about the size of a hatband. In the case at bar it was necessary to throw burning waste through such hole three or four feet into the fire box with a whirlwind whistling through the cab of the engine. A cookstove fire may be started with a lighted match in the hand. You could not accomplish much trying to throw a lighted match through the wind into the fire box of a locomotive. These were all questions to be submitted to the jury as was done in this case.

Counsel for the defendant further assert that at other points plaintiff fired engines in the open. The facts in this case show that the plaintiff was employed by the company at Chickasha, Okl., where he worked two-thirds of his time; that he fired engines at said point in the roundhouse; that roundhouses were made for the purpose of housing and firing engines; that he occasionally made trips out of Chickasha and remained

overnight at different points, but he kept the fire in the engines used burning all night at most of the places. The facts further show that when the plaintiff in this case was located permanently at Mangum that he advised the company of the danger of firing an engine in the open and secured two or three promises from the company that the roundhouse at said point would be opened in order that he might fire an engine in a safe place, and have a safe place in which to work.

The fact that an accident is unusual, unexpected, or even unheard of will not excuse the negligence which caused it. 26 Cyc. 1092; *Doyle v. Chicago, St. Paul & Kansas City Ry. Co.*, 77 Iowa, 607, 42 N. W. 555, 4 L. R. A. 420; *E. P. & N. W. Ry. Co. v. McComus*, 36 Tex. Civ. App. 170, 81 S. W. 760. A railroad company is liable for injuries to a fireman where flames burst out of the fire box upon his opening the door thereof, on account of the use of fine and dirty coal, and catch his clothes on fire. 4 *Thompson on Negligence*, § 3939; *M., K. & T. Ry. Co. v. Walker* (Tex. Civ. App.) 26 S. W. 513.

The master owes to the servant the duty to furnish him with a reasonably safe building or other place in which to do his work, and is liable for injuries occasioned by negligence in this regard. 36 Cyc. 1209, 1213.

Where a master promises to remedy a defect, the servant does not assume the risk of injury therefrom by remaining in his employment for a reasonable time after such promise. 26 Cyc. 1099, 1113; *Neeley v. S. W. Cotton Seed Oil Co.*, 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 145; *Huber v. Jackson & Sharp Co.*, 1 Marvel (Del.) 374, 41 Atl. 92; *McFarlan Carriage Co. v. Potter*, 158 Ind. 107, 53 N. E. 465; *Foster v. Chicago Rock Island*, 127 Iowa, 84, 102 N. W. 422, 4 Ann. Cas. 150; *A., T. & S. F. Ry. Co. v. Sledge*, 68 Kan. 321, 74 Pac. 1111; *Louisville Hotel Co. v. Kaltenbrun* (Ky.) 82 S. W. 378.

The question whether plaintiff assumed the risk by remaining at work in a dangerous place is for the jury. *Swift et al. v. O'Neill*, 187 Ill. 337, 58 N. E. 416; *Harris v. Hewitt*, 64 Minn. 54, 65 N. W. 1085; *Oklahoma Constitution*, § 6, art. 23.

Where plaintiff had complained to his foreman that premises were unsafe, and the foreman promised to refer the matter to the superintendent, and later informed plaintiff that the superintendent had promised that the defect should be remedied, the questions whether the superintendent was informed of such complaint and promised to remedy the defect and his authority to make the promise were for the jury. *Swift et al. v. O'Neill*, supra.

The question whether the person promising to remedy the defect is one having authority to do so is for the jury. *Labatt on Master and Servant*, §§ 511, 420; *Swift et al. v. O'Neill*, supra.

From the 1st of February to the 12th of April held not to be an unreasonable length of time to continue work, relying upon a promise to remedy a dangerous condition. *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714.

A master mechanic has authority to promise repairs, and a promise to an employé in the presence of plaintiff is sufficient. *A. T. & S. F. Ry. Co. v. Sledge*, supra.

Three distinct promises were made to the plaintiff in this case, two by the master mechanic through Mr. Cleaver, the man under whom the plaintiff was working at Mangum. The third was made direct to the plaintiff himself by Mr. Sharp, the roundhouse foreman. Counsel for the company endeavored to argue that Mr. Cleaver only asked that the roundhouse be opened for the purpose of convenience, and not for safety. However, Mr. Cleaver refused to deny the statement of Emmet Rogers to the effect that the complaint was made on the ground that it was dangerous to fire an engine in the open, and Mr. Sharp, the officer who made the promise in person to Mr. Rogers, was not offered as a witness, and the testimony of the plaintiff as to the promise of Mr. Sharp is undisputed and unchallenged.

This disposes of assignment of errors 2 and 3.

[7-9] Under assignment of error No. 4 defendant complains of the refusal of the court to give in charge to the jury instruction No. 4 asked for by the defendant, and which reads as follows:

"The court instructs the jury that an employé is held under the law of this state to have assumed the risk and hazard of injury resulting from open and obvious dangers incident to his employment. You are therefore instructed that, although you should find that the defendant was negligent in requiring the plaintiff to build fires in engines while the same were out of doors, and that the injury suffered by plaintiff was the result of said negligence, nevertheless your verdict should be for the defendant, provided you further find that the condition under which he was required to work was known to the plaintiff, and the dangers in doing said work were appreciated and understood by him."

Instruction No. 4, supra, requested by counsel for the defendant, was not warranted by the law and the facts of the case, and was properly refused by the court. Plaintiff testified that the agents of the defendant company had promised to provide a safe place in which to work and safe appliances with which to work, and that, relying upon said promises, he remained in the employ of the defendant. This testimony is uncontradicted by any of the witnesses offered by the defendant. If the plaintiff, with full knowledge of the dangers of his employment, had remained in the employ of the defendant without objection or protest, and without a promise on the part of the company to reopen said roundhouse, the defendant would have been in a better position to contend for instruction No. 4, but, as the master lulled

the servant into a sense of security by promises to supply the necessary safeguards, and failed to contradict the testimony of the servant with reference to such promises, it would be strange, indeed, to instruct a jury to find that, even though the defendant was negligent, the plaintiff nevertheless assumed the risk of injury resulting from such negligence.

The following instructions have been approved by appellate courts:

"The court instructs the jury that, if you believe from the evidence in this case that the proximity of said platform to the track and to the cars as they pass was plain and apparent, and the liability to injury therefrom was manifest, and that deceased knew of such proximity or by the exercise of care to avoid injury to himself might have known, and with such knowledge or opportunity of knowledge remained in defendant's employ and continued to work in the vicinity thereof without objection or protest and without promise of alteration of the platform, then plaintiff cannot recover in this action." *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Iowa, 277, 3 N. W. 44.

"The court instructs the jury that, if a brakeman on a railroad knows that the materials with which he works are defective and continues his work without objection and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risk of such defects, for the continuance of the brakeman in the employment is purely voluntary, and if he so continues without objection with knowledge of the defects in machinery, he is presumed to have waived the right to insist upon indemnity for injuries resulting from such defect." *Way v. Illinois Central R. Co.*, 40 Iowa, 341.

Practically the same instructions have been approved in *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106, and in the case of *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Iowa, 276, 3 N. W. 43.

It will be noted from the above and foregoing instructions that an essential element was omitted from said requested instruction, namely, that the plaintiff remained in the defendant's employ and continued therein without objection or protest and without a promise to provide a safe place in which to work and safe appliances to work with.

In support of the assignment of error under discussion counsel cite the case of *Osage Coal & Mining Co. v. Sperra*, 42 Okl. 726, 142 Pac. 1040. Said case is not in point with the case at bar. In the case above cited all the conditions of which the plaintiff complained were obvious and well known to him when he commenced work, and at all times thereafter. He made no complaint about such conditions to his master. The master made him no promises to furnish a safe place in which to work and safe appliances with which to work. There is no question but what the instruction complained of in said case was incorrect. On page 1043 of said opinion the court uses the following language:

"Upon the whole we think it clear that the court erroneously instructed the jury so as to preclude the finding that the plaintiff assumed any risk, as against actionable negligence on the part of defendant, unless the place to work, and the tools and appliances with which to work, were found to have been reasonably safe."

No such instruction was given in the case at bar as the instruction complained of in the Osage Coal & Mining Company case. The case is wholly inapplicable to the issues involved.

The other authority relied on by counsel for the defendant is the case of *St. L. & S. F. R. Co. v. Long*, 41 Okl. 177, 137 Pac. 1156, Ann. Cas. 1915C, 432. This case is not in point with the case at bar. The judgment in said case was affirmed, and not reversed. In said case the court uses the following language:

"The foregoing instructions given by the court, in the light of the authorities just quoted, appear free from reversible error on any point urged against them by defendant, although the jury is thereby informed that the plaintiff's decedent 'did not assume any risk which might be caused by the negligence of defendant.' * * *"

Instruction No. 9 given by the trial court is as follows:

"You are instructed, gentlemen of the jury, that under the law every employé assumes the risk and hazard of injury resulting from the ordinary and obvious dangers incident to his employment. And you are instructed, gentlemen of the jury, if you believe from the evidence in this case that the injury to plaintiff was the result of mere accident and misfortune and a part of the risk and hazard incident to the duties to be performed by this plaintiff, and were occasioned without fault or negligence on the part of this defendant, your verdict should be for the defendant."

In said instruction the jury were advised that under the law every employé assumes the risk and hazard of injury resulting from the ordinary and obvious dangers incident to his employment.

"In a suit for personal injuries the question of whether or not defendant's negligence is the proximate cause of the injury sustained should be left to the jury, where the evidence is conflicting, or where men of ordinary intelligence might differ as to the effect of the evidence on the point. The question of proximate cause may be determined from circumstantial evidence." *St. Louis & S. F. R. Co. v. Darnell*, Adm'r, 42 Okl. 394, 141 Pac. 785.

Instruction No. 10 of the trial court reads as follows:

"You are instructed, gentlemen of the jury, that it is the duty of every man employed by another to use reasonable and ordinary care to prevent injury to himself from the open and obvious dangers incident to his employment. And you are instructed that, even though you should believe from the evidence in this case that the defendant was negligent in providing the place in which plaintiff was to work, yet, if you should further believe from the evidence that plaintiff failed to use reasonable and ordinary care to protect himself from danger and hurt, your verdict should be for the defendant."

In said instruction the jury were again advised that it was the duty of every employé to use reasonable and ordinary care to prevent injury to himself from open and obvious dangers incident to his employment, and in said instruction the jury were further advised that, even though they should believe from the evidence that the defendant was negligent in providing a place in which plaintiff was to work, yet, if they further believed

that plaintiff failed to use reasonable and ordinary care to protect himself, their verdict should be for the defendant.

In this case the plaintiff had knowledge of the danger involved, had advised the defendant thereof, and the defendant had promised the plaintiff to remedy the matters complained of. The plaintiff gave the names of the parties to whom complaint was made and the names of the officers who promised to make the corrections, and defendant failed to offer any testimony whatever denying that said promises were made nor even attempted to disprove the same. The instructions given by the court were correct and proper under the facts of the case.

Specification of error No. 7 is as follows: "The court erred in giving instruction No. 3 of his charge to the jury."

And specification of error No. 9 is as follows:

"The court erred in giving instruction No. 7 of his charge to the jury."

We will consider these assignments of error together. Counsel states that in both instances the court places upon the defendant the following burden:

"* * * That it was the duty of the defendant railway company to use reasonable and ordinary care to provide a safe place. * * *"

And then it concludes his argument in the following language:

"We do not urge this as being reversible error in itself, but call it to the court's attention for its consideration in connection with the many other errors committed by the trial court. * * *"

Counsel thus seems to recognize the fact that no reversible error was committed by the court in giving said instruction, and we are also of the opinion that this instruction was proper under the issues and proofs in the case.

"It is next urged that the court erred in giving the following instructions: 'It was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to work, reasonably safe appliances and machinery with which to work, and a reasonably safe track over which the cars were to be hauled, and a failure to furnish such a place, appliances, and track, if there was such a failure, was negligence on the part of the defendant, and if the injuries complained of were the result of such failure, your verdict should be for the plaintiff, unless you shall find that he assumed the risk of injury on account of such failure.'"

"It is insisted that this instruction places altogether too high a duty on the master; that all the master is required to do is to exercise ordinary or reasonable care and diligence to provide his servant with a reasonably safe place in which to work, with reasonably safe tools and implements with which to work, with reasonably safe material upon which to work, and suitable and competent fellow servants, and that this instruction requires defendant to furnish a reasonably safe place to work, etc., and imposes upon the master an absolute duty in this respect, and does not give him the privilege of using ordinary and reasonable diligence in the furnishing of such place, tools, etc. The criticism offered to this instruction is unwarranted; and, while it is true that many of the cases go to the extent of saying that the master is bound to exercise rea-

sonable care and diligence to provide his servant with a reasonably safe place in which to work, etc., as was said by Mr. Justice Williams in *Dewey Portland Cement Co. v. Blunt*, 38 Okl. 182, 132 Pac. 659, yet we do not think it was the intent of the court in that case to emphasize the necessity of the use of such language, or to overrule or criticize the holdings of *Neeley v. S. W. Cotton Seed Oil Co.*, 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 145; *Coalgate v. Hurst*, 25 Okl. 588, 107 Pac. 657; *C. R. I. & P. Ry. Co. v. Wright* [39 Okl. 84] 134 Pac. 427; *Choctaw Elec. Co. v. Clark*, 28 Okl. 399, 114 Pac. 730; or *Frederick Cotton Oil & Mfg. Co. v. Traver*, 36 Okl. 717, 129 Pac. 747.

In the last-named case Commissioner Harrison's treatment of this question is so satisfactory that we feel it to be our plain duty to follow and approve the same. It follows: "There is one other assignment which plaintiff in error urges at considerable length, which, in order to prevent its arising in a future trial, it might be well to settle here, viz., that the court erred in the following instruction: 'You are instructed that, under the law, it is the duty of the master to provide a servant with a reasonably safe place to work and with reasonably safe tools or appliances with which to work.' It is contended by the plaintiff in error that this instruction is erroneous and vicious, in that it instructs the jury that the master must furnish a place reasonably safe, whereas his duty is only to use reasonable care in furnishing such a place. The materiality of this distinction has not been generally recognized by the courts. The two terms 'reasonably safe place' and 'reasonable care in providing a safe place,' as a general rule, have been used interchangeably. Some of the standard text works use the term 'reasonably safe place' as the adopted rule. Others use the two terms interchangeably. In 20 Am. & Eng. Enc. of Law (2d Ed.) 55, we find the following text supported by more than 200 decisions from 37 different states, and from the United States Supreme Court and the courts of Canada and England, viz.: 'In accordance with the rule that reasonable care must be taken to protect one's servants from injury, masters owe to their servants the duty of providing them with a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the services required and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty which the master owes, and is not one of the perils or risks assumed by a servant in his contract of employment; and the servant is entitled to rely upon the assumption that the master has performed the duty imposed on him by law, of providing a reasonably safe place to work.' In 26 Cyc. 1097, the following rule is stated: 'It is the positive duty of a master to furnish his servants with reasonably safe instrumentalities wherewith and place wherein to do his work, and, in the performance of these obligations imposed by law, it is essential that regard should be had, not only to the character of the work to be performed, but also to the ordinary hazards of the employment; and the servant may assume that the master has performed his duty.' This rule is supported by decisions from 43 states and from the United States Supreme Court and the courts of England and Canada. Our own court, in the case of *McCabe & Steen Construction Co. v. Wilson*, 17 Okl. 355, 87 Pac. 320, uses the two terms interchangeably, or treats the terms as having the same legal effect. In the course of the opinion the court quotes from *Ruemmel-Braun Co. v. Cahill*, 14 Okl. 422, 79 Pac. 260, as follows: 'It is the positive duty of the master to use reasonable care in providing safe tools, machinery, and appliances to work with, a safe place to work in, safe materials to work on. * * *' And, after quoting the above language, the court

says: "As above stated, it is now the fundamental and well-settled law of the land that it is the duty of the master to furnish the servant safe tools, materials, and structures to work with and upon, and to keep them in proper repair." In view of the overwhelming recognition of the interchangeable use of the terms "duty to provide a reasonably safe place" and "duty to exercise reasonable care in providing a safe place," we cannot be constrained to treat this objection of itself reversible. However, we believe the rule might be stated with more exact correctness by saying: It is the duty of the master to provide a servant with a reasonably safe place to work and with reasonably safe tools and appliances with which to work, taking into consideration the nature and character of the work to be performed and the dangers and hazards ordinarily arising therefrom."

In *Choctaw Elec. Co. v. Clark*, 28 Okl. 399, 114 Pac. 730, Mr. Justice (now Chief Justice) Hayes, speaking on this subject, said: 'It is well-settled doctrine that it is the duty of the master to furnish the servant or the employé a reasonably safe place in which to work, reasonably safe appliances with which to work, reasonably safe materials and reasonably competent fellow servants to work with; and this duty cannot be delegated by him so as to relieve him of liability for injuries resulting from its violation.'

"These authorities, to our minds, furnish a satisfactory answer to defendant's objection to the instruction given. Besides, no instruction was offered by defendant covering the objection urged, and it was the duty of defendant to submit to the court such an instruction as in its opinion would have correctly stated the law."

"The objection urged against instruction No. 5 of the court's general charge cannot be sustained. It is charged that in this instruction the failure of the court to use the word 'reasonably' results in making defendant the insurer of its servants, and that the positive duty is imposed on it to provide safe tools and place. This instruction, in our opinion, is a fair statement of the law on this phase of the case, and is not subject to the charge that the employer is thereby made the insurer of its servants. Read in connection with the balance of the court's general charge, it states in a fair manner the duties and requirements of both parties."

Great Western Coal & Coke Co. v. Malone, 39 Okl. 693, 136 Pac. 403.

Counsel for the defendant complains further of instruction No. 3 for the reason that it omits the defense of assumption of risk, and then cites authorities with reference to negligence and contributory negligence and concludes his argument with the following language:

"While our Supreme Court has not passed on the omission by the trial court of the defense of assumption of risk, yet, the omission of the sister defense to assumption of risk, 'contributory negligence,' having been passed on so clearly and unequivocally in the above case, it seems to us that this court must adopt the same rule concerning the omission of assumption of risk."

The court properly instructed separately with reference to assumption of risk.

"Assumption of risk' and 'contributory negligence' are not synonymous." *Parks v. St. L. & S. R. Co.*, 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425.

"The defenses of 'assumed risk' and 'contributory negligence' are separate and independent, the former arising out of contract relations, and the latter not." *St. L. I. M. & S. Ry. Co. v. Brogan*, 105 Ark. 533, 151 S. W. 699; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551.

"Assumed risk and contributory negligence are distinct doctrines of law." *La. & Texas Lbr. Co. v. Brown*, 50 Tex. Civ. App. 482, 109 S. W. 950; *Chicago & E. R. Co. v. Ponn*, 191 Fed. 682, 112 C. C. A. 228.

The authorities all hold that assumption of risk and contributory negligence are separate and distinct defenses; that they are separate and distinct doctrines of law; therefore we take it that the court was in keeping with the law in instructing separately with reference to such defenses.

The court also instructed the jury in instruction No. 13 as follows:

"You will take these instructions, considered as a whole, for the law of this case, singling out no particular paragraph upon which to base your deliberations or verdict, but, looking to these instructions as a whole for the law of the case and the evidence as you have heard it detailed from the witness stand, arrive at your verdict. * * *"

We will consider specifications of error Nos. 5, 6, 8, and 10, together, discussing thereunder the instruction which the court refused to give and the instructions which the court did give. Said instructions are with reference to the release involved. Before discussing the authorities cited by counsel for the defendant, we shall state that they do not seem to be in point with the case at bar, for the reason that the release desired to be avoided in each particular case cited and discussed was alleged to have been executed through fraud and misrepresentation, while the release in the case at bar was alleged to have been executed, not only through fraud and misrepresentation, but by mistake. The question of mistake does not enter into any of the cases cited by counsel for defendant.

The first case relied upon by counsel for defendant is that of *St. L. & S. F. R. Co. v. Chester*, reported in 41 Okl. 369, 158 Pac. 150. The syllabus of said case reads in part as follows:

"This court will not hesitate to set aside and avoid a release from damages in a personal injury case, where same has been obtained through fraud or misrepresentations upon the part of the defendant which have misled the injured party into signing same."

In this case the plaintiff's arm had been amputated. The extent of his injury was fully known, and the only representations claimed to have been made by the agent were that the agent stated that plaintiff's right to recover was, to his mind, doubtful, and that he had been informed that plaintiff was drinking when hurt. We quote from the language of the court:

"No act of fraud is shown. The plaintiff merely says: 'I did not understand this legal document. I do not know the meaning of certain words used,' such as 'settle,' 'apparent,' 'compromise.' * * * No claim is made that the release was falsely read, or only partially read, or that any improper influences were brought to bear to induce him to sign it."

The court further found that the statements made by the agent to the plaintiff were

true. We quote further from the language of the court:

"These statements were both true. From this record the gravest doubt arises as to his right to recover. All the proof shows that he was drinking when hurt."

In the case of *St. L. & S. F. R. Co. v. Nichols*, 39 Okl. 522, 136 Pac. 159, fraud was pleaded in order to avoid the release, and the evidence offered by the plaintiff was, in the opinion of the court, sufficient to justify the jury in avoiding same.

In the case of *St. L. & S. F. R. Co. v. Reed*, 37 Okl. 350, 132 Pac. 355, fraud was alleged and established in procuring the release. Mistake was not alleged, and no effort was made to establish mistake. We quote in part from the syllabus of said case:

"The gist of fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and, if this result is actually accomplished, the means of accomplishing it are immaterial."

We quote further from the language of the court at page 355, of 37 Okl., at page 357 of 132 Pac.:

"In this case the physician had superior knowledge of the subject-matter under discussion. The plaintiff, as shown by the evidence, was an ignorant woman and did not have such knowledge. Therefore his expression of an opinion which he did not entertain, because it was contrary to the facts, was such a misrepresentation as would warrant the cancellation of the release secured by reason thereof. We are of the opinion that the able and well-reasoned opinion by Justice Dunn in *St. L. & S. F. R. Co. v. Richards*, 23 Okl. 256 [102 Pac. 92, 23 L. R. A. (N. S.) 1032], is controlling authority on every question in the instant case, except, perhaps, the last one above mentioned, i. e., that the expressions of the physician were not representations, but merely statements of an opinion, and therefore not grounds to cancel the release on the grounds of fraud; but with this view, as hereinabove indicated, we do not agree."

None of the cases above referred to are authority on the question in the instant case, i. e., the question of mistake.

The case of *St. L. & S. F. R. Co. v. Richards*, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032, does not pass upon the right of a party to disaffirm a release executed through mistake. The following authorities are in point with the instructions which the court did give and sustain the court in refusing to give the instructions requested:

"An innocent misrepresentation by the release of a material fact intended to be acted upon by the releasor and relied upon by him is as effective to avoid a release induced thereby as a mutual mistake." 34 Cyc. 1059; *Shackelford v. Hendley*, 1 A. K. Marsh. (Ky.) 496, 10 Am. Dec. 753; *People's Natural Gas Co. v. Millbury*, 2 Monag. (Pa.) 145.

"A release of damages for a broken arm, executed by a railroad employé in reliance upon a false statement of a physician, acting as a representative of the company, and made for the purpose of inducing the execution of such release, that the bones of the arm had knitted together, and that the arm would be as good as ever, was not binding upon the employé, even though such statement were made in good faith." *Houston & T. C. Ry. Co. v. Brown* (Tex. Civ. App.) 69 S. W. 651.

We quote from the language of the court in the above case:

"It is true this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside if he was misled by the statement and executed the release believing the statement was true. In such a case innocent misrepresentation may as well be the basis of relief as where such statements are intentionally false."

"Complainant, while a passenger on defendant's railroad, was thrown down in a car, and her hip was fractured. She was attended by her own physician, who was also defendant's local physician. A week after the injury she was visited by the physician and a claim agent of defendant, and a settlement was made of her claim for damages against defendant, and she signed a release. She was then 65 years old, by occupation a nurse, and dependent on her earnings for support. The principal question with her in making the settlement was the length of time the injury would incapacitate her from following her employment, and she was led to believe from the statements made by the agent and the opinion given by the physician that it would not exceed a year, and the settlement was made on that basis. In fact, she did not recover the use of her limb, and was permanently incapacitated from following her occupation. Held, that she was entitled to a rescission of the contract of settlement on the ground of mistake, and to a cancellation of the release, conceding that all parties acted in good faith."

See, also, *Wilcox v. Chicago & N. W. Ry. Co.* (C. C.) 111 Fed. 435.

"Plaintiff, a railroad brakeman, after being injured, was solicited by defendant's claim agent to make a settlement, and went with him to the office of defendant's physician, who, after an examination, either through mistake or to deceive complainant, minimized his injuries, and stated that he would be able to work in a week or two, whereupon plaintiff, without other advice, was induced to sign a release of all damages and demands on account of his injuries, in consideration of payment of doctor's and nurse's bills and his wages for such period of time. It developed, however, that plaintiff was seriously injured, requiring a subsequent hazardous and delicate surgical operation on the skull, and that he would probably never be able to resume his avocation. Held, that the release was executed by mutual mistake of the parties, and was subject to vacation." *Great Northern Ry. Co. v. Fowler*, 136 Fed. 118, 69 C. C. A. 106.

It does not appear that the plaintiff in this case was anxious for a settlement for mercenary purposes. His prime object seems to have been that he might be able to perform labor. He did not ask of the defendant anything more than a \$1 release and the privilege of going to work. He was advised by Mr. Sharp, one of the officers of the company, to go to Mr. Brady, the claim agent. He was advised by Mr. Brady, the

claim agent, that the physicians of the company had reported the injury as merely a skin wound, and that it was not permanent. He was advised by Dr. Tye and Dr. Border, physicians of the company, that the injury was merely a skin wound, and not permanent. He was advised by Dr. Tye that he would have a good leg and would be able to perform labor to the extent and in the capacity he did prior to the injury. The plaintiff was a mere employé of the company. He had no knowledge of medical science. He could not judge of the effect of a burn as to its permanency or its temporary character. He relied upon the statements of the company's physicians to the effect that he would have a good leg, and, believing and relying upon such statements, executed the release in question.

The plaintiff was injured on December 10, 1910, and executed a release shortly after he was out of the hospital on February 15, 1911. Practically three months thereafter his leg was still bad, and he was unable to perform manual labor as he could and did prior to the injury, and on February 21, 1912, an action was instituted against the defendant. A trial was had on November 14, 1913, practically three years since the date of the injury, and even at that time plaintiff had not recovered and was unable to earn the wages and perform the labor which he had prior to the injury. The injury was exhibited to the jury, and it was established by competent testimony that the injury was permanent and lasting. The statements and representations of the claim agent and the company's physicians were not true. The plaintiff had relied upon the truthfulness of such statements, and had executed in reliance thereon a general release for the consideration of \$1. Under the law and facts of the case as we understand them, the court properly refused the instructions requested by counsel, and correctly gave the instructions objected to by counsel.

In the light of what we have said here, and after a most careful and thorough examination of the record and briefs in this cause, we find no reversible error in the record, and therefore sustain the action of the trial court herein, and affirm the judgment, with directions to the trial court to credit the one dollar thereon paid by defendant to plaintiff for the release, and which plaintiff testified under oath, upon the trial, he was willing to have credited upon any judgment which he might recover in the action.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. PENIX.
(No. 7625.)(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Sept. 26, 1916.)*(Syllabus by the Court.)*1. TRIAL \S 295(6)—INJURIES TO SERVANT—INSTRUCTIONS.

Instructions in an action against the master for damages for a personal injury sustained by a servant while in the employ of the railroad shops of the master copied and approved as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 709; Dec. Dig. \S 295(6).]

2. NEGLIGENCE \S 1—ESSENTIALS—"ACTIONABLE NEGLIGENCE."

To constitute actionable negligence, where the alleged wrong is not willful and intentional, three essential elements are necessary and must concur: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff proximately resulting from such failure.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 1; Dec. Dig. \S 1.

For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence.]

3. FRAUD \S 3, 50—ESSENTIALS—PROOF.

Fraud is a fact to be established by evidence, as any other fact. The general rule is that before fraud can be established it must be shown that a material representation has been made; that it was false; that when it was made the speaker knew it was untrue, or that it was made recklessly, without the knowledge of its truth and as a positive assertion; that it was made with the intention that it should be acted upon by the one to whom it was made; that it was so acted upon by reason of the reliance placed upon it; and that damage or injury resulted thereby.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 1, 46, 47; Dec. Dig. \S 3, 50.

For other definitions, see Words and Phrases, First and Second Series, Fraud.]

4. MASTER AND SERVANT \S 293(8)—INJURIES TO SERVANT—INSTRUCTIONS—"REASONABLY SAFE PLACE"—"REASONABLE CARE IN FURNISHING A SAFE PLACE."

An instruction which tells the jury to return a verdict for the plaintiff if they find, among other things, that the place furnished by the defendant to plaintiff in which to work was not a reasonably safe place is not erroneous. The terms "reasonably safe place" and "reasonable care in furnishing a safe place" are used interchangeably.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1150; Dec. Dig. \S 293(8).]

For other definitions, see Words and Phrases, First and Second Series, Reasonably Safe; Reasonable Care.]

5. TRIAL \S 296(9)—INSTRUCTIONS—ASSUMPTION OF FACTS—CURE BY OTHER INSTRUCTIONS.

Upon the measure of damages the court instructed the jury that, if they found from a preponderance of the evidence that the plaintiff is entitled to recover, they should award him such sum as would compensate him for the loss he has sustained by reason of his injuries, etc. Held in view of the fact that the court had previously correctly instructed the jury that before they could return a verdict for plaintiff

they should find, among other things, that the plaintiff had been injured, the instruction was not erroneous, and did not presume that the plaintiff had been injured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 712; Dec. Dig. \S 296(9).]

Commissioners' Opinion, Division No. 4. Error from Superior Court, Pottawatomie County; Leander G. Pitman, Judge.

Action by John Penix against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and the defendant brings error. Affirmed.

R. J. Roberts, C. O. Blake, and W. H. Moore, all of El Reno, K. W. Shartel, of Oklahoma City, and Abernathy & Howell, of Shawnee, for plaintiff in error. W. M. Engart and Ed. O. Cassidy, both of Shawnee, for defendant in error.

MATHEWS, C. This is an action for damages for personal injuries alleged to have been received by the plaintiff while employed as a laborer in defendant's shops at Shawnee. The parties will be referred to as in the trial court. The jury returned a verdict for plaintiff for \$1,000, the motion for a new trial was overruled, and this appeal followed.

At the close of the testimony the defendant asked for a peremptory instruction, the same was refused, and is the first assignment of error presented here. The defendant based its demand for a peremptory instruction upon the fact that the plaintiff, after the alleged injury, had executed a release from all claims for damages. Plaintiff contended at the trial that the release introduced by defendant was procured through fraud and deceit, and this was one of the principal issues in the case submitted to the jury.

The evidence on this point upon the part of the plaintiff was, in substance, that after his injury he was treated by the company's physician from time to time, and that upon the occasion of his signing the release he went to this physician's office and told him that his head was still hurting him and that he seemed to be getting worse instead of better; the physician then told him that the company's claim agent, whose office was adjoining the physician's, wanted to see him; that they went into the claim agent's office together and each insisted that he sign a release; that he had been examined a short while before by three physicians, one being the company's physician, and the claim agent then read to him the report of these three physicians, wherein it was stated that he was not injured and was bothered with malaria only; that they kept urging, and finally he agreed to and did sign the release; that as soon as he signed the release he was requested to sign an affidavit that he was in good condition, was in his right mind, and knew what he was doing; that about that time a notary came in, and that rather

scared him, but that he then told them he would sign the affidavit if the company's physician would also make an affidavit that he was not injured, but this the physician refused to do; that he then refused to sign the affidavit, and informed them that he would go no further with it, and at once left the office; that the company afterwards sent him a coupon for \$1, which was the stated consideration for the release; but that he had never cashed it. We think this evidence was sufficient to put the case to the jury and amply sustains their findings.

[1, 2] The general instructions were as follows:

"(2) You are instructed that to constitute actionable negligence, where the alleged wrong is not willful and intentional, three essential elements are necessary and must concur: First, the existence of a duty on the part of the defendant to protect the plaintiff from injury; second, failure of the defendant to perform that duty, and, third, injury to the plaintiff proximately resulting from such failure.

"(3) You are instructed that, if you find and believe, from a preponderance of the evidence in this case, that the place furnished by the defendant, Chicago, Rock Island & Pacific Railway Company, to the plaintiff, John Penix, in which to perform the work which the plaintiff was required to perform, was not a reasonably safe place, and that, because of the negligence of the defendant in failing to furnish the plaintiff a reasonably safe place, the plaintiff, while in the exercise of ordinary care, and as the direct and proximate result of the negligence of the defendant company to furnish him a reasonably safe place to work, was injured, then and in that event plaintiff would be entitled to a verdict at your hands, unless you find the plaintiff has released the defendant by means of the release introduced in evidence in the case.

"(4) If you find from the evidence, by a preponderance thereof, that the defendant company was negligent as alleged, and that as a proximate result of such negligence the plaintiff was injured and suffered damage thereby it will be your duty to determine whether or not by a preponderance of the evidence the release testified to in this case was procured by fraud or is otherwise void. And in this connection you are instructed that fraud is never presumed, and the burden of proof is therefore upon the plaintiff to prove to your satisfaction by a preponderance of the evidence that the release in question was procured by fraud. If you find all the other issues in the case in favor of the plaintiff, and believe by a preponderance of the evidence that the release in question was procured of the plaintiff by the defendant company by fraud, then your verdict should be for the plaintiff and against the defendant.

"(5) You are instructed that, before fraud sufficient to warrant the cancellation of the release which the plaintiff has admitted signing in this case can be established, it must be shown that a material representation has been made; that it was false; that when it was made the speaker knew it was untrue or made it recklessly or without knowledge of its truth and as a positive assertion; that it was made with the intention that it should be acted upon by the one to whom it was made; that it was so acted upon by reason of the reliance placed upon it; and that damage or injury resulted thereby. Therefore, unless you find in this case that some agent or employé of this defendant made a false statement to the plaintiff in connection with this release and the

execution thereof, and that the said release was signed as a result of the said false statement so made your verdict should be for the defendant.

"(6) You are instructed that negligence as the proximate cause of an injury is a cause which a man of ordinary experience and sagacity could foresee that the result might probably ensue.

"(7) You are instructed that certain persons have been permitted to testify in this case as expert witnesses, and in this connection you are instructed that an expert witness is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation, and practice. Expert testimony is the opinion of such a witness based upon the facts in the case as shown by the evidence, but it does not tend to prove any fact upon which it is based, and before you can give any weight whatever to expert testimony you must find from the evidence that the facts upon which it is based are true. The jury is not bound by expert testimony, but it should be considered by you in connection with the other evidence in the case. And you are instructed that the testimony given by the physicians and experts who testified in this case is to be taken and considered by the jury like the evidence of the other witnesses who testified in the cause; and the opinions on questions of paresis, nervous disturbances, insanity, and other matters involved in this case which have been given by the medical experts are subject to the same rules of credit or discredit as the testimony of the other witnesses, and are not conclusive on the jury. These opinions neither establish nor tend to establish the truth of the facts upon which they are based. Whether the matters testified to by the witnesses in the cause are facts, or true or false, is to be determined by the jury alone; and you must also determine whether the facts and matters stated and submitted to the experts in the hypothetical questions are true in fact and have been proven in the case.

"(8) You are instructed that in this case persons have been permitted to testify to certain statements, acts, and conduct of the plaintiff, and to express their opinions, based upon such statements, acts, and conduct, as to whether or not the plaintiff was sound or unsound in his mental, physical, and nervous condition. These witnesses are what are known in law as nonexpert witnesses, and in determining the value of the opinion of such a witness you may take into consideration the intelligence shown in his examination, his opportunities for acquiring the knowledge upon which his opinion is based, his previous personal acquaintance with the plaintiff, its character and the length of time it existed, his freedom from bias or interest, the absence of finely spun theories from his conception of the whole matter, the fullness of the facts within his knowledge, and the accuracy of his memory. No rule can be laid down as regards the amount of knowledge which the nonexpert must possess. The weight that the opinion of such a witness shall have is for the jury alone to determine.

"(9) Negligence, as used in these instructions, means a want of ordinary care. By ordinary care is meant such care as men of ordinary prudence usually exercise under the same or similar circumstances.

"(10) You are instructed that by a preponderance of the evidence is not necessarily meant the greater number of witnesses, but by a preponderance of the evidence is meant that evidence, which, in the light of all of the evidence, facts, and circumstances in proof in the case, is most satisfying and convincing to the minds of the jurors.

"(11) If you find from a preponderance of the evidence that the plaintiff is entitled to re-

cover from the defendant, then it is your duty to award him such sum by way of damages as you believe from the evidence will fairly compensate the plaintiff for the loss he has sustained by reason of his injuries; and in arriving at such amount you may consider his age at the time of the accident, his health and physical condition before and after the injury, his habits, his earning capacity, the character of his injuries, as to whether they are permanent or otherwise, the physical pain and mental suffering, if any, which he has suffered, or will reasonably be expected to suffer by reason of his injuries, his loss of time, if any, and, together with all other facts and circumstances in evidence in the case showing or tending to show the amount of damage the plaintiff has sustained, determine the amount which you believe the plaintiff is entitled to recover, but your verdict should not in any event exceed the sum of \$3,000, the amount claimed in the plaintiff's petition.

"(12) You are instructed that in passing upon the question of the admissibility of any evidence the court has not expressed nor intimated nor intended to express or intimate any opinion as to the weight or credibility of the evidence. The court has simply determined what evidence offered in the case was proper to go before you for your consideration. As to the weight and credit to be given to the evidence that has been introduced, you are the sole and only judges. You are the sole judges of the facts proved in the case, but you are bound by the law as given to you by the court. And in this connection you are instructed that it is of the utmost importance that you carefully weigh all the evidence in the case, so that you may, if it is possible to do so, ascertain the exact truth. The court is powerless to correct any mistake that you might make in your determination of a material fact where the evidence is conflicting, and therefore, if you should make a mistake in such regard, justice may go astray, and the court therefore desires to impress upon your minds the importance of a full, careful, unbiased, unprejudiced, and intelligent consideration of all the evidence, facts, and circumstances in the case.

"(13) In determining the weight and credit you will give to the testimony of any witness, you may take into consideration the interest or lack of interest of the witness in the result of this action, his appearance and demeanor in the presence of the jury, his intelligence or lack of intelligence, his apparent candor and fairness, or lack thereof, the reasonableness or the unreasonableness of the story told by him, his means and opportunities for seeing and knowing the matters concerning which he testifies, and from all the evidence, facts, and circumstances in the case determine the weight and credit you will give to the testimony of any witness and give credit accordingly.

"(14) You are the sole and exclusive judges of the facts proved in this case and of the credibility of the witnesses, and of the weight to be given to the testimony of the witnesses who have testified before you, but you are bound by the law as given to you by the court in these instructions.

"(15) You are instructed that you must consider these instructions all together. You have no right to consider any part or parts of the same to the exclusion of other portions thereof.

"(16) You are instructed that any nine or more of your number may agree upon and return a verdict in this case. In the event you reach a verdict by an agreement of less than your whole number, but not less than nine, then each juror concurring in the verdict must sign the same. If your verdict is unanimous, it need only be signed by your foreman."

Upon the question of fraud the defendant requested the following instruction:

"You are instructed that a misrepresentation within the meaning of the law of fraud is anything short of a warranty, which proceeds from the action or conduct of the party charged, and which is sufficient to create upon the mind a distinct impression of fact conducive to action. Therefore you are instructed that, unless you find from the facts in evidence in this case that a misrepresentation as defined herein was made, you will find that the release was not obtained by fraud, and your verdict should be for the defendant."

The court refused this instruction, giving as his reason that he had covered the subject sufficiently in No. 5 of his general charge. While we find no material objection to the instruction offered, yet we are of the opinion that the instruction given is clearer and more intelligible and preferable in every way to the one requested, and fully covers the question of fraud as presented in this case.

[3] "Fraud" amounting to misrepresentation is defined in *St. Louis & S. F. R. R. Co. v. Reed*, 37 Okl. 350, 132 Pac. 355, as follows:

"Fraud is a fact to be established by evidence, as any other fact. The general rule is that before fraud can be established it must be shown that a material representation has been made; that it was false; that when it was made the speaker knew it was untrue, or that it was made recklessly, without the knowledge of its truth and as a positive assertion; that it was made with the intention that it should be acted upon by the one to whom it was made; that it was so acted upon by reason of the reliance placed upon it; and that damage or injury resulted thereby. 20 Cyc. 13."

By comparison it will be noted that the instruction given follows closely the above concise definition of "fraud" and covers every phase of this definition.

[4] Defendant next complains of instruction 8 relative to the duty of the master to provide a reasonably safe place for his employees. Defendant contends that this instruction places a greater burden upon it in regard to furnishing a safe place for its employees than the law exacts, and that it is only required to exercise ordinary or reasonable care to furnish a reasonably safe place, and cites the following cases in support of its contention: *Dewey Portland Cement Co. v. Blunt* (1913) 38 Okl. 182, 132 Pac. 659; *Chicago, R. I. & P. Ry. Co. v. Brazzell*, 40 Okl. 480, 138 Pac. 794; *Sulsberger & Sons v. Castleberry*, 40 Okl. 613, 139 Pac. 839; *Frisco Lumber Co. v. Spivey*, 40 Okl. 633, 140 Pac. 157; *Texas Co. v. Collins*, 42 Okl. 374, 141 Pac. 783; *Dolese Bros. Co. v. Smith*, 42 Okl. 452, 141 Pac. 775; *Midland Valley R. Co. v. Williams*, 42 Okl. 444, 141 Pac. 1103; *Chicago, R. I. & P. Ry. Co. v. Townes*, 43 Okl. 568, 143 Pac. 680; *Rock Island Coal Min. Co. v. Davis*, 44 Okl. 412, 144 Pac. 600. We find no fault whatever with the doctrine laid down in these decisions. They simply hold that it is the duty of the master to exercise reasonable care and diligence to provide a reasonably safe place in which the employee is to work.

The exact question here raised has been passed upon by this court in numerous instances. In the case of *Frederick Cotton Oil & Mfg. Co. v. Traver*, 36 Okl. 717, 129 Pac. 747, the instruction complained of was as follows:

"You are instructed that, under the law, it is the duty of the master to provide a servant with a reasonably safe place to work and with reasonably safe tools or appliances with which to work."

And the court said this:

"It is contended by plaintiff in error that this instruction is erroneous and vicious, in that it instructs the jury that the master must furnish a place reasonably safe, whereas his duty is only to use reasonable care in furnishing such a place. The materiality of this distinction has not been generally recognized by the courts. The two terms, 'reasonably safe place' and 'reasonable care in providing a safe place,' as a general rule, have been used interchangeably. Some of the standard text works use the term 'reasonably safe place' as the adopted rule. Others use the two terms interchangeably."

In the case of *Great Western Coal & Coke Co. v. Malone*, 39 Okl. 693, 136 Pac. 403, the instruction under consideration was:

"It was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to work," etc.

And the court therein said:

"It is insisted that this instruction places altogether too high a duty on the master; that all the master is required to do is to exercise ordinary or reasonable care and diligence to provide his servant with a reasonably safe place in which to work, with reasonably safe tools and implements with which to work, with reasonably safe material upon which to work, and suitable and competent fellow servants, and that this instruction requires defendant to furnish a reasonably safe place to work, etc., and imposes upon the master an absolute duty in this respect, and does not give him the privilege of using ordinary and reasonable diligence in the furnishing of such place, tools, etc. The criticism offered to this instruction is unwarranted; and, while it is true that many of the cases go to the extent of saying that the master is bound to exercise reasonable care and diligence to provide his servant with a reasonably safe place in which to work, etc., as was said by Mr. Justice Williams in *Dewey Portland Cement Co. v. Blunt*, 38 Okl. 182, 132 Pac. 659, yet we do not think it was the intent of the court in that case to emphasize the necessity of the use of such language, or to overrule or criticize the holdings of *Neeley v. S. W. Cotton Seed Oil Co.*, 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 145; *Coalgate v. Hurst*, 25 Okl. 588, 107 Pac. 657; *C. v. R. I. &*

P. Ry. Co. v. Wright [39 Okl. 84] 134 Pac. 427; *Choctaw Elec. Co. v. Clark*, 28 Okl. 399, 114 Pac. 730; or *Frederick Cotton Oil & Mfg. Co. v. Traver*, 36 Okl. 717, 129 Pac. 747."

See, also, *Chickasaw Compress Co. v. Bow*, 149 Pac. 1166; *Ruammell-Braun Co. v. Cahill*, 14 Okl. 422, 79 Pac. 260; *McCabe & Steen Const. Co. v. Wilson*, 17 Okl. 355, 87 Pac. 320; *Frisco Lumber Co. v. Thomas*, 42 Okl. 670, 142 Pac. 310; *C. v. R. I. & P. R. R. Co. v. Rogers* (No. 6638) 159 Pac. 1132, not yet officially reported.

So it will be seen that the above decisions sustain the instruction complained of and hold that the two terms "reasonably safe place," as used in the instruction at bar, and "reasonable care in furnishing a safe place," are used interchangeably; yet, even if it should be an actual error, as urged by defendant (which we have shown it was not), instruction No. 6, defining negligence, following later in the opinion would have cured the error, if any.

[5] Defendant next attacks instruction No. 11, upon the measure of damages. The vice which defendant attempts to find in this instruction it claims appears in the first clause thereof, and it argues that it is there assumed that the plaintiff was injured, while this was one of the controverted points in the case upon which the defendant had introduced evidence tending to prove that the plaintiff was not injured at all, and most especially that there was no injury at the time he signed the release.

In instruction 3 the court had instructed the jury upon what conditions they could find for the plaintiff, one of the conditions being that they must find from a preponderance of the evidence, among other things, that the plaintiff was injured before the verdict could be for the plaintiff, and instruction No. 11, now complained of, simply informs them as to the measure of damages. It would have been perhaps better to have followed the first clause in section 11 with the further words, "if they find he was injured," but we see no vice in the instruction as it stands.

We recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

RAMER, Secretary of State, et al. v. WRIGHT et al. (No. 8799.)

(Supreme Court of Colorado. July 8, 1916.
Rehearing Denied Oct. 2, 1916.)

1. STATUTES \S 35 $\frac{1}{2}$ —INITIATIVE AND REFERENDUM—PROTEST.

Under Laws 1913, p. 811, \S 8, providing that all initiative and referendum petitions shall be deemed sufficient unless a protest in writing under oath shall be filed, a written protest to a petition to refer, the verifying certificate of the officer reading, "Subscribed to before me this 10th day of July, 1915," etc., was insufficient, as not showing that the signers swore to the instrument before the officer.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35 $\frac{1}{2}$.]

2. STATUTES \S 35 $\frac{1}{2}$ —INITIATIVE AND REFERENDUM—REQUIREMENTS OF PROTEST.

The requirements of Laws 1913, p. 310, are jurisdictional, that all initiative and referendum petitions properly verified shall be deemed sufficient if appearing to be signed by the requisite number of signers, and that such signers shall be deemed to be qualified electors unless otherwise determined, the procedure requiring that a protest to signatures shall be filed with the secretary of state within 15 days of the filing of the referendum petition, which protest shall set forth specifically its grounds and the names protested, being under oath, and the secretary of state is without power to act in the absence of a substantial compliance with the statute.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35 $\frac{1}{2}$.]

Teller and Hill, JJ., dissenting.

Petition for Review to the District Court, Denver County; Charles C. Butler, Judge.

En Banc. Petition to review a judgment of the district court by John M. Ramer, as Secretary of State, and others, against James R. Wright and others. Judgment affirmed.

Fred Farrar, Atty. Gen., Francis E. Bouck, Deputy Atty. Gen., and H. L. Ritter, Charles H. Haines, and Hugh McLean, all of Denver, for petitioners. I. B. Melville, M. D. Melville, Carle Whitehead, and Albert Vogl, all of Denver, for respondents.

SCOTT, J. On the 26th day of June, 1915, the respondents filed with petitioner John M. Ramer, as secretary of state, a petition to refer to the vote of the people of Colorado House Bill No. 178, being an act of the Twentieth General Assembly, relating to the practice of medicine. Within 15 days thereafter, and on the 19th day of July, 1915, there was filed with the secretary of state what purported to be a protest against said petition. A motion to dismiss the protest was filed with and overruled by the secretary of state. Upon the hearing the secretary of state sustained the protest and held the referendum petition to be insufficient. August 9, 1915, the respondents filed in the district court of the city and county of Denver their petition for a review of the proceeding before the secretary of state. Return was made by the secretary of state in due time, and upon a hearing by the court it was held that the protest to the petition to refer the act was not sufficient to meet the requirements of the

statute in such case, and an order entered directing the secretary of state to submit the bill for a referendum vote. This action is to review the findings and judgment of the district court.

Section 1, art. 5, of the Constitution provides, among other things, that:

"The text of all measures to be submitted shall be published as constitutional amendments are published, and in submitting the same and in all matters pertaining to the form of all petitions the secretary of state and all other officers shall be guided by the general laws, and the act submitting this amendment, until legislation shall be especially provided therefor. * * *

"The initiative and referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, [etc., etc.] The manner of exercising said powers shall be prescribed by general laws, except that cities, towns and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation."

[1] It will be seen that this article of the Constitution contemplated legislative action providing a special procedure in such cases. The Legislature (chapter 97, Laws of 1913) enacted what appears to be a very complete and comprehensive method of procedure supplementing the constitutional provision in this regard. Section 3 of this act provides:

"Sec. 3. All petitions, so verified, shall be deemed and held sufficient if they appear to be signed by the requisite number of signers, and such signers shall be deemed and held to be qualified electors, unless a protest in writing under oath shall be filed in the office in which such petition has been filed, by some qualified elector, within fifteen days after such petition is filed, setting forth specifically the grounds of such protest and the names protested; whereupon the officer with whom such petition is filed shall forthwith mail a copy of such protest to the persons named in such petition as representing the signers thereof, at the addresses therein given, together with a notice fixing a time for hearing such protest, not less than five or more than twenty days after such notice is mailed. All records and hearings shall be public. Hearings shall be summary and must be concluded within forty days after such petition is filed, and the result thereof shall be forthwith certified to the persons representing the signers of such petition. In case the petition be declared insufficient in form or number of signatures of qualified electors, it may be withdrawn by a majority in number of the persons representing the signers of such petition, and may, within fifteen days thereafter, be amended or additional names signed thereto as in the first instance, and refiled as an original petition. The finding as to the sufficiency of any petition may be reviewed by any state court of general jurisdiction in the county in which such petition is filed, but such review shall be had and determined forthwith, and, upon application, the decision of such court thereon shall be reviewed by the supreme court summarily."

The principal objections urged against the protest were: (a) That it was not under oath; and (b) that it did not specifically set forth the names protested, or the grounds of protest as required by the statute. Inasmuch as we hold the first objection fatal to the protest, it is not necessary to consider the second.

The statute requires the protest to be in writing and under oath. The verification to the protest relied on is as follows:

"State of Colorado, City and County of Denver—ss.:

"Martha A. Morrison, A. J. Cobb, J. W. Ames, Bertha De Wolf, Margaret W. Henderson, and Mabel I. Noble, each for himself (or herself), and not one for the other, deposes and says: That he (or she) subscribed his (or her) name to the above and foregoing protest after reading the same; that he (or she) knows the contents of said protest and the statements therein contained are true to the best of his (or her) knowledge, information, and belief.

"Martha A. Morrison, D. O.

"Abner J. Cobb, D. O.

"Bertha De Wolf.

"J. W. Ames, M. D.

"Margaret W. Henderson.

"Mabel I. Noble.

"Subscribed to before me this 10th day of July, 1915.

"My notarial commission expires July 27, 1915. Mary M. McCrum, Notary Public."

It will be seen that the certificate recites that the statement was subscribed to, but nowhere does it appear from such certificate that the signers were sworn. It is the certificate of the officer from which it must be determined whether or not an oath was administered. It is true that in the body of the statement the signers say that they "depose and say." But, if it be assumed that "to depose" means "to swear," the certificate does not show that the signers even "deposed" before the officer. It recites only that they subscribed.

It was held in *Palmer v. McCarthy*, 2 Colo. App. 422, 81 Pac. 241, that:

"The assignor is also required to verify the inventory and list of creditors under oath. The proceedings were in this respect fatally defective. The statute, as in all cases where such language is used, requires an affidavit subscribed by the party and the certificate of an officer that an oath was administered. Neither appears."

The Constitution and the act of 1913 provide that to each referendum petition shall be attached the affidavit of some qualified elector that each signature thereon is the signature of the person whose name it purports to be. The petition therefore is required to be under oath, and it is but just that such a petition should be met with a protest likewise under oath, as the statute requires. The Legislature has treated both the petition and the protest as very serious matters, and has required that both shall be under oath. If the oath in the one case may be omitted, then it may also be omitted in the other, and there would remain no protection to the public from fraudulent referendum petitions. The statute provides a severe penalty in both cases.

[2] The constitutional amendment authorized the Legislature to adopt a special procedure in such case, and the Legislature has enacted a statute in apparent harmony with the constitutional provision. This statute declares that all petitions properly verified

shall be deemed and held sufficient if they appear to be signed by the requisite number of signers, and that such signers shall be deemed and held to be qualified electors unless otherwise determined under the specific procedure provided. The procedure requires also that a protest shall be filed with the secretary of state within 15 days from the date of the filing of the referendum petition. It is further declared that such protest shall set forth specifically the grounds of such protest and the names protested. The further specific requirement is that such protest must be under oath. These requirements are clearly jurisdictional, and the secretary of state is without power to act in the absence of a substantial compliance with these requirements of the statute. We have held in this case that the protest under consideration was vitally defective in one respect at least, in that it was not under oath. Therefore the proceedings of the secretary of state upon and under such insufficient protest were without authority of law, and are without force or effect.

It is contended by counsel that section 3, at least, of the act of 1913, is unconstitutional, in that the protest is required to be filed within 15 days from the date of the filing of the petition; that the time provided is so short as to render it physically impossible to comply with it, and therefore it is so unreasonable as to deny the right conferred by the Constitution.

The only matter we determine here is that the protest is invalid for the reason that such protest was not verified as required by the statute. Certainly it cannot be contended that the requirement that the protest must be under oath is so unreasonable as to invalidate the statute. The requirement that the protest shall be filed within 15 days from the date of the filing of the petition for the referendum is not properly before us; for, if the protest was void for the reason suggested, it cannot matter when it was filed. Neither can the protestants be in any better position if the entire statute be held to be in violation of the Constitution. For, aside from the statute in question, there is no constitutional or other lawful authority for the filing of a protest with the secretary of state, and that officer is without power or authority, except under the statute, to hear or determine the questions attempted to be raised by the protest.

The judgment is affirmed.

GABBERT, C. J., and GARRIGUES, WHITE, and BAILEY, JJ., concur. TELLER and HILL, JJ., dissent.

TELLER, J. (dissenting). The majority opinion denies effect to the protest filed with the secretary of state on the ground that it was not under oath, and holds that, in the absence of a protest in conformity with the statute, the secretary of state could take no

steps to determine the validity of the petition to refer the law.

I think the opinion is wrong in both these particulars. The statutory provision for a protest is in the public interest, to prevent the incurring by the state of the expense of submitting a law to a vote of the people on a petition not meeting the requirements of that section of the Constitution which provides for the referendum; and, still more important, the protest is a safeguard against the suspension of duly enacted laws, except upon petition of qualified electors to the number prescribed therefor by the Constitution. That being the case, the statute should be liberally construed so as to promote its purpose.

The record discloses no objection to the verification during the several days of the hearing on the protest before the secretary of state. In the district court among the grounds of a motion to dismiss is one that the protest was not under oath. The record shows (folio 117) that, when the motion to dismiss was on hearing, counsel for the protestants stated that the notary who subscribed the jurat was in court, and that counsel wished to show by the notary that an oath was, in fact, administered. On objection by counsel for petitioners, the court denied the application, stating that he found the verification to be under oath. The general rule is that affidavits may be amended both as to formal defects and as to substance (1 Ency. Pl. & Pr. 336); and an affidavit defective for lack of a jurat may be reformed on a showing that it was made under oath (Re Cusick's Appeal, 136 Pa. 459, 20 Atl. 574, 10 L. R. A. 228). The jurat is no part of the affidavit, simply an officer's entry, and can be amended *nunc pro tunc*. *Veal v. Perkerson*, 47 Ga. 92.

There is nothing peculiar about the affidavit required in such a case as this which should exempt it from the general rule. Not having objected on this ground before the secretary of state, and having objected when the offer to amend the affidavit was made in the district court, the petitioners should be held to have waived the objection.

Of course, if a verification in due form must be attached to the protest to give jurisdiction to hear the protest, as the majority opinion holds, the fact that the protestants made oath to the protest would avail nothing, and there could be no waiver. But I find nothing in the statute nor in the nature of the proceeding to justify that conclusion. The purpose of the requirement manifestly is to prevent reckless and baseless charges against a petition, and that purpose is subserved by the requirement of an oath, and not by the officer's certificate that the oath was administered.

In *Miller v. Caraker*, 9 Ga. App. 255, 71 S. E. 9, the court said:

"None of the American courts, so far as our investigation goes, has ever given any great

weight to mere form in these matters, and it is well recognized in this state that no particular form is required, provided the facts sworn to are committed to writing and signed by the affiant, if, as a matter of fact, the oath was administered. * * * The affidavit is therefore good, provided: (1) That there is a written statement; (2) that the oath is administered to the affiant; and (3) that he signs the statement."

The statement that an oath was taken, cannot then, be jurisdictional, and so to hold is to indulge in a strict construction of the statute, for which there is no good reason, and so defeat its plain purpose. Moreover, if the law be fairly interpreted, the verification may be held sufficient, and it should be so held. The verification contains the statement that each of the persons therein named "deposes and says," and counsel for protestants urge that the word "deposes" means to state under oath. The opinion ignores this contention, so far as any discussion of it is concerned, and determines the case on the ground that "the certificate does not show that the signers even deposed before the officer." If "depose" in common usage means to state under oath, then the statement in the affidavit is equivalent to the usual form "being sworn says," or "under oath says." That it does so mean will appear from an examination of the authorities, and, so meaning, it is sufficient despite the supposed defect in the certificate. As to the first of these propositions it is sufficient to say that it is supported by the definition of "depose" in all the leading lexicons.

One of the definitions of "depose" given in Webster's New International Dictionary is:

"To say under oath, testify; especially to give witness of by an affidavit or other sworn statement in writing."

The Century Dictionary defines it as:

"To give testimony on oath, especially to give testimony which is embodied in writing in a deposition or an affidavit."

The Standard Dictionary, Worcester's Dictionary, Richardson's English Dictionary, Anderson's Law Dictionary, Black's Law Dictionary, Bouvier's Law Dictionary, and Cyc. all define the word "depose" in substantially the same way as meaning to state under oath, to give testimony by affidavit or deposition.

From the foregoing definitions it appears that the word "depose," used as it is in this case, is sufficient to justify a conclusion that the statement was made under oath. Indeed, the derivation of the word naturally gives it that effect, it being from the Latin verb "depono" to place, and meaning, as originally used, that the person named placed ("deponit") his hands on the Bible, thus making his statement under oath. It does not, then, require any strained construction of the language of the verification to hold it sufficient; and, in the light of the definitions above quoted, it is difficult to see how it can fairly be denied that from the entire instrument the statements in the verification appear to have been made under oath. If it

can be so determined the matter of form is not material. And this is true whether the supposed defect be in the body of the affidavit or in the jurat.

In *Mitchell v. Surety Co.* (D. C.) 206 Fed. 807, an affidavit was attacked because in the body of it there was no statement that the affiant was declaring under oath. On a full review of the authorities the court held the affidavit good.

In *Corpus Juris*, vol. 2, p. 362, it is said:

"The jurat must show that the affidavit was sworn to by affiant in the officer's presence. But a literal statement to this effect is usually not required if it appears from the entire instrument that the oath was taken."

This authority supports also my second proposition, which is that the verification is not bad because the certificate of the officer does not definitely state that the signers "deposed" before him.

That such statement in the certificate is necessary is the basis of the majority opinion; yet no authority is cited to the point except the case of *Palmer v. McCarthy*, 2 Colo. App. 422, 31 Pac. 241, and this court has pointed out that it is not clear whether the affidavit was there held bad because the court concluded no oath had been administered, or because the certificate that the oath was administered by the deputy clerk was not in compliance with the statute. *Halbouer v. Cuenin*, 45 Colo. 509. Such a holding is in direct conflict with the rulings of other courts. *Cross v. People*, 10 Mich. 24; *In re Teachout*, 15 Mich. 346; *Black v. M. & St. L. Ry. Co.*, 122 Iowa, 32, 96 N. W. 984; *Clement v. Bullens*, 159 Mass. 193, 34 N. E. 173; *Hosea v. State*, 47 Ind. 180.

In *Trice v. Jones*, 52 Miss. 138, it was held that an affidavit appearing by its language to have been made under oath was good, though the jurat contained only the recital: "Given under my hand and seal."

In *Loeb v. Smith*, 78 Ga. 504, 3 S. E. 458, speaking of this question, the court said:

"It is not necessary that it should be stated in the instrument, prior to the signature of the affiant, that the declaration was made under oath, if in fact the oath was administered."

In *Bickerdike v. Allen*, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782, it is held that an affidavit containing an averment that it was made under oath is good, though the jurat contained only a statement that it was subscribed before the officer.

Applying these authorities to this case, and it follows, since the word "depose" in the body of the verification means stating under oath, that it was not necessary for the notary to state specifically that it was made under oath, and hence the verification is sufficient.

I conclude, then, that with abundant authority for holding the verification good, and in the face of the fact that the secretary of state, upon a hearing lasting for several days, has found and announced that the petition was "insufficient in the number of sig-

natures of qualified electors, as well as insufficient in form as regards residence addresses and other matters required by the law," this court, interpreting a provision of the statute plainly intended to prevent fraud in referendum petitions, and promote the public interest, has rejected a well-known meaning of a word in the verification, and applied a strict rule of construction for which no authority is presented, and thus defeated the purpose of the law.

The further holding that the secretary of state has no power to act independently of the statute is sustained neither by precedent nor on principle. The grounds for this holding are supposed to be found in the constitutional provision that a petition with the prescribed verification "shall be prima facie evidence that the signatures thereon are genuine and true, and that the persons signing the same are qualified electors." This is to give to the words "prima facie" a new and startling effect. I had supposed that their meaning was well understood as being "on first appearance," or "first sight," following their literal meaning. In this connection they in no wise limit the power of the secretary of state. On the contrary, this provision is clearly intended to relieve him of the duty of determining the genuineness of the signatures, etc.; and he is now authorized—not compelled—to accept a petition and submit it without any investigation as to the signatures. It is prima facie good, but if the signatures are questioned their genuineness may be determined. Prima facie evidence of a fact is in law sufficient to establish the fact, unless rebutted. *Kelly v. Jackson*, 6 Pet. 622, 8 L. Ed. 523.

Is it to be supposed that the people in adopting this constitutional amendment intended to require the secretary of state to submit every law upon which a referendum was sought by a petition with the requisite number of signers, regardless of his knowledge of the insufficiency of the petition? This constitutional amendment was adopted in November, 1910, and the legislation providing a procedure therefor was approved May 8, 1913. In the meantime the right of initiating and the right of referring laws had been several times exercised by the people. No objection could be made to the exercise of those rights at that time, because the amendment, by providing that general laws shall govern until a procedure should be provided by legislation, clearly recognized the right to file such petitions before any general procedure has been provided therefor. Yet, according to the majority opinion, until a procedure had been provided, the secretary of state, and the people as well, were powerless to prevent the submission of any law, or all the laws enacted by the General Assembly, if petitions for submission, good on their face, were filed, though their fraudulent character was well known.

By the statute of 1913, if any elector has

doubts of the validity of any petition so filed, he may, by filing a verified protest, have the validity of the petition determined; but, if the court is right in its conclusions, the secretary of state, though he may have positive knowledge that the petition is honey-combed with fraud, can of his own motion make no investigation of the matter. Under oath to obey the laws and support the Constitution he must file a petition which he knows does not meet the requirements of this section, and which is therefore no petition in the eye of the law. To base such a conclusion on language which merely makes the submission of evidence of the validity of the petition unnecessary in the first instance would seem to require some argument for its support. Yet no reason is given for it.

It can hardly be seriously contended that the people intended by adopting this amendment to the Constitution to place the secretary of state in such an anomalous position, as is above suggested, pending legislation on the question of procedure. Yet, if the secretary of state had any authority in the premises before the procedure was provided, it was derived from the Constitution, and the statute did not take it away. He did have that right; he exercised it, and no one questioned his authority. On July 5, 1913, before the act of May 8, 1913, was in force, a petition to refer the act creating the county of Alamosa was filed in the office of the secretary of state. He rejected it, and the petitioners then obtained from the district court of the city and county of Denver an alternative writ of mandamus to compel him to submit it. Judge Perry, on a careful examination of the signatures, and a hearing on evidence, found that there were over 1,600 names on the petition which were fraudulent; that it could be seen by inspection that they had been written in groups, each group by the same person; and he sustained the secretary of state in his rejection of the petition.

Again, when a petition for a reference of the act creating the board of public utilities was filed in 1913, no procedure having at that time been provided, the people, on the relation of the Attorney General, applied to the district court for an injunction, on the ground that the secretary of state was about to submit the act on a petition not sufficient in law. On a hearing before Judge Allen he found that many of these signatures were forged, and granted the injunction. According to the majority opinion those petitions, thus judicially determined to be fraudulent and invalid, should have been accepted and made the basis for suspending valid laws, and imposing on the state the expense attendant upon their submission to a vote of the people.

It may be confidently asserted that until the present case arose the right of the secretary of state to reject a petition, if he was

satisfied of its invalidity, was unquestioned. To deny him that right is to make the words "prima facie" equivalent to "conclusive," and to compel an officer of the state to aid in perpetrating a fraud upon the law with full knowledge of the fact.

The majority opinion rejects most obvious and seemingly necessary conclusions, and decides questions of the most serious import to the people without citing authority or giving reasons therefor.

The length of this opinion is justified, I trust, by the importance of the questions involved, and the depth of my conviction that they have not been rightly determined.

HEWEY v. ANDREWS et al.

(Supreme Court of Oregon. Sept. 19, 1916.)

1. APPEAL AND ERROR \S 346(2) — TIME TO APPEAL—COMPUTATION.

Where defendant moved for judgment non obstante veredicto, such motion would not ordinarily suspend the running of the limitation for appeal, in view of L. O. L. \S 201, requiring judgment in conformity with the verdict to be entered on the day of the verdict; but, where the original judgment was modified by dismissal as to one defendant, the appeal time for another defendant runs from the second judgment, and appeal within 60 days thereof is in time.

[Ed. Nota.—For other cases, see Appeal and Error, Cent. Dig. \S 1891; Dec. Dig. \S 346(2).]

2. TIME \S 10(9)—COMPUTATION—SUNDAY.

Where the last day for perfecting appeal fell on Sunday, notice was properly filed the next day, under L. O. L. \S 531, as to computation of time.

[Ed. Nota.—For other cases, see Time, Cent. Dig. \S 48, 52; Dec. Dig. \S 10(9).]

In Banc. Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Action by Sam Hewey against C. S. Andrews, Lillie M. Andrews, and others. Judgment for plaintiff against C. S. and L. M. Andrews was modified to run against C. S. Andrews only, and he appealed. On motion to dismiss the appeal. Motion denied.

W. H. Wilson, of The Dalles, for the motion. Ralph R. Duniway, of Portland, opposed.

MOORE, C. J. This was an action by S. Hewey against C. S. Andrews, Lillie M. Andrews, Clarence L. Look, and Ethelda M. Look, to recover the balance of an alleged commission for services rendered by the plaintiff in effectuating the sale of land. The cause was tried and a verdict of \$1,727.50 returned February 16, 1916, against C. S. Andrews and Lillie M. Andrews, whose counsel, invoking the rule established in *Fisk v. Henarie*, 14 Or. 29, 13 Pac. 193, *Wilson v. Blakeslee*, 16 Or. 43, 16 Pac. 872, *Thomas v. Barnes*, 34 Or. 416, 56 Pac. 73, and *North Pacific Lumber Co. v. Spore*, 44 Or. 462, 75 Pac. 890, moved for a judgment dismissing the action notwithstanding the verdict, on the ground that the obligation sued on was

joint, and that as the trial was had and the verdict returned as to only two of the defendants, no valid judgment could be predicated thereon. This motion was denied March 1, 1916, by a judgment, a part of which reads:

"Thereupon it is hereby ordered that the judgment heretofore given and made in this court and cause on the 18th day of February, 1916, be and the same is hereby set aside, vacated, and held for naught as to the defendant Lillie M. Andrews, but the same is continued in full force and effect as to the defendant C. S. Andrews, and that this cause be, and the same is hereby, dismissed as to the defendants Lillie M. Andrews, Clarence L. Look, and Ethelda M. Look, and that the defendant Lillie M. Andrews have and recover of and from the plaintiff her costs and disbursements in this action to be taxed."

[1] In order to review the latter determination C. S. Andrews, on April 29, 1916, served a notice of appeal, and filed it May 1st following. The plaintiff's counsel move to dismiss the appeal on the ground that it was not taken within the 60 days limited therefor. The statute regulating the recording of final determinations by a circuit court reads:

"If the trial be by jury, judgment shall be given by the court in conformity with the verdict and so entered by the clerk within the day on which the verdict is returned." L. O. L. § 201.

Under the provisions of this enactment a motion to set aside a verdict and for a new trial will not ordinarily suspend the running of the statute of limitations as to the time limited for taking an appeal. *Barde v. Wilson*, 54 Or. 68, 102 Pac. 301; *Oldland v. Oregon Coal & Nav. Co.*, 55 Or. 340, 99 Pac. 423, 102 Pac. 596; *Colgan v. Farmers' & Mechanics' Bank*, 59 Or. 469, 106 Pac. 1134, 114 Pac. 460, 117 Pac. 807; *Macartney v. Shipherd*, 60 Or. 133, 117 Pac. 814, Ann. Cas. 1913D, 1257; *Gearin v. Portland Ry., L. & P. Co.*, 62 Or. 162, 124 Pac. 256; *Hahn v. Astoria National Bank*, 63 Or. 1, 114 Pac. 1134, 125 Pac. 284; *De Lore v. Smith*, 67 Or. 304, 132 Pac. 521, 136 Pac. 13, 49 L. R. A. (N. S.) 555; *Skelton v. Newberg*, 76 Or. 126, 136, 148 Pac. 53. Where, however, the original judgment is modified by a subsequent order, the date of the latter judgment is the time from which the limitation for taking the appeal should begin to run. In this instance the judgment was not altered as to C. S. Andrews, but if he were dissatisfied with the dismissal of the action as to Lillie M. Andrews, he would have been obliged to appeal from that determination, notwithstanding he may have taken an appeal from the original judgment. This procedure, if sanctioned, would necessitate two appeals by the same party when a single review of the final judgment by him ought to be sufficient, in which appeal the intermediate order could be reviewed. L. O. L. § 558. We conclude, therefore, that the original judgment, having been set aside in part, was in effect vacated in all particulars, and that the modi-

fied judgment, by referring to the preceding determination, incorporated therein the original judgment as to C. S. Andrews, thus making the latter judgment final, and the one from which this appeal was properly taken.

[2] By the statutory method of computing time the last day thus limited for perfecting the appeal was April 30, 1916; but, as that day was Sunday, the notice was properly filed the next day. L. O. L. § 531.

The motion to dismiss the appeal is denied.

MILLER v. STATE INDUSTRIAL ACCIDENT COMMISSION.

(Supreme Court of Oregon. Sept. 19, 1916.)

APPEAL AND ERROR \S 374(4)—NECESSITY OF BOND—APPEAL BY STATE COMMISSION—"INTERESTED."

The state is "interested" in an appeal by the Industrial Accident Commission from an order reversing its disposition of a claim for workmen's compensation, so that no appeal bond need be filed, in view of L. O. L. § 578, providing that the state, when a party or "interested," shall not be required to furnish bond on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2008-2010; Dec. Dig. \S 374(4).

For other definitions, see Words and Phrases, First and Second Series, Interest.]

In Banc. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Proceedings by George Miller for workman's compensation before the State Industrial Accident Commission. From a judgment reversing the order of the Commission, the Commission appealed. On motion to dismiss the appeal. Motion denied.

Joseph A. Benjamin, Asst. Atty. Gen., for appellant. Eugene Bland, of Findlay, Ill., and James H. McMenamin, of Portland, for respondent.

PER CURIAM. This is an appeal by the defendant from a decision of the circuit court of Multnomah county, Ore., reversing an order of the commission as to the validity of the plaintiff's claim for compensation for an injury sustained while he was employed as a carpenter working on a building in the city of Portland. The plaintiff's counsel move to dismiss the appeal because no undertaking has been filed. Section 578, L. O. L., reads:

"In all actions or proceedings in any court in this state in which the state of Oregon is a party, or interested therein, it shall not be required to advance any costs in any such action or proceeding; and that the state shall not be required to furnish any bond or undertaking upon appeal or otherwise in any such action or proceeding."

The state of Oregon is interested in the orders made by its commissions, and for that reason no undertaking on appeal was necessary in this cause.

The motion is denied.

NEILSON v. TITLE GUARANTY & SURETY CO.

(Supreme Court of Oregon. Sept. 19, 1916.)

1. APPEAL AND ERROR ¶671(1)—RECORD—REVIEW.

On an appeal presented upon a record embracing only the pleadings and the findings of the trial court, the only question involved is whether the judgment appealed from is supported by the facts ascertained by the court and the admissions found in the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2867; Dec. Dig. ¶671(1).]

2. PRINCIPAL AND SURETY ¶59—LIABILITY OF SURETY COMPANY—CONSTRUCTION.

The rule of strictissimi juris, usually available to sureties without compensation, is generally relaxed when applied to a paid surety, so that a bonding company must show that its rights have been injuriously affected before it can defeat its contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. ¶59.]

3. PRINCIPAL AND SURETY ¶117—CLEARING CONTRACT—DISCHARGE OF SURETY—UNAUTHORIZED PAYMENTS TO PRINCIPAL.

Under a contract to clear and plow a tract at a certain price per acre, aggregating a certain amount for the entire work, and stipulating that on or before the 5th day of each month the owner or his agent should pay to the contractor the amount then due for work completed upon an estimate made by the owner or his agent, secured by a surety bond, providing that on default of the principal the surety might complete the contract, and should be subrogated to the rights and properties of the principal, including deferred payments and credits due the principal at default, or to become due thereafter, the owner's payment of nearly one-half of the contract price on demands of the contractor, and without any information on which to make a real estimate, made before the contract was abandoned and when no part of the work was entirely completed and when not an eighth part of it was done, was such a payment as to relieve the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. ¶117.]

Department No. 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Suit by William Neilson against the Title Guaranty & Surety Company. Judgment for plaintiff, and defendant appeals. Reversed, and defendant surety company granted a judgment for costs and disbursements.

The plaintiff, William Neilson, owned 12 lots in a tract of land known as "Buena Vista Orchards" in Wasco county, Or. On July 20, 1911, C. Masters contracted to clear and plow all the lots, and was to receive \$5,700, "or \$71.25 per acre," for certain designated lots, and \$400 for the work to be done on the remaining lots, aggregating \$6,100 for the entire work which the parties agreed "shall be completed not later than February 1, 1912." It was also stipulated that:

"On or before the 5th day of each month the said William Neilson, or his duly appointed agent, shall pay to the contractor the amount then due for work completed; the estimate

shall be made by said William Neilson or his duly appointed agent."

In order to indemnify Neilson for any loss which he might sustain on account of any breach of the contract by Masters, the latter as principal, and the Title Guaranty & Surety Company, a corporation engaged in the bonding business, as surety, gave to Neilson a bond in the penal sum of \$6,100. It is provided in the bond that in case of default on the part of the principal, the surety shall have the right to complete the contract and "shall be subrogated and entitled to all the rights and properties of the principal arising out of the said contract and otherwise, including all securities and indemnities therefor received by the obligee, and all deferred payments, retained percentages and credits, due to the principal at the time of such default, or to become due thereafter by the terms and dates of the contract."

Alleging that Masters violated the contract in various particulars, and that "during the month of February, and after the term had lapsed within which said contract was to be performed, said defendant C. Masters further breached and broke said contract by abandoning" the work, leaving certain of the lots only partially cleared, the plaintiff commenced this action on the bond against the principal and surety. Masters did not appear, but the surety answered and alleged that it had been discharged from any liability because Neilson had paid Masters sums of money at various times without making any estimate, and without regard to the amount of work completed, and that approximately one-half of the contract price had been paid, although no part of the work was ever completed. The parties consenting, the cause was tried by the court without a jury. After hearing the evidence the trial judge made findings of fact, upon which Neilson was awarded a judgment against the surety for \$6,100, and the latter appealed.

J. R. Latourette, of Portland (Latourette & Latourette and Emmons & Webster, all of Portland, on the brief), for appellant. Hugh Montgomery, of Portland (Robt. J. Upton and Platt & Platt, all of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). In addition to what has already been stated a recital must be made of some of the facts found by the trial court, for the reason that the surety contends that it is entitled to a judgment on those facts. Neilson paid \$100 to Masters on September 5, 1911, \$400 on October 3d, and \$500 on November 1st, upon estimates of the work completed as provided in the contract. On November 18, 1911, however, Neilson departed for Boston and New York City, where he remained continuously until the following March, and while there he sent \$500 to Masters on De-

ember 5th, \$200 on December 11th, and \$1,200 on January 2d. In the language of the trial court all the "payments made during Neilson's absence were based upon estimates made by Neilson himself, and that said estimates so made by him were based solely upon his knowledge of the conditions of the work obtained before his departure for the East, together with information contained in the above letters from King and Masters, which said letters contained all and the only information Neilson received of the work completed during his said absence," and the surety "did not consent to any payment other than as the contract provided."

The letters referred to in the quoted finding embrace several communications from Masters and one letter from King, who "was Neilson's sole agent about said work." Under date of November 23, 1911, Masters wrote to Neilson for \$700, saying that the necessary expenses will "keep me going some to make that cover it," and upon receipt of this letter Neilson sent a payment of \$500 to Masters. On December 5th, Masters wired to Neilson that he needed \$200 more to meet bills coming due, and Neilson then sent \$200. On December 24th, Masters wrote to Neilson, giving a statement of his expenses for the month of December, and also stated that he would need \$1,700, and on January 2, 1912, upon receipt of this letter, Neilson sent two drafts to King, one for \$1,200 and the other for \$500, with instructions to deliver the \$1,200 draft to Masters, "and if the work is half done," to deliver the \$500 draft. The letter with which the drafts were inclosed concluded with a direction to King to "send me at once a detailed statement of the present condition of the clearing and your own estimate of the time necessary to complete it." King "determined that one-half of the work had not been completed," and returned the \$500 draft to Neilson. The single letter received from King was dated December 4, 1911, and did not contain any information which would enable Neilson to estimate the work completed. Masters breached the contract in various particulars, and finally abandoned the work, and "not one-eighth part of the work was ever done by him."

[1-3] The appeal is presented upon a record which embraces only the pleadings and findings made by the trial court, and consequently the only question involved is whether the judgment appealed from is supported by the facts ascertained by the circuit court and the admissions found in the pleadings. *Miller v. Head Camp*, 45 Or. 192, 77 Pac. 83; *Humphry v. Portland*, 79 Or. 430, 154 Pac. 897. The surety argues that it is discharged from liability because Neilson made payments to Masters without making estimates and without regard to the work completed. It will be recalled that Neilson agreed to pay to Masters on or before the 5th day of each month "the amount then due for work com-

pleted," and it was further stipulated that "the estimate shall be made by said William Neilson or his duly appointed agent." The September, October, and November payments, aggregating \$1,000, were based upon estimates which were duly made by Neilson. On November 18th, Neilson went to New York and Boston, and while there made the remaining payments, aggregating \$1,900. He had no personal knowledge of the conditions existing after November 18th, and was without information concerning the progress of the work, except as revealed by the communications from Masters. The telegram and letters from the contractor were urgent appeals for money to meet expenses rather than statements of work done or estimates of work completed, and the remittances made by Neilson were based upon the indebtedness incurred by Masters rather than upon the work completed by him. The letter written by Neilson on January 2d, plainly shows that he was without knowledge of the conditions then existing, and could not make an estimate of the work completed; and yet, in spite of his lack of information concerning the work completed, he instructed King to deliver to Masters the \$1,200 draft, with the result that when Masters abandoned the contract in the following February, Neilson had paid to him nearly one-half of the entire contract price, notwithstanding "no part of the work was ever entirely completed," and "not one-eighth part of the work was ever done."

The rule of *strictissimi juris*, which is usually available to those who become sureties without compensation, is generally relaxed when applied to a paid surety, and in this, as well as in most jurisdictions, a hired bonding company must show that its rights have been injuriously affected before it can defeat its contract of suretyship. *Broes v. McNicholas*, 66 Or. 42, 48, 133 Pac. 782, Ann. Cas. 1915B, 1272; *Atlantic Trust & Deposit Co. v. Town of Laurinburg*, 163 Fed. 690, 90 C. C. A. 274. The contract between Neilson and Masters contemplated an approximate judgment of the work completed, and the agreement was not observed when the owner made payments based on the expenses incurred by the contractor and without regard to the work completed. *Fidelity & Deposit Co. v. Agnew*, 152 Fed. 955, 82 C. C. A. 103; *O'Neill v. Title Guaranty & Trust Co.*, 191 Fed. 570, 113 C. C. A. 211; *Board of Com'rs v. Branham (C. C.)* 57 Fed. 179. Payment of substantially one-half the entire contract price, when less than one-eighth of the work had been done, is such an excessive overpayment "that it may be accepted as self-evident that the alteration by the plaintiff proved prejudicial to the surety." *Justice v. Empire State Surety Co.*, 218 Fed. 802, 804, 134 C. C. A. 490, 492. The contract undertaken by Masters was either a losing or a profitable venture, but in either event the excessive overpayment reduced the amount

to be paid for work yet to be done, and to the extent of such excess impaired the security which was available to the surety when Masters abandoned the contract. By his own conduct Neilson not only weakened one of the incentives for Masters to complete his contract, but he also materially lessened the security to which the bonding company was entitled, and therefore by his own conduct the plaintiff has injuriously affected the rights of the bonding company, so that the latter is now released from liability. *Calvert v. London Dock Co.*, 2 Keen, 638; *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *Black Masonry, etc., Co. v. National Surety Co.*, 61 Wash. 471, 112 Pac. 517; *Justice v. Empire State Surety Co. (D. C.)* 209 Fed. 105; *Id.*, 218 Fed. 802, 134 C. C. A. 490; *O'Neill v. Title Guaranty & Trust Co.*, supra; *Fidelity & Deposit Co. v. Agnew*, supra; *Wells v. National Surety Co.*, 222 Fed. 8, 137 C. C. A. 546. The judgment appealed from is reversed, and the surety is granted a judgment for its costs and disbursements.

MOORE, C. J., and BEAN and BENSON, JJ., concur.

FLEMING v. GERLINGER MOTOR CAR CO. et al.

(Supreme Court of Oregon. Sept. 19, 1916.)

APPEAL AND ERROR § 624—BOND—JUSTIFICATION OF SURETIES—TIME TO FILE TRANSCRIPT.

L. O. L. § 550, subd. 2, allows respondent five days in which to except to the sureties on appeal. Subdivision 4 provides that appeal shall be deemed perfected on expiration of time allowed to except to the sureties, or from their justification. Section 554 provides that on perfection of appeal, appellant shall, within 30 days thereafter, file a transcript. *Held*, that where by agreement plaintiff deposited a certain sum in case the judgment was affirmed, whereupon exceptions to the sureties were waived, it constituted a justification, and an order, extending time to file transcript, made within 30 days from the time exceptions to the sureties were overruled, was properly granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. § 624.]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by J. C. Fleming against the Gerlinger Motor Car Company and another. Judgment dismissing the action, and plaintiff appealed. On motion to dismiss the appeal. Motion denied.

C. M. Idleman, of Portland, for appellant. Maurice Seitz and Leon W. Behrman, both of Portland, for respondents.

PER CURIAM. A judgment dismissing this action was rendered February 4, 1916, and on April 4th following the plaintiff served and filed a notice of appeal and an under-

taking therefor. The defendant's counsel, on April 17, 1916, excepted to the sufficiency of the sureties on the undertaking, which exceptions were overruled on the 27th of that month. The trial court, on May 27, 1916, made an order extending the time to June 3, 1916, in which to file a transcript in this court, and the transcript was filed within the time so limited. The defendant's counsel moved to dismiss the appeal on the ground that jurisdiction of the attempted review of the judgment had been lost when such order was made. The statute declares that within ten days from the serving of a notice of appeal the appellant is required to serve upon the adverse party and file an undertaking on appeal. The respondent is allowed five days after the service of the undertaking in which to except to the sureties thereon. L. O. L. § 550, subd. 2. "From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof if excepted to, the appeal shall be deemed perfected." *Id.* subd. 4. "Upon the appeal being perfected, the appellant shall, within thirty days thereafter, file with the clerk of the appellate court a transcript," etc. *Id.* § 554.

It appears from an affidavit filed herein that by agreement with defendant's counsel the plaintiff deposited with the clerk of the trial court the sum of \$100 as costs and disbursements in case the judgment was affirmed on appeal, whereupon the exceptions so interposed were waived. This procedure was equivalent to a justification by the sureties, and the order of the trial court, extending the time to file the transcript, was made within 30 days from the time the exceptions were overruled, and while that court had jurisdiction of the cause.

The motion to dismiss the appeal is therefore denied.

VAN ZANDT v. PARSON et al.

(Supreme Court of Oregon. Sept. 26, 1916.)

1. APPEAL AND ERROR § 414 — NOTICE OF APPEAL—ADVERSE PARTY.

An "adverse party," with reference to the right to service of a notice of appeal, is a plaintiff or defendant in an action or suit whose interest in regard to the judgment or decree appealed from is in conflict with a reversal or modification of the final determination sought to be reviewed, and includes one whose discharge in bankruptcy would be thereby affected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. § 414.]

For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

2. JUDGMENT § 828(1) — CONCLUSIVENESS — STATE COURT—EFFECT IN FEDERAL COURT.

A judgment or decree of a state court in an action in which a trustee in bankruptcy is a party and appears and contests the bankrupt's property rights is conclusive upon the latter's estate, and estops his creditors from controverting such final determination even in the federal

court which has secured jurisdiction of the bankruptcy proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1504; Dec. Dig. ¶ 828(1).]

3. BANKRUPTCY ¶ 295—TRUSTEE—ACTION IN STATE COURT.

A trustee in bankruptcy may sue in the state court, and where he does so to recover fraudulently conveyed property or property otherwise recoverable, he is entitled to all remedies and all relief which would be afforded any other party litigant under the same facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 414, 417; Dec. Dig. ¶ 295.]

In Banc. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Harry M. Van Zandt against A. M. H. Parson, Ralph Wills, George Patterson, and Lee Armstrong, in which Parson deposited money into court and was dismissed, and in which, on motion of defendants Wills and Patterson, Frances J. Van Zandt and Robert E. Hitch, her trustee in bankruptcy, were made codefendants. Suit dismissed as to defendant Armstrong, decree for plaintiff, and defendants Wills, Patterson, and Hitch appeal. Appeal dismissed.

Harry Van Zandt commenced this suit to recover from A. M. H. Parson the remainder due upon the sale of an automobile and to foreclose a vendor's lien thereon. Ralph Wills, George Patterson, and Lee Armstrong were made codefendants; the complaint charging that they had or claimed some interest in or lien upon the car, which qualified right of property was inferior to plaintiff's lien. Parson, pursuant to a stipulation that \$334.60 was due on account of the purchase of the automobile, deposited that sum with the clerk of the court to abide the final determination as to who was entitled to the money, whereupon the plaintiff executed a formal transfer of the car to Parson who took no further part in the suit. Thereafter the defendants Wills and Patterson moved for an order making the plaintiff's mother, Frances J. Van Zandt, and her trustee in bankruptcy, Robert E. Hitch, codefendants on the ground that they were necessary parties. The supplemental affidavit of Wills asserts facts tending to show that, though the contract for the sale of the automobile was made with the plaintiff, his mother at that time was the owner of the car, and her creditors were entitled to the sum of money so on deposit. The trustee in bankruptcy, pursuant to an order of the United States District Court for the District of Oregon, in which such proceedings were pending, and by sanction of the state court in which this suit was instituted, was made a party defendant, as was also Mrs. Van Zandt. The latter filed an answer admitting the averments of the complaint and alleging that at all times mentioned in the primary pleading the plaintiff was the owner of the automobile, and that she never had or claimed any interest therein

or right to the proceeds of the sale thereof.

The suit was dismissed as to Armstrong. Wills, Patterson, and Hitch filed an answer denying some of the averments of the complaint and alleging facts tending to show that Mrs. Van Zandt was the owner of the car when the contract for the sale thereof was made by the plaintiff, and that her creditors were entitled to the money remaining due on account of the sale of the car. The prayer of the answer is to the effect that Mrs. Van Zandt be declared to be the owner of the automobile, and that the money left with the clerk be paid over to the trustee for distribution among her creditors. The reply denies the allegations of new matter in the answer. Based upon these issues, the cause was tried, resulting in a decree for the plaintiff that he was entitled to the money so left with the clerk. From this decree Wills, Patterson, and Hitch undertake to appeal, but did not give any notice in open court at the time the decree was rendered, or serve a notice of appeal upon the defendant Frances J. Van Zandt.

Robert E. Hitch and Barge E. Leonard, both of Portland, for appellants. W. B. Shively, of Portland, for respondent.

MOORE, C. J. (after stating the facts as above). [1] The plaintiff's counsel move to dismiss the appeal on the ground that Mrs. Van Zandt is an adverse party, and, not having been served with a notice of appeal, this court has no jurisdiction of the cause. An adverse party is a plaintiff or defendant in an action or suit whose interest in regard to the judgment or decree appealed from is in conflict with a reversal or modification of the final determination sought to be reviewed. *Hamilton v. Blair*, 23 Or. 64, 31 Pac. 197; *The Victorian*, 24 Or. 121, 32 Pac. 1040, 41 Am. St. Rep. 838; *Moody v. Miller*, 24 Or. 179, 33 Pac. 402; *Osborn v. Logus*, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; *Stuller v. Baker County*, 30 Or. 294, 47 Pac. 705; *Conrad v. Packing Co.*, 34 Or. 337, 49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021; *Kramer v. Marsh*, 49 Or. 417, 90 Pac. 583; *Hafer v. Medford*, etc., R. Co., 60 Or. 354, 117 Pac. 1122, 119 Pac. 337; *State v. McDonald*, 63 Or. 467, 128 Pac. 835, Ann. Cas. 1915A, 201; *Barton v. Young*, 152 Pac. 876; *D'Arcy v. Sanford*, 159 Pac. 567.

[2, 3] A text-writer in discussing the rights of a trustee in bankruptcy says:

"He may sue in a state court." Remington, *Bankruptcy*, § 1721.

This author in another section observes:

"Where the trustee resorts to the state court to recover fraudulently conveyed property or property otherwise recoverable, he is entitled to all remedies and all relief that would be afforded any other party litigant under the same facts." *Id.* § 1760.

A judgment or decree given or rendered by a state court in an action or suit in which a

trustee in bankruptcy is a party and who appears and contests the property rights of the bankrupt is conclusive upon the latter's estate and estops the creditors from controverting such final determination even in the federal court which has secured jurisdiction of the bankruptcy proceeding. Thus in the case of *In re Tiffany* (D. C.) 147 Fed. 314, decided August 15, 1906, it was held that the judgment of a state court, in a suit brought by a bankrupt's trustee, refusing to set aside a transfer of property made by the bankrupt as fraudulent, concludes creditors, who cannot thereafter set up the same ground to defeat the bankrupt's discharge. It was ruled in the case of *In re Seavey* (D. C.) 195 Fed. 825, that where a bankrupt's trustee instituted proceedings in a state court to set aside as fraudulent an assignment of an alleged interest in certain property under the will of her grandfather, and to establish his right thereto as trustee, and the bankrupt duly defended such action, in which the trustee was successful, the judgment, in the absence of an appeal therefrom, was conclusive, and could not be collaterally attacked or reviewed for error in the bankruptcy proceeding. So, too, a transfer by a bankrupt, while insolvent, to his wife of property which he omits from his schedule constitutes a concealment of his assets and defeats his right to a discharge. *In re Graves* (D. C.) 189 Fed. 847.

If this court has jurisdiction of the appeal, and upon a review of the evidence should conclude that Mrs. Van Zandt was the owner of the automobile when the contract of sale was made, and that her creditors were entitled to the money remaining due on the car, such determination would necessarily preclude her discharge in bankruptcy, thus showing she would be affected by a modification or reversal of the decree, and hence an adverse party. No notice of the appeal having been served upon her, this court did not secure jurisdiction of the cause.

The attempted appeal should therefore be dismissed; and it is so ordered.

FOREMAN v. SCHOOL DIST. NO. 25 OF COLUMBIA COUNTY.*

(Supreme Court of Oregon. Sept. 26, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS §141(4) — TEACHERS — DISCHARGE — STATUTE — "BUT."

Laws 1913, p. 304, § 1, subd. 22, provides that the board shall dismiss teachers only for good cause shown, and if it passes an order to dismiss, the material reason therefor shall be spread on the record by the district clerk. Subdivision 23 provides that a teacher unjustly dismissed may take an appeal from the board's action to the county superintendent, and thence to the superintendent of public instruction, but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies, and that on the trial of a teacher the board, etc., shall give him notice of charges and an opportunity to be heard; and subdivision 7 requires a written contract of hiring to be

made and filed specifying wages, etc. L. O. L. § 3950, authorizes the state board of education to make general rules, one of which required teachers to inculcate correct principles of morality and a proper regard for the government, and section 4057 required the board to provide a United States flag. Plaintiff, having a written contract to teach, and who taught disloyalty to the government and a disbelief in God, and who failed to fly the national flag provided by the board, after a refusal to obey the school directors' instructions, was dismissed. Held, in her action for salary under the contract, that the term "but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies" did not limit the power to dismiss to breaches of the contract of teaching, and that it extended also to acts rendering a teacher undesirable; the word "but" limiting or restraining the effect of something which has before been said, and indicating that what follows is an exception to that which has gone before, and not controlling that which follows it (citing Words and Phrases, First and Second Series, "But").

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 302; Dec. Dig. §141(4).]

2. SCHOOLS AND SCHOOL DISTRICTS §141(5) — TEACHERS — DISMISSAL — NOTICE.

Under such subdivision 22, a minute of dismissal having been made upon a piece of paper, the board's action was not defeated, where it was so made because its clerk was sick, on which account it was not entered in the district clerk's record book.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 304; Dec. Dig. §141(5).]

3. APPEAL AND ERROR §1170(1) — REVERSAL — CONSTITUTIONAL PROVISION.

Where the jury made no mistake in returning a verdict for the school district in a teacher's action for a balance due under a teaching contract, the judgment will be affirmed as required by Const. art. 7, § 3, as amended, notwithstanding any errors that may have been committed during the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. §1170(1).]

Department 1. Appeal from Circuit Court, Columbia County; J. A. Eakin, Judge.

Action by Flora I. Foreman against School District No. 25 of Columbia County. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff and the directors of school district No. 25 of Columbia county agreed in writing "that the said Flora I. Foreman is to teach the public school of district No. 25 for the time of eight months" for \$85 per month, "commencing on the 1st day of September, 1913, and for such services lawfully and properly rendered the directors of said district are to pay to said Flora I. Foreman the amount that may be due according to this contract, on or before the 8th day of May, 1914." After the plaintiff had taught about two months charges against her were filed with the school board, but she was exonerated after a hearing. Some of the patrons of the school were dissatisfied, and caused a recall election to be held on March 21, 1914, for

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion on petition for rehearing, see 159 Pac. 1168.

the purpose of unseating some of the directors. Immediately after the election a meeting of the directors was held, and "it was voted to go to the schoolhouse in a body Monday, the 23d of March and give rulings and instructions to the teachers in regard to their conduct, and it was also decided that, if they do not promise to obey, to give them five days in which to resign." The plaintiff refused to obey the "rulings and instructions" which the directors attempted to give, and because of such refusal she was notified in writing that her contract "has been and is canceled and abrogated to take effect from and after Friday, March 27, 1914." The plaintiff presented herself at the schoolhouse on Monday, March 30th, but the directors refused to permit her to continue teaching. The plaintiff was paid in full for the first seven months provided for in the contract, and she is now attempting to recover \$85, which is the amount she would have received if she had been permitted to teach until the end of the period specified in the contract. The complaint recites the contract, alleges that the plaintiff taught seven months, but was then wrongfully dismissed, and not permitted to teach the eighth month, and concludes with a demand for a judgment for \$85. The answer admits that the teacher was dismissed, and explains the dismissal by alleging that the plaintiff taught her pupils "principles of anarchy and disloyalty to their government, among other things, that the government under which she and they live 'is rotten to the core'"; that she also taught her pupils "that there is no God, and that Jesus Christ is not the Son of God; and that the plaintiff during the entire seven months that she taught under her contract set forth in her complaint performed such services as she rendered in an unlawful and improper manner and in such a way as to disrupt the school and the entire community—which several and many acts of misconduct on her part resulted in numerous and frequent breaches of her contract on her part and made it necessary and the duty of the defendant school board to discharge the plaintiff as such teacher."

A jury trial resulted in a judgment for the defendant, and the plaintiff has appealed.

Albert Streiff, of Portland, for appellant. Glen R. Metsker, of St. Helen, for respondent.

HARRIS, J. (after stating the facts as above). [1, 2] The important problem presented by this litigation arises out of two subdivisions of section 1, c. 172, Laws 1913, and for that reason both subdivisions are here set down in full:

Subdivision 22. "The board shall dismiss teachers only for good cause shown, and in case the board shall pass an order to dismiss, the material reason therefor shall be spread upon the record by the district clerk."

Subdivision 23. "If a teacher is unjustly dismissed, he may take an appeal from the action

of the board in dismissing him to the county superintendent and thence to the superintendent of public instruction, but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies. In the trial of a teacher, when it is sought to dismiss him, as above provided, the board, the county superintendent, or the state superintendent, as the case may be, shall give the teacher due and legal notice of the charges against him and an opportunity to be heard in his own defense in person or by attorney."

The plaintiff takes the position that the dismissal of a teacher is wrongful, unless (1) charges are made with notice and an opportunity for a hearing, and (2) for good cause shown; that the existence of one element alone does not justify the dismissal of a teacher; and that therefore, even though a teacher is discharged for "good cause," the dismissal is nevertheless wrongful, and is not a defense unless it has been preceded by the filing of charges, the giving of notice, and an opportunity to be heard. The defendant argues, however, that if a teacher breaches any of the terms of the contract of teaching, then the school board has the power summarily to dismiss the teacher. When examining this statute to ascertain which contention is correct, it must be borne in mind all the while that, "where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all" (section 715, L. O. L.), and that, "when a general and particular provision are inconsistent, the latter is paramount to the former" (section 716, L. O. L.).

The words "but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies," found in the first sentence of subdivision 23 of section 1, c. 172, Laws 1913, have brought about the variant contentions made by the litigants concerning the effect of the statute. If the quoted words had been omitted then a dismissal for any cause whatsoever would be wrongful in the absence of charges, notice, and an opportunity to be heard. *School Dist. v. McComb*, 18 Colo. 240, 32 Pac. 424; *Hull v. Ind. Dist. of Aplington*, 82 Iowa, 686, 46 N. W. 1053, 48 N. W. 82, 10 L. R. A. 273; *People ex rel. v. Board of Education*, 174 N. Y. 169, 66 N. E. 674; *Kellison v. School Dist.*, 20 Mont. 153, 50 Pac. 421; *Butcher v. Charles*, 95 Tenn. 532, 32 S. W. 631; *Arnold v. School Dist.*, 78 Mo. 226; *Richards v. School Dist. Board*, 78 Or. 621, 153 Pac. 482, L. R. A. 1916C, 789. The language employed by the statute is broad and sweeping and includes more than mere breaches of the contract of teaching. The words "but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies" of necessity imply that the power to dismiss is not limited to breaches of the contract of teaching; and therefore the statute includes delinquencies which may with propriety be divided into two classes: (1) Acts which breach the contract of teaching;

and (2) acts which render a person objectionable or undesirable as a teacher, although the contract of teaching is not breached.

When the school board hires a teacher, a written contract must be made and filed specifying "the wages, number of months to be taught, and time employment is to begin, as agreed upon by the parties," and, "unless otherwise provided in the teacher's contract, it shall be understood that the branches provided for in the state course for the first eight grades shall be taught excepting school law and theory and practice of teaching." Subdivision 7, § 1, c. 172, Laws 1913. The state board of education, in the exercise of the powers conferred upon it by section 3950, L. O. L., among other rules and regulations for the general government of public schools, has prescribed rule XXX which commands that "teachers in the public schools shall, to the utmost of their ability, inculcate in the minds of their pupils correct principles of morality, and a proper regard for the laws of society, and for the government under which they live." Oregon School Laws 1913, compiled by J. A. Churchill, Superintendent of Public Instruction, p. 171. The contract of teaching is made with reference to the provisions of the statute, so that the contractual obligations of the teacher are not necessarily limited to the words found in the written contract, and therefore the contract of teaching includes not only the duties enumerated by the written paper, which for convenience is called the contract, but it also embraces those duties which are imposed under a then existing statute; and if the teacher breaches this contract of teaching, one of the ordinary legal remedies available to the school board, unless some statute declares to the contrary, would be found in the right summarily to discharge the teacher. 26 Cyc. 987.

Assuming, but not deciding, that moral misconduct outside the schoolroom will generally of itself be sufficient to terminate the contract of teaching (26 Cyc. 990), it would nevertheless not be difficult to go further and suggest many acts which, when done outside the schoolroom by the individual, as distinguished from the teacher, would not constitute a breach of the contract of teaching, and yet would be so objectionable that the individual might no longer be desirable as a teacher. For the misconduct of the teacher as such there always has been a legal remedy, but generally for what is done by the individual outside the schoolroom not amounting to a breach of the contract there is ordinarily no legal remedy in the absence of legislation. For the purpose of protecting the public schools, the power to dismiss has therefore been enlarged, and at the same time, for the purpose of protecting the teacher, a mode has been prescribed for the exercise of the enlarged power, so that the school district now has a remedy for a class of misdoings

where before no relief was ordinarily available, and the teacher is at the same time afforded ample protection; and consequently an act may now be "good cause" for a dismissal under the statute notwithstanding no legal remedy existed before the statute. Having in mind the two classes of delinquencies, the rights arising out of them, and the remedies existing or created for them, and following the guidance offered by sections 715 and 716, L. O. L., the statute should be construed to mean that charges must be made and notice and an opportunity for a hearing given, before a teacher can be discharged for an act which does not amount to a breach of the contract of teaching; but for a breach of the contract of teaching the teacher may be dismissed summarily without a hearing because for that breach, in the words of the statute itself, the board shall have the "ordinary legal remedies," and the right of summary dismissal was ordinarily a legal remedy which was available before the statute was enacted.

Text-writers and precedents also support this conclusion. When the word "but" is used as an adversative conjunction, and is employed to fill the position where it is found in the first sentence of subdivision 23 of the statute, the term may limit or restrain the effect of something which has before been said and to indicate that what follows is an exception to that which has gone before (1 Words and Phrases, 926: 1 Words and Phrases [2d ser.] 540; 6 Cyc. 261; Mansfield v. Hill, 56 Or. 400, 411, 107 Pac. 471, 108 Pac. 1007); and therefore what is said before the word "but" does not control that which follows it (Western Union Tel. Co. v. Harris, [Tenn. Ch. App.] 52 S. W. 748).

The conclusion already announced is still further fortified if the examination of the statute is continued. Limiting our view to subdivisions 22 and 23, it will be seen that no mention is made of an appeal by the board or the person making charges against a teacher. Assume that a teacher cannot be dismissed for a breach of the contract of teaching without a hearing, and suppose that after a hearing the board dismisses the teacher, but upon appeal the county superintendent reverses the finding made by the board; then what effect does the finding of the county superintendent have? Can the school board appeal? Subdivision 23 does not say so, although it does permit the teacher to appeal. Does the finding of the county superintendent bind the school board if in truth the teacher has breached the contract, when no appeal by the board is mentioned, and the statute expressly states that for a breach of the contract both the teacher and the board shall have their ordinary legal remedies? The ordinary legal remedy for a breach of a contract of hiring is to discharge the person hired, and the hirer can utterly defeat an action

for damages by pleading and proving the breach and the dismissal.

The plaintiff contends that the board could not dismiss her unless the reason for the dismissal is spread upon the record by the district clerk as required by subdivision 22. Before notifying the plaintiff of the termination of the contract of teaching, the directors held a meeting and duly ordered the dismissal, and according to the testimony of one of the directors:

"That minute was made on different paper because our clerk was sick, and she wasn't fit to be up, and Mr. Joe Lumijarvi wrote down the minutes."

If a minute of the dismissal was actually made upon a piece of paper, the plaintiff cannot defeat the action of the board merely because the clerk was sick, and on that account the minutes of the meeting were written on a piece of paper instead of in the district clerk's record book.

It is not necessary to determine just what acts of misconduct on the part of the teacher or by the individual as distinguished from the teacher constitute a breach of the contract of teaching, because a breach of the contract was shown by the submission of ample evidence in support of the allegation that the plaintiff taught her pupils "disloyalty to their government, among other things, that the government under which she and they live 'is rotten to the core.'" A rehearsal of the evidence could only be a recital of bitter contentions and distracting disturbances. Within two months of her coming charges were made against the plaintiff. After her acquittal one of the directors resigned, and subsequently another was recalled, and on March 30th a serious disturbance occurred at the schoolhouse when the plaintiff and her followers clashed with the school directors. When the directors went to the schoolhouse on March 23d to "give rulings and instructions" to the plaintiff, she said, "I teach as I darn please." The national flag was not flown a single day while the plaintiff occupied the position of teacher, although the board had provided a United States flag in compliance with section 4057, L. O. L.; and an index of her conduct is furnished by the testimony of one of the directors who stated that another director told the plaintiff, "You better raise up the flag," and she says, "I won't do it; if you want the flag, you hoist it up yourself."

[3] The jury made no mistake in returning a verdict for the school district, and their finding is so eminently proper that the judgment should be affirmed notwithstanding any errors that may have been committed during the trial. Section 3 of article 7 of the Constitution as amended.

The judgment is affirmed.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

WOODS et al. v. DUNN et al.

(Supreme Court of Oregon. Sept. 26, 1916.)

1. WILLS §58(1)—AGREEMENT TO DEVISE—VALIDITY.

It is competent for one to make a binding agreement to devise real property by his last will, as the property of a living person is his own and he has a right to contract or alienate the title either by will or testament.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 184; Dec. Dig. §58(1).]

2. SPECIFIC PERFORMANCE §121(7)—AGREEMENT TO DEVISE—SUFFICIENCY OF EVIDENCE.

In a suit for specific performance of an agreement by defendant's deceased relative to devise to plaintiff certain realty in consideration of her promise to care for him and furnish him a home during the remainder of his life, evidence held to show the making of such agreement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391-393; Dec. Dig. §121(7).]

3. FRAUDS, STATUTE OF §75—MEMORANDUM—AGREEMENT TO DEVISE REALTY.

An agreement to devise real property is not within L. O. L. § 808, providing that an agreement for the leasing or sale of real property, or any interest therein, shall be void unless it, or some memorandum thereof, expressing the consideration, be in writing, subscribed by the party to be charged, or by his lawfully authorized agent.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 132; Dec. Dig. §75.]

4. WILLS §94 — AGREEMENT TO CONVEY — STATUTE.

L. O. L. § 804, providing that no estate or interest in real property other than a lease, etc., can be created except by conveyance or other instrument in writing, subscribed by the party creating it, etc., and section 806, qualifying it to provide that it shall not affect the power of a testator in the disposition of his realty by last will or the power of the court to compel the specific performance of an agreement in relation to such property, and section 7319, providing that every will shall be in writing, signed by the testator, or by some other person under his direction in his presence, and attested to by two or more competent witnesses in the presence of the testator, were satisfied by a duly executed writing or will, giving to plaintiff 200 acres of described land on the understanding that she should furnish testator a home and care for life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 228, 236; Dec. Dig. §94.]

5. SPECIFIC PERFORMANCE §121(11)—AGREEMENT TO DEVISE — CONSIDERATION — SUFFICIENCY OF EVIDENCE.

In a suit for specific performance of an agreement between the defendant's deceased relative and plaintiffs, whereby he covenanted to devise to plaintiff certain land in consideration of her promise to care for him and furnish him a home during his life, evidence held to show that plaintiff had fully performed all the conditions thereof.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 395; Dec. Dig. §121(11).]

6. SPECIFIC PERFORMANCE §96—AGREEMENT TO DEVISE—ADEQUACY OF CONSIDERATION.

Under such agreement, made when deceased was 64 years of age and having a life expectancy of 11 years, who was uncouth in person and habit, requiring special attention, food, and ever-increasing care, and made after he had had the advice of an attorney and understood the nature of the agreement, and after he had become dis-

satisfied with living with his relatives, and when he had property amounting to over \$52,000, of which the part agreed to be devised was valued at about \$12,000, the consideration was not so inadequate as to make its performance unreasonable and unjust, where deceased lived only four or five months after the agreement was made.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.]

Department 1. Appeal from Circuit Court, Benton County; J. W. Hamilton, Judge.

Suit by Winona L. Woods and husband against J. Leroy Dunn and others. Decree for defendants dismissing the suit, and plaintiffs appeal. Reversed, and decree rendered according to the prayer of the complaint.

This is a suit to enforce specific performance of an agreement, alleged to have been made between Richard Dunn, deceased, and the plaintiffs, whereby he covenanted to devise to the plaintiff Winona L. Woods 200 acres of land in Benton county, Or., in consideration of their promise to care for him and furnish him a home during the remainder of his life. He was 64 years of age, childless, and had been divorced from his former wife. The plaintiffs say that he was without a fixed home, and was living about from place to place without any settled habitation, although he was possessed of considerable property. His holdings in Benton county were appraised at \$52,454.02 after his death. The plaintiffs allege that in the early spring of 1913 they were residing in the vicinity of Corvallis upon a farm owned by them, and that in addition to the occupation of cultivating it the husband was engaged in teaching in the public schools. Further, that about that time Dunn came to their residence and proposed to them that if they would give up their home and remove to King's Valley, take possession of a certain 200 acres of his land, operate the same, and furnish him a home, nurse, cook for, board, and take care of him in sickness or in health during the remainder of his life, he would convey, or transfer, the title of this land by such means as his attorney should advise, and do certain other things in the way of helping to improve the property not necessary to be here mentioned. They aver that he was advised by his attorney that the best means of accomplishing the contract on his part would be by a will, and subsequently during the month of May of that year he executed in due form of law his last will and testament, whereby he devised to the plaintiff Winona L. Woods the 200-acre tract of land in consideration of the promise of the plaintiffs already mentioned. They state that in pursuance of the contract thus formed they sold their home near Corvallis, the plaintiff husband abandoned his intended career of teaching, and they removed to the land in question, took possession of the same, improved it and in every way complied with their agreement, furnished Richard Dunn with a home and cared for him attentively and com-

pletely in accordance with their covenant. Dunn died as the result of an accidental shooting on September 4, 1913. The complaint declares that later in the same month another instrument, purporting to be the last will and testament of Richard Dunn, was admitted to probate in the county court of Benton county, and that it omitted the devise to the plaintiff Winona of the 200 acres of land in question. The defendants J. Leroy Dunn, Lizzie E. Dunn, James Dunn, Madge Dunn, Ida Pruett, and Mary Pratt are heirs at law of Richard Dunn and devisees under this last-mentioned will, which bears date July 16, 1913. The plaintiffs allege that they have demanded a conveyance of the 200-acre tract which has been refused. The prayer of the complaint is to the effect that the defendants, as successors in interest of the decedent, convey the land in execution of the alleged agreement.

The contract upon which the complaint is based is denied by the defendants. The complaint is otherwise traversed in part. They rely upon the July will as a final disposition of the decedent's property. The first affirmative defense is:

"That the said alleged agreement set out in said complaint, if any such there were, was and is void because neither the said alleged agreement nor any note or memorandum thereof, expressing the consideration, was in writing and subscribed by the said Richard Dunn, or by his lawfully authorized agent, as required by section 803, Lord's Oregon Laws."

Next the defendants aver that the alleged contract was rescinded by the mutual agreement of the parties prior to Dunn's death. Of this we remark in passing there is no evidence whatever. Lastly, they declare thus:

"That at the time of said alleged agreement set out in the complaint, the lands described in the complaint were, ever since have been, and now are of the reasonable worth and value of \$12,000. That at the time of said alleged agreement the said Richard Dunn was aged and in an enfeebled condition of health, and seriously ill, and at said time the expectancy of life of the said Richard Dunn, because of his enfeebled condition and poor health and sickness, was not to exceed one year. That said alleged agreement, if any such there were, was grossly unequal and harsh in its terms, and was grossly improvident on the part of said Richard Dunn, by reason of the disparity between the benefits to accrue to him from the services to be performed thereunder by the plaintiffs and their value and the value of said lands. That at the time of making of said alleged agreement, and for a long time prior thereto, the said Richard Dunn was and had been greatly enfeebled in mind and body by reason of his age and sickness and long continued excessive indulgence in the use of intoxicating liquors, and to such an extent that he was easily susceptible to the influence of others; and that if said alleged agreement was made by the said Richard Dunn, the same was procured from him by the overreaching influence and persuasion of the plaintiffs, fraudulently exerted upon the mind of said Richard Dunn while in such weakened and enfeebled condition."

The affirmative matter of the answer is traversed by the reply. As matter in estoppel the plaintiffs further set forth more in detail the age and partially helpless condi-

tion of the decedent; that, owing to his afflictions and lack of culture, he was not a pleasant companion; that the defendants, who are his relatives, were unwilling to have anything to do with him; that in default of their attentions Dunn turned to the plaintiffs to supply him with the comforts of a home, which they did, and which his relatives neglected. They enlarge to considerable length on the allegations of their complaint respecting the services they rendered, and say that the defendants stood by without rendering any aid or service to Dunn, saw and without making objection permitted the plaintiffs to perform such offices and to go into possession of and remain on said land; that the plaintiffs have in every way performed their contract with Dunn; and that he received said performance to his great aid and comfort.

After a hearing the circuit court found substantially that the agreement was made as stated in the complaint; that Richard Dunn actually executed a will containing a devise to Mrs. Woods of the 200 acres mentioned, and that the plaintiffs performed their agreement for about five months, when Dunn was accidentally killed. The court, however, concluded that the services rendered might be estimated at full value liquidated in money so as to reasonably make the promisees whole, and that, in view of a gift of money previously made by Dunn to the plaintiff Winona, the services as a consideration are inadequate for the realty in dispute, and so dismissed the suit. The plaintiffs appeal.

J. K. Weatherford, of Albany, and Arthur Clarke, of Corvallis (Weatherford & Weatherford, of Albany, and McFadden & Clarke, of Corvallis, on the brief), for appellants. E. R. Bryson, of Eugene and John M. Pipes, of Portland (Yates & Woods, of Corvallis, and Woodcock, Smith & Bryson, of Eugene, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). The evidence shows, as stated, that Richard Dunn had accumulated property amounting to upwards of \$52,000, and that he was childless and alone in the world. He had little to do with his relatives, and the testimony discloses that they gave him little attention. He was uncouth in his habits, having lived on the frontier most of his life, and was addicted to the use of intoxicants. He had resided for a time with his nephew on lands afterwards devised to the latter by the July will, but the cookery in the family did not suit him, and he was disturbed by the noise of the nephew's little son, so that his home there was not to his liking. He had known Mrs. Woods from her childhood, and was quite fond of her. He had often visited at the home of her parents, where she showed him such attention as a little girl would render to an old man who appeared

to be attached to her. She and her husband were graduates of the Oregon Agricultural College. After their marriage they taught school, and finally purchased a small tract of land adjoining Corvallis, where, in addition to the operation of their little farm, the husband had secured a situation in the Corvallis schools. They intended to make that their permanent home and pursue the career of teaching near the seat of learning already mentioned. The testimony shows that at this juncture Dunn visited them, and proposed to the wife that if she and her husband would remove to the property in dispute, some 14 miles distant, and take care of him, furnish him a home, and minister to his necessities in sickness or in health as long as he lived, he would give her the land in such manner as his attorney should advise. She told him, in substance, that she preferred to consult her husband, that they had settled on their career, and that she would not give him an answer at the time. She and Dunn both told her husband about the matter, and they consulted with him, but the plaintiffs reserved their decision for a later date. After considering the subject about two weeks, they decided to accept Dunn's offer. During this period he remained at their house a part of the time, drank considerable liquor, and for about a week was drunk practically all the time. His condition is described by Mrs. Woods to the effect that he sat in his chair and slept most of the time, going to his bottle when he woke and drinking more. During the week that this continued she and her husband took care of him and ministered to his wants generally. After he recovered from his debauch, without saying anything to either of the plaintiffs, he went to the bank and drew out \$1,000 in coin, taking Mr. Woods with him. For that purpose he had the plaintiff husband draw a check in favor of Dunn which the latter signed, as for some reason or other he was not well able to write more. Calling Woods to accompany him, they went to another bank, where Dunn delivered the coin to the cashier, with instructions to deposit it to the account of Mrs. Woods. The cashier asked how she spelled her given name, and Dunn called upon Woods to supply the information. This was the first that either of the plaintiffs had any intimation of his intention to make the gift of the money. Afterwards Dunn had a slight stroke of paralysis, which interfered somewhat with his speech, but at his request, in order to wind up the business, Mrs. Woods sent for his attorney, who came and took his directions about the draft of his will, in pursuance of which that document was drawn up and executed by him the following day. After the instruction about the payment of his debts and the disposition of his body, he gave to a niece \$300, and any note or account he might hold against her at his death; to one nephew \$50, and to another, with whom he

had resided, as stated, a life estate in about 165 acres of land in Benton county, Or., remainder in fee to the son of the nephew. The sixth clause of that will reads thus:

"I give and bequeath to Winona L. Woods two hundred (200) acres to be taken from the north side of my lands situated in T'p. 10 S., R. 6 west of Willamette meridian in Benton county, Oregon. I make this bequest with the distinct understanding that the said Winona L. Woods shall furnish me a home and take care of me either in sickness or in health during my natural life."

He then devised to his four sisters all the rest of his land, finishing the disposition of his property by giving the residuum to all the legatees, to be divided between them equally. The July will was much like the former, except that it omitted all reference to the plaintiffs, or either of them.

[1] It is settled in this state that it is competent for one to make a binding agreement to devise real property by his last will and testament. *Rose v. Oliver*, 32 Or. 447, 456, 52 Pac. 176; *Richardson v. Orth*, 40 Or. 252, 263, 66 Pac. 925, 69 Pac. 455; *Kelley v. Devin*, 65 Or. 211, 132 Pac. 535. The property of a living person is his own. He has an undoubted right to lawfully contract so as to alienate the title from himself, either by deed or testament. During his lifetime his relatives have no right or interest in the same as such. The law of descents is a conventional process, instituted to take the place of title by mere occupancy, and may be avoided by testamentary disposition. It was permissible, therefore, for Richard Dunn to contract with the plaintiffs as they allege. The question to be determined is whether he did so stipulate.

[2] The record is replete with evidence that the agreement was made substantially as averred in the complaint. Concerning his lack of acumen to make the same, even if we should conclude that the answer of the defendants sufficiently pleads that he was suffering from disability, the testimony is ample that he thoroughly understood what he was about, and was competent in every way to make such a contract. It is true that his ailment made talking somewhat difficult, but he was able to make himself understood to his attorney, and, after the will had been drawn it was read to him to his thorough understanding, and he executed it in all respects as provided by our laws. Moreover, the matter had been thoroughly canvassed by the plaintiffs and the decedent prior to the attack of paralysis, and was fully understood by all of them.

[3,4] It is contended by the defendants that there is no writing satisfying the statute of frauds embodied in section 808, L. O. L. The defendants rest their contention in that respect on the part of that section here set down:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writ-

ing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * * 6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein."

Laying aside for the moment the idea that this was not an agreement for leasing or selling real property, but a contract to devise the same, we proceed to consider whether the clause of the will already quoted would be a sufficient memorandum within the statute. From the quoted devise we discern what is to be done by the owner of the realty. He is to give and bequeath to Winona L. Woods a certain described 200 acres of land. What induced him to do so is also specified. It is that she shall furnish him a home and take care of him, either in sickness or in health, during his natural life. The thing which induced him to make the devise is the consideration. It is expressed in the memorandum, even considering this as a sale instead of what it is, a devise. The terms of the statute respecting some note or memorandum thereof expressing the consideration are fully met in the writing, and it was subscribed by the party to be charged. That is to say, the duty of devising the realty was charged upon Richard Dunn, and we find over his own signature in the record the will containing the quoted clause. In all statutory respects it is a note or memorandum of the covenant between the parties, expressing the consideration in writing, and subscribed by the party to be charged. In treating of indispensable evidence, section 804, L. O. L., reads thus:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

This, however, is qualified by section 805, as follows:

"The last section shall not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent a trust from arising or being extinguished by implication or operation of law, nor to affect the power of a court to compel the specific performance of an agreement in relation to such property."

It is true that section 7319 says:

"Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator."

Reading all these sections together, it is manifest that an agreement to devise real property is not within the purview of section 808 as the defendants contend. The subject-matter of this contract is governed by sections 805 and 7319, both of which are satis-

fied by the writing introduced in evidence, to wit, the will of May, 1913.

[5] Beyond all this, the evidence is full and complete, without substantial dispute that the plaintiffs fully performed all the conditions of their pact with the decedent. They gave up the career which in their early married life they had mapped out for themselves. They went upon the land at Dunn's request. Largely at their own expense they made valuable and substantial improvements thereupon. They devoted themselves almost exclusively to his comfort. They supplied the place which ought to have been, but was not, offered by his own relatives. It was natural that in default of proper attention from those of his own blood, he should turn to the little girl of whom he was so fond in her childhood, but now grown to adult estate and settled in a home of her own. The kindness to him which she had learned in infancy she continued in the present juncture, and there is no showing that she in the least abated the devotion that would have been due from a most dutiful daughter.

[8] It is contended that because of the fact that Dunn accidentally met his death in about four months after the agreement was made it would be unreasonable and unjust to require the covenant to be specifically performed. As to the justice of the matter, bearing in mind that it is not a question between the original parties, all of whom were free, voluntary agents empowered to act as they desired, we remark that he could not rely upon his relatives to give him suitable attention. He was dissatisfied with them, and naturally turned to other sources for the desired care. It is just that the benefit of his bounty should inure to those who did him the most good, and all that was done for him at all. Moreover, it is but a part of his wealth that goes in that direction. As stated, his property amounted to upwards of \$52,000. Whatever claims his relatives might have upon him are amply compensated by the residuary clause of his will. It ill lies in their mouths to say that he was incompetent to enter into the agreement which they attack, or to make a will in performance of his covenant, for they claim under a devise made only about two months later. Besides this, at his age of 64, according to the American Mortality Tables he had an expectancy of more than 11 years. It is true that his physician said to him after the paralytic attack already mentioned that he might live a year or he might live 10 years, but that is mere opinion, and shows nothing to alter the case materially. The task imposed upon them by the agreement contemplated a probable continuance of 11 years, and possibly longer, taking care of an old man uncouth in person and habit and requiring special attention, special food, and ever-increasing care. The character of the service was such that it could not be fairly calculated in advance according to a mere

monetary standard. The property was his, and he had a right to compensate the plaintiffs for their ministrations in any manner he chose, provided he did it understandingly and without any fraud or imposition upon him. The testimony shows that he had the advice of his own attorney, that he thoroughly understood the nature of the business in which he was engaged, and that he acted without any coercion or influence of any one, and wholly on his own initiative. The transaction was as fair as it possibly could be made, and it was entered into upon mature deliberation. At that time none of his relatives had any right to or interest in any of his property. They did not do or pay anything giving them any claim upon it afterwards. If nothing else appeared, they would only be beneficiaries of a conventional system for the orderly devolution of property in default of other disposition of it by the last holder. At best, they are recipients of his generosity under his will, but they take it subject to his contract affecting the property.

That the undertaking was accomplished in less than the contemplated time cannot alter the question. Neither can it affect the matter that before the agreement was made he gave \$1,000 to the plaintiff wife. That was unsolicited by any one, and was a pure gratuity which he had the right to bestow. In that view the case must depend entirely upon whether plaintiffs performed their part of the contract. We hear of instances where a real estate broker earns a large fee in a day or two after he has taken the contract of finding a purchaser of the premises. Its payment is enforced. We continually pay premiums for the insurance of our houses, yet the buildings never burn. Shall we recover the money because no conflagration ensues? On the other hand, a fire often occurs the day after the premium was paid for insurance covering an extended period of years. Are we entitled to a rebate of the premium on that account? The uncertainty of the time during which the plaintiffs would continue performance of the contract was naturally within the contemplation of the parties, and they must be presumed to have contracted with reference thereto.

In brief, the statutes governing such a transaction have been fully complied with. Even if the statute of frauds, upon which the defendants rely, affected the case, the record is replete with testimony of part performance, taking the matter out of the statute. The contract is established. Its performance on the part of the plaintiffs is thoroughly proven. Without their knowledge the decedent broke his covenant by making a new will, ignoring the plaintiffs, yet gave them no notice of rescission, but continued to avail himself of their hospitality, and eventually died in their home. The court cannot make a new contract. The stipulation was made. It must be observed.

The following precedents are applicable to the instant case: *Berg v. Moreau*, 199 Mo. 416, 97 S. W. 901, 9 L. R. A. (N. S.) 157; *Bryson v. McShane*, 48 W. Va. 126, 35 S. E. 648, 49 L. R. A. 527; *Lothrop v. Marble*, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 628.

Upon the fact found, the decree of the circuit court was an erroneous conclusion. It is reversed, and one here rendered according to the prayer of the complaint.

MOORE, C. J., and BENSON and HARRIS, JJ., concur.

NELSON v. BROWN & McCABE, Stevedores. (Supreme Court of Oregon. Sept. 26, 1916.)

1. MASTER AND SERVANT §296(3)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—STATUTE.

Under the Employers' Liability Act (Laws 1911, p. 18) § 6, declaring that the contributory negligence shall not be a defense, but may be considered by the jury in fixing damages, in an action for injuries by the employé of a stevedore company, an instruction that, if the plaintiff was guilty of negligence contributing to injury, he could not recover, even though the defendant was also guilty of negligence, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §296(3).]

2. MASTER AND SERVANT §204(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK—STATUTE.

In actions for personal injuries by employés coming within the scope of the Employers' Liability Act, the doctrine of assumption of risk by the employé is abrogated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544; Dec. Dig. §204(1).]

3. MASTER AND SERVANT §293(8)—INJURIES TO SERVANT—SAFE PLACE TO WORK—STATUTE.

Under the Employers' Liability Act (Laws 1911, p. 18) § 1, providing that persons having charge of work involving risk or danger must use every device or care practicable for the protection of life and limb, in an action for personal injuries by the employé of a stevedore company, an instruction that, if the defendant had provided a reasonably and ordinarily safe place for the plaintiff to work, considering the character of the work, defendant could not be found negligent in not providing a safe place for the plaintiff to work, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1150; Dec. Dig. §293(8).]

4. APPEAL AND ERROR §1064(1)—HARMLESS ERROR—INSTRUCTIONS.

In an action for personal injuries by the employé of a stevedore company, the instruction that a servant in entering employment assumes the ordinary risks incident to the work contracted to be done, or such as the master might have avoided by reasonable care, though erroneous, was not prejudicial to the master.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. §1064(1); Trial, Cent. Dig. §§ 475, 525.]

5. MASTER AND SERVANT §97(2)—INJURIES TO SERVANT—"ACCIDENT."

In relation to the law of master and servant, an "accident" is an incident that could not have been reasonably foreseen, anticipated,

prevented, or provided against, and for it the master is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. §97(2).]

For other definitions, see Words and Phrases, First and Second Series, Accident.]

6. APPEAL AND ERROR §242(1)—REVERSAL FOR COLLOQUY OF COUNSEL.

In a servant's action for injuries, where, during argument, one of plaintiff's attorneys stated that plaintiff had a wife and family to support, which should be taken into consideration in assessing damages, whereupon defendant's attorney objected and took an exception to the remark, whereupon opposing counsel reiterated the statement, defendant's attorney again objecting and taking an exception, there was no reversible error, where the court was not called upon to rule upon the question or to instruct the jury to disregard the argument of plaintiff's counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417, 1424, 1425; Dec. Dig. §242(1).]

Department 2. Appeal from Circuit Court, Multnomah County; William Galloway, Judge.

Action by H. Nelson against Brown & McCabe, stevedores, a corporation. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

The defendant is a corporation engaged as stevedores in Portland, Or. It is admitted that at the time of the grievance of which the plaintiff complains he was in its employ and received an injury while working for the defendant upon a certain Japanese steamship in the port of Portland. It appears that the defendant was engaged in loading the ship with flour which was sent aboard the vessel by means of chutes carrying it into the various hatchways for storage on the lower decks and in the hold. The particular hatchway at which the accident happened was an opening through the decks of the vessel about 12 feet wide and 18 feet long running lengthwise of the ship. Into the opening were fitted edge up and athwartship some steel beams called "strongbacks" about 14 inches in width by one-half inch in thickness. Between the beams and at right angles to them were timbers called "fore and afts" resting in gains or pockets on the strongbacks. The timbers were about 6 inches square by about 6 feet long. In the progress of the work in which the plaintiff was engaged it became necessary to put one of these fore and afts in place. The plaintiff took hold of one end and a fellow employé took up the other end. A plank was laid across where his comrade was required to go, but the plaintiff was compelled by order of the foreman in charge of the work to sit astraddle of the strongback, and in this position to drag after him his end of the timber. It proved too long for the place, and they were directed to take it out. In doing so the plaintiff lost his balance and fell into the hold of the vessel, a distance of about 21 feet, breaking his arm near the

wrist and receiving other injuries. The burden of his complaint is that his employer did not furnish a reasonably safe place in which he was required to work, and that he was called upon to perform his task in a manner involving a risk and danger to himself. The answer denies all the allegations of the complaint except the corporate character of the defendant, the employment of the plaintiff, and the fact that he received an injury. It alleges as affirmative defenses that the hurt was the result of a pure accident which could not have been prevented by the exercise of any reasonable or proper care on the part of the defendant; that the plaintiff was guilty of negligence contributing to his own hurt; and, lastly, that he was a skilled workman, understanding the nature of his task and fully appreciating all the risks of the employment. These defenses are traversed by the reply. As a result of a jury trial there was a verdict and judgment in favor of the plaintiff, from which the defendant appeals.

F. C. Howell, of Portland (Wilbur, Spencer & Beckett, of Portland, on the brief), for appellant. G. G. Schmitt, of Portland (Schmitt & Schmitt, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] The errors relied upon before us are predicated upon instructions given by the court and the refusal of others requested by the defendant. One of the latter is this:

"Contributory negligence consists of such acts or omissions on the part of the plaintiff as would amount to want of ordinary care under the particular circumstances; and if the plaintiff in this case was guilty of negligence contributing to the accident and injury which he sustained, he cannot recover, even though the defendant was also guilty of negligence."

Such an instruction to the jury would make contributory negligence a bar to the action, whereas section 6 of what is known as the Employers' Liability Law declares that:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage." Laws 1911, p. 18.

[2] By another instruction refused the defendant sought to impose upon the plaintiff the assumption of risk. Since the passage of the initiative act above mentioned we have frequently held that because this is a criminal statute visiting a penalty upon persons in charge of a work involving a risk or danger the doctrine of assumption of risk by the employé is abrogated in actions coming within the scope of the act for the reason that it will not be presumed that one party to the contract will be bound by the action or nonaction of the other involving a violation of public law by the latter. The authorities on this subject are collated in *Marks v. Columbia County Lumber Co.*, 77 Or. 22, 149 Pac. 1041.

[3] The third request by the defendant was to direct the jury as follows:

"While it is the duty of an employer to provide his servants a place to work in that is reasonably safe, taking into consideration the character of the work being performed, yet the master is not obliged to use more than ordinary or reasonable care in providing a safe place, and if you find from a preponderance of the evidence that the defendant herein had provided a reasonably and ordinarily safe place for the plaintiff to work, taking into consideration the character of the work being done, you are instructed that the defendant cannot be found negligent in not providing a safe place for the plaintiff to work."

Before the passage of the Employers' Liability Law this instruction might have been justified by precedents holding that an employer was not bound to use the latest or most improved appliances, but was only required to employ reasonably safe machinery and the like, but this does not measure up to the standard prescribed by the latter clause of section 1 of the enactment referred to, the language of which is:

"And generally all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Measured by the statute, the action of the court in refusing this instruction was correct.

[4] The defendant complains that the judge did wrong in saying to the jury:

"You are further instructed that a servant, in entering the employment of a master, assumes the ordinary risks incident to the work contracted to be done, but not such as the master might have avoided by reasonable care."

The instruction was indeed erroneous, but the error was favorable to the defendant. It cannot complain.

[5, 6] Further error is predicated of this charge given to the jury:

"An accident is an incident that could not have been reasonably foreseen, anticipated, prevented, or provided against; so that in this case, if you find that it was purely an accident, the defendant is not liable. On the other hand, if you find that the injury to the plaintiff could have been reasonably foreseen or anticipated, or could have been prevented or provided against, then it is not considered an accident, but is negligence in failing to prevent or provide against the happening of the injury."

We think this fairly describes pure accident. The jury was properly instructed on this point. Lastly it is said that during the argument to the jury one of plaintiff's attorneys stated that the plaintiff had a wife and family to support, which should be taken into consideration in reaching the verdict and assessing the damages. The bill of exceptions discloses that the defendant's attorney objected to the remark mentioned and took an exception to it, whereupon opposing counsel

reiterated the statement, and the defendant again objected and took an exception. The court was not called upon to rule upon the question or to instruct the jury to disregard the argument of plaintiff's counsel. Nothing further is disclosed than a colloquy between the opposing attorneys. We cannot reverse a case except for some error of the court. Nothing of the kind is shown here, and hence the defendant can take nothing on that point. There was testimony on behalf of the plaintiff sufficient to take the case to the jury over the motion for nonsuit made by the defendant.

No error appears in the record, and the judgment is affirmed.

MOORE, C. J., and BEAN and McBRIDE, JJ., concur. EAKIN, J., absent.

STATE v. KEENEY.

(Supreme Court of Oregon. Oct. 3, 1916.)

1. CRIMINAL LAW \S 1106(3)—APPEAL—PERFECTING APPEAL—TRANSCRIPT—STATUTE.

Under L. O. L. \S 1610, 1611, whereby an appeal becomes perfected by serving and filing with the clerk a notice of appeal, and section 1621, as amended by Laws 1913, p. 496, providing that on appeal the clerk of the court where the notice thereof is filed must, within 30 days thereafter, or such further time as the court may allow, transmit a certified copy of the notice, certificate of cause, if any, and the judgment roll, to the clerk of the Supreme Court, an appeal will be dismissed for failure to file the transcript within the time prescribed by law, unless the failure is shown to be due to the negligence of the clerk.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2892; Dec. Dig. \S 1106(3).]

2. CRIMINAL LAW \S 1014—PERFECTED APPEAL—SUBSEQUENT APPEAL—STIPULATION.

Where a defendant perfected his first appeal by serving and filing the notice required by the statute, he thereby exhausted his right of appeal, and it was not within the power of the parties to stipulate for a new notice and a new appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2571; Dec. Dig. \S 1014.]

In Banc. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Mordie Keeney was convicted of arson, and he appeals. Appeal dismissed.

The defendant was convicted in the circuit court of Multnomah county of the crime of arson, and on the 9th day of November, 1915, was sentenced to imprisonment in the penitentiary. On the 15th day of December, 1915, he duly served and filed with the clerk of the circuit court a notice of appeal to this court, and upon the same day procured an order extending the time to file a transcript in said cause until ninety days from said date. Subsequently the time for filing such transcript was extended up to and including March 21, 1916. No transcript was filed, and upon April 5, 1916, the defendant served and filed a second notice of appeal, and an order

was made extending his time to file his transcript up to and including April 10, 1916. No transcript was filed. On June 15, 1916, defendant served and filed a third notice of appeal, and upon July 6, 1916, the transcript on appeal was filed in this court. The state filed affidavits of Robert Hindman, deputy district attorney, and of the clerk of the circuit court, setting forth these facts. The defendant filed counter affidavits, admitting the principal facts set forth in the affidavits, but with the following explanatory allegations: That prior to March 21, 1916, John A. Collier, the deputy district attorney, who acted for the state in the trial of the cause, orally stipulated that defendant should have 10 days' additional time to file his bill of exceptions and have transmitted to the Supreme Court his notice of appeal, certificate of probable cause, and other documents necessary to perfect the appeal; that no order of the court was entered upon said oral stipulation, but with the consent of said deputy it was determined that a new notice of appeal should be served; that thereafter, on April 5, 1916, a new notice was served, a certificate of probable cause secured, and a proposed bill of exceptions served upon the district attorney, and an order obtained from the court extending the time to file defendant's transcript up to and including April 10, 1916; that thereafter, and prior to April 10th, at the request of the deputy district attorney, and to enable him to examine the proposed bill, the matter was permitted to proceed until he should have sufficient time to make such examination; that on the 9th day of May, 1916, a written stipulation was entered into between counsel for defendant and said deputy district attorney, stipulating that defendant should have to and including June 1, 1916, to prepare and file his notice of appeal, certificate of probable cause, transcript, and bill of exceptions; that prior to June 1, 1916, at the request of the district attorney, further time was granted him in which to file objections to the bill of exceptions; that upon several occasions the presiding judge fixed a date upon which to settle the bill of exceptions, but, although the attorneys for defendant were always ready and willing to proceed, the matter was always continued at the request of John A. Collier, deputy district attorney, representing the state; that no appeal has ever been perfected in this cause until the notice of appeal, bill of exceptions, and bond, and other necessary documents of the transcript, were filed in this court upon the 29th day of June, 1916, and that said bill was settled and the transcript made up with the express consent of said John A. Collier.

Littlefield & Maguire, of Portland, for appellant. Walter H. Evans, Dist. Atty., of Portland, for the State.

McBRIDE, J. (after stating the facts as above). [1] If the appeal was perfected by the service and filing of the first notice, this motion must be allowed, and such we believe to be the law. In civil cases an appeal to this court is perfected by serving the notice of appeal and filing the necessary undertaking for costs. In criminal cases, there being no undertaking for costs required, the appeal becomes perfected by serving and filing with the clerk a notice of appeal. Sections 1610, 1611, L. O. L. Section 1621, L. O. L., as amended in 1913 provides:

"Upon appeal being taken, the clerk of the court where the notice of appeal is filed must within 30 days thereafter, or such further time as such court, or the judge thereof may allow, transmit a certified copy of the notice of appeal, certificate of cause, if any, and judgment roll to the clerk of the Supreme Court." Laws 1913, p. 496.

Under this section we have frequently held that, unless the failure to file the transcript within the time prescribed by law was shown to be due to the negligence of the clerk, the appeal would be dismissed. *State v. Williams*, 55 Or. 143, 105 Pac. 716; *State v. Dickerson*, 55 Or. 390, 106 Pac. 790; *State v. Douglas*, 56 Or. 20, 107 Pac. 957; *State v. Webb*, 59 Or. 235, 117 Pac. 272.

[2] The defendant, having perfected his first appeal by serving and filing the notice required by the statute, thereby exhausted his right of appeal. *Schmeer v. Schmeer*, 16 Or. 243, 17 Pac. 864; *Columbia City Land Co. v. Ruhl*, 70 Or. 246, 134 Pac. 1035, 141 Pac. 208; *Brill v. Meek*, 20 Mo. 358. The right of appeal having been exhausted, it was not within the power of the parties to stipulate for a new notice and a new appeal, even if they had done so. A transcript containing the first notice of appeal is not here, and we are not now called upon to pass upon the question as to whether there was a sufficient excuse for defendant's failure to file his transcript pursuant to that notice.

It sufficiently appears that the present appeal was taken after the right to take it had been exhausted, and it is therefore dismissed.

WEBSTER v. BOYER.

(Supreme Court of Oregon. Oct. 5, 1916.)

JUSTICES OF THE PEACE §8 — TENURE — "COURT" — "JUDGE."

Within Const. art. 7, §§ 1, 2, as amended November 8, 1910, providing that the judicial power shall be vested in the Supreme Court and such other courts as may be created by law, that the judges thereof shall be elected for six years, and that the courts and judicial system, except as expressly changed by the amendment shall remain as at present till otherwise provided, a justice's court is a "court" and a justice of the peace a "judge"; the original sections providing for justices of the peace with limited judicial powers.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 11-14, 56; Dec. Dig. §5.

For other definitions, see *Words and Phrases*, First and Second Series, Court; Judge.]

In Banc. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Action for injunction by Daniel Webster against U. G. Boyer. From an adverse decree, defendant appeals. Affirmed.

The complaint shows that at the general election for 1912 the plaintiff was elected justice of the peace for Salem precinct, in Marion county, and still holds said office; that at the primary nominating election held in May, 1916, R. C. Wygant was nominated for justice of the peace for said precinct, and a certificate of nomination issued to him; that the defendant, the county clerk, unless restrained, will place the name of said Wygant upon the official ticket to be voted at the ensuing November election, and, as the said Wygant is the only candidate for said office, the defendant will after such election issue to him a certificate of election, thereby causing irreparable injury and interminable confusion by reason of the fact that there will be two persons each claiming to hold and exercise the duties of justice of the peace in said precinct. Other allegations not necessary to detail here appear. The prayer of the complaint is for an order enjoining defendant from placing Wygant's name upon the ballot. That part of the Constitution applicable to this case is found in sections 1 and 2, art. 7, as amended November 8, 1910, which are as follows:

"The judicial power of the state shall be vested in one Supreme Court and in such other courts as may from time to time be created by law. The judges of the Supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years. * * * The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. * * *"

There was a demurrer to the complaint, which being overruled, and defendant refusing to plead further, there was a decree enjoining defendant from placing the name of R. C. Wygant upon the ballot, from which decree defendant appeals.

Ernest R. Ringo, Dist. Atty., of Salem, for appellant. McNary & McNary and E. M. Page, all of Salem, for respondent.

McBRIDE, J. (after stating the facts as above). Two questions are raised by the briefs upon this appeal: Is a justice's court a "court," and is a justice of the peace a "judge" within the meaning and intent of sections 1 and 2 of article 7 of the Constitution? We answer both questions in the affirmative. Sections 1 and 2 of article 7 of our original Constitution were as follows:

"The judicial power of the state shall be vested in a Supreme Court, circuit courts, and county court, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law, in accordance with this Constitution. Justices of the peace may also be invested with limited judicial powers, and municipal courts may be created to administer the

regulations of incorporated towns and cities. The Supreme Court shall consist of four justices, to be chosen in districts by the electors thereof, who shall be citizens of the United States, and who shall have resided in the state at least three years next preceding their election, and after their election, to reside in their respective districts. The number of justices and districts may be increased, but shall not exceed five, until the white population of the state shall amount to one hundred thousand, and shall never exceed seven; and the boundaries of districts may be changed, but no change of district shall have the effect to remove a judge from office, or require him to change his residence without his consent."

It will be observed that the sections as amended omit all reference to justices of the peace *eo nomine*, but vest judicial power in the Supreme Court and "such other courts as may from time to time be provided by law." But for the proviso in section 2 of article 7, the whole system of circuit courts, county courts, and justices' courts would have been repealed. If justices' courts exist now, it is because they are included among the courts preserved by the terms of section 2. It is not conceivable that the framers of the amended article 7 intended to abolish justices' courts and thus leave a hiatus in our judicial system to be filled by subsequent legislation. The Constitution of Georgia (section 1, art. 6) is similar to our original Constitution in respect to the distribution of judicial powers. It reads:

"The judicial powers of this state shall be vested in the Supreme Court, superior courts, courts of ordinary, and justices of the peace."

In *State v. Port* (C. C.) 3 Fed. 117, 123, the court in construing this provision says:

"A justice of the peace is therefore an officer, clothed with judicial powers, when acting in his capacity, and within his jurisdiction he is, to all intent and purposes, a court."

See, also, *Tissier v. Rhein*, 130 Ill. 110, 22 N. E. 848; *Scott v. Spiegel*, 67 Conn. 349, 35 Atl. 262.

In our statutes and reports, as well as in common parlance, the proceedings before a justice of the peace are always referred to as proceedings in "justices' courts," and it is only fair to presume that when the amendment of 1910 speaks of courts it was intended to include all courts and all tribunals then generally called and recognized as courts. Being by the Constitution invested with judicial powers, it would seem to follow naturally that a justice of the peace is a judge. By title he is a justice of the peace, by function he is a judge—just as judges of this court are by title justices, and by function judges. In New York it has been frequently held that statutes relating to judges should be construed as applying to justices of the peace. Thus, where the statute declared that no judge of any court could sit in any cause in which he was interested, it was held that the term "judge" included a justice of the peace. *Edwards v. Russell*, 21 Wend. (N. Y.) 63; *Baldwin v. McArthur*, 17 Barb. (N.

Y.) 414; *Foot v. Morgan*, 1 Hill (N. Y.) 654. And so, where the statute declared that no judge of any court should have a voice in the decision of any cause in which he had been attorney or solicitor, it was held that a justice of the peace was a judge within the meaning of the law. *Carrington v. Andrews*, 12 Abb. Prac. (N. Y.) 348.

We are of the opinion that a justice's court is a court and a justice of the peace a judge within the meaning and intent of sections 1 and 2, art. 7, of the Constitution, as amended in 1910; and that plaintiff is entitled to hold the office of justice of the peace for the term of six years from January 1, 1913.

The decree of the circuit court is affirmed.

BERTIN & LEPORI v. MATTISON et al.
(Supreme Court of Oregon. Oct. 3, 1916.)

1. APPEAL AND ERROR \S 1198—DISPOSITION
—FOLLOWING MANDATE OF SUPREME COURT.

Where the mandate of the Supreme Court directs specifically what judgment shall be entered by the lower court, the latter's duty is to follow the direction implicitly; it being, in effect, the judgment of the Supreme Court, which the lower court, after entering, has no authority to set aside, or to grant new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4668; Dec. Dig. \S 1198.]

2. APPEAL AND ERROR \S 14(2) — JUDGMENT ON REMAND.

An appeal does not lie from a judgment entered by the lower court pursuant to the mandate of the Supreme Court, in the absence of suggestion that the judgment and mandate are broader than essential.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 48, 54; Dec. Dig. \S 14(2).]

In Banc. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by Bertin & Lepori against N. Mattison, Martin Franciscovich, and Paul Bakotich. There was verdict for plaintiffs against defendant Franciscovich, whereupon plaintiffs moved for judgment on the verdict against Franciscovich, while the latter moved for a judgment non obstante against plaintiffs, which motion was allowed, plaintiffs appealing, the judgment being reversed, and the cause remanded, with directions to enter a judgment for plaintiffs, which was done, defendant Franciscovich moving for a new trial and appealing from denial thereof. Appeal dismissed.

M. B. Meacham, of Portland, and C. W. Mullins, of Astoria, for the motion. G. C. & A. C. Fulton, of Astoria, opposed.

McBRIDE, J. This is a motion to dismiss an appeal. The circumstances are as follows: On June 29, 1912, plaintiffs brought an action to recover from defendants upon a promissory note. By a plea in abatement defendants challenged plaintiffs' right to maintain the action, and prevailed in the lower court, but upon appeal here the judgment was reversed, and the cause remanded

to the circuit court for further proceedings. *Bertin & Lepori v. Mattison*, 69 Or. 470, 139 Pac. 330. Thereafter Franciscovich and Bakotich answered to the merits, and upon a trial before a jury a verdict was returned in favor of plaintiffs and against defendant Franciscovich. Thereupon plaintiffs moved for judgment on the verdict against Franciscovich, defendant Bakotich moved for a judgment for costs against plaintiffs, and defendant Franciscovich moved for a judgment non obstante against plaintiffs, which motion was allowed. Plaintiffs appealed to this court, where the judgment was reversed, and the cause remanded to the circuit court, with directions to enter a judgment for plaintiffs. *Bertin & Lepori v. Mattison*, 157 Pac. 153. Within one day after the judgment upon the mandate was entered defendant Franciscovich moved for a new trial, which being denied, he caused a bill of exceptions to be prepared and signed and brought his appeal to this court.

[1, 2] The rule seems to be invariable that, where the mandate of the Supreme Court directs specifically what judgment shall be entered by the lower court, its duty is to follow that direction implicitly; it being, in effect, the judgment of the Supreme Court. 3 Cyc. 481; 2 R. C. L. p. 33, § 12; 3 C. J. 541, § 378; *Apex Transportation Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513; *State v. Anthony*, 65 Mo. App. 543. Being in effect the judgment of the supreme court, the lower court has no authority after entering such judgment to set it aside or to grant a new trial. *State v. Anthony*, supra. An appeal from such judgment would be, in effect, an appeal to this court from its own judgment. It is possible that the judgment and mandate here was broader than was essential, and that upon a showing that defendants desired to question the rulings of the lower court in the admission or rejection of testimony, or for any other reason, the order would have been restricted to directing the lower court to set aside the judgment non obstante, and thereafter to take such further proceedings as should seem proper. Such was the mandate in the case of *Flisk v. Henarie*, 15 Or. 89, 13 Pac. 760, cited by defendants' counsel, and that very cir-

cumstance distinguishes that case from the one at bar. But in this case, as in *Apex Transportation Co. v. Garbade*, supra, in the absence of such a suggestion, we must hold the judgment conclusive, and not appealable. There is a contention by plaintiffs that defendant Franciscovich should be penalized for a frivolous appeal; but since the amendment of the statute relating to appeals (Laws 1911, p. 152) there has been no case in this court involving this question, and some of the provisions of that amendment furnish at least plausible ground for his contention. While we must resolve the contention against him, we find it far from frivolous.

The appeal is dismissed.

FOREMAN v. SCHOOL DIST. NO. 25 OF COLUMBIA COUNTY.

(Supreme Court of Oregon. Oct. 24, 1916.)

On petition for rehearing. Denied.

For former opinion, see 159 Pac. 1155.

BENSON, J. In a very earnestly argued petition for rehearing, counsel for appellant urges that the original opinion herein is inconsistent with the law as announced in the case of *Richards v. School District No. 1*, 78 Or. 621, 153 Pac. 482, L. R. A. 1916C, 789; but a careful consideration of both opinions does not sustain the contention. The *Richards Case* is based upon Laws 1913, c. 37, which is applicable only to districts having a population of 20,000 or more persons, while the case at bar is controlled entirely by the provisions of chapter 172, Laws 1913. The distinction between the two acts is so clear, and the exposition of the law as expressed in chapter 172 so explicitly stated in the former opinion herein, as to require no further discussion. The vast difference in the facts of the two cases only emphasizes the correctness of the conclusion heretofore reached.

Petition for rehearing is denied.

MOORE, C. J., and BURNETT and HARRIS, JJ., concur.

CITY OF LOS ANGELES v. CENTRAL TRUST CO. OF NEW YORK et al.
(L. A. 3863.)

(Supreme Court of California. Sept. 11, 1916.
Rehearing Denied Oct. 9, 1916.)

MUNICIPAL CORPORATIONS — 269(1)—STREETS — RAILROAD CROSSING — "MUNICIPAL AFFAIRS"—CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 6, provides that city charters adopted thereunder shall not be subject to control by general laws, so far as municipal affairs are concerned. The charter of the city of Los Angeles (St. 1889, p. 458), as amended March 25, 1911 (St. 1911, p. 2061) authorizes the city to establish, lay out, open, or vacate streets and crossings, to acquire real property for the exercise of its powers, and, to regulate the operation of railroads and other public utilities within the city. Const. art. 12, § 23, reserves to each incorporated city all control of public utilities, other than the fixing of rates, unless the city by a vote transfers such control to the Railroad Commission, and Public Utilities Act of 1911 (Sp. Sess. 1911, p. 40), § 43, provides that no grade crossing shall be made without the permission of the Railroad Commission, and section 82 thereof reserves the same control to cities, as that given by Const. art. 12, § 23, Code Civ. Proc. § 1247, gives the superior court jurisdiction to regulate the mode of making crossings, condemnation, etc. *Held*, that the city, which had not elected to make such transfer to the Railroad Commission, had the power to lay out and regulate streets, such matters being clearly "municipal affairs," and the incidental power to regulate the construction of railroads and to open a street across an existing road, to regulate the railroad at such crossing, and to acquire land for such purpose, so that it might open a street across a railroad, acquire land therefor, and regulate the use of a crossing without the permission of the Railroad Commission.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 718, 720, 722; Dec. Dig. ¶ 269(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Municipal Affairs*.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Proceedings by the City of Los Angeles against the Central Trust Company of New York and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. McKinley, Frank Karr, and A. W. Ashburn, Jr., all of Los Angeles, and Joline, Larkin & Rathbone, and Murray, Prentice & Howland, all of New York City, for appellants. Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for respondent. Max Thelen and Douglas Brookman, both of San Francisco, for Railroad Commission.

SHAW, J. The defendants appeal from the judgment. By regular proceedings under the Street Opening Act of 1903 (St. 1903, p. 376), and subsequent amendments thereto, the city council of Los Angeles ordered the opening of Arlington street across a strip of land owned in fee by the defendant Southern Pacific Company and used by it as a part of its right of way for its railroad, and directed the city attorney to bring an action in the

name of the city for the condemnation of the interest of the defendants in the land necessary to be taken for said crossing. This action was begun in pursuance of said order. Upon the trial the parties stipulated that the condemnation of the lands by the city for street purposes should not interfere with nor prejudice the defendants in the use of said land for the maintenance and operation of its railroad thereon, and that with that condition appended to the right to open and use the street, the value of the land to be taken was \$10. The court below found the necessary facts regarding the proceedings for the opening of the street and the right of the city to condemn the land and, in pursuance of the stipulation, entered judgment of condemnation, fixing the value of the land taken at \$10. Proceedings to open the street were begun on December 26, 1911. This action was begun in April, 1912, and judgment was given in May, 1913.

The appellants base their appeal upon section 43 of the Public Utilities Act of 1911, which took effect March 23, 1912 (Special Sess. 1911, p. 18), providing that no grade crossings of any railroad by a street, or of any street by a railroad, shall be made without the permission of the Railroad Commission first obtained, that the Commission shall have power to refuse or grant such permission upon such terms and conditions as it may prescribe, and that it shall have exclusive power to determine and prescribe the manner and place of making such crossings, and to abolish such crossings, at its pleasure. Their position is that this provision withholds from the superior court jurisdiction to entertain the condemnation suit for the opening of the street across a railroad in operation until after the permission of the Railroad Commission shall have been obtained. If section 43 is in force in the city of Los Angeles, and is to be construed as claimed by appellants, the effect would be that the land for the crossing cannot be acquired by condemnation, nor the crossing itself established, until after the Railroad Commission has consented thereto, and then only upon compliance with the conditions which it may prescribe.

It is contended by the respondent that, conceding the statute to have this effect, it would not divest the superior court of jurisdiction, but would give the court power to entertain the action and render its judgment of condemnation, leaving the city to make its application to the Railroad Commission after having acquired title to the land in the condemnation proceeding. To this, objection is made on the ground that it would be futile to subject the property owner to the expense of the litigation necessary to obtain the judgment of condemnation before it could be known whether the crossing could be established at that point or not, and that the dam-

ages could not be estimated until the conditions regulating its maintenance were prescribed. We do not think it necessary to determine the question thus presented. We have concluded that the aforesaid section of the Public Utilities Act does not apply to street openings and railroad crossings within the city of Los Angeles.

The power of the Legislature to pass the Public Utilities Act is derived from the provisions of section 23, art. 12, of the Constitution. This constitutional provision reserved to every incorporated city all the powers of control over public utilities relating to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, which are vested in such city, unless the city by popular vote chooses to transfer the same to the Railroad Commission. Section 82 of the Public Utilities Act in substantially identical terms makes the same reservation in favor of cities. The city of Los Angeles has never elected to make such transfer. Consequently it still retains unimpaired all its regulatory powers of control over public utilities, except rate fixing. Section 6, art. 11, also provides that city charters framed and adopted under the provisions of that article shall not be subject to or controlled by general laws, so far as municipal affairs are concerned. The amendment of 1914 to section 6 uses different terms, but does not change the effect, and it still leaves such city charters paramount to general laws with respect to municipal affairs. The charter of the city of Los Angeles, as amended on March 25, 1911 (Stats. 1911, p. 2061), gave to that city the following powers:

"To establish, lay out, open * * * or vacate, * * * streets, * * * crossings, * * * and other public places." (Section 2, subd. 13); also "to acquire by * * * condemnation * * * real property * * * within or without the city, necessary, * * * for the exercise of the powers of the corporation" (section 2, subd. 16); also "to regulate, subject to the provisions of the Constitution of the state of California, the construction and operation of railroads," and other public utilities in their operations within the city (section 2, subd. 30).

The charter of 1889 and the amendments of 1905 and 1909 to section 2 thereof gave to the city similar powers. St. 1889, p. 457; St. 1905, p. 994; St. 1909, p. 1291.

The opening, laying out, and improving of streets within a city, and the regulation of the manner of their use, are matters of much greater concern to its inhabitants than to the people of the state at large, and they are clearly municipal affairs, the control of which has always been deemed within the proper scope of municipal powers. *Sinton v. Ashbury*, 41 Cal. 531; *People v. Holladay*, 93 Cal. 248, 29 Pac. 54, 27 Am. St. Rep. 186; *Hellman v. Shoulters*, 114 Cal. 149, 44 Pac. 915, 45 Pac. 1057; *Byrne v. Drain*, 127 Cal. 667, 60 Pac. 433. The power to establish, lay out, and open streets, and crossings thereof, and to regulate the construction and operation of rail-

roads within the city, includes the power to open a street across an existing railroad as well as anywhere else within the city, and to regulate the operations of the railroad at such crossing as well as elsewhere. The power to acquire land for that purpose applies as well to the land of a railroad company as to that of any other person. The charter, therefore, vested in the city of Los Angeles the power to open this street across the defendants' railroad, to acquire such interest in the land as was necessary for that purpose, and to regulate the manner in which the crossing should be maintained, guarded, and protected by the railroad company and the municipal authorities, respectively. Being municipal affairs the provisions of the charter on the subject are paramount, and supersede general laws which would otherwise apply thereto, so far as operations within the city are concerned. *Law v. San Francisco*, 144 Cal. 391, 77 Pac. 1014; *Fritz v. San Francisco*, 132 Cal. 877, 64 Pac. 566; *Byrne v. Drain*, supra; *Barber, etc., Co. v. Costa*, 171 Cal. 138, 152 Pac. 298.

Therefore, if we regard the Public Utilities Act as a general law on the subject and consider it independently of any special authority to legislate upon that subject given to the Legislature by the provisions of section 23, art. 12, of the Constitution, the conclusion is inevitable that the charter provisions override those of the Public Utilities Act on the subject so far as the same would otherwise apply to the city of Los Angeles.

If we consider the Public Utilities Act as an exercise of the power to legislate over public utilities specially given to it by the last-cited section of the Constitution, we find that the Legislature is restricted in its powers by the aforesaid proviso, declaring that all powers theretofore vested in a city respecting the local control of public utilities shall remain unimpaired, until such city has voted to transfer such powers to the Railroad Commission; that these powers, in cities such as Los Angeles, are reserved to the city, and hence that they are unaffected by any act of the Legislature purporting to confer power of that character upon the Railroad Commission. For these reasons we are of the opinion that the provision of the Public Utilities Act has no application to this case.

It is contended, however, by the appellants, and also in a brief, filed amicus curiæ on behalf of the Railroad Commission, that the city of Los Angeles never possessed the power to regulate the place and manner of making crossings of streets and railroads within its limits, because, as they say, section 1247 of the Code of Civil Procedure, enacted in 1872, vested in the superior court the power to make such regulations whenever they should be involved in a condemnation suit. The provision of that section is as follows:

"The court shall have power—

"1. To regulate and determine the place and manner of making connections and crossings,

or of enjoying the common use mentioned in the fifth subdivision of section twelve hundred and forty."

If section 1247 were construed to give the superior court power to determine the places where public streets should be allowed to cross existing railroads and to make regulations governing the manner of making such crossings, it would confer legislative power upon the judicial department of the state. The opening and maintaining of public streets and the regulation of the manner of making crossings of streets and railroads so as to promote the public safety and welfare are legislative functions, and hence it may be doubted if under article 3 of the Constitutions of 1849 and 1879 such functions could be given to the superior court by the Legislature. *Wulzen v. Board*, 101 Cal. 21, 25, 35 Pac. 353, 40 Am. St. Rep. 17; *People v. Provines*, 34 Cal. 532; *Smith v. Strother*, 68 Cal. 196, 8 Pac. 852. Perhaps the power so given extends only to the making of such provisions in the judgment of condemnation as may be appropriate to preserve the rights of the respective parties, having reference to the compensation to be made for the taking, and to secure to them the guaranty of the fifth (now the seventh) subdivision of section 1240 and of section 1242 that the property shall be taken in the manner most compatible with the greatest public good and the least private injury. In doing so the court must comply with existing regulations on the subject made by the legislative department. We need not discuss its scope in this direction, nor decide the questions which might arise concerning it. Whatever it may mean, it cannot prevail over the provisions of the city charter of Los Angeles, above quoted, on the subject, so far as to interfere with the powers of the city to extend and open streets. These provisions relate to municipal affairs, and, as we have said, they are paramount to general laws, and supersede such laws where inconsistent therewith. This section of the Code of Civil Procedure is not to be distinguished in this respect from any other general law inconsistent with the charter, and it falls within the rule above applied to the Public Utilities Act, considered independently of the special legislative authority given by section 23, art. 12, of the Constitution. The power to open a street, establish the crossing, and regulate the use thereof, and the manner of making it, were therefore vested in the city of Los Angeles at the time the Public Utilities Act and section 23, aforesaid, became the law, and by virtue of the reservation in said section 23 and of section 82 of the act, if not otherwise, they remain vested in the city, and not in the Railroad Commission, anything in section 1247 of the Code of Civil Procedure to the contrary notwithstanding.

This conclusion disposes of the case, and

settles all the questions presented by the record.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

HENSHAW, J. (concurring). I concur in the foregoing opinion and judgment. I do so because I agree with my Associates that the law is so written. One may be permitted, however, to express the regret that the law itself is not otherwise. Touching a public utility operating wholly within the corporate limits of a municipality, no reason can be perceived why its regulation and control might not, with propriety, be intrusted to the municipal authorities; but the condition is very different where the operations of the utility extend beyond the boundaries of a city and where its services are rendered to several, or to many other communities and cities. In such cases it is manifest that the welfare of all concerned (of the utility, of the public and of the state) is best conserved by placing the whole control under a single board or commission (in this state, the Railroad Commission) empowered to adjust all questions which may arise, in the light of all interests entitled to consideration. But, as pointed out, our laws are designedly framed so as not to do this thing, and, as framed, they must be given effect.

I concur: MELVIN, J.

PEARSON v. PARSONS. (L. A. 3763.)

(Supreme Court of California. Sept. 13, 1916.)

1. SALES §71(5)—CONSTRUCTION—NOTICE OF SELECTION.

Under a contract providing that plaintiff would buy and defendant sell 25,000 budded orange trees of standard size, the buyer to have the option of taking them at one year old or two years old from the bud, delivery to be between 1909 and 1911, inclusive, that the buyer should notify the seller one month before the trees were budded as to the variety which he would select in purchasing the trees under the contract and option, and that the buyer should have an option to purchase 25,000 additional trees on the same terms, a notice of selection of varieties for budding, given March 31, 1908, specifying that the trees to be purchased were to be budded to certain varieties, applied both to those bought outright and to those bought under the option, and was sufficiently certain as not to release the seller from delivery of the optional number of trees.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 194, 195; Dec. Dig. §71(5).]

2. SALES §71(5) — CONSTRUCTION OF CONTRACT—EXERCISE OF OPTION.

A notice served on the seller March 13, 1909, that, in accordance with the contract, the buyer would take 25,000 standard trees one year from the bud for delivery in April, 1909, and 25,000 standard trees two years from the bud to be delivered between January 1 and July 1, 1910,

constituted an exercise of the option to buy the additional trees.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 194, 195; Dec. Dig. § 71(5).]

3. SALES § 81(5) — CONSTRUCTION OF CONTRACT—EXERCISE OF OPTION—TIME.

The notice of the buyer's exercise of his option, given March 13, 1909, after he had given notice of the varieties he desired in time for the trees to be budded to such varieties, and in the absence of anything to show that the alleged delay caused any inconvenience or loss to the seller, was given within a reasonable time after the making of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 221; Dec. Dig. § 81(5).]

4. WITNESSES § 167—COMPETENCY—TRANSACTIONS WITH DECEDENT.

In an action for damages for the refusal of an administrator to deliver certain orange trees covered by an option contained in his intestate's contract to sell, testimony of the plaintiff as to conversations, etc., with the intestate were inadmissible, under the express provision of Code Civ. Proc. § 1880, subd. 3.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 703; Dec. Dig. § 167.]

Department 1. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by George M. Pearson against Sidney J. Parsons, administrator of the estate of E. E. Hendrick, deceased. Judgment for defendant, motion for new trial denied, and plaintiff appeals. Judgment and order reversed.

See, also, 160 Cal. 649, 117 Pac. 919; 159 Pac. 1173.

Miguel Estudillo and George A. French, both of Riverside, for appellant. Sidney J. Parsons, of Los Angeles, for respondent.

SHAW, J. The plaintiff has appealed from the judgment and from an order denying a new trial. The complaint alleges that on or about November 12, 1906, the plaintiff and E. E. Hendrick entered into an agreement whereby said Hendrick agreed to sell plaintiff 25,000 orange trees at a price therein stated; that by the terms of said agreement plaintiff was given an option to purchase 25,000 additional trees upon the same terms and conditions as provided in said agreement for the purchase of the first 25,000 trees; that on or about February 20, 1907, plaintiff exercised and took up said option by notifying the said E. E. Hendrick of his intention to purchase the said additional trees; that on March 13, 1909, plaintiff notified Hendrick that he would buy under said option 25,000 trees to be delivered between January 1 and July 1, 1910; that Hendrick died October 25, 1909; that thereafter, on April 22, 1910, plaintiff demanded of J. G. McKinney, then the administrator of the estate of Hendrick, the delivery of 10,000 trees, and on June 25, 1910, the delivery of 14,200 trees, all in accordance with the terms of the agreement and the option therein provided, but that McKinney refused to make delivery. Parsons

was substituted as administrator and as defendant after the action was begun.

[1] The contract sued on is the contract that was under consideration in *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919. The action there determined was a suit for the refusal to deliver the first 25,000 of the budded trees covered by the contract. The present action relates exclusively to the refusal of McKinney, as administrator of the estate of Hendrick, to deliver the 25,000 trees covered by the option given by said contract. The contract contained the following clause:

"It is hereby agreed that the party of the first part shall give notice to the party of the second part one month before the trees are budded as to the variety which the party of the first part will select in purchasing the trees as per this contract and the option hereinafter set forth."

The court found that on March 31, 1908, Pearson gave to Hendrick a notice of selection of varieties for budding, but that at said time Pearson had not exercised or accepted the option for the additional 25,000 trees, and that the notice did not refer to the option, and was not intended to apply thereto. It also found that:

The plaintiff "did not, within a reasonable time after the making of the contract, or at all, accept and become bound to the said E. E. Hendrick to take and purchase said additional 25,000 trees mentioned in the optional portion of said contract."

We are of the opinion that the court was wrong upon both propositions.

The contract first provided that Pearson would buy and Hendrick would sell to him "25,000 budded trees of standard size," Pearson to have the option of buying them "at one year old or two years old from the bud," and that "the delivery of said trees shall be between 1909 and 1911, inclusive." The last clause of the contract was the one giving the option, and was as follows:

"In consideration of the covenants and agreements hereinbefore mentioned, the party of the second part hereby gives to the party of the first part an option to purchase 25,000 additional standard trees as above described, upon the same terms and conditions as herein provided for the purchase of the first 25,000 of such standard trees."

The notice of selection of varieties for budding given on March 31, 1908, was as follows:

"In accordance with contract between G. M. Pearson and E. E. Hendrick, dated the 12th day of November, 1906, I hereby notify you that the trees which I am to purchase under said contract I wish budded to the following varieties: 20 per cent. Thompson improved navels; 25 per cent. Valencias; 45 per cent. Washington navels, 10 per cent. Eureka lemons."

There is no ground for the conclusion that this notice did not apply to the trees to be bought under the option as well as to those bought outright. The clause providing for such notice refers to the trees embraced in the option, as well as to those bought outright, and its terms imply that one selection should serve for all the trees to be bought

under the agreement. The notice of selection includes "the trees which I am to purchase under said contract." This would include the last 25,000 trees as well as the first 25,000 trees, and it refers as much to one as to the other. Furthermore, it appears from the evidence that all of the trees of the Pearson stock were budded during the year 1908, after the receipt of this notice, and that a large number of them were budded to the varieties named in the notice. We see no ground for the conclusion that Hendrick was released from the obligation to sell the optional 25,000 trees by reason of any uncertainty in the notice of selection for budding.

[2] With respect to the exercise of the option the court found that it was not exercised on the 20th of February, 1907, as alleged. There was evidence by a witness that in 1907 Pearson handed a letter to Hendrick, in the presence of the witness, saying to Hendrick that it was a notice stating that he would take 50,000 of those citrus trees under a contract. Because of this evidence, which was not contradicted in any way, it is insisted that the finding that the option was not then exercised is not correct. The court further found, however, that on March 13, 1909, Pearson served on Hendrick the following notice:

"In accordance with the contract between Pearson and Hendrick dated November 12, 1906, by the terms of which I am to buy and you are to sell certain nursery stock, I hereby notify you that, in accordance with the terms of said contract, I will buy 25,000 standard trees, one year old from the bud, for delivery in April, May, and June, 1909, and 25,000 standard trees, two years old from the bud, to be delivered between January 1 and July 1, 1910. Will give you later details as to exact dates."

[3] There can be no doubt that this notice constituted an exercise of the option to buy the 25,000 additional trees, even if it had not been previously exercised in February, 1907. The court's finding that the notice of March 13, 1909, was not given within a reasonable time after the making of the contract is not sustained by the terms of the contract itself. Pearson was to have the option of taking trees at one year or two years old, and was given the right to demand delivery at any time during the years 1909, 1910, and 1911. He had already given notice of the varieties he desired, and in accordance therewith the trees had been budded to such varieties during the year 1908. A notice given in March, 1909, before any of the trees had become one year old from the bud, stating that he would take the 25,000 additional trees, under the option, during the year 1910, between January 1st and July 1st, was clearly within the time which the contract itself specified. There was nothing in the circumstances requiring an earlier election to exercise the option. No facts are shown indicating that the delay caused any inconvenience, hardship, or loss to Hendrick, nor anything to indicate

that an earlier time would be beneficial to Hendrick. The evidence shows that he persistently and designedly refused to deliver any trees under the Pearson contract. As it also appears that the price of such trees had increased two or three times over in the meantime, we need not seek far to discover the motive for the refusal. In April and June, 1910, when Pearson demanded delivery of the trees covered by the option, the defendant had on hand trees of the kinds and varieties described in the contract and notice of selection. Because of its conclusion that the option had not been exercised, the judgment was given for the defendant. As the notice of March 13, 1909, was a sufficient exercise of the option, even if there was none in February, 1907, as alleged, and as the notice of selection of varieties applied to all the trees bought under the contract, including the option, the judgment should have been for the plaintiff.

[4] Upon the trial Pearson was called as a witness to testify to the service of the notice of February, 1907, of the exercise of the option, and of the conversation between him and Hendrick at that time. The court first admitted the evidence, but before the decision was filed it made a ruling excluding it. A large portion of the briefs is devoted to the discussion of the soundness of this ruling. We do not doubt that it was correct. The action was upon a claim against the administrator upon a contract made with the decedent in his lifetime, and the evidence related to facts occurring prior to the death of the decedent. That the other party is incompetent to testify to any facts occurring prior to the death of the decedent is too thoroughly settled to require discussion. Code Civ. Proc. § 1880, subd. 3; *Stuart v. Lord*, 138 Cal. 676, 72 Pac. 142; *Kaltschmidt v. Weber*, 145 Cal. 598, 79 Pac. 272.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

PEARSON v. PARSONS. (L. A. 3667.)

(Supreme Court of California. Sept. 13, 1916.)

1. PLEADING — 417 — DEMURRER — WAIVER — AMENDMENT.

Where a demurrer to the complaint was sustained on the ground that it included several causes of action not separately stated, and the plaintiff amended to state such causes of action in separate counts, and thereby removed the objection and went to trial upon the complaint as amended, he waived the objection that the demurrer was improperly sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1401, 1402; Dec. Dig. — 417.]

2. EXECUTORS AND ADMINISTRATORS — 222 (2) — PRESENTATION OF CLAIMS — SCOPE.

Code Civ. Proc. § 1500, requires claims against an estate to be presented before suit thereon, and section 1502 provides that, where an action is pending at a decedent's death,

plaintiff must file his claim against the decedent with his administrator. A buyer contracted for sale and delivery to him of orange plants. On failure of the seller to comply with the contract, he brought an action for its breach, and on his death pending action his administrator was substituted as defendant, and plaintiff presented a claim against the estate for damages for breach of contract. Judgment for plaintiff was reversed on appeal, and he filed an amended complaint setting forth fraud and negligence of the seller. *Held* that, as damages for fraud were not included in the claim presented to the administrator, evidence thereof was inadmissible on the second trial.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 785; Dec. Dig. ¶ 222(2).]

3. SALES ¶81(5) — ACTION FOR BREACH — FRAUD—ALLEGATION.

Plaintiff under contract was to furnish defendant's intestate orange plants to be cultivated and budded by him in varieties selected by plaintiff during 1909–11. Plaintiff was to give notice one month before the budding of the varieties wished, and gave notice March 31, 1908, of such varieties, and that plaintiff would demand deliveries thereof in April, 1909. *Held*, that the notice was too late to cause intestate to delay budding in April, 1908, as he had prepared for, and where he had sufficient trees left to bud for delivery in 1909, whether the budding in April, 1908, was to prevent plaintiff from obtaining such trees or not, it showed no fraud against plaintiff.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 221; Dec. Dig. ¶81(5).]

Department 1. Appeal from Superior Court, Riverside County; B. F. Bledsoe, Judge.

Action by George M. Pearson against S. J. Parsons, administrator of the estate of E. E. Hendrick, deceased. Judgment for plaintiff, and he appeals. *Affirmed*.

See, also, 159 Pac. 1171.

Miguel Estudillo and George A. French, both of Riverside, for appellant. Purington & Adair, of Riverside, and Sidney J. Parsons, of Los Angeles, for respondent.

SHAW, J. This cause was heretofore before this court on an appeal by the defendant from a former judgment. *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919. Upon that appeal the judgment in favor of the plaintiff was reversed, and the cause remanded for a new trial. Afterwards S. J. Parsons was substituted as administrator of the deceased, Hendrick, and the complaint was amended. Thereupon another trial was had resulting in a judgment for the plaintiff in the sum of \$900. From this judgment, the plaintiff appeals.

[1] The first point urged by the appellant is that the court below erred in sustaining a demurrer to the complaint on the ground that the complaint included several causes of action which were not separately stated. The plaintiff then amended the complaint by stating in separate counts the respective demands claimed to constitute separate causes of action. Having thus removed the objection,

and having thus gone to trial upon the complaint as amended, the plaintiff must be deemed to have waived the objection that the demurrer was improperly sustained. *Gale v. Tuolumne W. Co.*, 14 Cal. 28; *Ganceart v. Henry*, 98 Cal. 283, 33 Pac. 92.

[2] The only other point urged in support of the appeal is that the court erred in refusing to allow the plaintiff to introduce evidence in support of damages claimed to have been suffered by reason of the fraud and negligence of the decedent, Hendrick, in carrying out his part of the contract of sale upon which the action was based. In order to make this point clear it is necessary to state the facts.

The original complaint attempted to state a cause of action against the decedent, Hendrick, who was then living, to recover damages alleged to have been sustained by reason of the refusal of Hendrick to deliver to the plaintiff 25,000 budded orange trees sold by him to the plaintiff. The contract of sale was made November 12, 1906, and was in writing. As construed upon the former appeal, it provided that Hendrick was to set out 150,000 seed bed orange plants sold to him by Pearson, to be delivered to Hendrick, before May 15, 1907, cultivate them, bud them when of proper size to varieties of oranges selected by Pearson, and sell 25,000 of them to Pearson during the years 1909, 1910, and 1911, at stated prices. Pearson was to have the option of taking them when one year old from the bud at 30 cents each, or two years old from the bud at 35 cents each. They were to be of a specified size in order to come within the contract. The decision on the former appeal was that in an action by the vendee for breach of the contract of the vendor to sell trees to be budded by the vendor and to be grown under his care for one year or more thereafter, and to a specified size before delivery, it was necessary for the plaintiff to allege and prove that at the time when delivery was demanded the vendor had trees on hand of the kind required by the contract. 160 Cal. 657, 117 Pac. 919. The complaint contained no allegation that Hendrick had the trees on hand of the proper kinds, size, or age at the time Pearson demanded delivery thereof. It was framed upon the theory that the contract of sale was general, and must be performed by Hendrick even if he did not have trees of the size and kind required, and that in such a case he would be obliged to go into the market and get them from any source to fill his contract. For this reason it was held to be defective. It alleged demands made in April, May, and June, 1909, for delivery of trees under the contract, and the failure of Hendrick to deliver them. The action was begun on July 1, 1909, immediately after the alleged breach occurred. Before the first trial Hendrick died and the administrator of his estate was sub-

stituted as defendant. It then became necessary for the plaintiff to present to the administrator a claim for the demand sued on before proceeding with the action. The plaintiff presented such claim, stating therein that the estate was indebted to him in the amount claimed in the complaint, as damages for breach of the agreement sued on, as set forth in the complaint in the action, a copy of which was attached to and made a part of the claim. The complaint stated no breach of the contract except the failure to deliver the 25,000 trees in May, June, and July, 1909, as called for. It did not claim damages because of any fraud or negligence of Hendrick resulting in his failing to have on hand the trees necessary to fill the contract at the time of Pearson's demands. 160 Cal. 659, 117 Pac. 919. After the reversal the plaintiff filed in the court below the amended complaint, in which he set forth that because of Hendrick's fraud and negligence, particularly set forth, Hendrick did not have on hand trees of the proper kinds, size, or age to fill the orders of Pearson in April, May, and June, 1909. On the second trial the court below was of the opinion that damages for this cause was not included in the claim presented to the administrator, and, under the familiar rule, it held that evidence could not be received in support of a demand not included in the claim so presented. *Lichtenberg v. McGlynn*, 105 Cal. 47, 39 Pac. 541; *McGrath v. Carroll*, 110 Cal. 84, 42 Pac. 466; *Etchas v. Orena*, 127 Cal. 593, 60 Pac. 45; *Morehouse v. Morehouse*, 140 Cal. 94, 73 Pac. 738. There is no distinction in this respect between claims in support of pending actions, under section 1502 of the Code of Civil Procedure, and claims filed before the action is begun, under section 1500 of the Code of Civil Procedure.

We think the court was correct in its conclusion that the claim presented to the administrator did not include a demand for damages caused by the negligence of the vendor whereby he did not have the trees ready for delivery at the times of the demands. The original complaint proceeded upon the theory that the defendant had the trees ready for delivery, but failed to deliver them. It alleged nothing in regard to a breach of the implied contract to properly care for and cultivate the trees. The claim for damages on account of the breach of that part of the contract was therefore not included in the claim presented to the administrator, and evidence thereof was correctly excluded.

[3] The allegations of fraud are insufficient, and therefore it is immaterial whether it was included in the claim presented or not. Pearson gave notice of his selection of the

varieties for budding on March 31, 1908. On the former appeal we held that this notice did not give him a right to demand trees budded during April, 1908. The fraud alleged is that Hendrick, after receiving that notice, budded 24,500 of the trees in April, 1908, that being all that were then large enough to bud; that this was done to prevent Pearson from obtaining trees under the contract. It is not alleged that Pearson had at that time given notice to Hendrick that he would demand trees for delivery in April, May, and June, 1909. Hendrick received 150,000 plants from Pearson, out of which Pearson was to buy, at some time during the years 1909, 1910, and 1911, 25,000 budded trees with an option, not then exercised, for 25,000 more. The contract did not specify the time of budding the trees. Under its provisions Hendrick was free to bud in April, 1908, all of the trees that were then large enough, provided enough were left to be budded afterwards to supply Pearson at some time after April 30, 1909, on which date, as held on the former appeal, he first became entitled to buy trees in pursuance of his selection of varieties on March 31, 1908. It is not disputed that there were plenty of trees left in addition to those budded in April, 1908, to supply all that were to be sold to Pearson during the years specified in the contract. Until he received notice that Pearson would demand deliveries of trees in April, May, and June, 1909, Hendrick was under no obligation to delay the budding of the trees ready therefor in April, 1908, so that they might be budded in May to fill possible orders from Pearson. Hence the budding of 24,500 trees in April, 1908, violated no right of Pearson, and, whether done to prevent Pearson from obtaining the trees budded during that month or not, it did not constitute any fraud against Pearson and evidence thereof was properly rejected.

For the purposes of the case, we have assumed that evidence was offered which would have supported the allegations of fraud and negligence. In view of the general neglect of the statutory requirements that the parties shall print in their briefs such portions of the record as they desire to call to the attention of the court (Code Civ. Proc. § 953a), we take occasion to say that, if it had been necessary to reverse the case for error in the ruling complained of, it is extremely doubtful if we would have been able to consider the point over the objection of respondent that the matter was not properly presented to the court for decision. There is no other point of sufficient importance to merit notice.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

ARMSTRONG v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 8038.)

(Supreme Court of California. Sept. 15, 1916.)

1. INJUNCTION \S 231—PUNISHMENT FOR VIOLATION—CERTIORARI.

That an order restraining picketing by defendants is too broad, in that it enjoins all picketing, is not ground for sustaining certiorari to review an order, adjudging a defendant in contempt for violating the restraining order; there being no question as to jurisdiction to enter the restraining order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 517; Dec. Dig. \S 231; Appeal and Error, Cent. Dig. \S 680.]

2. INJUNCTION \S 228 — PARTIES — DEFENDANTS—ASSOCIATION.

Code Civ. Proc. \S 388, authorizing two or more persons associated and transacting business under a common name to be sued by such common name, authorizes an action to restrain the members, officers, agents, representatives, and employees of voluntary associations, in their common or associate name, from maintaining pickets in front of plaintiff's place of business, so as to render all members having knowledge of the terms of an injunction granted, as well as the officers, etc., liable for contempt in any willful violation thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 484-495; Dec. Dig. \S 228.]

3. INJUNCTION \S 230(2) — VIOLATION — PROCEEDINGS TO PUNISH.

Where a restraining order enjoins picketing upon plaintiff furnishing a bond, an allegation in a contempt proceeding for violation of the order that the restraining order was made whereby the defendants were enjoined, etc., was sufficient to support a finding that the court made an effective restraining order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 507, 508; Dec. Dig. \S 230(2).]

In Bank. Petition by A. C. Armstrong for certiorari to the Superior Court of the State of California in and for the City and County of San Francisco and John Hunt, Judge of said Court. Denied.

Henry B. Lister and Devoto, Richardson & Devoto, all of San Francisco, for petitioner.

PER CURIAM. This is an application for a writ of certiorari to review an order of the superior court of San Francisco adjudging one A. C. Armstrong guilty of contempt of court, and imposing a penalty therefor.

The contempt alleged was disobedience, with knowledge of the terms thereof, of a restraining order of said court made in an action pending therein, whereby the defendants, being certain voluntary associations, alleged to be associations composed of more than two persons associated in business and transacting such business under a common name, including Cooks' Union No. 44, and their members, officers, agents, representatives, and employees, and various fictitious defendants, were enjoined and restrained from placing or stationing or maintaining pickets

in front of the plaintiff's place of business. Violation of this order on the part of petitioner and others, alleged to be members of said Cooks' Union No. 44, and to have violated the same with knowledge of its terms, were alleged in the affidavit upon which the contempt proceeding was based, and the superior court found, after hearing the parties on an order to show cause, that Armstrong was guilty of such violation.

[1] In view of the fact that certiorari will lie only to review an excess of jurisdiction and that errors in the exercise of jurisdiction may not be considered in such a proceeding, we see no good ground for the granting of the application. Something is said, for instance, in support of the claim that the restraining order is too broad, in that it enjoined all "picketing," the theory being that there are certain kinds of "picketing," as that term is used in connection with labor disputes, that should not have been enjoined. However this may be, we are satisfied that it cannot be held that a court of equity is without jurisdiction to enjoin any and all picketing, as it has done in this case, and that if there be any error in this regard, a matter as to which we are not to be understood as intimating any opinion, it is simply error in the exercise of jurisdiction which can be reviewed by a higher court only upon direct appeal from the order.

[2] We deem it proper to say, in reply to certain claims made by counsel for petitioner in their brief filed with the application, as follows:

First. We are all of the opinion that the provisions of section 388 of the Code of Civil Procedure authorize the maintenance of an action of the character of the one in which the restraining order was made, against the members of such associations as are described in the complaint in that action, in their common or associate name, and that all members of any such association having knowledge of the terms of any injunction issued therein, as well as all their officers, agents, representatives, and employees having such knowledge, are bound thereby, and guilty of contempt in any willful violation thereof.

[3] Second. The restraining order provided "that upon plaintiff furnishing a bond in the sum of \$500, the said defendants," etc., be enjoined and restrained. The order, of course, was ineffectual for any purpose unless and until such bond was given. It is claimed that there was no showing that any bond was ever given. Even if we assume that in the contempt proceeding the superior court could not take judicial notice of the records and files in the action in which the restraining order was made, we are of the opinion that the affidavit constituting the foundation for the contempt proceeding, while not as specific and definite as it might well have been, sufficiently alleged an effective and valid restraining order for all the

purposes of the proceeding. The effectiveness of the order as one actually enjoining and restraining is sufficiently alleged to support the finding that "the court made an order * * * restraining," etc.

No other point made by counsel requires notice on this application for a writ of certiorari.

The application is denied.

NORTON v. RANSOME-CRUMMEY CO.
(S. F. 7595.)

(Supreme Court of California. Sept. 16, 1916.)

MUNICIPAL CORPORATIONS — 400 — TORTS — LIABILITY OF CONTRACTOR.

A contractor employed by a city to regutter a street, removing the rock of which the old gutter was constructed, to be replaced by other material, is not liable for injuries to the basement of an adjacent owner, caused by rainwater seeping through the natural soil and washing away the inadequate walls of the basement, where the work of the contractor was done in a workmanlike manner, and the contractor was in no wise negligent with regard to the performance of its contract with the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 962-964; Dec. Dig. § 400.]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by S. W. Norton against the Ransome-Crummey Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Raleigh E. Rhodes, of Madera, and R. M. F. Soto, of San Francisco, for appellant. Harris & Hayhurst and J. P. Bernhard, all of Fresno, for respondent.

MELVIN, J. This appeal was heard originally by the District Court of Appeal of the First Appellate District, and the following opinion, prepared by Mr. Presiding Justice Lennon, was announced by that court:

"The plaintiff is the lessee, and is also the assignee of another lessee, of certain premises consisting of storerooms and basements on Mariposa street in the city of Fresno. At some time prior to the injuries complained of the plaintiff and his assignor had each applied to the city council of Fresno for permission to extend their respective basements out under the sidewalk of Mariposa street to a distance at or near the gutter line; and, being granted such permission, made the extension, building brick walls along the line thereof and adjacent to the gutter line of the street. The city of Fresno is the owner of the fee of said Mariposa street. The street being in need of repair, a contract was let to the defendant, by the terms of which it was required to remove the basalt blocks which had hitherto formed the base of said gutter, in order to replace them with other material. While these blocks were so removed opposite the premises of the plaintiff and his assignor a rain-storm came on, which flooded the gutter, the water flowing down through the unprotected portion of the gutter to and through the brick walls along the extended line of these two basements, which walls proving an ineffectual barrier to those waters, they flooded the basements and

caused the damage to the goods of plaintiff and his assignor, for which recovery is sought in this action. From a judgment awarding such damages and from an order denying a new trial the defendant prosecutes this appeal.

"The plaintiff's complaint alleges that the defendant negligently and carelessly removed the stone gutter and protecting curb in front of said premises, and negligently and carelessly left said basement of said premises open and unprotected, by reason whereof the detriment occurred. The court in its findings has found this averment to be true; but it was stipulated at the trial, and is conceded upon this appeal, that the defendant was in all respects performing in a workmanlike manner the terms of its contract with the city, and was in no wise negligent in that regard, so that the only negligence upon which the plaintiff can rely to support the court's finding must consist in the fact that the defendant, by its act in removing the basalt blocks and curb of the gutter, according to the requirements of its contract, and in an otherwise proper manner, put said gutter in such a condition that it would not and did not retain the floodwaters of the storm, but permitted the same to reach and penetrate the plaintiff's ineffectual wall into the basements. The question which arises out of this state of facts, and which is practically the only question in this case, is as to what duty the city, or the defendant, its contractor, owed this plaintiff and his assignor in respect of the protection of their property from consequential damages growing out of the repair of the street when, as is conceded, such repair is being made in accordance with contract and in a proper and workmanlike manner.

"The Supreme Court of this state, in the early case of *Shaw v. Crocker*, 42 Cal. 435, laid down the rule that, cities having the right to improve and grade their streets, neither they nor their contractors are responsible for consequential damages to adjacent property when such work is performed with proper care and skill. The same doctrine was later adhered to in the case of *Reardon v. San Francisco*, 66 Cal. 492 [6 Pac. 317, 56 Am. Rep. 109], wherein the court declared that it was the universally accepted rule that in the making of street improvements the city is the agent of the state, and is performing a public duty imposed upon it by law, and that neither it nor its duly authorized agents are answerable for consequential damages as a result of such work when done with proper care and skill. And the court in that case went further in holding that the owners of property adjacent to streets in the course of such improvement or repair were bound to take steps to protect their own property from the liability of such injury. It is true that in the case last cited the court construed and applied the rule adopted by the then recent change in the state Constitution relating to compensation for property taken or damaged for public use; but that question does not arise in the present case. The general rule, in harmony with the foregoing cases, is thus laid down by Dillon in the latest edition of his work on *Municipal Corporations*: 'In view of the nature of streets, and of the control over them which of right belongs to the state, and of the nature of ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in the grade thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of a street) shall be found expedient, it results, we think, that adjoining property owners are not entitled, of legal right, without statutory aid, to compensation for damages which result as an incident or consequence of the exercise of this power by the state, or the municipality by delegation from the state. Accordingly the courts by numerous decisions in most states have set-

tled the doctrine that municipal corporations, acting under authority conferred by the Legislature to make and repair, or to grade, level, and improve, streets, if they exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner whose lands are not actually taken for consequential damages to his premises, unless there is a provision in the charter of the corporation or some statute creating the liability." 2 Dillon, *Municipal Corporations*, sec. 782-3, and cases cited.

"In view of the foregoing statement of the general trend of authority touching the question in issue here, we are constrained to hold that the defendant was guilty of no breach of duty in the performance of the work of making the street repairs in question under its contract with the city of Fresno, of which the plaintiff can complain, but that on the other hand, it was the duty of the plaintiff and his assignor to protect their respective premises excavated below the street level, and which they had extended beyond the street line into proximity with this gutter as mere licensees of the city, from the possibility of consequential damages occurring through the course of proper street repairs. The cases cited by the respondent, announcing a rule apparently at variance with the foregoing principles, will be found, upon analysis, to involve questions of negligence in the performance of the work which were eliminated from the case at bar."

Subsequently a hearing in this court was ordered. Upon further consideration of the case we are constrained to agree with the conclusions reached by the District Court of Appeal, and to adopt the opinion of that court.

It was alleged in the complaint, and found by the court to be true, that:

"Defendant negligently and carelessly removed the stone gutter and protecting curb on the street in front of said premises and negligently and carelessly left said basement of said premises open and unprotected, so that by reason of said negligence and carelessness on the part of defendant, a large quantity of rainwater ran into said basement."

Undoubtedly if the work done by defendant had made an opening into the basement through which water could have run, the consequent damage from rain occurring during the progress of the work would be chargeable to the contractor. The proof showed, however, that the removal of the stones forming the gutter (the curb not being disturbed) merely exposed the sandy soil and permitted the water to find its way to that which Mr. Justice Lennon aptly calls "the plaintiff's ineffectual wall." True, the action of the water eventually made a hole through which a stream poured into the basement, but that was after the "ineffectual wall" had collapsed. The question, then, is this: Was the contractor, when it had, in the proper execution of its contract, removed the stones forming the bed of the gutter, obligated to protect plaintiff and his assignor from the consequences of the seepage of water through the sandy soil and through an underground wall which was not water tight? We feel bound to answer this question in the negative. Suppose, for example, that there had been no wall at all, and that through the negligence of the superintendent of streets the removal

of the blocks forming the gutter had been permitted, resulting in the seepage of water into the cellar. In such a case could the owner of the property charge the city with liability for failing to protect the cellar? We think not. The officers of the city might well say to the owner:

"You were given a license to excavate under the sidewalk, but the city did not promise to keep your cellar dry by constantly maintaining a waterproof street in front of your premises."

Obviously such contention must be correct. If the rule were otherwise, the city would be estopped from repairing, regrading, or removing the pavement from the street for any purpose except in dry weather. If, then, the city would not be required to insure the property owner against percolation of water into his unvalled basement, may a court hold the city's contractor for the penetration of the previous and inadequate wall by the water which went through the sandy soil after the removal of the stones which formed the gutter? We think not. If the wall had been properly constructed, it would have turned any water which might have soaked through the sandy soil. Surely it was not the contractor's duty to know that the basement was inadequately walled. There was no proof of great hydraulic force exerted against the wall, nor of the maintenance of a large body of water exercising hydrostatic pressure thereon. On the contrary, the evidence showed a very slight rainfall during the time that the natural soil of the street was uncovered. That the wall was totally inadequate to keep out water is very evident from the proof adduced at the trial. Surely it was no part of the duty of defendant to go upon the property of plaintiff and repair the latter's masonry. *Alta Planing Mill Co. v. Garland*, 167 Cal. 179, 138 Pac. 738. Any default upon the contractor's part must have been due to its negligence in prosecuting or in failing to safeguard the work required of it under the contract. That the work of removing the blocks from the gutter was done in the usual manner is admitted; that the contractor was not bound immediately to replace the material removed with other substance impervious to water we are certain.

While some of the cases cited by respondent seem to be at variance with our conclusions, the facts in each of them differ from those presented by the record before us in this case.

For example, in *Schumacher v. The City of York*, 166 N. Y. 103, 59 N. E. 773, it was held that the lower court erred in not permitting the evidence to go to the jury. The facts were that a trench had been dug two feet from the curb; that this excavation was several rods long, four or five feet wide, and more than eight feet deep; that the earth taken from the trench was so placed as to obstruct the gutter and a culvert; and that

the trench "thus became a pocket for all the surface drainage of a large area." During a heavy rain, water accumulated in the trench, "washed out the sand between it and the basement wall, and then percolated through the wall into the basement." Although the work was done under the supervision of the city's inspector it made no attempt "to open the gutter, uncover the culvert, protect the trench, or provide for water." Hence the court of appeals held, very properly, that there was sufficient evidence to go to the jury. In the case at bar there was no such evidence of a large body of water negligently maintained for a long period of time in contact with the wall surrounding the basement. The case is not therefore controlling, nor even persuasive against our conclusions in the case now before us.

Schroeder v. City of Baraboo, 98 Wis. 95, 67 N. W. 27, also presents a set of facts totally dissimilar to those set forth in this record. In that case plaintiff alleged damage to his property by reason of the incapacity of the defendant's new drainage system and by the bursting of the drain which defendant had caused to be obstructed. There was evidence tending to support these allegations, and the Supreme Court held that the lower court erred in granting a motion for nonsuit.

In *Wallace v. City of Muscatine*, 4 Greene (Iowa) 373, 61 Am. Dec. 131, also cited by respondent, the complaint contained allegations to the effect that plaintiffs were damaged by the improper and unskillful construction of certain culverts, drains, and gutters by which water was made to flow upon their land, and that the city, in the construction of these works, carelessly and negligently left them in an unfinished state, whereby a large quantity of water was made to flow upon and injure the property in question. It was held that a demurrer to this pleading had been erroneously sustained. This authority is not in any way opposed to the views expressed above.

From the foregoing it follows that the judgment and order must be reversed; and it is so ordered.

We concur: LORIGAN, J; HENSHAW, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment. The evidence does not, in my opinion, fairly furnish sufficient support for a conclusion that the defendant was guilty of any negligence with relation to the plaintiff or his assignor. If in doing the work it had contracted with the city to do it used reasonable care to avoid injury to the property of others, concededly it cannot be held to have been negligent. To my mind there is nothing in the record fairly warranting a conclusion that it knew, or had any reason to believe, that the basement

walls were in such a condition that a possible rainfall, while its work was in progress, might cause water to penetrate the same and thus gain access to the basements, or that there was anything reasonably putting it to inquiry regarding this matter. Apparently the owners themselves were fully aware of the work being done. I am entirely unable to see any reasonable support for a conclusion that defendant failed to use reasonable care to avoid injury to the property of those fronting on the line of the work.

SHAW, J. I dissent. I am of the opinion that if matters of common knowledge were considered in connection with the facts proven, and all reasonable inferences therefrom indulged in favor of the action of the court below, there is enough evidence to support the finding that the defendant did not exercise reasonable care to protect the basement of plaintiff from injury in case of the rain then threatening. This, in my view, is the only question in the case. Being a question of fact, and as the evidence may be different upon a new trial, I should deem it useless to express my dissent if there were no other reason therefor.

I do so solely to emphasize the fact that the views of the majority, except on the point above stated, do not constitute a decision of the court, only three Justices concurring on the other points discussed. The intimation and statements that it was the duty of the plaintiff to construct a retaining wall impervious to water, and that one lawfully replacing the pavement of a public street, under authority from the city, is not liable for damages from his failure to use ordinary care to protect the property of abutting owners from overflow or accumulations of rainwater caused by his temporary interference with the surface of the street, do not constitute the law of this case. In my opinion they are contrary to our own decisions and against the principles of justice. *Stanford v. San Francisco*, 111 Cal. 202, 43 Pac. 605; *Durgin v. Neal*, 82 Cal. 595, 23 Pac. 133; *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30; 3 *Farnham on Waters*, p. 2625, § 895; *Paolini v. Fresno Canal Co.*, 9 Cal. App. 1, 97 Pac. 1130; *Crommelin v. Cox*, 30 Ala. 318, 68 Am. Dec. 120; *Shields v. Orr, etc., Co.*, 23 Nev. 349, 47 Pac. 194.

SCHOLLE v. FINNELL et al. (S. F. 6899.)
(Supreme Court of California. Sept. 20, 1916.)

1. TRIAL ~~6~~393(1)—TRIAL BY COURT—DECISION—OPINION.

On trial without a jury, where findings are not waived, no expression of the judge, whether casual or in the form of an opinion, can restrict his power to declare his final conclusion by filing a decision, consisting of findings of fact and conclusions of law, as provided by Code Civ. Proc.

§§ 632, 633, though the record is prepared under the new and alternative method.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 920; Dec. Dig. ☞393(1).]

2. FRAUDULENT CONVEYANCES ☞276—REMEDIES OF CREDITORS — BURDEN OF PROOF — TRANSFER.

In an action under Civ. Code, §§ 3439, 3440, to set aside a transfer as fraudulent, it is essential, to make out the case alleged, for plaintiff to establish that there has been a transfer of the property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 808; Dec. Dig. ☞276.]

3. FRAUDULENT CONVEYANCES ☞24(1) — TRANSACTIONS INVALID—"TRANSFER."

Civ. Code, § 1039, defining a transfer as an act of the parties or of the law by which title to property is conveyed from one living person to another, is applicable to the Code sections declaring certain transfers void against creditors, so that in such case the word "transfer" designates only those transactions which, as between the parties, pass, or purport to pass, the title or right of possession to property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 32, 34-36; Dec. Dig. ☞24(1).]

For other definitions, see Words and Phrases, First and Second Series, Transfer.]

4. FRAUDULENT CONVEYANCES ☞32—TRANSACTIONS INVALID—FORM OF TRANSFER.

That live stock of a debtor was mingled with live stock belonging to defendants, and they sold it, does not give creditors a right of action to set aside as fraudulent a transfer of the live stock to defendants, but shows a conversion of the live stock to their own use.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 49, 50; Dec. Dig. ☞32.]

5. FRAUDULENT CONVEYANCES ☞276—REMEDIES OF CREDITORS—BURDEN OF PROOF.

In an action to set aside transfers of personal property as fraudulent, the fact that the court found against the contention of defendants that the property had been transferred to a third person, and by him to defendants, did not relieve plaintiff of the necessity of proving the transfer he alleged.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 808; Dec. Dig. ☞276.]

6. FRAUDULENT CONVEYANCES ☞74(1) — TRANSACTIONS INVALID — FORM OF TRANSFER.

The purchase of corporate stock by a debtor, which he caused to be transferred to defendant without consideration, if accompanied by a fraudulent intent as to debtors, would constitute a transfer to defendant assailable by the creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186-190; Dec. Dig. ☞74(1).]

7. APPEAL AND ERROR ☞1011(1)—REVIEW—QUESTIONS OF FACT—FINDINGS.

Where there was a substantial conflict of evidence as to whether a transfer alleged to have been fraudulent as to creditors was made, the determination of the trial court that it had been sold to defendant by a third person, and that the debtor had no interest in it, and had not transferred it to defendant is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ☞1011(1).]

8. APPEAL AND ERROR ☞843(2)—REVIEW—SCOPE AND EXTENT.

In an action to set aside a transfer of personalty as in fraud of creditors, where the court found that the transfer alleged had not been made, it is immaterial that a fraudulent intent of the debtor may have been shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ☞843(2).]

9. APPEAL AND ERROR ☞1056(4)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action to set aside transfers of personalty as in fraud of creditors, where the court found that the transfers were not made, the exclusion of evidence of declarations by the debtor, tending to show his ownership of the property afterwards claimed by one or more of the defendants, but having no tendency to show that transfers had been made, is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. ☞1056(4).]

10. PLEADING ☞248(16)—AMENDMENT—COMPLAINT—NEW CAUSE OF ACTION.

In an action to set aside transfers of personal property, a proposed amendment, alleging facts regarding transfers of real estate, construed as laying foundation for an attack on the conveyance of real estate, was properly denied as introducing a new and distinct cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 686; Dec. Dig. ☞248(16).]

11. PLEADING ☞11—FORM OF ALLEGATIONS—EVIDENTIARY MATTER.

In an action to set aside transfers of personalty, amendment alleging matters connected with transfers of realty, construed merely as tending to establish a general scheme of conspiracy to defraud, is properly excluded as being merely evidentiary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. ☞11.]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Albert W. Scholle against John Finnell, Jr., and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Morrison, Dunne & Brobeck and Edward Lynch, all of San Francisco, for appellant. Charles W. Slack and Bush Finnell, both of San Francisco, for respondents.

SLOSS, J. John Finnell was, in his lifetime, largely indebted to the plaintiff. He died in October, 1905, leaving an estate which was appraised at a value insignificant in comparison with his obligations. Plaintiff's claim for the amount due him was presented, allowed by the administrator of Finnell's estate, and approved by the court. The plaintiff sought to realize on his claim by instituting actions to set aside, as in fraud of creditors, transfers of property alleged to have been made by John Finnell during his lifetime. One such action was instituted in the superior court of Tehama county. In that litigation the plaintiff assailed six conveyances of real estate, all made to one or more of John Finnell's four sons. The superior court of Tehama county found and adjudged that three of the six conveyances were fraudulent and void as to plaintiff, be-

cause made without consideration and while the grantor was insolvent. The defendants appealed from this portion of the decree, and such appeal resulted in an affirmance. *Scholle v. Finnell*, 166 Cal. 546, 137 Pac. 241. With respect to the other three conveyances involved in the Tehama action, the court found against the allegations of fraud, and gave judgment in favor of Simpson Finnell, the grantee named in said three deeds. From this part of the judgment the plaintiff appealed, and an affirmance followed. *Scholle v. Finnell*, 167 Cal. 90, 138 Pac. 746.

The present action was brought to set aside as fraudulent two alleged transfers of personal property from John Finnell to his son Simpson Finnell. The property involved consisted of two items: (1) A quantity of live stock and farming implements claimed to have been transferred in September, 1900; and (2) 2,000 shares of the capital stock of the Finnell Land Company, a corporation, and a contingent claim to a further number of shares of said company. A general view of the relations between the plaintiff herein and the estate of John Finnell, and of the complications in which the affairs of the Finnell family had become involved, may be had from a reading of the two decisions in *Scholle v. Finnell*, above referred to, and of the opinions of this court in *Finnell v. Goodman & Co. Bank*, 156 Cal. 18, 103 Pac. 483, and *Finnell v. Finnell*, 156 Cal. 589, 105 Pac. 740, 134 Am. St. Rep. 143.

For present purposes, it will suffice to say that the plaintiff alleged that the live stock and farming implements in question were transferred by John Finnell to Simpson Finnell in September, 1900; that such transfer was not accompanied by a delivery or change of possession, and was made by John Finnell while he was insolvent, with the intent to hinder, delay, and defraud his creditors. The averment with respect to the shares of stock of the Finnell Land Company was that on September 8, 1903, John Finnell purchased these shares from George E. Goodman for the sum of \$20,000, and caused the same to be transferred to Simpson Finnell, there being no consideration to John Finnell for said transfers, and the same being made to Simpson fraudulently for the purpose of hindering, delaying, and defrauding the creditors of John Finnell. All of these allegations were denied by the answers.

The court found that John Finnell was insolvent from July, 1893, until the time of his death, and that his estate was insolvent; that he did not, in the year 1900, transfer to Simpson Finnell any live stock, farming implements, or machinery. It was further found that the live stock mentioned in the complaint was, at the time of the alleged transfer thereof, mingled with other live stock belonging to the sons of John Finnell, defendants herein; that the said live stock was controlled and retained by John Finnell up to the time of his death, until sold and

disposed of in connection with the control by the four sons of the live stock belonging to them. It is further found that said live stock was all sold prior to the commencement of this action, and that so much of it as was unsold at the time of John Finnell's death belonged to the said John Finnell, and that "the claim of the plaintiff thereto and for the proceeds thereof is barred by the laches of the plaintiff." The farming implements and machinery were found to be of no value at the time of the alleged transfer; and, as this finding is not attacked, we need not concern ourselves with these items of property.

With respect to the shares of stock of the Finnell Land Company, the court found that John Finnell did not purchase such shares from George E. Goodman, nor cause said shares to be transferred to Simpson, but that on or about September 8, 1903, George E. Goodman sold, assigned, and transferred to Simpson Finnell, for the sum of \$20,000 the said 2,000 shares of stock, together with his claim to the additional shares, and that said transfers were not made to Simpson Finnell nor the shares placed in his name fraudulently and for the purpose of hindering, delaying, and defrauding the creditors of John Finnell.

On these findings the court gave judgment that the plaintiff take nothing by his action, and that the defendants recover their costs. From this judgment the plaintiff appeals, bringing up a record of the proceedings under sections 953a, 953b, and 953c of the Code of Civil Procedure.

[1] The principal contentions of the appellant have to do with the sufficiency of the evidence to support the findings. Some six weeks after the submission of the case, the learned judge of the court below delivered an opinion in which he summarized the important facts, as he saw them. The findings were signed and filed between two and three months later. The findings do not, in all respects, accord with the views which had found expression in the opinion. The appellant contends that the formal findings are, so far as there is any conflict, to be subordinated to or controlled by the opinion theretofore rendered. This position is not tenable. "The findings of fact must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision." *Goldner v. Spencer*, 163 Cal. 320, 125 Pac. 347. Where the trial is without a jury, and findings are not waived, the issues of fact remain undecided until findings are filed. No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final conclusion in the only manner authorized by law, to wit, by filing the "decision" (findings of fact and conclusions of law) provided for by sections 632 and 633 of the Code of Civil Procedure. This rule, which has long been established in our practice, is not altered by the circum-

stance that the record has been prepared under the "new and alternative" method.

[2] As hereinbefore stated, the complaint charged that the live stock and farming implements had been transferred by John Finnell to Simpson Finnell in September, 1900. The finding was that John Finnell did not transfer such property to Simpson. The respondents contend that this finding, if supported by the evidence, as they contend it is, is determinative of the case so far as these items of property are concerned. The action was one to set aside a transfer as fraudulent under sections 3439 and 3440 of the Civil Code. To make out the case alleged it was essential for plaintiff to establish that there had been a transfer of the property. *Doerfler v. Schmidt*, 64 Cal. 265, 30 Pac. 816; *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 184, 100 Pac. 236.

[3] The term "transfer" is defined in section 1039 of the Civil Code as "an act of the parties or of the law by which the title to property is conveyed from one living person to another." The appellant contends that this definition has no application to the Code sections declaring that certain transfers are void against creditors. He seeks to include in the word transfer every act, whether committed by the debtor or by others, which may tend to hamper the creditor in subjecting the property to the payment of his claim. We are cited to no authority which, in our view, sustains this interpretation. The word "transfer" is, no doubt, a broad one, but it designates only those transactions which, as between the parties, pass, or purport to pass, the title or right of possession to the property. The transfer need not, to be sure, be by a writing, but it must be such an act as vests the real or apparent ownership of some interest in the transferee.

[4] If the facts were as found by the court, the situation was simply this: John Finnell was the owner of the live stock and machinery in controversy. He made no transfer of this property to Simpson Finnell, but remained the owner and in possession of it until his death. The live stock was mingled with other live stock belonging to the defendants, and they, prior to the commencement of this action, had sold all of it. The legal consequence of these facts is, not that there was a transfer of the live stock to Simpson Finnell or his codefendants, but that such live stock, belonging to and in the possession of John Finnell, was unlawfully taken by the defendants and converted to their own use. Such conversion may have given a right of action for damages to the estate of John Finnell, but it did not give to the creditors of John Finnell a right to sue in their own names to recover such property or its proceeds on the ground that it had been fraudulently transferred. Even if it were granted that a creditor has the right to pursue one who has unlawfully taken property belonging to the estate of his debtor, the complaint in

this case was not framed upon any such theory, and did not allege any such cause of action.

[5] There can be no doubt that the evidence fully supports the finding of the court that there was no transfer of the live stock and machinery from John to Simpson Finnell. Simpson contended that the live stock had been transferred by John Finnell to George E. Goodman, and subsequently transferred by Goodman to Simpson Finnell. The court did not accept this view, the finding being "that the said property was not sold or transferred by Goodman to Simpson Finnell." But the fact that the particular mode of transfer under which Simpson claimed title was found not to have taken place did not relieve the plaintiff of the necessity of proving the fraudulent transfer (from John Finnell to Simpson Finnell) upon which he relied, and the record is devoid of any evidence tending to show such transfer. In fact, the appellant's contention, as has already been suggested, really is that Simpson Finnell and his codefendants were in possession of the live stock which had belonged to John Finnell, the debtor, and that proof of this fact alone established a transfer which a creditor could assail as fraudulent. For the reasons above stated, we do not agree with this contention. The finding against the transfer alleged is sufficient to support the judgment with reference to the live stock and machinery, and renders it unnecessary to consider whether the finding of laches is supported by the evidence.

[6, 7] Similar considerations force the conclusion that the plaintiff cannot succeed in his attack upon the findings relative to the stock of the Finnell Land Company. The allegation of the complaint was that John Finnell purchased this stock from George E. Goodman, and caused the same to be transferred to Simpson Finnell without consideration. Such transaction, if accompanied by the fraudulent intent asserted, would, in effect, have constituted a transfer from John to Simpson, assailable by the creditors of John Finnell. But the court found that no such transfer had taken place. On the contrary, it found that in September, 1903, Goodman sold and transferred the stock to Simpson Finnell for \$20,000, and that the estate of John Finnell had no interest in the stock. The record contains direct testimony to support these findings. The appellant makes an elaborate and earnest argument designed to show that this testimony should have been rejected by the trial court, and that there were strong circumstances pointing to a contrary conclusion. We shall not take the time or space required for a complete review of all of the items of evidence introduced in this connection. Suffice it to say that, even if we concede the probative force of the various matters insisted upon by the appellant, it still remains that there was at the least a substantial conflict of evidence upon the

point, and that the finding of the trial court, evidencing its view of the preponderance of the evidence, is beyond our power of review. The determination that the stock, belonging to Goodman, had been sold by him to Simpson Finnell, that John Finnell had no interest in it, and that he had not transferred it to Simpson is conclusive here.

[8] Since the plaintiff failed to prove a transfer from John to Simpson Finnell of any of the property described in the complaint, it is entirely unnecessary to follow counsel in the inquiry whether the circumstances showed a fraudulent intent on the part of the debtor. There may have been an intent to defraud, but such intent cannot justify the setting aside of a transfer unless there has been a transfer. In other words, the findings which are sustained by the evidence required the giving of the judgment which was given, irrespective of the soundness of the findings on other issues.

[9] Certain rulings by the court below are assigned as error. The court excluded evidence of declarations by John Finnell tending, as is claimed, to show his ownership of the property, afterwards claimed by one or more of the defendants herein. Without passing on the question of the admissibility of this evidence, it will be sufficient to say that the declarations could have had no tendency to show that transfers had been made as alleged in the complaint. In the face of the findings that there had been no such transfers, these rulings become immaterial.

[10, 11] During the trial the plaintiff asked leave to amend his complaint by adding thereto various allegations connected with the transfers of real estate which had theretofore been under judicial scrutiny in the action instituted in Tehama county. The court declined to grant leave to file the amended pleading. There was no error in this ruling. If the amended complaint was intended to lay the foundation for an attack upon the conveyances of real estate, the plaintiff was seeking to introduce an entirely new and distinct cause of action, and this was a sufficient ground for denying the application. *Peiser v. Griffin*, 125 Cal. 9, 57 Pac. 690. If, on the other hand, as the appellant claims, he sought to make the allegations regarding the transfers of real estate for the purpose merely of establishing the existence of a general scheme or conspiracy to defraud, which scheme embraced the transfers of the personal property here attacked, it may be answered that the new matter was merely evidentiary, and thus incidental to the cause of action set up in the original complaint. It is, of course, well settled that the evidence tending to support a cause of action need not be pleaded.

We find no other points requiring notice. The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

STATE v. FITE.

(Supreme Court of Idaho. Oct. 9, 1916.)

1. CONSTITUTIONAL LAW — 16 — STATUTES — 215 — CONSTRUCTION — GENERAL RULES.

Constitutional provisions and statutory enactments should be read and construed in the light of conditions of affairs and circumstances existing at the time of their adoption.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 12, 16; Dec. Dig. — 16; Statutes, Cent. Dig. § 291; Dec. Dig. — 215.]

2. PHYSICIANS AND SURGEONS — 6(1) — "PRACTICING MEDICINE AND SURGERY" — CHIROPRACTORS.

One following the vocation of a chiropractor, who charges and receives compensation for his services as such, is not thereby engaged in the practice of medicine and surgery as defined in section 1353, Rev. Codes, wherein it is provided: "Any person shall be regarded as practicing medicine and surgery, or either, who shall advertise in any manner, or hold himself or herself out to the public, as a physician and surgeon, or either, in this state, or who shall investigate or diagnose, or offer to investigate or diagnose, any physical or mental ailment of any person with a view of relieving the same as is commonly done by physicians and surgeons, or suggest, recommend, prescribe or direct, for the use of any person, sick, injured or deformed, any drug, medicine, means or appliance for the intended relief, palliation or cure of the same, with the intent of receiving therefor, either directly or indirectly, any fee, gift or compensation whatsoever."

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 8, 10, 11; Dec. Dig. — 6(1).]

For other definitions, see Words and Phrases, First and Second Series, Practice of Medicine and Surgery.]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Marcus S. Fite was convicted of practicing medicine within this state without having obtained a license so to do, and appeals. Reversed, with instructions to dismiss.

Fred M. Butler, of Lewiston, and J. F. Allshie, of Coeur d'Alene, for appellant. J. H. Peterson, Atty. Gen., Herbert Wing and D. A. Dunning, Asst. Attys. Gen., and Henry S. Gray and Miles S. Johnson, both of Lewiston, for the State.

MORGAN, J. This is an appeal from a judgment pronounced against the appellant upon his conviction of having practiced medicine within this state without having obtained a license so to do.

The practice of medicine in Idaho is regulated by chapter 17, tit. 8, of the Political Code (sections 1341 to 1356, inclusive). Section 1350 provides that any person practicing medicine and surgery within this state without having obtained the license required, or contrary to the provisions of that chapter, shall be guilty of a misdemeanor, and fixes the penalty therefor. Section 1353, in so far as it is applicable to this case, is as follows:

"Any person shall be regarded as practicing medicine and surgery, or either, who shall advertise in any manner, or hold himself or herself

out to the public, as a physician and surgeon, or either, in this state, or who shall investigate or diagnosticate, or offer to investigate or diagnosticate, any physical or mental ailment of any person with a view of relieving the same as is commonly done by physicians and surgeons, or suggest, recommend, prescribe or direct, for the use of any person, sick, injured or deformed, any drug, medicine, means or appliance for the intended relief, palliation or cure of the same, with the intent of receiving therefor, either directly or indirectly, any fee, gift or compensation whatsoever: Provided, however, this chapter shall not apply to dentists and registered pharmacists or midwives in the legitimate practice of their respective professions, nor to services rendered in cases of emergency, where no fee is charged."

The proper interpretation of that section is our chief concern in this case.

The record discloses that appellant, who is a chiropractor, had no license to practice medicine and surgery; that he administered chiropractic treatments to certain persons and charged and received compensation therefor; that these treatments consisted in the manipulation of the region of the patient's spinal column with the hands of the practitioner, and that no instruments were used, nor were any drugs or medicine prescribed or given. The evidence does not tend to show that appellant held himself out to the public as a physician and surgeon, or either, or that he investigated or diagnosticated, or offered to investigate or diagnosticate, any physical or mental ailment of any person with a view to relieving the same, as is commonly done by physicians and surgeons, nor did he suggest, recommend, prescribe or direct, for the use of any person sick, injured, or deformed, any drug, medicine, means or appliance for the intended relief, palliation, or cure of the same, unless a chiropractic treatment, as above described, can be construed to be a "means" or "appliance" in the sense in which these words were employed by the Legislature in section 1353, *supra*.

The courts of last resort of a number of states have passed upon statutes intended to regulate the practice of medicine and surgery. Some of them have held that the giving of treatments without the employment of instruments, appliances, or agencies such as are commonly used by physicians and surgeons, and without the use of drugs or medicines, is not violative of these statutes. Among the cases so holding are *State v. Liffing*, 61 Ohio St. 39, 55 N. E. 168, 46 L. R. A. 334, 76 Am. St. Rep. 358; *Hayden v. State*, 81 Miss. 291, 33 South. 653, 95 Am. St. Rep. 471; *State v. Gallagher*, 101 Ark. 593, 143 S. W. 98, 38 L. R. A. (N. S.) 328; *State v. Herring*, 70 N. J. Law, 34, 56 Atl. 670, 1 Ann. Cas. 51; *Smith v. Lane*, 24 Hun (N. Y.) 632; *Nelson v. State Board of Health*, 106 Ky. 769, 57 S. W. 501, 50 L. R. A. 383; *Martin v. Baldy*, 249 Pa. 253, 94 Atl. 1091; *State v. McKnight*, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; *State v. Biggs*, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139, 98 Am. St. Rep. 731. Others adhere to the doctrine that one who treats,

or attempts to treat, another for any physical or mental ailment, in any manner whatever, for compensation, must first procure a license to practice medicine and surgery, or be held to have violated the law. From the latter class of decisions the following are selected: *Swarts v. Siveny*, 35 R. I. 1, 85 Atl. 33; *State v. Gorwin*, 151 Iowa, 420, 131 N. W. 659; *State v. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179; *State v. Erickson* (Utah) 154 Pac. 948; *People v. Gordon*, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165; *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *Bragg v. State*, 134 Ala. 165, 32 South. 767, 58 L. R. A. 925; *People v. Ratledge* (Cal.) 156 Pac. 455.

The apparent lack of harmony among the reported cases may be accounted for, to a considerable extent at least, by the difference in the language employed by the different Legislatures in formulating statutes upon the subject. These statutes may be divided into two classes: (1) Those which seek to prevent the use of drugs, medicines, surgical instruments and appliances by persons unskilled in their use; and (2) those which seek to prevent the practice, or pretended practice, of the healing art, in any manner, by persons who do not possess sufficient educational qualifications to enable them to pass a medical examination such as is prescribed by a board of medical examiners provided for by law. The statute of Idaho here under consideration belongs to the former classification.

[1] In considering this legislative enactment we are guided by the rules heretofore adhered to by this court relative to statutory interpretation. It was said in case of *Colburn v. Wilson et al.*, 24 Idaho, 94, 132 Pac. 579:

"It is a well-recognized rule of law that a section of the statute should be construed in the light of the purpose for which the Legislature enacted the particular act, of which such section is a part."

See, also, *Oregon, etc., R. R. Co. v. Minidoka Co. et al.*, 23 Idaho, 214, 153 Pac. 424; *Onelda Co. v. Evans*, 25 Idaho, 456, 138 Pac. 337; *Wood v. Independent School Dist. No. 2*, 21 Idaho, 734, 124 Pac. 780.

In *Adams v. Lansdon*, 18 Idaho, 488, 110 Pac. 280, it is said:

"Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey, and uphold them."

See, also, *In re Bossner*, 18 Idaho, 519, 110 Pac. 502; *Ingard v. Barker*, 27 Idaho, 124, 147 Pac. 293; *State v. Morris*, 28 Idaho, 599, 155 Pac. 296.

Constitutional provisions and statutory enactments should be read and construed in the light of conditions of affairs and circumstances existing at the time of their adop-

tion. *Toncray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

[2] The law of Idaho regulating the practice of medicine and surgery, of which section 1353, *supra*, is a part, was enacted by the Legislature in 1899. Up to that time no provision had been made for the appointment of a state board of medical examiners, nor for subjecting applicants for a license to practice that learned profession to an examination touching their educational qualifications to do so. At that time chiropractic was unknown in this state, and but little, if anything, was known of osteopathy. Those who offered to heal the afflicted were either graduates of reputable schools of medicine and surgery, or were mere pretenders who assumed to practice that profession without having so graduated. It seems to us to be perfectly clear that the Legislature, recognizing drugs and surgical instruments to be dangerous in the hands of the unskilled, sought, by the enactment of chapter 17, tit. 8, of the Political Code, to reach and prohibit the pretenders rather than practitioners of branches of the healing art which had not yet come into existence, or were, at least, unknown in Idaho.

Subsequent Legislatures seem to have adopted this view, for, in 1907, a law regulating the practice of osteopathy was enacted, now known as chapter 19, tit. 8, of the Political Code (sections 1366 to 1371, inclusive), which prescribes the qualifications and provides for the examination and registration of those who practice that science within this state. The Legislature in 1907 also adopted the law regulating the practice of optometry, being chapter 20, tit. 8, of the Political Code (sections 1372 to 1384, inclusive), and in 1911 an act was passed providing for and regulating the examination and registration of graduate nurses and fixing their qualifications. Chapter 186, Sess. Laws 1911, p. 614. In none of these subsequent enactments is any mention made of the act regulating the practice of medicine and surgery, nor are those who prove themselves to be qualified to practice osteopathy, optometry, or to act in the capacity of graduate registered nurses exempted by any expression in these acts from the operation of the medical law. It is to be inferred from this circumstance that the legislative branch of our state government has not placed upon that law the broad and comprehensive construction contended for by counsel for respondent here, whereby the language, "or suggest, recommend, prescribe or direct for the use of any person sick, injured or deformed any drug, medicine, means or appliance for the intended relief, palliation or cure of the same," shall be held to prohibit the legitimate practice of their professions by osteopaths, optometrists, nurses, or chiropractors, unless they pass an examination intended to test the qualifications of

physicians and surgeons. Upon the other hand, it has given to the clause contained in section 1353, *supra*, "as is commonly done by physicians and surgeons," controlling force, and has limited the prohibition contained in the chapter in question to persons who would attempt to practice medicine and surgery without first having obtained a license so to do by the words "physicians and surgeons," as those words were used and commonly understood by the people of Idaho at the time the law was enacted. We believe this to be a correct interpretation of that statute, and that it was the intention of the Legislature which enacted it that it should be so limited. In case of *Empire Copper Co. v. Henderson*, 15 Idaho, 635, 99 Pac. 127, this court, quoting from *Sutherland on Statutory Construction*, vol. 2, § 363, said:

"The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. 'The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute.' * * * 'Intent is the spirit which gives life to a legislative enactment.' 'In construing statutes the proper course is to start out and follow the true intent of the Legislature, and to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature.'"

We conclude that the practice of chiropractic is not the practice of medicine and surgery as defined in section 1353, *supra*, and that appellant was erroneously convicted.

The judgment of the trial court is reversed, with instructions to dismiss the action.

* SULLIVAN, C. J., and BUDGE, J., concur.

ZEHR v. CHAMPLIN et al. (No. 7724.)

(Supreme Court of Oklahoma. Sept. 19, 1916.)

(Syllabus by the Court.)

1. TRIAL \S 139(1)—TAKING CASE FROM JURY—DEMURRER TO EVIDENCE.

Where the evidence of the defendant tends to establish a defense in whole or in part to the note sued upon, it is error for the court to sustain a demurrer thereto.

[Ed. Note.—For other cases, see *Trial, Cent. Dig.* §§ 332, 333, 338-341; *Dec. Dig.* \S 139(1).]

2. ALTERATION OF INSTRUMENTS \S 20—BILLS AND NOTES \S 378—EFFECT.

In this case the evidence of defendant Joseph Zehr sought to establish an alteration in the note sued upon after its execution and delivery, and, if true, the plaintiff, if an innocent purchaser before maturity and for value, was entitled to recover on the note according to its original tenor, but if the plaintiff was not an innocent purchaser as stated, and there had been an alteration in said note after its execution, no recovery should be had thereon. This evidence was competent, and the court was in error in sustaining a demurrer thereto.

[Ed. Note.—For other cases, see *Alteration of Instruments, Cent. Dig.* §§ 156-189; *Dec. Dig.* \S 20; *Bills and Notes, Cent. Dig.* §§ 985-992; *Dec. Dig.* \S 378.]

Commissioners' Opinion, Division No. 3. Error from District Court, Garfield County; James B. Cullison, Judge.

Action by H. H. Champlin against Joseph Zehr and others. Judgment for plaintiff, and defendant Zehr brings error. Reversed and remanded.

Titus & Talbot, of Cherokee, for plaintiff in error. Adam S. Garis, of Enid, for defendants in error.

HOOKEE, C. This suit was instituted by H. H. Champlin against Joseph Zehr, the Enid Implement Manufacturing Company, and the Coates Hardware Company to recover a judgment upon one promissory note executed by Joseph Zehr to the Enid Implement Manufacturing Company, and after its execution and before its maturity assigned to the Coates Hardware Company, and likewise before its maturity assigned by the Coates Hardware Company to H. H. Champlin.

The plaintiff below alleged that he was a holder in due course for value before maturity and without notice of any equities or defenses, and that he was therefore entitled to recover a judgment upon said note against the maker and the indorsers. Only Joseph Zehr answered in said action, and in his answer he denied the execution of the instrument, denied that the plaintiff was a holder before maturity for value and without notice, and further pleaded want of consideration and an alteration in said note after its execution. Upon the trial in the court below the plaintiff introduced the note in evidence and testified that he purchased the same before maturity for a valuable consideration, and rested the case. Thereupon the defendant below, Joseph Zehr, introduced testimony for the purpose of establishing a want of consideration and an alteration in said note after its execution. At the conclusion of his evidence the plaintiff offered a demurrer to said evidence which the court did not pass upon, but reserved the ruling until the conclusion of all the evidence in said cause. The plaintiff thereupon introduced evidence of expert witnesses seeking to establish that all of said note was written at the same time, and that there had not been any alteration in the same.

After all the evidence had been introduced by both the plaintiff and defendant below, the court took said matter under advisement, and at a later date entered an order in said action on the 27th day of March, 1915, sustaining the demurrer of the plaintiff to the evidence of the defendant for the reason that in the judgment of the court the same did not prove or tend to prove any defense to the action of the plaintiff, to which ruling of the court the defendant below excepted.

There are many questions urged by the plaintiff in error here, but, under the view that we take, it is only necessary for us to consider one question.

[1, 2] Section 4174 of the Revised Laws of 1910, which was in force at the time this action was tried and at the time of the execution of the note in question, is as follows:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its tenor."

One of the main questions of fact presented is to determine whether the note in question was altered after its execution and delivery by Joseph Zehr to the Enid Implement Manufacturing Company. If it was altered, and if the plaintiff is an innocent holder for value before maturity without notice of any defense existing in favor of the defendant, then the plaintiff is entitled to recover only according to the original tenor of the note sued upon, but if the plaintiff is not an innocent holder as stated, and if there has been an alteration, the plaintiff is not entitled to recover at all.

As we view the testimony introduced here by the defendant below, it presented the question as to the alteration of this instrument, which must be decided before a judgment can be rendered in this action, and this testimony thus introduced by the defendant below did establish a defense in part to the note sued upon, and the ruling of the court sustaining a demurrer to this evidence was therefore erroneous. It is impossible for this court to decide this question; for there is evidence either way upon the proposition. If the testimony of the defendant is to be relied upon, then this note was altered; but, if the testimony of the plaintiff's witnesses is to be relied upon, the note was written all at the same time; hence this court cannot pass upon this question of fact.

For the error indicated, this cause must be reversed and remanded.

PER CURIAM. Adopted in whole.

THOMASON v. CHAMPLIN et al. (No. 7725.)
(Supreme Court of Oklahoma. Sept. 19, 1916.)

Commissioners' Opinion, Division No. 3. Error from District Court, Garfield County; James B. Cullison, Judge.

Action by H. H. Champlin against S. B. Thomason and others. Judgment for plaintiff, and defendant named brings error. Reversed and remanded.

Titus & Talbot, of Cherokee, for plaintiff in error. Adam S. Garis, of Enid, for defendants in error.

HOOKEE, C. The opinion this day rendered in cause No. 7724, Joseph Zehr v. H. H. Champlin, 159 Pac. 1185, is decisive of the issues involved here, and under the authority of that case this cause is reversed and remanded.

PER CURIAM. Adopted in whole.

THOMASON v. CHAMPLIN et al. (No. 7726.)
(Supreme Court of Oklahoma. Sept. 19, 1916.)

Commissioners' Opinion, Division No. 3. Error from District Court, Garfield County; James B. Cullison, Judge.

Action by H. H. Champlin against C. B. Thomason and others. Judgment for plaintiff, and defendant Thomason brings error. Reversed and remanded.

Titus & Talbot, of Cherokee, for plaintiff in error. Adam S. Garis, of Enid, for defendants in error.

HOOKER, C. The issues involved in this case have this day been decided in cause No. 7724, Joseph Zehr v. H. H. Champlin et al., 159 Pac. 1185, and under the authority of that case this cause is hereby reversed and remanded.

PER CURIAM. Adopted in whole.

STEWART et al. v. W. T. RAWLEIGH MEDICAL CO. (No. 8248.)

(Supreme Court of Oklahoma. June 6, 1916.
Rehearing Denied Oct. 3, 1916.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW § 89(1)—POWER TO REGULATE — COMMERCE — LIBERTY OF CONTRACT.

The constitutional guaranty of liberty of the individual to enter into private contracts does not limit the power of Congress so as to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89(1).]

2. MONOPOLIES § 17(1)—VALIDITY OF CONTRACTS—RESTRAINT OF TRADE.

A contract of absolute sale, made by a manufacturer of its various manufactured preparations, in which the purchaser agrees to sell the goods purchased "at regular retail prices to be indicated by it [the manufacturer]," where its entire product is sold throughout the country only by means of like restrictive contracts, operates as a "restraint of trade," unlawful as to interstate commerce under the Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647; U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17(1).]

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

3. MONOPOLIES § 17(1)—VALIDITY OF CONTRACTS—RESTRAINT OF TRADE.

Where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to fix and control the price paid therefor by the consumer is not determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The manufacturer having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17(1).]

4. MONOPOLIES § 23 — VALIDITY OF CONTRACTS—RESTRAINT OF TRADE.

The defense that a contract is in violation of the act of Congress of July 2, 1890 (26 Stat. 209, c. 647), to protect trade and commerce against unlawful restraints and monopolies,

which makes illegal every contract violative of its provisions, may be set up by a private individual when sued thereon, and, if proved, constitutes a good defense to the action.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 16; Dec. Dig. § 23.]

Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by W. T. Rawleigh Medical Company against Warren F. Stewart and others. Judgment for plaintiff, and defendants bring error. Reversed.

Blanton & Andrews, Albert Rennie, and Marion Henderson, all of Pauls Valley, and Bond, Melton & Melton, of Chickasha, for plaintiffs in error. Swan O. Burnette, of Cordell, and C. E. Cruikshank and I. P. Gassman, both of Freeport, Ill., for defendant in error.

SHARP, J. For convenience the W. T. Rawleigh Medical Company will hereinafter be referred to as the plaintiff, and the plaintiffs in error as defendants. Plaintiff's action was to recover of Henry Minette as principal, and of the other defendants as guarantors, a balance of \$1,212.22, on account of certain bills of merchandise sold Minette pursuant to a written contract between said Minette and the plaintiff, the performance of which, it was charged, was guaranteed by the defendants, Stewart, Alexander, Henson, and Sparks. The contract is in part as follows:

"Whereas Henry Minette, of Pauls Valley, Oklahoma, desires to purchase of the W. T. Rawleigh Medical Company, of Freeport, Illinois, on credit and at wholesale prices, to sell again to consumers, medicines, extracts, spices, soaps, stock food, and other goods manufactured and put up by it, paying his account for such goods in installments as hereinafter provided: Therefore he hereby agrees to sell no other goods than those sold him by said company, to sell all such goods at regular retail prices to be indicated by it, and to have no other business or employment."

Another clause in the contract provides that the company should notify Minette promptly of any change in the wholesale or retail prices.

Among other defenses interposed by the defendants was that the contract was void, in that the same was made for the sole purpose of maintaining a monopoly in the articles prepared, manufactured, and sold by plaintiff, and that the provisions of said contract and all other contracts made by said plaintiff throughout the different states of the Union, other than the state of its domicile, constituted an unreasonable restraint upon trade and interstate commerce. Under the issues as joined by the pleadings, the defendants assumed the burden of proof, and having introduced their evidence, and rested their case, the plaintiff demurred thereto, and the amount in controversy not being disputed, the court instructed the jury to

return a verdict in favor of plaintiff in the sum of \$1,212.22, and for interest.

It appears that the plaintiff at the time was the manufacturer of certain medicines, extracts, spices, soaps, perfumes, toilet articles, stock food, and other wares, about 65 in number. The manufactured articles it sold only through contracts similar to that made with the defendant Minette. These contracts were made with numerous parties designated as salesmen or agents for certain exclusive territory, consisting in the present case of three townships in Grady county. At the trial it was agreed that the contracts made by plaintiff in the sale of its goods were identical with the Minette contract, and that it sold its products solely by means of such contracts. That the business carried on constituted interstate commerce is admitted. Counsel rely largely for a reversal of the judgment upon the following cases: *Dr. Miles Med. Co. v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; *Park & Sons v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. Although a number of other authorities are cited in their brief, upon the authority of these cases, it is insisted that the stipulation restricting the price at which sales might be made by Minette and other contract holders, was in violation of the act of Congress of July 2, 1890 (26 Stat. 209, c. 647; U. S. Comp. Stat. 1901, p. 3200), upon the subject of trusts and restraints of interstate trade. Said act, in section 1, declares illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, and also declares it to be a misdemeanor, punishable by fine or imprisonment, or both, for any one to make any such contract, or to engage in any such combination or conspiracy. By section 2 it is also made a misdemeanor, punishable by fine or imprisonment, or both, for any one to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations.

[1-3] The general rule is well settled that a system of contracts between manufacturers, jobbers, and retailers, by which the manufacturers attempt to control the prices for all sales by all dealers, at wholesale or retail, whether purchasers or subpurchasers, eliminating all competition, and fixing the amount which the consumer shall pay, amounts to restraint of trade, and is invalid both at common law, and, so far as it affects interstate commerce, under the Sherman Anti-Trust Act. *United States v. Kellogg Toasted Corn Flake Co.* (D. C.) 222 Fed. 725, Ann. Cas. 1916A, 78. No rights are claimed for the plaintiff in the present case, other than those of a manufacturer. Cases, therefore, arising under the patent or copy-

right statutes, during the term of the lawful monopoly, are not in point, and have no application. The opinion in *Park & Sons v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 147, by Judge Lurton, followed by the decision in *Dr. Miles Med. Co. v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, by Justice Hughes, it would seem announces a rule which forbids a recovery by plaintiff on its contract. The opinion in the *Hartman Case* is a comprehensive review of the decisions respecting the common-law rules against monopoly and restraint of trade, as well as the federal Anti-Trust Act, and gives the highest evidence of a painstaking and careful examination of the authorities both at common law and under the statute. *Hartman* was a manufacturer of certain proprietary medicines, the chief of which was the well-known article called "Peruna". This, with other preparations, *Hartman* put on the market through a system of contracts intended to maintain prices. Each jobber was required to sign a written agreement to sell only to retailers whose names should be furnished by the complainant, and who had signed a retailer's agreement with him, obligating them to sell only to consumers at a price named by the complainant, or found on his labels and wrappers. It was charged that there had grown up a very large demand for *Peruna*, and that such contracts had been made with jobbers and wholesalers throughout the United States, and that a majority of the retail druggists of the country had executed such contracts. In the suit brought against *Park & Sons*, it was sought to enjoin the latter from causing a breach of its sales with its customers, and from procuring from such customers, whether wholesaler or retailer, any of plaintiff's remedies and medicines, and from advertising, selling, or offering for sale said remedies and medicines obtained in or by any of the means charged at prices less than the established retail price thereof. The inquiry was made by the court in the course of the opinion:

"Assuming that these contracts operate only as a partial and not a general restraint—a question which we do not concede—and that they are properly to be considered as covenants ancillary to a principal contract, are the restraints thereby imposed necessary to protect the plaintiff in his retained business, or to protect him from an unjust use of the articles by the purchaser?"

—and was answered as follows:

"In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might, in no way, affect the public interest, when a large number might. So, also, the question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining cove-

nants were not the principal, rather than the ancillary matter would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. A common purpose unites each covenant to every other, and the 'system' is to be construed as 'one piece,' in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenant to sell only at the prices dictated by the manufacturer constitutes one general scheme. The question here is therefore one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee"—citing *Continental Wall Paper Co. v. Lewis Voight & Sons*, 78 C. C. A. 567, 148 Fed. 939, 19 L. R. A. (N. S.) 143; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 275, 29 C. C. A. 141, 46 L. R. A. 122; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

Further, in discussing the plaintiff's plan of business, the opinion reads:

"The plain effect of the 'system of contracts,' the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is, first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price, and to only such persons as will sign one of his system of contracts. The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to any one who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about."

It was held that, *prima facie*, the contracts were plainly in restraint of trade, and that it was for the complainant to show that the covenants were not larger than necessary for his protection against an unjust use to the injury of complainant's retained business, and that, unless he could do this, he could not ask equitable relief under such covenants. It was noted that the whole economic system which has made our civilization is founded upon the theory that competition is desirable, and the common-law rules against restraints of trade rest upon that foundation; that a partial restraint of competition may be upheld, when one sells a business or other property, provided that it is no greater than necessary to enable a vendor to realize the value of his good will, or to secure to the buyer the enjoyment of his purchase, or to prevent the use of the property to the prejudice of the seller. Attention was called to the fact that the only

competition which the contracts there in question tend to suppress was competition between those who bought his goods to sell again. That the suppression of competition between his vendees and subvendees secured to him the enjoyment of the legitimate fruits of his sale, to which the restrictive covenants were supposed to be ancillary, or to protect him against the unjust competition, it was said, was not clear, and that the bill failed to state facts from which the court could say whether the covenants were necessary and reasonable. Looking to the averments of the bill as a whole, and to the scheme of the business as disclosed by the contracts themselves it was said the court could not escape the conclusion that the covenants restricting sales and resales had as their prime object the suppression of competition between those who bought to sell again and that any benefit to the retained business to result from them was manifestly but an incident of the main purpose, which was to benefit his vendees and subvendees by breaking down their competition with each other. It was said, further, that restraints which might be upheld if ancillary to some principal contract could not be enforced if, when unmasked, they appear to be the main purpose of the contract, and not subordinate, and that in that case the covenants in the contract signed by the retailers were not even collateral to any sales by the complainant, but to sales by the wholesalers, and that their prime purpose was neither the protection of the retained business of the complainant, nor of the wholesaler, but only to prevent competition between retailers. Covenants, it was observed, protecting the seller of the property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business. The conclusion of the court was that the complainant's system of contracts were not enforceable, and that their direct effect was to limit and restrain the right of each wholesaler and each retailer to transact business in the ordinary way.

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, it was held that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made; that a total suppression of the trade in a commodity is not necessary in order to render the combination one in restraint of trade; that it

is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity that is regarded.

The Hartman Case was followed by the Supreme Court of the United States in *Dr. Miles Med. Co. v. Park & Sons*, supra. In that case, the complainant, a manufacturer of proprietary medicines, prepared in accordance with secret formulas, presented by its bill a system, carefully devised, by which it sought to maintain certain prices fixed by it for all the sales of its products, both at wholesale and retail. Its purpose was to establish minimum prices at which sales should be made by its vendees, and by all subsequent purchasers who trafficked in its remedies. Its plan was thus to govern directly the entire trade in the medicines it manufactured, embracing interstate commerce as well as commerce within the state, respectively. The defendant was a wholesale drug concern, which had refused to enter into the required contract, and was procuring medicines for sale at "cut prices" by inducing those who had made the contracts to violate the restrictions. The complainant invoked the established doctrine that an actionable wrong was committed by one who maliciously interfered with the contract between two parties, and induced one of them to break that contract to the injury of the other; and that, in the absence of an adequate remedy at law, equitable relief would be granted. The principal question, as stated by the court, was the validity of the restrictive agreements. It was said of the bill that it presented a system of interlocking restrictions by which the complainant sought to control, not merely the prices at which its agents might sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer should pay, eliminating all competition. It was said:

"That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with 'most of the jobbers and wholesale druggists and a majority of the retail druggists of the country,' and having for their purpose the control of the entire trade, they relate directly to interstate, as well as intrastate, trade, and operate to restrain trade or commerce among the several states is also clear."

It was insisted that the restrictions were not invalid, either at common law or under the act of Congress of July 2, 1890, upon the following grounds: (1) That the restrictions were valid because they relate to proprietary medicines manufactured under a secret process; and (2) that apart from this, a manufacturer is entitled to control the prices on all sales of his own product. We dismiss the first contention as not in the present case, but note in passing that it was there expressly decided that a restraint of trade which

would be unlawful as to other manufactured articles could not be justified because the article in question is a proprietary medicine, made under a secret formula. To the second, it was urged that as the manufacturer may make and sell or not, as he chooses, he may affix conditions as to the use of the article, or as to the prices at which purchasers may dispose of it; that the propriety of the restraint is sought to be derived from the liberty of the producer. But it was observed by the court that it did not follow, in case of sales actually made, that the manufacturer may impose upon purchasers every sort of restriction. Thus, it was said, a general restraint upon alienation is ordinarily invalid. The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. Quoting from Lord Coke (2 Coke on Littleton, par. 360) the court said:

"If a man be possessed of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against the trade and traffic, and bargaining and contracting between man and man."

Proceeding further in the opinion, it is said:

"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenant. Otherwise restraints of trade are void as against public policy." *Gibbs v. Consolidated Gas Co.*, 130 U. S. 409, 9 Sup. Ct. 553, 32 L. Ed. 984.

It was said that the case was not unlike that of a sale of good will, or of any interest in business, or of a grant of the right to use a process of manufacture; that complainant had not parted with any interest in its business or instrumentalities of production. It had conferred no right by virtue of which purchasers of its products might compete with it. It retained complete control over the business in which it was engaged, manufacturing what it pleased, and fixing such prices for its own sales as it desired. Attention was called to the fact that the court was not dealing with a single transaction, conceivably unrelated to the public interest, but:

"The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them."

Continuing, the court said:

"But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."

They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer"—citing *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690; *Judd v. Harrington*, 189 N. Y. 105, 34 N. E. 790; *People v. Milk Exch.*, 145 N. Y. 287, 39 N. E. 1082, 27 L. R. A. 437, 45 Am. St. Rep. 609; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; on appeal, *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *W. W. Montague & Co. v. Lowry*, 183 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *Chapin v. Brown Bros.*, 83 Iowa, 156, 43 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297; *Craft v. McCoughy*, 79 Ill. 346, 22 Am. Rep. 171; *W. H. Hill Co. v. Gray & Worcester*, 163 Mich. 12, 127 N. W. 803, 30 L. R. A. (N. S.) 327.

In conclusion it was held that the complainant's plan fell within the principle which condemns contracts of its class; that it in effect created a combination for prohibited purposes, and that no distinction could properly be made by reason of the particular character of the commodity in question, and that it was an article of commerce entitled to no special privilege or immunity, and that the rules concerning the freedom of trade must be held to apply to it; that where commodities have passed into the channels of trade, and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances, whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many; that, the complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

We have reviewed at length the foregoing opinions because of their lucid exposition of the law, and on account of the fact that they involve the construction of a federal statute, and are controlling upon this court. *Missouri, K. & T. R. Co. v. Walston*, 37 Okl. 517, 133 Pac. 42. Recurring to the facts of the case at hand, it will be seen that plaintiff's plan or scheme of sale of its manufactured products eliminated all form of competition therein. Its goods were sold only to those who entered into a contract to sell to the consumer at the prices fixed by plaintiff. While but a single contract is involved here, it was admitted that the plaintiff transacted business only in pursuance of like contracts. It was shown that the medical company had a capital and surplus of over \$1,000,000 invested in its business, and that an "army of Rawleigh men" was engaged in selling its products throughout the United States. There was no competition in its products between its so-called agents and others, for its sales were confined to those who entered into its restrictive contracts. There was, or could be, no competition between its so-called salesmen, and in no other means than through a purchase from such salesmen could the consumer buy its products. The contracts left no room for the usu-

al competition between the dealers in the products sold by plaintiff; and this was the obvious purpose of the plan. It was not shown, nor can we conceive it to be the case, that the restraints fixed by the manufacturer upon the price to be paid by the consumer were necessary to its retained business, and therefore ancillary to the principal purpose of the agreement; but, on the other hand, the plain effect of its system of contracts was to destroy all competition in the sale of its manufactured products. Well may we in this connection use the language of the court in the *Hartman Case*:

"Now, in what way is only a fair protection afforded the interests of complainant by stifling all competition between the jobbers of the United States who deal in complainant's preparations? In what way are the covenants which forbid them to resell to any one who will buy 'necessary,' to use Judge Taft's phrase, 'to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party?' In what way are covenants which compel retailers to maintain prices, to quote Chief Justice Tindal, 'such only, as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public?' *Horner v. Graves*, 7 Bing. 735."

To sustain the validity of the restrictive agreements of plaintiff would be to give effect to a system of doing business by which all the sales of all its products would be, under all circumstances, controlled by it. Applied to modern conditions, the public interest is of first importance in determining the validity of contracts in restraint of trade. If the restraint is sustained, it can only be in cases where it is found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary in the circumstances of the particular case, for the protection of the covenantee. The fact that here there was no agreement between different manufacturers, wholesalers, jobbers, or others to fix and maintain a selling price is, in the language of Justice Hughes, in the *Dr. Miles Case*, unimportant. In that case it was said:

"The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to the manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain

would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system."

As we read the decisions principally relied on, the plaintiff's plan of selling its products comes within the inhibition of the statute. Contracts which by reason of the intent, or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade are within the act. *United States v. American Tobacco Co.*, 221 U. S. 179, 31 Sup. Ct. 632, 55 L. Ed. 694; *Nash v. United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232.

[4] But may the defendants avail themselves of the statute in an action to recover for goods sold Minette? Plaintiff's recovery is predicated upon the illegal agreement. The contract is referred to and made the basis of its cause of action. Aside from the contract, there was no liability on the part of the guarantors. Against them, plaintiff had no claim, except through the medium of an illegal agreement. In short, the account sued on was made up in execution of the agreement that constituted the illegal restraint upon trade and commerce, and was not, therefore, as in some of the reported cases, collateral to and independent of the agreement under which the combination or restraint was effected. Plaintiff could not enforce its contract without bringing under review all its parts, for it is well settled that where it is necessary to prove an illegal contract in order to maintain an action, courts will not enforce it, nor will they enforce alleged rights directly springing from such contract. As stated in *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117:

"Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal"—citing *Booth v. Hodgson*, 6 T. R. 405, 408; *Thompson v. Thompson*, 7 Ves. Jr. 470; *Embrey v. Jemison*, 131 U. S. 336, 348, 9 Sup. Ct. 776, 33 L. Ed. 172, 177.

Turning to the authorities declaring when the statute may be set up in defense of an action to recover for goods sold, it appears that in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, there was no necessary legal connection between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as held by the court, collateral to the arrangement for the combination referred to, and the action was not one to enforce the terms of such an arrangement. In *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, the court,

after referring to that section of the act of Congress, relating to suits by the Attorney General and by persons injured in their business or property, said:

"Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon the contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action. * * * As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court."

A leading authority, giving to the purchaser the right to defend, under the statute, on account of the unlawful nature of the contract, is *Continental Wall Paper Co. v. Voight & Sons*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486. In that case the action was brought to recover for wall paper sold by the representative of a combination or trust formed for the purpose of restraining and monopolizing trade and commerce among the several states in the manufacturing, buying, selling, and dealing in wall paper. The defendant, who was engaged in buying and selling wall paper in Ohio and other states was a party to the illegal combination; and the account in suit was made up, as to the prices and terms of sale, not upon the basis of an independent collateral contract, for goods sold and delivered, but with direct reference to, in conformity with, and for the object of enforcing the agreement that constituted, or out of which came, the illegal combination, whose business was carried on under the name of the Continental Wall Paper Company, and that a judgment against the defendant upon the account in suit would, in effect, legally and practically aid the combination to reap the fruits of agreements that were illegal under the acts of Congress, and the making of which was declared by that act to be a crime. The *Connolly* Case is reviewed at length by Justice Harlan, who wrote both opinions, and the cases distinguished. Of the case there at hand, it was said:

"The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff, the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination."

The last expression of the Supreme Court of the United States upon the question is *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118, in which the court reviews both its earlier holdings in the *Connolly* and *Continental Wall Paper Company* Cases. The primary question there decided was that the defendant could not set

up in defense the illegal organization of the seller, the contract being otherwise inherently legal. Having dealt with the refining company as an existing concern, possessing the capacity to sell, speaking generally, the assertion that it had no legal existence because it was an unlawful combination in violation of the anti-trust act was irrelevant to the question of the liability of the manufacturing company to pay for the goods, since such defense was a mere collateral attack on the organization which could not lawfully be made.

In *J. W. Ripy & Son v. Art Wall Paper Co.*, 41 Okl. 20, 136 Pac. 1080, 51 L. R. A. (N. S.) 33, the contract under review did not undertake to fix the price at which the defendants might sell the goods purchased; neither did it restrict the plaintiff from selling goods to others, nor was either party restricted from selling goods to any other person or class of persons. And it was observed that it could not be seen wherein the public would be injuriously affected by the enforcement of the contract.

The fact that in a few isolated cases Minette varied slightly from the selling price fixed by the plaintiff does not serve to render enforceable the contract, following which the bill of goods was made up, and for which the action is brought to recover the value. Plaintiff may not avail itself of its patron's infraction of his contract in order to give character to its illegal undertaking.

From the facts proven, and without further citation of authorities, we conclude that the contract entered into between the parties was illegal under the anti-trust act of 1890, that it is to be taken as one intended, and which if enforced would have the effect, directly to restrain and monopolize trade and commerce among the several states, and that plaintiff cannot have a judgment for the amount of the account sued on, because, for the reasons we have already stated, such a judgment would, in effect, aid the execution of the agreements which constituted the illegal combination.

The judgment of the trial court is therefore reversed. All the Justices concur.

STATE ex. rel. GETZELMAN et al. v. SUPERIOR COURT FOR KING COUNTY
et al. (No. 18577.)

(Supreme Court of Washington. Oct. 5, 1916.)

1. ATTACHMENT \S 107—PROCEEDINGS TO PROCURE—AFFIDAVITS—"INDEBTEDNESS."

Under Rem. & Bal. Code, § 643, requiring a writ of attachment to show that defendant is indebted to the plaintiff, specifying the amount of the indebtedness, "indebtedness" includes a liability for damages arising on breach of a written contract.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 285-289; Dec. Dig. \S 107.

For other definitions, see Words and Phrases, First and Second Series, Indebtedness.]

2. ATTACHMENT \S 5—NATURE OF REMEDY—ACTIONS IN WHICH AUTHORIZED — BREACH OF CONTRACT.

Under Rem. & Bal. Code, § 648, authorizing the issuance of a writ of attachment on affidavit showing the indebtedness of defendant to plaintiff, and, among other things, that the defendant is a nonresident of the state, or that the damages for which the action is brought are for injuries arising from the commission of some felony or for the seduction of some female, where the affidavit for attachment shows that the defendant is a nonresident of the state, the provision of the section as to damages from commission of the felony does not exclude the right to attachment for damages from breach of a written contract.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 12-21; Dec. Dig. \S 5.]

Department 1. Application by the State on the relation of T. E. Getzelman and others, for writ of prohibition to the Superior Court of King County and another. Denied.

Kerr & McCord, of Seattle, for plaintiff.
Warren H. Lewis, of Seattle, for respondents.

MOUNT, J. This is an application for a writ of prohibition. The petition shows that some time prior to December, 1915, the relators sold a tract of land in Snohomish county to A. Roe and wife, and executed and delivered a warranty deed to said land for a consideration of \$16,500, of which \$5,500 was paid in cash and deposited to the credit of relators in the National Bank of Commerce of Seattle. The balance of the purchase price was evidenced by promissory notes made by Roe and wife to the relator T. E. Getzelman. One of these notes was for \$5,000 and three for \$2,000 each. The \$5,000 note was secured by a first mortgage on the property deeded by the Getzelmans to Roe. The three notes for \$2,000 each were secured by a second mortgage on the same property. All these notes and mortgages were deposited in the National Bank of Commerce for the use and benefit of the relators. Thereafter Roe and wife conceived that the grantors had breached certain covenants in the deed, and thereupon instituted an action in the superior court of King county claiming damages for a breach of the covenants.

The amended complaint contained three causes of action. The first cause of action, after describing the deed and the covenants therein contained, alleged in substance that there was a certain easement upon a part of the premises in favor of an abutting owner to carry drain and waste water across the premises; that the existence of this easement caused damages to the plaintiff in that action in the sum of \$2,000. The second cause of action, after referring to the deed and the covenants therein and the warranty of quiet and peaceable possession, alleged in substance that a portion of the land was in the lawful possession of other parties, and that by reason thereof the plaintiffs were

damaged in the sum of \$500. And for a third cause of action it was alleged that there was an outstanding lease by reason of which the plaintiffs claimed damages in the sum of \$3,000, amounting in the aggregate for the three causes of action to the sum of \$5,500. After the complaint in that action was filed, the plaintiffs therein, Roe and wife, sued out a writ of attachment. No property was found within this state upon which the writ could be levied, and thereafter a writ of garnishment was issued and served upon the National Bank of Commerce of Seattle and the bank made answer to the writ of garnishment to the effect that it held the money and notes and mortgages hereinbefore referred to in its possession. The relators are not residents of the state of Washington, but are residents of the state of Illinois. A summons and complaint in that action were served upon them personally in the state of Illinois and no other process has ever been served upon them. The garnishee, the National Bank of Commerce, attacked the procedure upon the ground that the court was without jurisdiction, and an adverse order in that respect was entered against it. An appeal from that order has been taken to this court.

The relators appeared specially in the cause for the sole purpose of attacking the jurisdiction of the court. The trial court held that it had jurisdiction of the subject-matter of the action by reason of the attachment and garnishment, and this application is to prevent the lower court from proceeding in that cause.

It will be observed from what is said above in regard to the action of Roe against the relators that the action is one for damages for breach of warranty of a deed, and it is argued by the relators that, because such damages are entirely uncertain and unliquidated and speculative in their nature, the action will not support the issuance of the writ of attachment under our statute. Our statute, at section 647, Rem. & Bal. Code, provides that:

"The plaintiff at the time of commencing an action, * * * may have the property of the defendant, * * * attached in the manner hereinafter prescribed."

The next section provides:

"The writ of attachment shall be issued by the clerk of the court in which the action is pending; but before any such writ of attachment shall issue, the plaintiff, or some one in his behalf, shall make and file with such clerk an affidavit showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all just credits and offsets), and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, and either— * * * (2) That the defendant is not a resident of this state; or * * * (9) That the damages for which the action is brought are for injuries arising from the commission of some felony, or for the seduction of some female."

[1] It is not claimed by the petitioner that the affidavit upon which the attachment was issued was not sufficient, but it is contended that the word "indebtedness" does not cover an action for damages. The word "indebtedness" as used in this statute we think may be applied to an action for damages arising upon a breach of a written contract. In 22 Cyc. at page 75, in defining the term "indebtedness," it is stated:

"It is a word of large meaning, and must be construed in every case in accord with its context. When used in its strict legal significance, the word applies only to a pecuniary obligation arising from a contract, expressed or implied; but given its plainest and most literal signification, it includes every obligation by which one person is bound to pay money, goods, or services to another."

See, also, 1 Wade on Attachments, §§ 12, 13, 14.

We are satisfied, therefore, that the affidavit for the writ was sufficient under this statute.

[2] It is also argued by the relators as we understand them that, because of the ninth subdivision of section 648, to the effect that the damages for which the action was brought are injuries arising from the commission of some felony, every other cause of action for damages is excluded. But it is apparent that subdivision 9 does not limit the causes for which the attachment may be issued. It is one of nine independent causes. The writ of attachment in this case was issued because, first, there was a debt alleged to be due, and, second, the defendants were nonresidents of this state. Where the debt is alleged to be due and the defendants are nonresidents of the state the attachment may issue. Or it may issue for an injury arising from the commission of a felony or for an injury for seduction under the provisions of subdivision 9, irrespective of the other subdivisions of that statute. In the case of Bingham v. Keylor, 19 Wash. 555, 53 Pac. 729, in referring to this statute, this court said:

"Under this statute we think an attachment may issue in an equitable action equally as well as in an action strictly legal, when the object is to recover money, and the nature of it is such as to enable the plaintiff to specify the amount of indebtedness."

It is true in this case the separate causes of action are for damages for the alleged breach of a warranty deed. The object of the complaint was clearly to recover money, and the nature of the action was such that the plaintiff could and did specify the amount of the money demanded as an indebtedness.

We are satisfied, therefore, that the trial court has jurisdiction of the subject-matter of the action by reason of the writs of attachment and garnishment. The application for the writ must therefore be denied.

MORRIS, C. J., and CHADWICK, ELLIS, and FULLERTON, JJ., concur.

AMERICAN SAV. BANK & TRUST CO. v. MUNSON et ux. (No. 18416.)

(Supreme Court of Washington. Aug. 28, 1916.)

1. PLEDGES \S 55—COLLATERAL—EVIDENCE.
Evidence held to warrant the finding that collateral was given to secure the entire indebtedness and not a single note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. \S 140-151; Dec. Dig. \S 55.]

2. PAYMENT \S 39(1)—APPLICATION OF COLLATERAL—RIGHTS OF HOLDER.

The holder of several notes secured by insurance policies, on payment of the policies, may apply the proceeds as he chooses to any of the notes, in the absence of contract to the contrary.

[Ed. Note.—For other cases, see Payment, Cent. Dig. \S 104, 108, 109; Dec. Dig. \S 39(1).]

3. BANKRUPTCY \S 143(11) — DIVIDENDS — HOW APPLIED.

Where the maker of several notes secured by insurance policies as collateral became bankrupt, and the insurer paid the loss in drafts payable jointly to the trustee in bankruptcy in whose name the parties had agreed suit might be brought, and the holder of the notes, the holder could not be charged with the full amount of such drafts, but the fund was chargeable with amounts determined by the bankruptcy court to be prior to the holder's claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 201; Dec. Dig. \S 143(11).]

4. BANKRUPTCY \S 336 — DECLARATION OF DIVIDENDS—WITHDRAWAL OF CLAIM.

Where creditors of a bankrupt received notice of the intention of the bankruptcy court to declare a dividend in accordance with Bankruptcy Act, July 1, 1898, c. 541, \S 53, 30 Stat. 581 (U. S. Comp. St. 1913, \S 9642), and voluntarily withdrew their claim pending the declaration of the dividend, they were affected with notice thereof, and their withdrawal was binding on them, the referee, under Bankruptcy Act, \S 389a (U. S. Comp. St. 1913, \S 9623), having jurisdiction to declare the dividend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 523, 524; Dec. Dig. \S 336.]

5. BANKRUPTCY \S 482(1) — COSTS — ATTORNEY'S FEES.

A fee of an attorney collecting \$6,000 for the bankrupt estate from insurers on occurrence of loss is properly allowable in the sum of \$500.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 874-876, 897; Dec. Dig. \S 482(1).]

6. BANKRUPTCY \S 368 — TRUSTEE'S FEES—PARTIES BOUND BY ALLOWANCE.

Although parties alleged the trustee had agreed with their attorney to act without fees, they were bound by an allowance of fees made to him in the presence of their attorney, who made no objection.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. \S 571; Dec. Dig. \S 368.]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by the American Savings Bank & Trust Company against J. E. Munson and wife and others, Judgment for plaintiff, and defendants Munson and wife appeal. Affirmed.

J. W. Russell and Ballinger & Hutson, all of Seattle, for appellants. Farrell, Kane & Stratton, of Seattle, for respondent.

ELLIS, J. Action for a balance claimed to be due on a promissory note.

Prior to August 19, 1911, the Seattle Table & Manufacturing Company, a corporation, was operating a manufacturing plant in the city of Seattle. Defendants J. R. Grant, J. E. Munson, and George M. Wintermute were, so far as the record shows, the only stockholders. Between that date and October 14, 1911, both inclusive, plaintiff discounted for the manufacturing company five notes aggregating \$5,750, two for \$2,000 each, two for \$500 each, and one for \$750. These were all made by the Seattle Table & Manufacturing Company payable to its own order and indorsed by it and also by Grant, Wintermute, and Munson. All of these notes being due and unpaid, on January 4, 1912, a conference was had between Graham K. Betts, plaintiff's cashier, and Grant, Munson, and Wintermute, at which it was agreed that, of this indebtedness, \$5,000 would be carried by the bank, as a carrying account, and the balance of \$750 should be paid in 30 days. The two \$2,000 notes and the two \$500 notes were accordingly consolidated and a new note of that date for \$5,000, payable in 60 days, was given. The \$750 note was renewed by a 30-day note. These notes were also made by the manufacturing company payable to its own order and indorsed by it, Grant, Munson, and Wintermute. The \$5,000 note is the note in suit. The \$750 note was not paid at maturity.

The Seattle Table & Manufacturing Company carried nine policies of fire insurance on its plant, aggregating \$12,500, issued from April 17 to July 2, 1911, both dates inclusive. When the manufacturing company first began doing business with plaintiff it deposited these policies with plaintiff, the evidence leaves it in doubt whether as collateral security for the original notes or only for safe-keeping. The policies were all in full force on January 4, 1911. Certain it is that on that date it was agreed between Betts for the bank and Wintermute and Munson for the Seattle Table & Manufacturing Company that these policies should be held as collateral, but on the question whether as security for the \$5,000 note alone, or for any and all indebtedness of the company to the bank, the evidence presents an irreconcilable conflict. It is conceded that the bank was to have these policies renewed at their respective expirations, with the clause inserted usual in such cases, loss if any payable to the bank as its interest might appear. This the bank did as to all of the policies save one, which was also renewed but from which the loss if any clause was by inadvertence omitted.

About the middle of July, 1912, the plant

of the Seattle Table & Manufacturing Company was destroyed by fire. The insurance companies all refused to pay the loss. Suits were brought in the superior court of King county in the name of Wintermute, who held a power of attorney to settle the loss, and the Seattle Table & Manufacturing Company, as plaintiffs, to collect all the policies. The loss claimed was \$7,822.72. While these suits were pending the Seattle Table & Manufacturing Company was put into bankruptcy by its creditors, among them the bank. L. V. Newcombe, an attorney in the office of Farrell, Kane & Stratton, attorneys for the bank, was appointed receiver in the bankruptcy court and afterwards elected as trustee. He, as trustee, was substituted as plaintiff in the suits on the policies by stipulation. Edward H. Chavelle, who was attorney for Wintermute and the manufacturing company in the original suits, continued to act therein as attorney for the trustee as substituted plaintiff. Later the insurance companies offered \$6,000 in settlement of the nine suits. The trustee and the bank favored acceptance. Wintermute objected. Munson, after a conference with Betts, cashier of the bank, consented to the settlement. Grant's attitude in the matter does not appear. The settlement was made. The payment was by drafts, one made payable to the attorneys for the insurance companies and indorsed to the trustee, three made payable to the trustee, and the other five made payable to the bank and the trustee jointly. Before the bank would indorse these five drafts, Kane, one of the attorneys for the bank, insisted upon a written consent thereto by Grant and Munson. Chavelle, who then held a power of attorney from Grant and Munson to collect for them certain claims in the bankruptcy suit, prepared a letter, took it to them, and they both signed it. It was addressed to the bank and read:

"I am advised by Mr. Chavelle to-day that the drafts drawn by the various insurance companies in settlement of the suits of the Seattle Table & Manufacturing Company against them, have in some instances been made payable jointly to L. V. Newcombe, as trustee in bankruptcy of the Seattle Table & Manufacturing Company, and American Savings Bank & Trust Company, and I direct you to indorse the drafts that are payable to you jointly with Mr. Newcombe, and relieve you from any obligation or responsibility for so doing."

The letter was returned by Chavelle to the bank. The five drafts were then indorsed by the bank and turned over to the trustee, who collected the nine drafts and turned the whole \$6,000 of proceeds into the general fund in the bankruptcy court.

The bank, prior to this time, had filed claims in the court against the bankrupt estate based upon the \$5,000 note here in suit and all other indebtedness from the bankrupt to the bank, claiming to be a secured creditor on account of the deposit of the insurance policies as collateral. The claims which Chavelle as attorney for Grant and Munson had

filed against the estate on objection thereto by the trustee were disallowed and by him withdrawn with Munson's and Grant's consent on November 4, 1913. On November 7, 1913, an order was made in the bankruptcy court allowing to the bank \$4,000 as a dividend, and on April 4, 1914, another order was made allowing to the bank additional dividends aggregating \$710.28. Of the total \$4,710.28 the bank applied \$861 in payment of the 30-day note and accrued interest; \$467.62 in payment of insurance premiums advanced by it in renewing the policies and interest; \$211.82 on an overdraft and interest; and the balance, \$3,189.84, on the \$5,000 note here in suit and the interest thereon, leaving a balance of the principal \$2,662.49 unpaid for which with subsequently accruing interest recovery is sought in this action. There was also allowed, from the \$6,000, to Chavelle an attorney's fee of \$500, and to the trustee \$253 as fees.

This cause was tried to the court without a jury. The court found for plaintiff, and entered judgment against defendants for \$2,875.45, and for \$200 attorney's fee. Defendants Munson and Grant appeal.

[1] It is first contended that the court erred in not holding that the insurance policies were put up as security for the \$5,000 note only. As noted in our statement, the evidence on this point was sharply conflicting. Munson and Wintermute were positive that Betts said the bank would hold the policies as security for the carrying account alone. Betts was equally positive that nothing of the kind was said, and that the rule of the bank to hold such collateral for any indebtedness that might exist was so universal that had any exception been made in this case he would certainly have remembered it. Betts was no longer connected with the respondent bank. He was the most disinterested witness who testified on the subject. The trial court evidently believed him. We cannot say that the evidence preponderates the other way. We are not bound by the views of the trial court, but they are entitled to great weight. Moreover, the probabilities are with respondent. It is unquestioned that the carrying account was not to exceed \$5,000. Had the bank not deemed itself secured by the collateral it would hardly have permitted the 30-day note to run after due and in addition the overdraft to accumulate. We are satisfied that the policies were held as collateral for the full indebtedness.

[2] Appellants' second contention that the payment by the insurance companies of the \$6,000 operated, as a matter of law, as a payment of the \$5,000 note necessarily falls with their first claim. Since the insurance was held as collateral to the whole indebtedness respondent had the right to apply the money received from the insurance on any part of that debt. The payment was not a voluntary payment by appellants with a con-

temporaneous direction as to its application, nor was there any antecedent contract requiring its application alone to the note in question. The case is the converse of that presented in *Ross-Higgins Co. v. Rook*, 65 Wash. 546, 118 Pac. 744, relied upon by appellants.

[3] Nor do we find merit in the claim that the bank should in any event be charged with the full \$6,000 as money coming into its possession. In the first place the drafts were so drawn that the bank could not collect the money on any of them. In the second place the trustee was vested by law with title to all assets of the bankrupt, including securities held by the creditor as collateral. The bank had no right to hold the securities until its debt was paid, nor to sell them or otherwise realize on them independently of the bankruptcy proceedings. The trustee had sole authority to reduce them to money, and the bankruptcy court had sole jurisdiction to determine the bank's claim to priority of payment from the proceeds.

"The trustee is vested by law with the estate, and could by a proper action recover possession of the securities in possession of any one as collateral, subject to any valid lien such person might have on the proceeds of such securities. The vesting of title gives him constructive possession of the property the instant the title passes. Such property is then brought into the bankruptcy court in its entirety, and under its protection, as fully as if actually brought into the visible presence of the court. No other court and no person acting under process can, without permission of the bankruptcy court, interfere with it, and to so interfere is a contempt. The trustee is an officer of the court, and his possession, actual or legal, is the possession of the court." *In re Cobb* (D. C.) 96 Fed. 821, 823.

At the time these drafts were drawn the policies were in suit in the name of the trustee as plaintiff with the consent of all parties concerned. They were in contemplation of law in the custody of the trustee. The bank had no such possession as to bar the jurisdiction of the bankruptcy court to determine the validity of its claim. *In re Waterloo Organ Co.* (D. C.) 118 Fed. 904, 906; *In re Porterfield* (D. C.) 138 Fed. 192.

In the third place the letter signed by Grant and Munson authorizing the bank to indorse the drafts, in view of the manner in which the drafts were drawn, can only be construed as intended to authorize the bank to turn the drafts over to the trustee. This letter was dictated by Chavelle, who at the time was not only attorney for the trustee in the suits on the policies, but was then attorney for Grant and Munson in the bankruptcy proceedings. But aside from this the letter was sufficiently indefinite on its face to admit of parol proof as to its purpose. Such evidence was admitted, and we think properly so. It seems to us overwhelmingly to show that the then understood purpose of all parties was to authorize the bank to indorse and turn over these drafts to the trustee without waiving any of its rights against

Grant and Munson as indorsers of the note. In every view of the case we are clear that the bank was justified in turning these drafts over to the trustee and submitting its claims to the bankruptcy court for adjudication as to its claim of priority in right to the fund.

[4] What we have said sufficiently disposes of the appellants' main contention. But it is urged that the order of the referee in bankruptcy of November 7, 1913, fixing the amount of the dividend on the bank's claim is not binding on Grant and Munson because 8 days before they had consented to the disallowance and withdrawal of their own claims. But they had already received notice of the intention of the bankruptcy court to declare dividends while they were in the fullest sense parties to the proceeding. Bankruptcy Act, § 58. If, as appears, they voluntarily withdrew from that proceeding pending the matter in which they now claim to have been most interested they can hardly be heard to say that they are not bound by the result. It seems to be conceded that had they been notified of the referee's order so that they might have appeared and appealed from it to the judge of the bankruptcy court, they would be bound by that order. We think they were affected with notice and their withdrawal on the very eve of the time set for declaring the dividends binds them. There can be no question that the order of the referee was binding upon the bank. The referee had jurisdiction to declare the dividends. Bankruptcy Act, § 39a. It was only incumbent upon the bank to establish its priority right to the \$6,000 as against other creditors in a tribunal of competent jurisdiction. It was not incumbent upon it to appeal from the referee's decision in order to preserve its rights as against Munson and Grant. The bank objected to the order as made and sought to have the whole sum applied to its claim. There is no claim that the order was procured through fraud or collusion. In view of the relation of appellants to the whole transaction we are clear that they cannot now question the order.

[5] Moreover, the two principal claims allowed by the referee to others than the bank were properly so allowed in any event. The \$500 attorney's fee allowed to Chavelle was incurred in collecting the fund. It would seem to stand in the same relation to that fund as money paid or expenses incurred in the preservation of the estate or expenses incurred in recovering property of the bankrupt for the estate which under the Bankruptcy Act, section 64 (U. S. Comp. St. 1913, § 9648), are among the claims prior to all others save taxes.

[6] As to the \$253 fees allowed the trustee, it is claimed that the evidence shows an agreement on Betts' part that if some one from the office of Farrell, Kane & Stratton were appointed trustee he would serve without compensation. It is not claimed that

this agreement was ever called to the attention of those attorneys or of the trustee, nor is it claimed that any such agreement was made with either Grant or Munson directly. Chavelle says the agreement was made with him. This was while he was acting as attorney for the Seattle Table & Manufacturing Company and Wintermute in the suits against the insurance companies. There is no competent evidence that he was then attorney for Grant and Munson in any capacity. He was present in court when the referee allowed the trustee fees and made no objection. As pointed out by the trial court since Grant and Munson claim only through an agreement made with Chavelle they ought to be bound by his acquiescence.

Finally it is claimed that the judgment should be reversed because the court did not make specific findings upon every controverted question of fact. The court, however, did find the ultimate facts. We are satisfied that the findings are sufficient to sustain the judgment which under the evidence we find no sufficient reason to disturb.

Affirmed.

MORRIS, C. J., and CHADWICK, MOUNT, and FULLERTON, JJ., concur.

HASKINS v. FIDELITY NAT. BANK. (No. 13432.)

(Supreme Court of Washington. Sept. 26, 1918.)

1. FRAUDULENT CONVEYANCES — 147(1) — RIGHTS OF ASSIGNEE—POSSESSION OF PROPERTY.

Where a debtor, who had given a bill of sale of lumber as security, consented to the creditor's taking possession, and the creditor's representative checked up the lumber and employed a man to haul it as soon as the roads were passable, and on the appointment of an assignee for the debtor for the benefit of creditors, the assignee was notified of the arrangement, there was a sufficient change in the possession of the lumber as against the assignee and other creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 457-459, 461-464, 466; Dec. Dig. —147(1).]

2. APPEAL AND ERROR — 1011(1)—REVIEW—QUESTIONS OF FACT — CONFLICTING EVIDENCE.

In an action for the value of lumber taken from the possession of plaintiff, where there was a dispute in the evidence as to the value of the lumber taken, it was for the court to find, on trial without jury, what the value was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. —1011(1).]

3. CHATTEL MORTGAGES — 198 — FRAUDULENT CONVEYANCES — 154(2) — RIGHTS OF CREDITORS—NOTICE—RECORD.

Where a vendee of personalty takes possession before other claims are made thereon, he is entitled thereto, though his bill of sale or

chattel mortgage may be invalid because not properly recorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 442-449; Dec. Dig. —198; Fraudulent Conveyances, Cent. Dig. § 487; Dec. Dig. —154(2).]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by W. A. Haskins, as assignee of E. A. Holston for the benefit of creditors, against the Fidelity National Bank. From the judgment for plaintiff for a sum less than that demanded, he appeals. Affirmed.

W. C. Stayt, of Spokane, and L. B. Donley, of Colville, and Peacock & Ludden, of Spokane, for appellant. Hamblen & Gilbert, of Spokane, for respondent.

MOUNT, J. This action was brought to recover the value of 282,000 feet of lumber alleged to have been wrongfully taken by the defendant. At the trial of the case the court found that the defendant had taken possession of the lumber under a bill of sale by authority of the owner, except a small amount which was not included in the bill of sale. For the value of this small amount the court allowed the plaintiff a judgment for \$144.56. The plaintiff has appealed from that judgment.

The principal question in the case is whether the defendant took actual possession of the lumber prior to an assignment made by the vendor for the benefit of creditors.

It appears that on April 12, 1913, E. A. Holston, doing business under the name of Holston Lumber Company, was indebted to the Fidelity National Bank in the sum of \$3,000. On that date Mr. Holston executed a bill of sale for "one million two hundred thousand feet of pine logs decked in mill pond at the company's mill, Boyds, Wash., and all the lumber sawed therefrom and piled in the yards of the company." This bill of sale was filed for record on April 23, 1913, in the auditor's office of Ferry county, where the mill was located. It is conceded that this bill of sale was taken as security for the money then owing by Holston to the bank. At that time Holston was indebted to other persons. Afterwards in December, 1914, Mr. Phelps, representing the defendant bank, went to the mill of Mr. Holston, and Mr. Holston authorized Mr. Phelps to take possession of certain lumber then in the yard, to sell the same, and credit the amount received upon the note, upon which there was then due about \$1,000. Mr. Phelps thereupon checked up the lumber, and employed a Mr. Wilson to haul the lumber from the mill to Boyds, which was a railroad station. It appears that this station was several miles from the mill, and, on account of the condition of the roads, it was necessary to wait for snow before the lumber could be moved. There is some evidence that a small portion

of the lumber was hauled by Mr. Wilson to Boyds during the month of December.

Thereafter on the 31st day of December, 1914, Mr. Holston made an assignment of all his property to W. A. Haskins for the benefit of creditors. Mr. Haskins thereupon employed a Mr. Anderson to go up to the mill and care for the property. About the 1st of January, 1915, Mr. Wilson, who had been employed by the bank to move the lumber to Boyds, proceeded to do so, and from that until the 6th, removed the lumber to Boyds; and it was afterwards sold and the proceeds credited upon the note by the bank. This action was thereafter brought to recover the value of the lumber so taken. It is shown that at the time of the assignment, the assignee was informed that this particular lumber had been sold to the bank.

[1] It is strenuously argued by the appellant that there was no manual delivery of the lumber to the bank prior to the time of the assignment by Mr. Holston to Mr. Haskins for the benefit of creditors, that the evidence shows that Mr. Phelps simply checked over the lumber, and that there was no outward indication of any change of possession from Mr. Holston to the bank. It is no doubt true that there was no outward open possession indicated after Mr. Phelps had left the property. But it was not property of which manual possession could be taken. It was lumber piled in the yards of the mill.

In *Churchill v. Miller*, 90 Wash. 694, 156 Pac. 851, after reviewing a number of cases from this court and other courts, we said:

"35 Cyc. 311, 312, is cited to the effect that the general rule is that the delivery must consist of an actual and continuous transfer of property. This rule must be applied, however, in view of the character and situation of the property and circumstances. Although such possession as a purchaser can reasonably take must be taken, it is not essential, as against creditors and subsequent purchasers, that there should be in all cases an actual manual delivery or a change of possession at the time of the sale, or immediately—citing also 5 R. C. L. 397. The rule is stated in 35 Cyc. 312, as follows: 'It has been held that it is sufficient as against creditors and subsequent purchasers if notice of the sale is given to the third person in possession, unless his

possession is of such a character that it does not convey any notice to the world of the change of ownership. * * *'"

We think that rule should apply to this case. There were no liens upon this lumber at the time Mr. Holston agreed the bank might take it. The agent for the bank came, looked over the lumber, and took it. He employed a man to take charge of and haul the lumber to the railway station, some distance away. He took such possession as a purchaser could reasonably take, and, quoting from the rule above stated, "It is not essential as against creditors and subsequent purchasers, that there should be in all cases an actual manual delivery or a change of possession at the time of the sale, or immediately." We are satisfied, therefore, that the court properly found that there had been an actual change of possession; and also that the assignee took with notice of the claim of the bank at the time of the assignment.

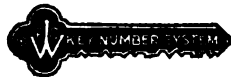
[2] It is next argued that the value of lumber taken which was not included within the sale or delivery, and which was found by the court to be of the value of \$144.56, should have been found to have been of the value of \$353. There was dispute in the evidence as to the value of this lumber, and it was therefore for the court to find, according to its best judgment, what the value was. After reading the evidence we are not disposed to find a greater value than was found by the trial court.

[3] The appellant also contends that the bill of sale without an affidavit of good faith does not constitute a mortgage. Where the vendee takes possession of the property prior to the time other claims are made thereon, he is entitled thereto, even though his bill of sale or chattel mortgage may be invalid as such because not properly recorded. *Watson v. First National Bank*, 82 Wash. 65, 143 Pac. 451.

We find no error in the record, and the judgment is therefore affirmed.

MORRIS, C. J., and FULLERTON and ELLIS, JJ., concur.

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THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and
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⑈2 (Mont.) An "abandonment" is the relinquishment of a right; the giving up absolutely of something to which one is entitled, without reference to any particular person or purpose.—*Moore v. Sherman*, 159 P. 968.

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⑈74(1) (Okl.) Order to revive action cannot, without consent, be made at all more than one year from time it might first have been made.—*Zahn v. Obert*, 159 P. 298.

⑈75(1) (Okl.) Under Rev. Laws 1910, §§ 5288, 5293, 5294, no consent is necessary to revive action within one year from time order might have been first made, and, if made with consent, no notice is required.—*Zahn v. Obert*, 159 P. 298.

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—22 (Cal.) Under Civ. Code, §§ 227-229, an adopted child's adopted parents inherit from the child to the exclusion of the natural parents, under Succession Law, Civ. Code, § 1386.—In re *Darling's Estate*, 159 P. 608.

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¶11 (Cal.) Under Pol. Code, §§ 2322, 2322a-2322c, creating a lien for expenses incurred after written notice by horticultural commissioner to fumigate has been served on an orchard's owner, no lien is created where inspector, apparently without authority, signed and handed notice to owner.—*San Bernardino County v. Stewart*, 159 P. 719.

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¶14½ [New, vol. 19 Key-No. Series] (N. M.) Code 1915, § 1632, authorizing sale and seizure of calves and the young of domestic animals held in inclosures contrary to law without any provision for notice to owner of seizure and sale, is invalid as authorizing the taking of property without due process of law.—*Lacey v. Lemmons*, 159 P. 949.

¶22 (N.M.) When sheep, cattle, or other animals are received from the owner under a contract to care for them on shares, such animals, together with the increase, belong, under Code 1915, § 42, to the owner until consummation of contract, and, unless herder has consent of owner, he cannot dispose of any of animals or increase.—*Milliken v. Martinez*, 159 P. 952. ¶91 (Cal.App.) St. 1877-78, p. 176, giving right of recovery for trespassing of animals, in certain counties, on private lands, though not fenced, is not repealed by St. 1907, p. 999, giving, generally, right of recovery for trespassing of animals on planted lands inclosed by fence.—*Hicks v. Butterworth*, 159 P. 224.

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the demand for judgment.—*Sherman v. Babcock*, 159 P. 781.

§47(2) (Wash.) In an action on a contract, allegation that defendants agreed to pay \$190 for a monument, but not alleging when it was to be erected, held not to show that the amount in controversy was over \$200, necessary to give Supreme Court appellate jurisdiction.—*Sherman v. Babcock*, 159 P. 781.

§54 (Wash.) Interest when recoverable may be considered in determining the amount in controversy, so that if the principal sum and recoverable interest at the time of commencement of an action exceeds \$200 the Supreme Court has appellate jurisdiction.—*Sherman v. Babcock*, 159 P. 781.

(D) Finality of Determination.

§78(1) (Cal.) In suit to quiet title, an order directing the defendant to assign to plaintiff a note and mortgage upon payment of the amount thereof, and subrogating plaintiff to the rights of mortgagee, is a final judgment as to defendant and appealable.—*Hildebrand v. Superior Court* in and for City and County of San Francisco, 159 P. 147.

(E) Nature, Scope, and Effect of Decision.

§100(1) (Okla.) Order of district court, allowing temporary injunction, may be appealed from before final judgment in main action.—*Burnett v. Sapulpa Refining Co.*, 159 P. 360.

(F) Mode of Rendition, Form, and Entry of Judgment or Order.

§123 (Wash.) The Supreme Court cannot entertain an appeal as from a final judgment from an oral order which was never expressed in a formal written judgment.—*Codd v. Von Der Ahe*, 159 P. 686.

IV. RIGHT OF REVIEW.

(B) Estoppel, Waiver, or Agreements Affecting Right.

§158(1) (N.M.) One who has duly perfected an appeal from a judgment, having executed a supersedeas bond, cannot further prosecute the appeal after satisfying the judgment; such satisfaction being a voluntary acquiescence therein.—*Culp v. Sandoval*, 159 P. 956.

§162(1) (N.M.) Where appellant, who recovered a judgment, received and accepted the amount in full settlement thereof, which was paid into court by defendant, he cannot appeal.—*Wells v. Romero*, 159 P. 1001.

§162(2) (Nev.) Plaintiff does not waive his right of appeal from that portion of judgment denying him costs by accepting payment for damage and interest items, and satisfying judgment to that extent.—*Glock v. Elges*, 159 P. 629.

§165 (Okla.) No estoppel to contest by appeal judgment of ouster in ejectment arises by the mere filing after judgment of demand for trial of defendants' right as occupying claimants.—*Scott v. Potts*, 159 P. 932.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

§171(1) (Mont.) Where a personal injury case is tried as if governed by common-law principles, and without regard to Rev. Codes, § 5301, requiring common carrier conveyances to be kept in a safe condition, the Supreme Court will dispose of it upon the same theory.—*Batch v. Helena Light & Ry. Co.*, 159 P. 411.

§172(1) (Cal.) Where the court stated the issues in the case without any objection to the statement at the time, plaintiff could not on appeal, complain that such statement improperly excluded the issue of undue influence.—*Tanforan v. Tanforan*, 159 P. 709.

§173(2) (Wash.) A garnishee against whom no judgment was rendered, not having pleaded an assignment to it of the fund, but merely denied indebtedness, has no standing to assert on appeal any right under assignment.—*Hanson v. Hodge*, 159 P. 388.

The principal defendant, though, by his answer disclaiming the indebtedness from garnishee county, having claimed statutory exemption, has appealable interest to claim that, and also a common-law immunity of salary from garnishment, invokable at any stage.—*Id.*

§175 (Nev.) On application of attorney for appellant in matter of distribution of an estate Supreme Court could not direct appellant to pay expenses of proceedings, including attorney's fees, out of funds coming to it from the estate, where no such issue had been made up and tried in lower court.—*In re Hartung's Estate*, 159 P. 864.

(B) Objections and Motions, and Rulings Thereon.

§185(1) (Okla.) Under Rev. Laws 1910, § 4742, objection to court's jurisdiction is never waived, and may be raised for first time in appellate court.—*Zahn v. Obert*, 159 P. 298.

§187(2) (Okla.) Objection to right of trustee of bankrupt to be made party plaintiff cannot be urged in Supreme Court for the first time.—*Insurance Co. of North America v. Cochran*, 159 P. 247.

§193(1) (Nev.) Where defendant was entitled to assume from the complaint and evidence that the action was to prevent a cloud on title, his failure to object below to insufficiency of the complaint as one to quiet title cannot be urged by plaintiff on appeal.—*Clay v. Scheeline Banking & Trust Co.*, 159 P. 1081.

§193(4) (Cal.App.) In the absence of demurrer or of objection to introduction of lien in evidence, or denial of allegations of complaint which incorporated the lien, the question of sufficiency of complaint under Code Civ. Proc. § 1187, stating requirements thereof, should not be considered on appeal.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

§193(9) (Okla.) Under Rev. Laws 1910, § 4742, objection that petition does not state cause of action is never waived, and may be raised for first time in appellate court.—*Zahn v. Obert*, 159 P. 298.

§194(1) (Nev.) Plaintiff, not having questioned below the sufficiency of the answer, cannot do so on appeal, where the complaint was insufficient, though not objected to below by defendant.—*Clay v. Scheeline Banking & Trust Co.*, 159 P. 1081.

§197(3) (Cal.App.) Although complaint in mechanic's lien action alleged occupation by owner and cessation of work for over 30 days after abandonment by contractor, where the judge found to the contrary, as alleged in answer and supported by evidence not objected to as at variance with pleadings, the court is justified in adopting findings instead of allegations of complaint.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

§197(3) (Okla.) A judgment will not be reversed because of variance between a petition and facts proven without objection at the trial where an amendment to conform to the proof should have been allowed.—*Gafford v. Davis*, 159 P. 490.

§215(1) (Okla.) Errors in the giving of instructions are waived unless saved as provided by statute.—*Pioneer Telephone & Telegraph Co. v. Tulsa Vitriified Brick & Tile Co.*, 159 P. 477.

§216(1) (Wash.) Where as to measure of damages no instruction was requested by appellant, nor exception taken to failure to instruct thereon, failure was not reversible error, where the damages allowed were within the issues and proofs.—*Phoenix Assur. Co. v. Columbia & P. S. R. Co.*, 159 P. 360.

⇒223 (Wash.) In action by tenant against his landlord and other tenants for disturbance of his enjoyment of the premises, the objection by the landlord that judgment was rendered separately against him and defendant tenants, made for the first time on appeal, was not considered.—*Dobrentai v. Piehl*, 159 P. 371.

⇒233(2) (Okl.) A party cannot complain of the admission of evidence over his objection to a single question, where he permits like evidence of other witnesses to be admitted without objection.—*Gafford v. Davis*, 159 P. 490.

⇒237(3) (Okl.) Without a demurrer to the evidence or motion for directed verdict, sufficiency of the evidence to sustain verdict is not reviewable except as to excessive damages.—*Chicago, R. I. & P. Ry. Co. v. Swinney*, 159 P. 484.

⇒242(1) (Or.) Colloquy between counsel relative to the propriety of an argument of plaintiff's counsel on which the court was not called upon to rule or to instruct the jury to disregard held not reversible error.—*Nelson v. Brown & McCabe*, 159 P. 1163.

(C) Exceptions.

⇒248 (Okl.) Errors which are not excepted to at the time are waived, and cannot be considered on appeal.—*Brown v. Chowning*, 159 P. 323.

⇒257 (Okl.) Where no exception is taken to the trial court's refusal to quash service of summons, it is not reviewable.—*Tracy v. State*, 159 P. 496.

⇒263(3) (Wash.) Where as to measure of damages no instruction was requested by appellant, nor exception taken to failure to instruct thereon, such failure was not reversible error, where the damages allowed were within the issues and proofs.—*Phoenix Assur. Co. v. Columbia & P. S. R. Co.*, 159 P. 369.

(D) Motions for New Trial.

⇒301 (Okl.) Errors which are not set forth in the motion for new trial are waived, and cannot be considered on appeal.—*Brown v. Chowning*, 159 P. 323.

⇒302(1) (Mont.) By Rev. Codes, § 6746, on appeal from order denying new trial, the Supreme Court cannot consider any error in instructions not specifically pointed out at the time of settlement.—*Stokes v. Long*, 159 P. 28.

⇒302(3) (Kan.) Error in excluding evidence cannot be considered unless the evidence is produced on hearing of motion for new trial.—*Muenzenmayer v. Hay*, 159 P. 1.

⇒302(3) (Kan.) Under Code Civ. Proc. § 307 (Gen. St. 1909, § 5901), omission to produce excluded evidence at hearing of motion for new trial waives error in its rejection.—*Oliver v. Christopher*, 159 P. 397.

⇒302(4) (Kan.) Judgment will not be reversed for error in instructions or in refusing to submit special questions, where evidence excluded and necessary to determine questions is not produced on hearing of motion for new trial.—*Muenzenmayer v. Hay*, 159 P. 1.

⇒305 (Okl.) Errors at the trial cannot be considered unless ruling on motion for new trial is assigned as error.—*Aaron v. American Nat. Bank*, 159 P. 246.

VI. PARTIES.

⇒327(2) (Or.) Whether one is a necessary party to an appeal depends not on whether he is adverse to the appealing party, but whether he will be injuriously affected by modification or reversal.—*D'Arcy v. Sanford*, 159 P. 567.

⇒327(2) (Utah) All parties who may be adversely affected by reversal or modification of the judgment must be made parties to the ap-

peal, although they defaulted in the court below.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

⇒327(11) (Utah) A contractor who defaulted in a mechanic's lien case need not be joined in an appeal taken by the owner, since reversal or modification of the judgment would not adversely affect him.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

⇒332 (Okl.) An action cannot be revived in an appellate court where the party died before the proceeding was transferred thereto.—*Zahn v. Obert*, 159 P. 298.

⇒336(1) (Okl.) All parties to a judgment who appear to have a substantial interest in sustaining or reversing it, or whose interests may be affected, are necessary parties to an appeal, and where they are not joined, the appeal must be dismissed.—*King v. Shulta*, 159 P. 1108.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

⇒337(2) (Utah) A cause cannot be appealed until final judgment is entered therein between all the parties.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

⇒346(2) (Or.) Motion for judgment non obstante veredicto, will not ordinarily suspend the running of the limitation for appeal, in view of L. O. L. § 201, requiring judgment to be entered on day of verdict, but, where original judgment was modified by dismissal as to one defendant, the appeal time for another defendant runs from such modification.—*Hewey v. Andrews*, 159 P. 1149.

⇒351(2) (Okl.) Under Rev. Laws 1910, § 4659, summons must be served within 60 days after the time for filing notice of appeal.—*Dill v. Sands*, 159 P. 505.

⇒356 (Okl.) Where plaintiff in error fails to file appeal in Supreme Court within six months from rendition of judgment or order, as required by Laws 1910-11, c. 18, it will be dismissed for want of jurisdiction.—*Incorporated Town of Caddo v. J. S. Terry Const. Co.*, 159 P. 328.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

⇒362(2) (Okl.) Where statutory period for beginning proceeding in error has elapsed and the only errors presented are those on the trial, and no assignment is made that the court erred in its action on motion for new trial, Supreme Court is without jurisdiction to review case or allow amendment of petition in error.—*Keener v. Buttler*, 159 P. 468.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

⇒374(4) (Or.) The state is "interested" in an appeal by the Industrial Accident Commission from an order reversing its disposition of claim for compensation, so that no appeal bond need be filed, in view of L. O. L. § 578.—*Miller v. State Industrial Accident Commission*, 159 P. 1150.

(D) Writ of Error, Citation, or Notice.

⇒411 (Cal.) Notice to the clerk to prepare a record, under Code Civ. Proc. § 953a, stating that defendant desires to appeal, but nowhere that it does appeal, is ineffectual to constitute an appeal.—*Michelson v. City of Sacramento*, 159 P. 431.

⇒413 (Wash.) Under Rem. & Bal. Code, § 1720, failure to serve a notice of appeal upon a party which had appeared in appellant's receivership proceeding and become a party to the order of sale rendered the appeal from the

order ineffectual for any purpose.—Crawford v. Seattle, R. & S. Ry. Co., 159 P. 782.

⚡414 (Or.) Where the maker of a note secured judgment as against the assignee and the maker's former partner, decreeing the note paid and canceled for fraud of such partner in securing it and failing to pay it as agreed, the partner was a necessary and "adverse party," and notice of appeal to him was required under L. O. L. § 550, as amended by Laws 1913, p. 617.—D'Arcy v. Sanford, 159 P. 587.

⚡414 (Or.) An "adverse party" with reference to notice of appeal is one whose interest in regard to judgment appealed from is in conflict with a reversal or modification of final determination sought to be reviewed, and includes one whose discharge in bankruptcy would be thereby affected.—Van Zandt v. Parson, 159 P. 1153.

⚡417(2) (Cal.App.) In an action against named parties composing board of trustees of a school district, notice of appeal showing the title of the case as against one named defendant "et al." and stating that the defendants above named appealed, held a sufficient notice.—Hopkins v. Sanderson, 159 P. 1063.

⚡424 (Cal.App.) Appearance of attorney for insurance company which deposited fund contested for by appellant and respondent, and in another suit in which respondent was party, did not constitute him attorney for respondent so as to require service of notice of appeal on him.—Garrett v. Garrett, 159 P. 1050.

⚡425 (Wash.) Appeal from judgment in receivership proceeding if regarded as final judgment from which an appeal might be taken would be dismissed, where a notice thereof was not given until more than 90 days after the entry of judgment.—Crawford v. Seattle, R. & S. Ry. Co., 159 P. 782.

⚡426 (Cal.App.) Though an attorney for respondent resides in the same city with attorney for appellant, Code Civ. Proc. § 1012, does not prevent service by mail on another attorney for respondent residing in another county.—Garrett v. Garrett, 159 P. 1050.

⚡429 (Cal.App.) Parties who accept and act upon notices with regard to appeal and proceedings preliminary thereto cannot question the sufficiency of the service.—Peters v. Superior Court of California in and for San Bernardino County, 159 P. 875.

⚡430(1) (Ok.) Petition in error dismissed for failure to issue and serve summons.—Dill v. Sands, 159 P. 505.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

⚡460(2) (Cal.App.) Under Code Civ. Proc. § 943, as to stay of execution on appeal, where sheriff appealed from order requiring delivery of goods to plaintiff, without giving bond or delivering the goods to a custodian appointed by the court, execution was not stayed, and compliance with the order was necessary.—Bailey v. Superior Court of California in and for Kern County, 159 P. 990.

Perfection of appeal, alternative or under Code Civ. Proc. §§ 939-941, as to judgments appealable, procedure, and bonds on appeal, does not stay execution if the judgment is one under sections 942-944, or section 945, unless bond is filed.—Id.

⚡485(1) (Cal.App.) Where defendant appealed from judgment for petitioner giving stay bond, and petitioner secured order that the sheriff deliver goods to him, and sheriff appealed by alternative method without bond, and failed to deliver goods, on petitioner's application for writ of mandate defendant's appeal was immaterial, and the order against the sheriff not being stayed, it was his duty to make delivery.—Bailey v. Superior Court of California in and for Kern County, 159 P. 990.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

⚡494 (Ok.) Where case-made does not affirmatively show that judgment has been entered in journal, Supreme Court is without jurisdiction.—Board of Com'rs of Mayes County v. Vann, 159 P. 297.

⚡511(1) (N.M.) A bill of exceptions must be filed with the clerk of the district court, and such filing should be shown by the transcript of the record on appeal.—Milliken v. Martinez, 159 P. 952.

(B) Scope and Contents of Record.

⚡516 (Cal.App.) Minute orders not being part of the judgment roll as defined by Code Civ. Proc. § 670, held, that assignments of error dependent on such matters cannot be reviewed where appeal is from the judgment alone.—Brown v. Canty, 159 P. 1056.

⚡518(1) (Nev.) Upon appeal from order denying costs, pleadings cannot be considered unless embodied in statement attached to order.—Glock v. Elges, 159 P. 629.

⚡522(1) (Cal.App.) The evidence being no part of the judgment roll as defined by Code Civ. Proc. § 670, held, that assignments of error dependent on such matters cannot be reviewed where appeal is from the judgment alone.—Brown v. Canty, 159 P. 1056.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

⚡544(1) (Ok.) Overruling motion to file amended answer cannot be reviewed on appeal by transcript, but must be preserved by case-made or bill of exceptions made part of record.—Lockett v. Ely-Walker Dry Goods Co., 159 P. 324.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

⚡560 (Wash.) A statement of fact, not purporting to give the testimony of witnesses, either by question and answer or in narrative form, but rather being a statement of the conclusion of counsel as to the force and effect of the testimony as a whole, is insufficient in form.—Morgan v. Chittenden Land Co., 159 P. 129.

⚡564(1) (Nev.) Under Rev. Laws, § 5331, requiring proposed statement to be served and filed within 30 days after written notice of judgment or order appealed from, any defect in such notice is waived by serving and filing notice of appeal.—Glock v. Elges, 159 P. 629.

⚡564(2) (Wash.) Time for filing a statement of facts on appeal in foreclosure proceeding held to run from the entry of the mortgage judgment contained in a foreclosure decree.—Codd v. Von Der Ahe, 159 P. 686.

⚡564(3) (Ok.) After the expiration of the time allowed to serve the case-made, the court cannot extend the time, and an appeal based on service of case-made under such order of extension will be dismissed.—Morgan v. Board of Com'rs of Logan County, 159 P. 514.

⚡564(4) (Nev.) Failure to serve and file statement within time prescribed by Rev. Laws, § 5331, does not defeat appeal, where it was duly perfected under section 5330, by filing notice of appeal and undertaking or waiver thereof.—Glock v. Elges, 159 P. 629.

A statement, not served and filed within time prescribed by Rev. Laws, § 5331, cannot be considered on appeal.—Id.

⚡564(4) (Ok.) Where case-made shows it was not made and served within time fixed by law, and fails to affirmatively show that order extending time was entered on journals of court pursuant to Rev. Laws 1910, § 5317, or section 5324, appeal must be dismissed.—Colter v. Martin, 159 P. 853.

⇒564(5) (Wash.) Under Laws 1915, p. 803, § 8, not repealing former law, Rem. & Bal. Code § 393, it was no excuse that appellant mistakenly assumed that oral decision in foreclosure proceeding never expressed in formal written order or judgment, was a final and appealable judgment, and the statement filed would be stricken.—Codd v. Von Der Ahe, 159 P. 686.

⇒567(1) (Ok.) In the absence of a waiver by the defendant in error, a case-made, signed and delivered by the trial court before expiration of the time granted for suggestion of amendments, is a nullity.—Kostachek v. Owen, 159 P. 386.

⇒568 (Ok.) Under Rev. Laws 1910, § 5242, notice to settle case-made, served only 21 hours before time specified for settlement, is void, and the case-made is a nullity, unless within exceptions to rule requiring notice.—Allen v. Dillard, 159 P. 749.

Exceptions to rule, requiring notice of settlement of case-made, are where defendant in error has waived notice or appeared in person or by counsel, or has suggested amendments, all of which were allowed, or all of which were allowed except those that were immaterial.—Id.

(G) Authentication and Certification.

⇒612(4) (Mont.) On appeal from order denying new trial made on the minutes, the record need not contain a copy of the judgment roll authenticated as such if it contains certified copies of all the papers which go to make it up, under Rev. Codes, § 6799.—Stokes v. Long, 159 P. 28.

⇒616(2) (Wash.) Affidavits on motion to open case for reception of additional evidence, not identified by the motion itself or by the order overruling it, could not be considered on appeal upon claim that a new trial must be had because of trial court's refusal to grant motion.—Codd v. Von Der Ahe, 159 P. 686.

(H) Transmission, Filing, Printing, and Service of Copies.

⇒624 (Or.) Under L. O. L. § 550, subds. 2, 4, and section 554, as to procedure for perfecting appeal, where, after exceptions to sureties on bond were filed, parties agreed to deposit \$100 in lieu of bond, the deposit was equivalent to justification of sureties, so that order within 90 days thereof, extending time to file transcript, was in time.—Fleming v. Gerlinger Motor Car Co., 159 P. 1153.

(I) Defects, Objections, Amendment, and Correction.

⇒641 (Ok.) Failure of clerk to attest signature of trial judge to certificate to case-made with seal of court deprives Supreme Court of jurisdiction to consider case-made.—Board of Com'rs of Mayes County v. Vann, 159 P. 297.

⇒641 (Wash.) Where the statement of facts is insufficient in form and is not certified in form required by Rem. & Bal. Code, § 391, it may be stricken on motion.—Morgan v. Chittenden Land Co., 159 P. 129.

⇒653(3) (Nev.) The Supreme Court cannot make, or direct the trial court to make, a new statement on appeal, but any relief under Practice Act, § 142 (Rev. Laws, § 5084) for mistake of appellant must be in the lower court.—Skaggs v. Bridgman, 159 P. 521.

⇒653(3) (Ok.) The Supreme Court is without authority to amend a case-made.—O'Neil Engineering Co. v. City of Lehigh, 159 P. 497.

⇒657(3) (Ok.) On timely motion to withdraw a case-made for correction, it appearing from certificate of clerk of trial court and record to be amendable under Rev. Laws 1910, § 5248, an appeal will not be dismissed.—O'Neil Engineering Co. v. City of Lehigh, 159 P. 497.

The Supreme Court will, on motion, permit a case-made to be withdrawn for proper amendment under supervision of trial judge.—Id.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

⇒662(2) (Kan.) Complaint that evidence was excluded will not be considered, where it appears from transcript that evidence was admitted and read to jury.—Zellner Mercantile Co. v. Parlin & Orendorff Plow Co., 159 P. 891.

(K) Questions Presented for Review.

⇒671(1) (Or.) On appeal upon record embracing only pleadings and findings, the only question involved is whether the judgment is supported by facts ascertained by court and admissions in pleadings.—Neilson v. Title Guaranty & Surety Co., 159 P. 1151.

⇒671(1) (Wash.) Whether Laws 1915, p. 357, making counties and municipal corporations subject to garnishment, by necessary implication authorizes an assignment of future salary of an officer, cannot be considered; the record presenting no assignment.—Hanson v. Hodge, 159 P. 388.

⇒671(3) (Ok.) Assignments of error which require an examination of the evidence will not be considered, where the case-made does not aver that it contains all the evidence.—Ledgerwood v. Neal, 159 P. 292.

⇒680(1) (Ok.) No reviewable question was presented by record failing to show entry of record in the trial court of its order sustaining demurrer to petition or final judgment awarding costs against plaintiff.—Hilligoss v. Webb, 159 P. 291.

⇒706(1) (Cal.App.) An order denying a new trial will be reviewed where the transcript shows that notice of intention to move for new trial was served and filed, and the notice is set out with general specifications of error.—Whitcomb v. Worthing, 159 P. 613.

(L) Matters Not Apparent of Record.

⇒715(2) (Cal.App.) Where the transcript on appeal discloses the filing of the notice of appeal with the clerk, its omission to show service thereof is supplied by an affidavit showing proper service by mail.—Garrett v. Garrett, 159 P. 1050.

XI. ASSIGNMENT OF ERRORS.

⇒754(3) (Ok.) Errors at the trial are not reviewable, where denial of new trial is not assigned as error.—Ledgerwood v. Neal, 159 P. 292.

XII. BRIEFS.

⇒757(3) (Ok.) Assignments of error to the admission of testimony which do not comply with court rule 25 (95 Pac. viii) by setting up the substance of the testimony objected to and the objections will not be considered.—Sovereign Camp of Woodmen of the World v. Hutchins, 159 P. 920.

⇒766 (Ok.) Judgment affirmed for failure to include in brief appeal bond complained of, as required by rule 25 (20 Okl. xii, 95 Pac. viii).—Finch v. Rose, 159 P. 513.

⇒771 (Or.) That indictments have been returned against plaintiff and her witness, for subornation of perjury and perjury, respectively, and proceedings had to set aside the judgment on that ground, is sufficient excuse for failure of defendant's counsel to file briefs on appeal within the time allowed.—Wallace v. Portland Ry., Light & Power Co., 159 P. 974.

⇒773(2) (Ok.) Where plaintiff in error fails to file briefs as required by Supreme Court rule 7 (137 Pac. ix), and offers no excuse therefor, appeal will be dismissed.—Hilligoss v. Webb, 159 P. 291.

⇒773(2) (Ok.) Where plaintiff in error fails to file briefs in accordance with the rules and orders of the Supreme Court, the writ will be dismissed.—Wilcox v. Wootton, 159 P. 1118.

☞773(5) (Okla.) Where defendant in error neither files nor offers to excuse failure to file brief and plaintiff in error's brief appears reasonably to sustain assignments of error on appeal duly perfected, judgment may be reversed.—*Western Silo Co. v. Kelley*, 159 P. 246; *Smith v. Whitlow*, 159 P. 258.

☞773(5) (Okla.) Where plaintiff in error duly files his brief, but defendant files no brief within the time allowed, the court is not required to search the record to sustain the judgment, but may reverse if plaintiff's brief appears to fairly sustain his assignments of error.—*Champion v. Oklahoma City Land & Development Co.*, 159 P. 854.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

☞795(2) (Cal.App.) Under Code Civ. Proc. §§ 964, 1010, notice of motion to dismiss appeal held insufficient to apprise appellant of the grounds of motion.—*Garrett v. Garrett*, 159 P. 1050.

☞801(3) (Okla.) An order extending time to serve case-made, made under Rev. Laws 1910, § 5246, regular on its face and reciting unavoidable accident and misfortune as reason for not serving previously, is not reviewable on motion to dismiss.—*O'Neil Engineering Co. v. City of Lehigh*, 159 P. 497.

☞803 (Wash.) In receivership proceeding, the dismissal of an appeal from a judgment, regarded as an interlocutory order in the case reviewable by appeal from a subsequent order of sale, would follow the dismissal of the appeal from such order.—*Crawford v. Seattle, R. & S. Ry. Co.*, 159 P. 782.

☞807 (Nev.) An appeal dismissed for noncompliance with Supreme Court rules 2 and 3 (154 Pac. viii), will not be restored, where no purpose would be served, the record presenting for consideration only the judgment roll showing no error.—*Skaggs v. Bridgman*, 159 P. 521.

XVI. REVIEW.

(A) Scope and Extent in General.

☞837(4) (Cal.) In reviewing a judgment on demurrer to the complaint, the Supreme Court cannot anticipate that plaintiff has stated a cause of action which he cannot prove, or base an opinion on statements of counsel made only in the briefs.—*Stone v. Imperial Water Co. No. 1*, 159 P. 164.

☞843(2) (Cal.) Where court found that transfer had not been made, it is immaterial that the evidence may have shown a fraudulent intent of the debtor.—*Scholle v. Finnell*, 159 P. 1179.

☞843(2) (Cal.App.) Where defendant benefit association paid the proceeds of a policy into court and did not appeal from a judgment awarding it to plaintiff, held that, upon appeal by other defendants, it is unnecessary to determine whether the complaint stated a cause of action against the insurer.—*Freitas v. Freitas*, 159 P. 611.

☞843(2) (Mont.) Where the assessed value of a county is clearly high enough to make it a fifth-class county, and this determination decides the case, it is unnecessary to decide whether certain additions to the assessed value, made by the court below are proper.—*State v. Ellis*, 159 P. 414.

☞864 (Cal.) Where appeal from judgment is taken within 60 days, sufficiency of the evidence may be considered as well as alleged errors of law at the trial.—*Vore v. Ephraim*, 159 P. 719.

(C) Parties Entitled to Allege Error.

☞877(5) (Or.) Plaintiff having joined his employer and the owner of the premises upon which he was injured while engaged in repair work, held that neither defendant could complain of an instruction more favorable to its

codefendant than to itself.—*Gunhell v. Van Emon Elevator Co.*, 159 P. 971.

☞877(7) (Wash.) The propriety of striking an allegation from the answer of a garnishee cannot be raised on appeal; only the principal defendant and another garnishee appealing.—*Hanson v. Hodge*, 159 P. 383.

☞878(1) (Or.) In suit to enjoin trespass by cutting and removal of timber and brush from banks of swale on plaintiff's land, where he took no cross-appeal from part of decree sanctioning defendant's maintenance of a spillway on his land, it will be assumed that he was satisfied therewith.—*Mathews v. Chambers Power Co.*, 159 P. 564.

☞880(1) (N.M.) An intervener appealing from a judgment against himself and the principal defendants can complain only of errors prejudicial to himself.—*Milliken v. Martinez*, 159 P. 952.

(E) Presumptions.

☞927(5) (Okla.) A demurrer to the evidence admits every fact which the evidence in the slightest degree tends to prove, and all inferences which can be drawn therefrom, and in reviewing such matter the Supreme Court will consider such inferences drawn.—*Sartain vs Walker*, 159 P. 1096.

☞930(3) (Kan.) Where only part of facts are embraced in special findings, they will, in the absence of the evidence, as far as possible be construed as consistent with general verdict, which will be deemed supported by evidence, and including every element necessary to its validity and not negated by the special finding.—*Sheat v. Lusk*, 159 P. 407.

☞931(1) (Cal.App.) The record showing only signing of proposed findings less than five days after service on adverse party, contrary to Code Civ. Proc. § 634, held not to affirmatively show error; waiver of service or objection thereto being presumed.—*California Central Creameries Co. v. Crescent City Light, Water & Power Co.*, 159 P. 209.

☞931(1) (Cal.App.) In reviewing findings of fact by the trial court, evidence in support of such findings will be presumed true.—*Gallo v. Gallo*, 159 P. 1058.

☞931(4) (Cal.App.) Where appellant was entitled to a finding upon an issue of fact, but the findings were silent thereon, the appellate court must determine the case as if the finding had been in favor of the appellant.—*Security Life Ins. Co. of America v. Booms*, 159 P. 1000.

☞931(8) (N.M.) In trial before court, erroneous admission of testimony is not ground for reversal unless it appears that court considered such testimony in deciding case.—*Halford Ditch Co. v. Independent Ditch Co.*, 159 P. 860.

☞931(8) (Utah) Where there is ample, competent, and material evidence in a mechanic's lien case, it will be presumed that the court considered only proper evidence in making its findings.—*Langton-Lime & Cement Co. v. Peery*, 159 P. 49.

☞933(1) (Okla.) As the granting of a new trial places the parties in position to have the issues again submitted to the jury, a showing for reversal must be much stronger than where it is denied.—*Missouri, K. & T. Ry. Co. v. James*, 159 P. 1109.

☞934(1) (Wash.) The court on appeal must accept the decree of the court below as correctly speaking the judgment of such court.—*Clark v. Clark*, 159 P. 702.

☞934(2) (Kan.) A judgment rendered on an oral contract based on a general finding will not be reversed, though the evidence be not clear as to the terms of the contract, where it showed that the contract was afterwards confirmed by letters referring thereto, and was partly explained by the conduct of the parties.—*Northrup Nat. Bank v. Yates Center Nat. Bank*, 159 P. 403.

(F) Discretion of Lower Court.

- ⇒954(1) (Cal.App.) Application for grant of a preliminary injunction, being addressed to the sound discretion of the court, its action will not be reviewed unless it clearly appears that there was an abuse of discretion.—*Temple v. Gordon*, 159 P. 983.
- ⇒957(1) (Cal.) The discretion of trial court on application to open default is not reviewable, unless clear abuse of discretion is shown.—*McDonald v. McDonald*, 159 P. 426.
- ⇒959(1) (Or.) Action of a trial court in permitting or refusing an amendment of verification is discretionary, and not reviewable.—*Clark v. Clark*, 159 P. 969.
- ⇒970(4) (N.M.) The discretion of the court on a motion to reopen a cause for further proofs will ordinarily not be reviewed.—*Hodges v. Hodges*, 159 P. 1007.
- ⇒971(2) (Ok.) Unless an abuse clearly appears, a ruling by the trial court as to the qualification of witnesses to give opinion evidence will not be disturbed on appeal.—*Incorporated Town of Sallisaw v. Priest*, 159 P. 1093.
- ⇒977(3) (Ok.) Discretion of court in granting new trial will not be disturbed, unless record shows that court has erred as to some pure question of law, and grant of new trial is based on such view.—*Pinkston v. Marlow*, 159 P. 488.
- ⇒977(3) (Ok.) In view of the discretionary nature of the granting of a new trial, an order granting new trial will not be disturbed unless it is obvious that the trial court erred on some point of law, and that such was the reason for the granting of a new trial.—*Missouri, K. & T. Ry. Co. v. James*, 159 P. 1109.
- ⇒977(3) (Wash.) Supreme Court will only interfere with discretion of trial court in granting a new trial, when there has been a clear abuse of discretion.—*Commercial Bank of Port Huron v. Elliott*, 159 P. 877.
- ⇒981 (Wash.) The Supreme Court will not reverse the denial of an application for new trial based upon the newly discovered fact that plaintiff had been convicted of forgery, especially where the failure to previously discover such fact is not explained.—*Forsyth v. Wallace*, 159 P. 696.
- ⇒982(1) (N.M.) The discretion of the trial court on motion to vacate or set aside judgment will not be disturbed unless abused.—*Stafford v. Clouthier*, 159 P. 524.

(G) Questions of Fact, Verdicts, and Findings.

- ⇒994(2) (Cal.App.) The jury's determination as to credibility of witnesses cannot be interfered with on appeal unless it can safely be said to be the result of passion and prejudice.—*Porterfield v. City of Modesto*, 159 P. 205.
- ⇒994(3) (Cal.App.) Evidence held such that the court on appeal could not say that the trial court abused its discretion in rejecting plaintiff's testimony.—*Pacific Coast Dried Fruits Co. v. Sheriffs*, 159 P. 986.
- ⇒995 (Wash.) The Supreme Court cannot interfere with the jury's disposition of the question of weight of testimony.—*Peterson v. Chess*, 159 P. 894.
- ⇒1001(1) (Nev.) A judgment based upon substantial evidence will not be reversed because not supported by the evidence.—*Jensen v. Pradere*, 159 P. 54.
- ⇒1001(1) (Ok.) Where jury is properly instructed on issue of fact, and there is evidence reasonably tending to support their finding, verdict will not be disturbed by Supreme Court.—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 844.
- ⇒1001(1) (Ok.) A verdict will not be disturbed where supported by evidence, and the instructions were correct.—*Freeman v. Langley*, 159 P. 1107.
- ⇒1002 (Cal.App.) Verdict on evidence substantially in conflict, on questions of negligence of defendant's employe, and plaintiff's contributory negligence, will not be disturbed.—*De Liere v. Goldberg, Bowen & Co.*, 159 P. 197.
- ⇒1002 (Ok.) A judgment, supported by the testimony of a single witness, although he is contradicted by several other witnesses, will be sustained.—*Bruce v. McIntosh*, 159 P. 261.
- ⇒1002 (Ok.) Where there is evidence to sustain a verdict, it will not be disturbed, though other evidence conflicted with it.—*Phoenix Ins. Co. of Hartford v. Newell*, 159 P. 1127.
- ⇒1010(1) (N.M.) Where findings of trial court are supported by substantial evidence, they will not be disturbed.—*Nickle v. Coulter*, 159 P. 673.
- ⇒1010(1) (N.M.) Findings of fact by the trial court, when supported by substantial evidence will not be disturbed.—*Hodges v. Hodges*, 159 P. 1007.
- ⇒1010(1) (Utah) Findings by the court in a law case supported by substantial evidence cannot be reversed.—*Burt v. Stringfellow*, 159 P. 527.
- ⇒1010(1) (Wash.) Findings of fact based on insufficient evidence are reviewable as erroneous conclusions of law.—*Balkema v. Grolimund*, 159 P. 127.
- ⇒1010(1) (Wash.) In action on note, where plaintiff claimed that makers had misrepresented value of the mortgaged premises, and where there was substantial evidence to support the court's finding that there had been no such misrepresentation, and no evidence preponderating against it, the finding could not be disturbed.—*Sappington v. Owens*, 159 P. 785.
- ⇒1011(1) (Cal.) Finding of the lower court on conflicting evidence as to the fitness of persons for guardians of an infant is not reviewable.—*In re Lew Choy Foon*, 159 P. 440.
- ⇒1011(1) (Cal.) Where there is a substantial conflict of evidence as to transfer in fraud of creditors, determination of trial court is conclusive on appeal.—*Scholle v. Finnell*, 159 P. 1179.
- ⇒1011(1) (Cal.App.) The court's finding of fact on conflicting evidence is conclusive.—*Tischhauser v. Prentice*, 159 P. 226.
- ⇒1011(1) (Cal.App.) In action on note, wherein defendant set up counterclaim and where there was a substantial conflict in the evidence on such counterclaim, findings of trial court against it must be sustained on appeal.—*Clark v. Hotle*, 159 P. 735.
- ⇒1011(1) (Cal.App.) Decree on conflicting evidence, consisting of testimony of husband and wife, will not be disturbed by the appellate court.—*Hagan v. Hagan*, 159 P. 825.
- ⇒1011(1) (Cal.App.) The appellate court is bound by the conclusion of the superior court as to a disputed fact.—*Fletcher Collection Agency v. Superior Court of California in and for Los Angeles County*, 159 P. 1049.
- ⇒1011(1) (Cal.App.) A court of appeal must assume facts to be as found by trial court if supported by evidence, notwithstanding other evidence to contrary.—*In re Soale*, 159 P. 1065.
- ⇒1011(1) (Nev.) A judgment will not be reversed for insufficiency of evidence where substantial, although conflicting evidence supports it.—*Picetti v. D. C. Wheeler, Inc.*, 159 P. 522.
- ⇒1011(1) (Ok.) Where evidence leaves it doubtful whether defendant carrier, or another from whom it received goods is liable, Supreme Court will not disturb findings of trial court.—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 344.
- ⇒1011(1) (Or.) The findings of fact by the court on conflicting oral testimony, while not

conclusive, are entitled to great weight.—*Baldwin Co. v. Savage*, 159 P. 80.

⇒1011(1) (Wash.) In ejectment, where the estimates as to the value of three acres of land varied from \$5 an acre to \$150 an acre, the finding that its value was \$55, with a rental of \$45, will not be disturbed.—*Skinner v. McCrackan*, 159 P. 977.

⇒1011(1) (Wash.) Where there was dispute in evidence as to value of lumber taken from defendant, it was for the court to find on trial without jury what the value was.—*Haskins v. Fidelity Nat. Bank*, 159 P. 1198.

⇒1015(2) (Cal.App.) The appellate court cannot review the action of the trial judge in granting new trial on defendant's motion on the ground of insufficiency of the evidence, where the evidence presents a conflict as to material matters.—*Brode v. Clark*, 159 P. 1048.

(H) Harmless Error.

⇒1033(5) (Cal.App.) Defendant cannot complain of inconsistency in instructions arising from the giving, at its request, of an instruction too favorable to it.—*Poor v. W. P. Fuller & Co.*, 159 P. 233.

⇒1033(5) (Mont.) Appellant cannot complain of an instruction, whether correct or not, which was as favorable to him as he could ask.—*Stokes v. Long*, 159 P. 28.

⇒1033(5) (Wash.) Appellant cannot complain of errors in instructions which were favorable to himself.—*Remmsnyder v. Lowman & Hanford*, 159 P. 107.

⇒1039(9) (Cal.) Erroneous requirement that plaintiff elect upon which of two inconsistent causes she will rely is harmless, where made after all of plaintiff's evidence is in, and there is absolutely no evidence to support the count then discarded.—*Tanforan v. Tanforan*, 159 P. 709.

⇒1042(4) (Kan.) Refusal to strike from petition matter negating an anticipated defense held not prejudicial.—*Oliver v. Christopher*, 159 P. 397.

⇒1050(2) (Mont.) Evidence regarding the condition of defendant's street car in other respects than that upon which the case was tried did not constitute prejudicial error.—*Batch v. Helena Light & Ry. Co.*, 159 P. 411.

⇒1051(1) (Kan.) Admission of letter containing self-serving declarations was not prejudicial, where the writer testified to same facts and adverse party had opportunity to deny them.—*United States Tire Co. of New York v. Kirk*, 159 P. 392.

⇒1052(2) (Cal.App.) Overruling objection to question held harmless where meaning of answer was not open to construction of having a meaning different from answer by witness to another unobjectionable question.—*Poor v. W. P. Fuller & Co.*, 159 P. 233.

⇒1052(5) (Utah) Any error in admitting testimony that defendant was protected by automobile accident insurance is harmless, where only a \$1,500 verdict was returned for a miscarriage and injuries that may be permanent.—*Boeddcher v. Frank*, 159 P. 634.

⇒1053(1) (Wash.) Defendant cannot predicate error on admission of a letter in a foreign language, contents of which was not disclosed to the jury; the court, on a translation being offered, reversing its ruling and excluding the letter.—*Backman v. Holman*, 159 P. 123.

⇒1053(5) (Mont.) Admission of evidence of treatment by associated physician after defendant left town was not prejudicial, where the jury were instructed to find for plaintiff only if his injury was suffered from defendant's acts or omissions before he left.—*Stokes v. Long*, 159 P. 28.

⇒1054(1) (Okla.) Before cause tried by the court will be reversed for admission of incompetent evidence, it must appear that judge re-

lied thereon, and where it appears that it was not considered, its admission is not prejudicial.—*Insurance Co. of North America v. Cochran*, 159 P. 247.

⇒1058(4) (Cal.) Where court found that alleged transfers had not been made, exclusion of evidence which had no tendency to show they had been made, was immaterial.—*Scholle v. Finnell*, 159 P. 1179.

⇒1060(1) (Cal.App.) In action for personal injuries, suggestion of plaintiff's counsel, in examining prospective juror and witness for defendant, that defendant was indemnified against an adverse verdict by surety company, held not prejudicial misconduct justifying reversal.—*De Liere v. Goldberg, Bowen & Co.*, 159 P. 197.

⇒1062(2) (Kan.) Judgment will not be reversed for refusal to submit special questions, where answer to those submitted gave court sufficient facts on which to render judgment.—*Muenzenmayer v. Hay*, 159 P. 1.

⇒1064(1) (Cal.App.) Giving or refusing the instruction as to distrusting a witness false in one part of his testimony, unless injury is shown, is not prejudicial error.—*Poor v. W. P. Fuller & Co.*, 159 P. 233.

⇒1064(1) (Mont.) An erroneous instruction on question of liability cannot be disregarded, and a verdict for defendant sustained, where the evidence would have justified a verdict for plaintiff.—*Batch v. Helena Light & Ry. Co.*, 159 P. 411.

⇒1064(1) (Or.) In an action for injuries to employe, instruction that a servant in entering employment assumes the ordinary risks incident to the work, or in such as the master might have avoided by reasonable care, though erroneous, was not prejudicial to defendant.—*Nelson v. Brown & McCabe*, 159 P. 1163.

⇒1064(1) (Wash.) Error in instruction as to whether plaintiff was a farmer entitled to exemptions held harmless, where court might have told jury that it was not disputed that he was a farmer.—*Shell v. Svensson*, 159 P. 1076.

⇒1065 (Okla.) In equity, when findings of fact are made by court, instructions to jury are immaterial and error cannot be predicated thereon.—*City of Chickasha v. O'Brien*, 159 P. 282.

⇒1067 (Kan.) Where parties agree to submit cause on special questions and for general verdict, and agree that court shall then render such judgment as it deems proper, any error in refusing instruction on question of fact, which does not materially affect those necessary for court to know to render judgment, is not reversible.—*Muenzenmayer v. Hay*, 159 P. 1.

⇒1071(1) (Cal.App.) An error in foreclosure in finding that a small separate tract of land of no value had been released from the mortgage held not injurious or reversible.—*Goldner v. Spencer*, 159 P. 462.

⇒1071(5) (Cal.App.) The evidence sustaining a finding of an express contract, it is immaterial whether, as also found, an implied contract to the same effect arose.—*Lynch v. Bekins Van & Storage Co.*, 159 P. 822.

⇒1071(5) (Utah) In an action against a husband for goods purchased by his wife, the finding that the goods furnished were not necessities, though immaterial, held not prejudicial where the conclusions of law in favor of defendant were supported by other sufficient findings of fact.—*Berow v. Shields*, 159 P. 538.

(I) Error Waived in Appellate Court.

⇒1078(1) (Okla.) Only such assignments of error as are argued in the brief of plaintiff in error will be considered.—*Ft. Smith & W. R. Co. v. Knott*, 159 P. 847.

(K) Subsequent Appeals.

⇒1099(3) (Okla.) Where, on a former appeal, the right of a receiver under the pleadings to

property was sustained, the receiver is on subsequent hearing entitled to the property, where the facts support the averments of the pleadings.—*Severns v. English*, 159 P. 917.

⇨1099(7) (Cal.) Where evidence on second trial after appeal is identical with that on first trial and court, having on first appeal held the evidence sufficient, will not reverse for insufficiency of evidence.—*Burr v. United Railroads of San Francisco*, 159 P. 584.

⇨1099(7) (Cal.App.) Where evidence on a point has been held insufficient on prior appeal, if the evidence on second trial on the same point is practically the same, the same ruling will be applied.—*Goldner v. Spencer*, 159 P. 462.

⇨1099(7) (Ok.) Where evidence is the same as that considered on former appeal, decision on former appeal is the law of the case.—*Insurance Co. of North America v. Cochran*, 159 P. 247.

⇨1099(8) (Or.) Where evidence in record on second appeal is not materially different from that on first trial, decision on first appeal, that plaintiff was entitled to have jury pass on evidence, is law of case on second appeal.—*Wicks v. Sanborn*, 159 P. 71.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

⇨1121 (Or.) On appeal in suit to foreclose purchase-money mortgage to which defendant set up a breach of covenant against incumbrances by reason of sale of timber, the case will be remanded to be continued until expiration of the right to remove it when mortgagor's damages might be determined.—*Kreinbring v. Mathews*, 159 P. 75.

(C) Modification.

⇨1151(2) (Cal.App.) In action for personal injuries, judgment will not be reversed for improper allowance of one item of damage, but verdict and judgment will be reduced by the amount.—*De Liere v. Goldberg, Bowen & Co.*, 159 P. 197.

⇨1151(2) (Wash.) The appellate court cannot, instead of ordering a new trial, order a remission of damages because of submission of an improper element of damages; it having no means of ascertaining the amount, if any, allowed on such item.—*Peterson v. Chess*, 159 P. 894.

(D) Reversal.

⇨1170(1) (Cal.App.) Where no prejudice resulted, since but one judgment could have been rendered under the evidence, judgment will not be reversed, as Code Civ. Proc. § 475, prohibits reversal, for technical or nonprejudicial error.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

⇨1170(1) (Cal.App.) Under Const. art. 6, § 4½, and Code Civ. Proc. § 475, in widow's action for decree adjudging her the owner of an undivided half interest in notes and mortgages, error in allowing her to testify to her husband's declaration that the money which was the consideration for the loans belonged to her as much as to him held not ground for reversal.—*Crowley v. Savings Union Bank & Trust Co.*, 159 P. 194.

⇨1170(1) (Or.) Where jury made no mistake in returning verdict for school district, in teacher's action for balance due under contract, judgment will be affirmed as required by Const. art. 7, § 3, as amended, notwithstanding any errors that may have been committed during trial.—*Foreman v. School Dist. No. 25 of Columbia County*, 159 P. 1155.

⇨1170(2) (Wash.) In cases tried by the court, where the court, on appeal, has before it the whole record, it will, under Rem. & Bal. Code,

§ 307, requiring errors not affecting substantial rights of the parties to be disregarded, deem pleadings to be amended to conform to the proofs.—*Roudebush v. Gannon*, 159 P. 680.

⇨1170(3) (Or.) In an action on notes, the failure of defendant to properly plead a counterclaim for the value of a horse leased to plaintiff and which died through want of proper care, held not to require reversal under Const. art. 7, § 3, of a judgment allowing such counterclaim.—*Meadow Valley Land & Investment Co. v. Manerud*, 159 P. 559.

⇨1170(7) (Ok.) Under Rev. Laws 1910, § 6005, no judgment is to be set aside for improper ruling on evidence unless in opinion of Supreme Court error has probably resulted in miscarriage of justice or violates constitutional or statutory rights.—*Midland Valley R. Co. v. Ogden*, 159 P. 256.

⇨1170(9) (Cal.App.) Any error in instructing as to duty of master to warn held, in view of evidence as to general negligence and the whole case, not ground under Const. art. 6, § 4½, for reversal.—*Fonts v. Southern Pac. Co.*, 159 P. 215.

⇨1170(9) (Ok.) Under Rev. Laws 1910, § 6005, no judgment is to be set aside for misdirection of jury, unless in opinion of Supreme Court error has probably resulted in miscarriage of justice or violates constitutional or statutory rights.—*Midland Valley R. Co. v. Ogden*, 159 P. 256.

⇨1173(1) (Ok.) Under Rev. Laws 1910, § 5236, the Supreme Court may render such judgment as the facts warrant, and may reverse as to one defendant and affirm as to another, unless their interests are so interwoven they cannot be separated.—*Davis v. Mimes*, 159 P. 1112.

⇨1176(4) (Utah) Upon reversing an equity case, the Supreme Court may direct the findings, conclusions, and decree to be entered below.—*Wherritt v. Dennis*, 159 P. 534.

⇨1179 (Cal.App.) The fact that the trial court, after the money deposited in court had been paid over in satisfaction of the judgment, vacated the order on which it was paid, could not vest the District Court of Appeal with jurisdiction to order a restoration of the fund.—*Garrett v. Garrett*, 159 P. 1050.

(F) Mandate and Proceedings in Lower Court.

⇨1195(2) (Ok.) Where sustaining of a demurrer to a petition on a life policy was upheld solely on ground that action was premature, held, that such decision is the law of the case, and is binding in a subsequent action, though in the interim the Supreme Court held that a similar petition stated a cause of action.—*Dixon v. State Mut. Ins. Co.*, 159 P. 922.

⇨1195(3) (Ok.) Where on appeal from a judgment sustaining a demurrer to a petition in an action on life policy the judgment was upheld on the ground that the action was prematurely brought, but other grounds of demurrer were held bad, such decision is the law of the case, and on a subsequent action in due time, a petition setting up similar facts is not subject to demurrer.—*Dixon v. State Mut. Ins. Co.*, 159 P. 922.

⇨1198 (Or.) Where mandate of Supreme Court directs specifically what judgment shall be entered by lower court, it must follow the direction implicitly; it being, in effect, the judgment of the Supreme Court, which the lower court has no authority to set aside, or to grant new trial.—*Bertin & Lepori v. Mattison*, 159 P. 1167.

⇨1208(1) (Cal. App.) A party obtaining through a judgment before reversal any advantage or benefit must restore the amount to the other party after reversal.—*Garrett v. Garrett*, 159 P. 1050.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

↪1236 (Okla.) Under Laws 1915, c. 249, where supersedeas bond has been given on appeal and judgment is rendered against appellant, Supreme Court will enter judgment against sureties.—*Butts v. Rothschild Bros. Hat Co.*, 159 P. 243.

↪1236 (Okla.) Where plaintiff in error filed a supersedeas bond staying execution and the writ is dismissed for lack of briefs, judgment may be entered against the sureties on the bond pursuant to Laws 1915, c. 249.—*Wilcox v. Wootton*, 159 P. 1118.

↪1236 (Okla.) Where a supersedeas bond staying execution has been given and judgment is affirmed, judgment by virtue of Laws 1915, c. 249, will be entered against the sureties on the bond.—*Eureka Pub. Co. v. First Nat. Bank of Stigler*, 159 P. 1118.

↪1236 (Okla.) Where a supersedeas bond is filed and on appeal the judgment is affirmed, judgment will, on motion of appellee, be entered against the sureties on the bond.—*Elliott v. Coggswell*, 159 P. 1119.

APPEARANCE.

See Justices of the Peace, ↪161; Partnership, ↪204.

↪9(5) (Cal.App.) Since a motion to dismiss for want of jurisdiction of the subject-matter necessarily calls for relief which may be demanded only by a party to the record, it constitutes a general appearance.—*Roberts v. Superior Court of California, in and for Stanislaus County*, 159 P. 465.

↪20 (Okla.) Where motion to quash service of summons is overruled and not excepted to, and upon application movant files answer, service of summons is waived and movant is properly in court.—*Tracy v. State*, 159 P. 496.

APPLIANCES.

See Master and Servant, ↪101-103, 278, 286.

APPLICATION.

See Payment, ↪39.

APPOINTMENT.

See Executors and Administrators, ↪22; Guardian and Ward, ↪10-17; Justices of the Peace, ↪2.

APPORTIONMENT.

See States, ↪27.

APPROPRIATION.

See Waters and Water Courses, ↪188.

APPROVAL.

See Criminal Law, ↪1105; Indians, ↪15.

ARBITRATION AND AWARD.

See Counties, ↪114; Jury, ↪28; Mandamus, ↪63; Reference.

I. SUBMISSION.

↪2 (Wash.) Under Rem. & Bal. Code, § 420 et seq., providing for statutory arbitration and award, common-law arbitration no longer exists.—*Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 159 P. 129.

↪6 (Wash.) There can be no valid arbitration, unless the parties enter into a proper agreement under Rem. & Bal. Code, § 420 et seq., for statutory arbitration.—*Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 159 P. 129.

↪14 (Wash.) Under Rem. & Bal. Code, § 420 et seq., providing for statutory arbitration, a bond to abide the award is not indispensable to a valid arbitration agreement, nor does the omission to give such bond oust the court of jurisdiction to adopt, modify, and enforce the award.—*Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 159 P. 129.

↪16(2) (Wash.) Either party to a common-law arbitration may repudiate the agreement to arbitrate any time before an award is actually returned.—*Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 159 P. 129.

The parties to an agreement for statutory arbitration under Rem. & Bal. Code, § 420 et seq., have no right to revoke such agreement either before or after award.—*Id.*

III. AWARD.

↪73 (Wash.) The jurisdiction of the superior court over a controversy submitted to arbitration under Rem. & Bal. Code, § 420 et seq., is limited to review of the proceedings upon exception.—*Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 159 P. 129.

Where the superior court cannot adequately correct errors in arbitration proceedings under Rem. & Bal. Code, § 420 et seq., on exception it may under section 422, take over the whole controversy and determine it without a jury.—*Id.*

↪78 (Wash.) Under Rem. & Bal. Code, § 420 et seq., an independent suit will not lie to set aside an arbitration award for unfairness, prejudice, improper conduct of arbitrators or other reasons; the only remedy being by exceptions to the superior court.—*Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 159 P. 129.

Failure of the arbitrators to use expedition in deciding a controversy submitted under Rem. & Bal. Code, § 420 et seq., as required by the arbitration, resulting in the withdrawal of the arbitrator named by plaintiff, and prejudice or unfairness of the remaining arbitrators, are not grounds for an independent suit to set aside the award, but can be reviewed only on exceptions.—*Id.*

↪84 (Wash.) Where no exceptions are taken to a statutory award of arbitrators under Rem. & Bal. Code, § 420 et seq., an action to set aside a judgment can be maintained only if there was in fact no statutory arbitration or if it was void.—*Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 159 P. 129.

↪85(1) (Wash.) Where the defeated party to a common-law arbitration refuses to pay the award, the only remedy is an action at law upon it.—*Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 159 P. 129.

ARGUMENT OF COUNSEL.

See Trial, ↪114.

ARREST.

See Bail.

II. ON CRIMINAL CHARGES.

↪63(4) (Wash.) A peace officer can arrest without a warrant where he has reasonable grounds for believing that the party arrested has committed a felony.—*Greenius v. American Surety Co. of New York*, 159 P. 384.

ASSAULT AND BATTERY.

See Criminal Law, ↪178; Homicide, ↪286; Sheriffs and Constables, ↪157.

ASSESSMENT.

See Municipal Corporations, ↪407-513; Taxation, ↪363-461, 898.

ASSETS.

See Partnership, ¶178-187.

ASSIGNMENT OF ERRORS.

See Appeal and Error, ¶754.

ASSIGNMENTS.

See Assignments for Benefit of Creditors; Attorney and Client, ¶187; Fraudulent Conveyances.

II. OPERATION AND EFFECT.

¶84 (Wash.) A surety company which completed a defaulting contractor's work, rather than the contractor's assignee, is entitled to sums due only upon the work's completion.—City of Aberdeen v. Equitable Surety Co., 159 P. 683.

A contractor's assignee is entitled to sums due under a completed contract in preference to a surety company, which completed a second contract between the same parties upon its abandonment by the contractor.—Id.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy; Corporations, ¶550.

VII. ACCOUNTING, SETTLEMENT, AND DISCHARGE OF ASSIGNEE.

¶364 (Cal.App.) It cannot be presumed that, in the absence of any provision for accounting in the instrument creating the trust for creditors the trustee could hold and enjoy the use and incomes of trust property for an indefinite period and account to no one; it being his duty to account to the trustor as well as the creditors whom he represents.—Schneider v. Moncur, 159 P. 459.

ASSOCIATIONS.

See Insurance, ¶693-818.

ASSUMPSIT, ACTION OF.

See Account Stated; Money Received.

ASSUMPTION OF RISKS.

See Master and Servant, ¶203-226, 280, 288.

ATTACHMENT.

See Bills and Notes, ¶104; Carriers, ¶58; Execution; Exemptions; Garnishment.

I. NATURE AND GROUNDS.

(A) Nature of Remedy, Causes of Action, and Parties.

¶5 (Wash.) Under Rem. & Bal. Code, § 648, where affidavit for attachment shows that defendant is a nonresident of the state, right of attachment for damages from breach of contract is not precluded by provision for attachment for damages from commission of felony.—State v. Superior Court for King County, 159 P. 1193.

III. PROCEEDINGS TO PROCURE.

(B) Affidavits.

¶101 (N.M.) In affidavit for attachment under Code 1915, § 4311, it is not necessary to state residence of nonresident defendant, or that his place of residence is unknown.—Glasgow v. Peyton, 159 P. 670.

¶107 (Wash.) In Rem. & Bal. Code, § 648, requiring affidavit for attachment to specify amount of indebtedness, "indebtedness" includes liability for damages from breach of written

contract.—State v. Superior Court for King County, 159 P. 1193.

(C) Security.

¶136 (Cal.App.) A defect in attachment proceedings consisting of the omission of the word "free" or "house" in the blank space before the word "holder" in the affidavit of justification of sureties, held amendable.—Bone v. Trafton, 159 P. 819.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

¶209(6) (N.M.) Where attachment is obtained under Code 1915, § 4311, it is not necessary for copy of complaint and summons to be mailed to defendant as required in ordinary civil actions by section 4066.—Glasgow v. Peyton, 159 P. 670.

ATTORNEY AND CLIENT.

See Animals, ¶100; Appeal and Error, ¶1060; Bankruptcy, ¶482; Bills and Notes, ¶126, 534; Costs, ¶172; District and Prosecuting Attorneys; Judges, ¶4; States, ¶87; Trial, ¶114.

I. THE OFFICE OF ATTORNEY.

(B) Privileges, Disabilities, and Liabilities.

¶17 (Okla.) A bond in any civil action signed as surety by a licensed attorney employed as counselor in the case in which it is given is void, but before it is found void those facts must be pleaded and proved.—Peck v. Ourlee Clothing Co., 159 P. 906.

(C) Suspension and Disbarment.

¶44(1) (Cal.App.) In disbarment proceedings it is a good defense, as to transactions prior to 1911, that the client did not deal with defendant as an attorney; section 287, as then in force, failing to provide for disbarment in such cases.—In re Soale, 159 P. 1065.

The phrase "maintain inviolate the confidence," as contained in Code Civ. Proc. § 282, is not confined merely to noncommunication of facts learned in the course of professional employment.—Id.

¶53(1) (Cal.App.) Under Code Civ. Proc. § 282, subd. 5, one alleging unprofessional conduct must prove that she reposed confidence in accused as an attorney, and that he violated such confidence.—In re Soale, 159 P. 1065.

¶53(2) (Cal.App.) Evidence held to show that client reposed confidence in accused as an attorney, so that his violation thereof rendered him subject to disbarment, though he entered no fee charges and though the transaction was in ordinary business.—In re Soale, 159 P. 1065.

Evidence held to show violation of confidence of client so as to subject attorney to disbarment.—Id.

To sustain accusation in disbarment proceeding for alleged violation of client's confidence, it is not necessary to establish all facts as to ultimate loss on client's part which might be necessary in action for damages for deceit.—Id.

¶61 (Cal.App.) Where attorney was alleged to have defrauded a client by indirect sale of alleged worthless bonds, under evidence tending to show that they had some value, the court, in judgment of temporary disbarment, should not make reinstatement depend on payment of accuser's claim; that being too indefinite.—In re Soale, 159 P. 1065.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

¶144 (Wash.) Attorney employed under contract fixing his compensation cannot recover for

unusual professional services, where client did not request them, nor understand that they were outside contract.—*Gabrielson v. Gorin*, 159 P. 387.

(B) Lien.

☞182(1) (N.M.) An attorney is entitled to a "charging lien" or right to recover fees from fund recovered by his efforts.—*Prichard v. Fulmer*, 159 P. 39.

☞182(3) (N.M.) At common law an attorney had right to "general" or "retaining lien," attaching to all papers, documents, and money coming into his hands professionally, by which he was entitled to retain possession till the money due him for services was paid.—*Prichard v. Fulmer*, 159 P. 39.

☞186 (N.M.) Attorney's lien on judgment in foreclosure is waived, where he permits client to purchase property, and court without objection confirms sale and approves deed to client, and attorney's lien does not follow the land.—*Prichard v. Fulmer*, 159 P. 39.

☞186 (Wash.) Stockholder of corporation, stipulating for appointment of trustee to collect its assets, without reserving his lien as attorney for collecting claim given by Rem. & Bal. Code, § 136, *held* to have waived his right thereto.—*Jensen v. Kohler*, 159 P. 978.

☞187 (N.M.) An attorney having a charging lien may prevent or set aside assignments made in fraud of his rights.—*Prichard v. Fulmer*, 159 P. 39.

☞189 (N.M.) An attorney having a charging lien has the right to have the court interfere to prevent payment by the judgment debtor.—*Prichard v. Fulmer*, 159 P. 39.

☞192(2) (N.M.) An attorney cannot assert his lien in an independent suit, since court will afford ample remedy in original suit.—*Prichard v. Fulmer*, 159 P. 39.

AUDIT.

See Mandamus, ☞101; States, ☞178.

AUDITING.

See Counties, ☞24.

AUTHENTICATION.

See Appeal and Error, ☞612, 616, 641.

AUTOMOBILES.

See Municipal Corporations, ☞706; Street Railroads, ☞114.

AWARD.

See Arbitration and Award, ☞73-85.

BAIL

II. IN CRIMINAL PROSECUTIONS.

☞89(2) (Okla.) In action on appearance bond, where forfeiture is alleged and answer denies forfeiture, demurrer to answer was properly overruled.—*State v. Metcalf*, 159 P. 470.

BAILMENT.

See Pledges; Warehousemen.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(C) Involuntary Proceedings.

☞100(1) (Or.) Involuntary petition in bankruptcy, setting forth at least one act of bankruptcy within Bankruptcy Act, § 3a, averring that a judgment creditor attached funds and realized on its judgment in full, was not open to attack by such creditor in trustee's action

to set aside its alleged preference.—*Anderson v. Stayton State Bank*, 159 P. 1033.

Adjudication in bankruptcy of itself imports existence of all requisite jurisdictional facts, including service of subpoena, especially in collateral attack.—*Id.*

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

☞143(11) (Wash.) Where maker of several notes secured by insurance policies as collateral became bankrupt, and the insurer paid the loss in drafts payable jointly to the trustee in bankruptcy in whose name the parties had agreed suit might be brought, and the holder of the notes, the holder could not be charged with the full amount, but the fund was chargeable with amounts determined by the bankruptcy court to be prior to the holder's claim.—*American Sav. Bank & Trust Co. v. Munson*, 159 P. 1195.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

☞165(1) (Or.) In bankruptcy proceeding against partnership and each of its individual partners, creditors holding joint notes and creditors holding joint and several notes *held* of the fourth class of creditors of individual partner, under Bankruptcy Act, § 60, subds. "a," "b," as amended, so that enforcement of judgment on joint and several notes would work preference.—*Anderson v. Stayton State Bank*, 159 P. 1033.

☞168 (Or.) Where enforcement of judgment obtained against bankrupt works preference within meaning of Bankruptcy Act, trustee in bankruptcy is entitled to recover from judgment creditor amount received on the judgment.—*Anderson v. Stayton State Bank*, 159 P. 1033.

☞200(4) (Wash.) Under Bankruptcy Act, § 67f, defendant, after default judgment and certificate of sheriff's sale, but before confirmation of sale, on showing that when suit was commenced he was insolvent, and that on his petition in bankruptcy the realty had been set off to him as exempt, *held* entitled to order vacating sale.—*Mowbray Pearson Co. v. Pershall*, 159 P. 682.

(E) Actions by or Against Trustee.

☞295 (Or.) A trustee in bankruptcy may sue in the state court, and where he does so to recover property, he is entitled to all remedies and all relief which would be afforded any other party litigant under the same facts.—*Van Zandt v. Parson*, 159 P. 1158.

☞302(4) (Or.) Trustee in bankruptcy cannot question judgment against bankrupt, unless he alleges and proves his right to appear as trustee in bankruptcy, which involves filing of petition in bankruptcy, and adjudication, his appointment, and his qualifications as trustee.—*Anderson v. Stayton State Bank*, 159 P. 1033.

☞303(1) (Or.) Under Bankruptcy Act, § 60, subds. "a," "b," as amended, trustee in action to set aside alleged preference *held* required to show debtor's insolvency at entry of judgment; that he suffered judgment within four months before filing of petition, that enforcement gives judgment creditor preference over creditors of same class, etc.—*Anderson v. Stayton State Bank*, 159 P. 1033.

☞303(3) (Or.) Record in bankruptcy proceeding *held* to sufficiently show for purpose of trustee's action to set aside alleged preference that he was selected in full compliance with Bankruptcy Act, § 5b.—*Anderson v. Stayton State Bank*, 159 P. 1033.

Approval of bond of trustee in bankruptcy constitutes, under Bankruptcy Act, § 21e, con-

clusive evidence of vesting in him of title of bankrupt's property.—Id.

That debtor suffered judgment within four months before filing of petition in bankruptcy was shown when all proceedings from commencement of action to entry of judgment, including issuance and return of execution and enforced payment thereof, occurred within four months before filing of petition.—Id.

(F) Claims Against and Distribution of Estate.

⚡309 (Or.) Holder of joint and several notes, executed by partners in adjustment of partnership debt, might share with claims against partnership in bankruptcy, and also participate in dividends in claims against the individuals.—Anderson v. Stayton State Bank, 159 P. 1033.

⚡336 (Wash.) Where creditors of a bankrupt received notice of the intention to declare a dividend under Bankruptcy Act, § 58, and voluntarily withdrew their claim, withdrawal was binding upon them, the referee under Bankruptcy Act, § 39a, having jurisdiction to declare the dividend.—American Sav. Bank & Trust Co. v. Munson, 159 P. 1195.

⚡351 (Or.) Claims against partnership and claims against one of partners were not in same class as joint and several notes, signed by such partner and the other partner in their individual names in adjustment of claim against partnership, in respect to preference alleged to have been obtained by holder of such notes.—Anderson v. Stayton State Bank, 159 P. 1033.

Under Bankruptcy Act, § 5f, holder of joint and several notes of individual partners would share with creditors of same class holding claims against individual partner, and might also compel payment in full before any dividends out of individual estate on purely partnership debts, even though there were no partnership assets.—Id.

In bankruptcy a pure partnership creditor is not in same class as creditor holding claim against individual member of partnership.—Id.

(G) Accounting and Discharge of Trustee.

⚡368 (Wash.) Although parties alleged trustee in bankruptcy had agreed to act without fees, they were bound by an allowance of fees made to him in the presence of their attorney, who made no objection.—American Sav. Bank & Trust Co. v. Munson, 159 P. 1195.

VII. COSTS AND FEES.

⚡482(1) (Wash.) A fee of an attorney collecting \$6,000 for the bankrupt estate from insurers on occurrence of loss is properly allowable in the sum of \$500.—American Sav. Bank & Trust Co. v. Munson, 159 P. 1195.

BANKS AND BANKING.

See Criminal Law, ⚡371; Taxation, ⚡879.

I. CONTROL AND REGULATION IN GENERAL.

⚡21 (Cal.App.) In charging commission of felony under Pen. Code, § 476a, making it a crime willfully and with intent to defraud to make, draw, or deliver a bank check knowing that there are insufficient funds, the information need not allege that the check was presented to the bank, nor need such fact be proved.—People v. Weir, 159 P. 442.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(D) Officers and Agents.

⚡54(7) (Cal.) Where an interloper became trustee of insolvent bank whose affairs were taken over by bank commissioner and secured

control of the concern and prosecuted various actions to remove it from control of the commissioner, he could not have compensation for his alleged services in such actions.—Crane v. State Savings & Commercial Bank, 159 P. 585.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

⚡129 (Cal.) Under express provisions of Bank Act, § 16, deposits by husband and wife, upon agreement that the money should be payable to them; or either of them, during their joint lives, and should belong to the survivor, became the property of husband and wife as joint tenants.—McDougald v. Boyd, 159 P. 168.

IV. NATIONAL BANKS.

⚡261(3) (Okl.) A national bank which pursuant to agreement that debtor will apply loan on indebtedness to bank guarantees payment is liable to lender for amount received in execution of agreement, though guaranty is beyond its powers under National Banking Act.—Oklahoma City Nat. Bank v. Ezzard, 159 P. 267.

⚡281 (Okl.) Where national bank is placed in voluntary liquidation in charge of liquidating agent, it is capable of suing and being sued in its corporate capacity, until its affairs are settled.—Oklahoma City Nat. Bank v. Ezzard, 159 P. 267.

BAR.

See Judgment, ⚡563-743.

BASTARDS.

I. ILLEGITIMACY IN GENERAL.

⚡3 (Okl.Cr.App.) Where a husband has access to his wife, there is a presumption of the legitimacy of the offspring.—O'Hern v. State, 159 P. 938.

BENEFICIAL ASSOCIATIONS.

See Insurance, ⚡693-819.

BENEFICIARIES.

See Insurance, ⚡781-784.

BENEFITS.

See Principal and Agent, ⚡171.

BEST AND SECONDARY EVIDENCE.

See Evidence, ⚡177, 181.

BIDS.

See Municipal Corporations, ⚡336, 993.

BILL.

See Statutes, ⚡21.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, ⚡58.

BILLS AND NOTES.

See Alteration of Instruments, ⚡20; Appeal and Error, ⚡1170; Corporations, ⚡92; Evidence, ⚡423; Husband and Wife, ⚡234; Insurance, ⚡349; Landlord and Tenant, ⚡213; Limitation of Actions, ⚡2;

Partnership, *§*165, 178; Pledges, *§*33, 44; Principal and Surety, *§*104, 128, 129; Reformation of Instruments, *§*21; Set-off and Counterclaim, *§*29.

I. REQUISITES AND VALIDITY.

(C) Execution and Delivery.

*§*64 (Cal.App.) Where a note was delivered by one maker upon apparent authority from all, the holder not knowing signatures of the two makers who did not deliver it, who were sureties for the maker who delivered it, were obtained by fraud, and that the note was delivered by them upon a condition which was not performed, the sureties were liable on the note.—*Tischhauser v. Prentice*, 159 P. 228.

(E) Consideration.

*§*92(3) (Cal.App.) The act of plaintiff in granting an extension of time for payment of a debt presently due was sufficient consideration for a note executed to him.—*Tischhauser v. Prentice*, 159 P. 228.

*§*92(3) (Or.) Where joint and several notes executed by partners originated in partnership indebtedness, extension of time for payment, granted by creditor's assignee, furnished sufficient consideration for liability of individual partners.—*Anderson v. Stayton State Bank*, 159 P. 1033.

(F) Validity.

*§*104 (Okla.) Under Rev. Laws 1910, *§* 900, par. 2, it is not duress where defendant signs notes in settlement of account not due on which suit and affidavit for attachment were filed, but no order of attachment issued, and no goods were detained.—*Phillips v. Hargadine-McKittrick Dry Goods Co.*, 159 P. 320.

*§*104 (Or.) Notes and mortgages, given by parents under the influence of threats that otherwise their son will be sent to the penitentiary for embezzlement of moneys of the mortgagee, are voidable for duress.—*Baldwin Co. v. Savage*, 159 P. 80.

II. CONSTRUCTION AND OPERATION.

*§*120 (Or.) Notes containing words, "We promise to pay to the order of" payee, signed by lumber company and by each of partners doing business under such firm name, were "joint notes."—*Anderson v. Stayton State Bank*, 159 P. 1033.

Notes executed in adjustment of claim against partnership doing business under firm name of company, signed by each of partners, were "joint and several notes" within L. O. L. *§* 5350.—*Id.*

*§*126 (Wash.) An attorney's fees authorized by a note to be adjudged against maker in suit upon the note is not recoverable in suit against the maker by indorser who has been compelled to pay the note by previous suit and judgment against the maker and such indorser.—*Balkema v. Grolimund*, 159 P. 127.

*§*129(1) (Okla.) "Maturity," when applied to commercial paper, means the time when the paper becomes due and demandable; the time when an action can be maintained thereon to enforce payment.—*Ardmore State Bank v. Lee*, 159 P. 903.

III. MODIFICATION, RENEWAL, AND RESCISSION.

*§*137(2) (Okla.) Where a creditor without inadvertence or mistake receives a payment of interest in advance on the note of the debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract to extend the time of payment during that period.—*Ardmore State Bank v. Lee*, 159 P. 903.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(D) Bona Fide Purchasers.

*§*343 (Wash.) President of corporation who knew that its stocks were practically valueless, and that note indorsed to him as collateral had been given for such stocks, even if he took it before maturity, held chargeable with knowledge of failure of consideration.—*Hamilton v. Mihills*, 159 P. 887.

*§*378 (Okla.) Where a note is altered after execution and delivery, an innocent holder may recover according to its original tenor, but one not an innocent purchaser can have no recovery thereon.—*Zehr v. Champlin*, 159 P. 1185.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

*§*396 (Wash.) In absence of any notice of nonpayment given to either of the indorsers of a note, they could not be held as indorsers.—*Codd v. Von Der Ahe*, 159 P. 686.

VIII. ACTIONS.

*§*452(3) (Wash.) In action on note, partial failure of consideration is pro tanto a valid defense.—*Hamilton v. Mihills*, 159 P. 887.

*§*517 (Okla.) In an action on a note tried to the court, where execution was denied, and a comparison of the contested signature with signatures admittedly genuine admitted, a finding that the note was that of defendant was supported by evidence.—*McMinn v. Johnson County Savings Bank*, 159 P. 921.

*§*518(1) (Wash.) In action on note given for bonds and stocks of corporation, evidence held to show that there was practically a total failure of consideration.—*Hamilton v. Mihills*, 159 P. 887.

*§*520 (Or.) Evidence held sufficient to sustain a finding that notes and mortgages should be set aside as procured by duress and executed under threats that defendants' son would be sent to the penitentiary for embezzling money while agent of the mortgagee.—*Baldwin Co. v. Savage*, 159 P. 80.

*§*520 (Wash.) In action on note, evidence held to show that giving of note and renewal thereof were induced by deceitful representations.—*Hamilton v. Mihills*, 159 P. 887.

*§*534 (Or.) In an action on notes, where, by the allowance of defendant's counterclaim, plaintiff had judgment for only \$48.77, the allowance of \$100 as attorney's fees held unreasonable.—*Meadow Valley Land & Investment Co. v. Manerud*, 159 P. 559.

BLACKMAIL.

See Threats.

BOARD OF CONTROL.

See States, *§*173.

BOARDS.

See Municipal Corporations, *§*100; Schools and School Districts, *§*63; States, *§*173-199.

BONA FIDE PURCHASERS.

See Bills and Notes, *§*343, 378; Execution, *§*275; Mortgages, *§*154, 155; Trusts, *§*357; Vendor and Purchaser, *§*231.

BONDS.

See Appeal and Error, *§*374, 1236; Arbitration and Award, *§*14; Attorney and Client, *§*17; Bail; Boundaries, *§*64; Depositaries; Garnishment, *§*195; Guardian and Ward, *§*174, 182; Highways, *§*113; Infants, *§*77; Justices of the Peace, *§*159; Municipal Corporations, *§*345; Principal

and Surety; Receivers, ¶212-216; Sheriffs and Constables, ¶188, 187; Undertakings; Waters and Water Courses, ¶230.

I. REQUISITES AND VALIDITY.

¶27 (Cal.) A bond given in pursuance of and solely because of a statute ineffectual to require it, is without consideration and void.—Loop Lumber Co. v. Van Loben Sels, 159 P. 600.

BOUNDARIES.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

¶54(3) (Okla.) Under Rev. Laws 1910, § 1721, on filing of report of survey, any person served with notice thereof may, within 30 days, appeal to court, by filing with county surveyor notice of his intention and giving bond.—In re Survey of Section 30, Township 19, Range 20, Dewey County, 159 P. 357.

When notice and bond on appeal from survey are not given until after 30 days from filing of report, district court does not acquire jurisdiction.—Id.

BREACH.

See Sales, ¶418; Vendor and Purchaser, ¶351.

BRIEFS.

See Appeal and Error, ¶757-773; Criminal Law, 1130.

BROKERS.

See Factors.

II. EMPLOYMENT AND AUTHORITY.

¶11 (Okla.) Contract appointing agent to procure loan of money, contemplating that agent expend time and money to carry it out, where the agent expends time and money in its performance, is irrevocable by principal, except on burden of responding for damages suffered by agent.—Deming Inv. Co. v. Christensen, 159 P. 663.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

¶31 (Utah) A contract under which a prospective vendor gives a broker the right to sell within a certain period with the option of purchasing the land himself is valid.—Burt v. Stringfellow, 159 P. 527.

IV. COMPENSATION AND LIEN.

¶50 (Utah) Where a broker interested certain parties in land which they purchased from his principals soon after his contract expired, but the principals did not prevent him from closing the deal within the contract period, *held*, the broker could not collect his commission.—Burt v. Stringfellow, 159 P. 527.

¶69 (Wash.) Since broker's right to commission depends on consummation of sale, he cannot have double commission for negotiating sale, getting surrender of the contract therefor, and negotiating a new sale, without specific agreement for such compensation.—Forrer v. John Davis & Co., 159 P. 696.

¶77 (Okla.) Contract, appointing agent to procure loan, and expressly providing that employers pledge and mortgage certain real estate to secure compensation to which agent may be entitled under contract, creates lien on the real estate for compensation though not recorded.—Deming Inv. Co. v. Christensen, 159 P. 663.

BUILDING CONTRACTS.

See Contracts, ¶295, 303; Principal and Surety, ¶100.

BUILDINGS.

See Municipal Corporations, ¶703.

BURNS.

See Hospitals, ¶8.

BY-LAWS.

See Insurance, ¶693, 712.

CANCELLATION OF INSTRUMENTS.

See Arbitration and Award, ¶78; Executors and Administrators, ¶509; Insurance, ¶83, 229, 291; Reformation of Instruments; Vendor and Purchaser, ¶87.

I. RIGHT OF ACTION AND DEFENSES.

¶4 (Cal.) A cause of action for undue influence in procuring execution of a deed presumed from the confidential relationship of the parties is wholly separate from that which would seek the cancellation of an instrument either for fraud or for duress.—Tanforan v. Tanforan, 159 P. 709.

II. PROCEEDINGS AND RELIEF.

¶37(1) (N.M.) Complaint for cancellation of deed from mother to son for failure of grantee to comply with agreement *held* to state a cause of action sufficient against demurrer.—Sanchez v. Sanchez, 159 P. 609.

¶47 (Okla.) In suit to cancel deed, decree for plaintiffs for incompetency of grantor *held* sustained by the evidence.—Gafford v. Davis, 159 P. 490.

CARRIERS.

See Commerce, ¶8; Trial, ¶296.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

¶2 (Okla.) Provision in Hepburn Act (Carmack Amendment), making initial carrier liable for loss, is constitutional.—St. Louis & S. F. R. Co. v. Akard, 159 P. 344.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

¶58 (Wash.) Bank by reason of owning a bill of lading had a right to all property covered by the bill superior to a party, whose only claim was by virtue of a subsequent attachment.—Commercial Bank of Port Huron v. Elliott, 159 P. 377.

On trial to determine whether plaintiff in an action on a bank which claimed to own the automobile attached by him was the owner of the car, question whether the car attached was covered by the bill of lading held by the bank, being a question of fact, was for the jury.—Id.

On trial of bank's claim to automobile attached by plaintiff in his action against motor car company, evidence as to whether car in question was covered by bank's bill of lading *held* insufficient to support verdict for plaintiff.—Id.

(C) Limitation of Liability.

¶149½ (Okla.) As to interstate shipments, common-law liability of carrier may be limited by special contract fairly entered into and not covering losses from negligence or misconduct of carrier.—St. Louis & S. F. R. Co. v. Akard, 159 P. 344.

(D) Connecting Carriers.

¶177(4) (Okla.) Act to regulate commerce authorizes recovery by initial interstate carrier

from connecting carrier of loss initial carrier has been required to pay shipper.—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 344.

Connecting carrier having delivered goods not in the condition in which they were received by its agent, the delivering carrier must account for the injury.—*Id.*

Initial carrier has authority to involve connecting carrier in liability after goods have come to custody of delivering carrier.—*Id.*

§180(2) (Okl.) Clause in bill of lading issued by initial interstate carrier, limiting liability to loss on initial carrier's lines, is violative of Hepburn Act (Carmack Amendment).—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 344.

Under common law, independently of statute, where carrier issues through bill of lading, it makes connecting carriers its agents, and is responsible for loss or damage on either line, which it cannot limit by contract.—*Id.*

§180(6) (Okl.) Where a transfer company, having agreed to ship goods over a certain route, shipped them over another and they were burned, the transfer company is liable for the value of the goods without regard to a limitation of liability contained in the shipping order.—*O. K. Transfer & Storage Co. v. Neill*, 159 P. 272.

§185(1) (Okl.) Burden rests on delivering carrier to show that injury to goods shipped occurred without its fault or negligence.—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 344.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§244 (Okl.) One on a freight train with the knowledge and consent of the agents in charge is not a trespasser, though there in violation of the rules of the company, and the company owes him the duty of care.—*Chicago, R. I. & P. Ry. Co. v. Shadid*, 159 P. 913.

(D) Personal Injuries.

§292(2) (Mont.) A street car company is liable for any defects in its car appliances which might be disclosed by a most rigid examination.—*Batch v. Helena Light & Ry. Co.*, 159 P. 411.

Where straps in a street car used for registering fares were inspected by looking at them, but were not tested by ringing fares, held, that the company was liable where a strap broke, causing the conductor to fall upon the plaintiff.—*Id.*

§316(7) (Mont.) Where a street car passenger is injured by the breaking of a strap, the company has the burden of proving its freedom from negligence.—*Batch v. Helena Light & Ry. Co.*, 159 P. 411.

§318(4) (Okl.) One injured while riding as a passenger on platform of caboose of a freight train makes out a prima facie case when he shows injury was caused by an unusually sudden stop which was unnecessary, and surrounding circumstances indicate negligence.—*Chicago, R. I. & P. Ry. Co. v. Grace*, 159 P. 1011.

§318(8) (Cal.App.) Evidence held insufficient to show negligence in the operation of defendant's train, whereby plaintiff was injured in attempting to board it while moving.—*Gaskill v. Pacific Electric Ry. Co.*, 159 P. 200.

§320(2) (Okl.) Where one who had been carried on a freight train for less than full fare was informed when the train reached a station that he could be carried no further, and that he must procure a ticket, held, that the question whether he was a passenger in going to the station as directed was for the jury.—*Chicago, R. I. & P. Ry. Co. v. Shadid*, 159 P. 913.

(E) Contributory Negligence of Person Injured.

§331(4) (Okl.) Despite general rules as to contributory negligence and Rev. Laws 1910, § 1423, a passenger who believed when a freight

train stopped that it had reached its destination and went on caboose platform to alight is not guilty of negligence in remaining thereon when he finds the train has to go a short distance if he holds securely to guard rail.—*Chicago, R. I. & P. Ry. Co. v. Grace*, 159 P. 1011.
 §346(1) (Cal.App.) Evidence held to sustain a finding that plaintiff's intestate was guilty of contributory negligence in attempting to board a moving passenger train.—*Gaskill v. Pacific Electric Ry. Co.*, 159 P. 200.

CASE-MADE.

See Appeal and Error, §544, 567, 568.

CERTAINTY.

See Contracts, §9; Statutes, §47.

CERTIFICATE.

See Corporations, §94.

CERTIORARI.

See Public Service Commissions, §35.

I. NATURE AND GROUNDS.

§1 (Cal.App.) The sole office of the writ of certiorari is to test the question of jurisdiction.—*Albers v. Superior Court in and for Humboldt County*, 159 P. 453.

§5(1) (Cal.) Under Code Civ. Proc. § 1068, a judgment or order which is appealable cannot be reviewed on certiorari.—*Hildebrand v. Superior Court in and for City and County of San Francisco*, 159 P. 147.

§24 (Or.) A writ of review is an appropriate proceeding to present questions of law arising in relation to a disputed claim against the county after it has been presented and disallowed.—*Berridge v. Marion County*, 159 P. 623.

The question of law whether the state insurance commissioner may contract for audit of county books without assurance that county will pay therefor, so as to render the county liable for the expense, in view of Laws 1913, p. 545, as to audits, may properly be raised by writ of review directed to the order of the county court disallowing the claim.—*Id.*

§28(2) (Nev.) Certiorari will lie to review erroneous assumption of jurisdiction by district court, where a statutory step was omitted upon appealing to it from justice court.—*Yowell v. District Court of Fourth Judicial Dist., in and for Elko County*, 159 P. 632.

§33(2) (Cal.) Under Code Civ. Proc. § 1069, an order requiring an assignment to plaintiff of a mortgage and subrogating him to rights of the mortgagee is not reviewable on certiorari on the petition of the mortgagor and of mortgagees under a subsequent mortgage, such persons not being beneficially interested.—*Hildebrand v. Superior Court in and for City and County of San Francisco*, 159 P. 147.

II. PROCEEDINGS AND DETERMINATION.

§64(1) (Or.) On re-examination on writ of review, the court will not consider evidence outside the record, unless it was submitted to the inferior tribunal prior to its decision.—*Berridge v. Marion County*, 159 P. 623.

CHALLENGE.

See Jury, §118.

CHAMPERTY AND MAINTENANCE.

§7(5) (Okl.) The grantor in a deed, void as against the defendant in adverse possession, may maintain an action in his own name and without joining in the action his grantee against those holding adversely to him and his grantee to re-

cover the land described in such void deed.—
Buell v. U-Pai-har-ha, 159 P. 507.

CHANCERY.

See Equity.

CHARACTER.

See Witnesses, ¶387.

CHARGE.

By irrigation companies, see Waters and Water Courses, ¶257.

To jury, see Criminal Law, ¶761-844; Trial, ¶191-296.

CHARTER.

See Municipal Corporations, ¶47, 58, 968.

CHATTEL MORTGAGES.

See Pledges.

I. REQUISITES AND VALIDITY.

(C) Execution and Delivery.

¶63 (Wash.) Rem. & Bal. Code, § 3660, declaring chattel mortgages void against creditors and subsequent purchasers unless accompanied by affidavit of good faith, etc., applies to a bill of sale intended as a chattel mortgage.—Kato v. Union Oil Co. of California, 159 P. 692.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

¶138(1) (Wash.) Under Rem. & Bal. Code, § 3660, declaring chattel mortgages void against creditors or subsequent purchasers unless accompanied by an affidavit of good faith, etc., an execution levy is superior to a previously recorded chattel mortgage which lacked the required affidavit.—Kato v. Union Oil Co. of California, 159 P. 692.

¶149 (Wash.) An action to foreclose a chattel mortgage is not an equitable levy which so places the mortgagee in possession as to be notice of his rights to others.—Kato v. Union Oil Co. of California, 159 P. 692.

¶150(1) (Okla.) Record of chattel mortgage not acknowledged before a notary public, and attested by only one witness, is not constructive notice so as to entitle mortgagee to lien superior to subsequent incumbrancer in good faith and without notice.—Merchants' Nat. Bank of Sallisaw v. Frazier, 159 P. 647.

IV. RIGHTS AND LIABILITIES OF PARTIES.

¶173(6) (Okla.) In replevin for two mules to which plaintiff claimed title under a chattel mortgage, the question of plaintiff's right held for the jury.—Gerlach Bank of Woodward v. Herd, 159 P. 901.

V. RIGHTS AND REMEDIES OF CREDITORS.

¶198 (Wash.) Where a vendee of personalty takes possession before other claims are made thereon, he is entitled thereto, though his chattel mortgage may be invalid because not properly recorded.—Haskins v. Fidelity Nat. Bank, 159 P. 1198.

CHAUFFEUR.

See Negligence, ¶93.

CHEAT.

See Fraud.

CHECKS.

See Banks and Banking, ¶21.

CHILDREN.

See Adoption; Bastards; Guardian and Ward; Infants; Negligence, ¶136; Parent and Child.

CHIROPRACTORS.

See Physicians and Surgeons, ¶6.

CIRCUMSTANTIAL EVIDENCE.

See Master and Servant, ¶405; Negligence, ¶134.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

CITIZENS.

See Indians.

CLAIMS.

See Bankruptcy, ¶309-351; Executors and Administrators, ¶222; Mandamus, ¶101; Mechanics' Liens, ¶132-142; States, ¶173-185.

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL ATTACK.

See Guardian and Ward, ¶107; Judgment, ¶485; States, ¶185.

COLLATERAL SECURITY.

See Pledges.

COLOR OF TITLE.

See Adverse Possession, ¶79.

COMBINATIONS.

See Monopolies.

COMMERCE.

See Carriers; Constitutional Law, ¶27.

I. POWER TO REGULATE IN GENERAL.

¶8 (Okla.) Act to regulate commerce imposes liability on initial interstate carrier of goods, but a shipper is not deprived of remedies under existing law.—St. Louis & S. F. R. Co. v. Akard, 159 P. 344.

The Carmack Amendment to the Hepburn Act leaves interstate shipper free to resort to laws of state applicable to contract.—Id.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION MERCHANTS.

See Factors.

COMMISSIONS AND COMMISSIONERS.

See Indians, ¶18; Master and Servant, ¶367; Public Service Commissions; States, ¶67, 173.

COMMON LAW.

See Garnishment, ¶63.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, ¶262-272.

COMPARATIVE NEGLIGENCE.

See Negligence, ¶97, 101.

COMPENSATION.

See Attorney and Client, ¶144-192; Bankruptcy, ¶368, 482; Banks and Banking, ¶54; Brokers, ¶50-77; Contracts, ¶235; Eminent Domain, ¶85-158; Judges, ¶22; Master and Servant, ¶385, 405; Officers, ¶94, 100; Statutes, ¶125.

COMPETENCY.

See Witnesses, ¶56-211.

COMPLAINT.

See Criminal Law, ¶252; Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPRESS COMPANIES.

See Warehousemen, ¶24.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Attorney and Client, ¶189; Payment; Release.

¶6(2) (Okl.) Receipt of a sum less than that claimed will, where the claim is unliquidated or disputed, be treated as a satisfaction.—*Sherman v. Pacific Coast Pipe Co.*, 159 P. 333.

¶8(3) (Okl.) A railroad employé who made a settlement under misrepresentations by the company's physicians as to the extent of his injuries held entitled to relief, whether they were innocently or intentionally false.—*Chicago, R. I. & P. Ry. Co. v. Rogers*, 159 P. 1182.

¶23(3) (Kan.) Evidence held to sustain finding of settlement by which plaintiff agreed to accept return of specific goods and that settlement was executed by constructive delivery of goods.—*United States Tire Co. of New York v. Kirk*, 159 P. 392.

COMPUTATION.

See Limitation of Actions, ¶46-127; Time.

CONCLUSION.

See Pleading, ¶8.

CONCLUSIVENESS.

See Appeal and Error, ¶862; Criminal Law, ¶1159; Eminent Domain, ¶68, 243; Evidence, ¶265, 591; Highways, ¶107; Judgment, ¶563-743.

CONCURRENT NEGLIGENCE.

See Master and Servant, ¶226.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, ¶481.

CONDITIONS.

See Bills and Notes, ¶396; Continuance, ¶49; Dismissal and Nonsuit, ¶37; Eminent Domain, ¶169; Guardian and Ward, ¶182; Master and Servant, ¶36; Principal and Agent, ¶103; Vendor and Purchaser, ¶79, 299.

CONFESSION.

See Criminal Law, 517, 520.

CONFIRMATION.

See Execution, ¶242.

CONFLICT OF LAWS.

See Corporations, ¶216; Insurance, ¶712; Limitation of Actions, ¶2.

CONNECTING CARRIERS.

See Carriers, ¶177-185.

CONSENT.

See Appeal and Error, ¶21; Homestead, ¶117; Principal and Surety, ¶128; States, ¶191.

CONSERVATION COMMISSION.

See States, ¶67, 173, 191.

CONSIDERATION.

See Accord and Satisfaction, ¶8; Bills and Notes, ¶92, 343, 518; Bonds; Compromise and Settlement, ¶6; Contracts, ¶138, 237; Corporations, ¶123; Fraudulent Conveyances, ¶74, 168, 300; Guaranty, ¶17; Principal and Surety, ¶175; Vendor and Purchaser, ¶13.

CONSOLIDATION.

See Action, ¶59.

CONSPIRACY.

See Criminal Law, ¶422.

CONSTABLES.

See Sheriffs and Constables, ¶9, 157.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics.

Enactment and validity of statutes, see Statutes, ¶21-64.

Partial invalidity of statutes, see Statutes, ¶64.

Special and local laws, see Statutes, ¶73-93.

Subjects and titles of statutes, see Statutes, ¶117-125.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

¶13 (Wash.) While a constitutional provision should be strictly construed, especially when its terms are clear, the reason and intention control the strict letter when it would lead to palpable injustice, contradiction, and absurdity.—*State v. Monfort*, 159 P. 889.

¶16 (Idaho) Constitutional provisions should be construed in the light of conditions existing at their adoption.—*State v. Fite*, 159 P. 1183.

¶26 (Cal.App.) In view of Const. art. 4, § 1, vesting legislative power in the Legislature, there is no implication of absence of power in it to do anything not expressly prohibited.—*Wigley v. South Joaquin Irr. Dist.*, 159 P. 985.

¶26 (Mont.) Const. art. 13, § 6, as to municipal indebtedness for water supply, must be construed as to the provision of ownership as a limitation of power rather than a grant, the purpose of the Constitution being to declare the limitations on popular power.—*Public Service Commission of Montana v. City of Helena*, 159 P. 24.

¶26 (Wash.) The police power of a state is not a delegated, but a reserved, power.—*Ray-*

mond Lumber Co. v. Raymond Light & Water Co., 159 P. 133.

§27 (Wash.) The commerce clause of the United States Constitution is a delegation of power to the United States.—Raymond Lumber Co. v. Raymond Light & Water Co., 159 P. 133.

§42 (Nev.) Where a petition fails to show that authorized representatives of the Progressive party sought to preserve the rights of their party under section 8, St. 1915, c. 283, for the apportionment of convention delegates, held, that petitioners for writ of prohibition cannot question the validity of section 8, providing for apportionment on the basis of vote for Congressmen at the last election.—Turner v. Fogg, 159 P. 56.

§42 (Ok.) The Supreme Court will not pass on the constitutionality of a statute until it is presented in a proper case in which the person complaining has or is about to be denied some right or privilege or subjected to some burden or penalty by reason of the statute thereof.—Black v. Geissler, 159 P. 1124.

§43(1) (Wash.) The Apportionment Act of 1901 even if it be conceded that it was unconstitutional, cannot be questioned by a proceeding brought after 15 years of uncontradicted action under such statute.—State v. Howell, 159 P. 777.

The argument that, if an act is invalid when passed, the vice continues and the statute may be annulled at any time does not apply to political or administrative legislation, but such laws must be attacked in seasonable time without delay.—Id.

§46(1) (Wash.) The validity of proposed legislation initiated under art. 2, § 1, will not be determined by the court prior to the enactment of such legislation, and whether such proposed act violates the provision of article 2, § 37, of the Constitution, providing that no act shall be amended by mere reference to its title, will not be determined.—State v. Superior Court in and for Thurston County, 159 P. 101.

§48 (Cal.) A criminal statute will be upheld unless it is clearly obnoxious.—Ex parte Ahart, 159 P. 160.

Of two permissible constructions, a criminal statute will be given that one which renders it valid.—Id.

§48 (Mont.) Rather than declare a law invalid, the court will construe its provisions in harmony with the Constitution if possible.—Public Service Commission of Montana v. City of Helena, 159 P. 24.

§48 (Nev.) On an application on the eve of election to annul St. 1915, c. 283, providing for nominations by political parties, and the holding of primaries and conventions, the court will not hold it invalid because contingencies may arise under section 11 of such act which would make the act impossible of enforcement.—Turner v. Fogg, 159 P. 56.

§48 (Wash.) Since the Legislature may aside from constitutional restrictions, apportion the state as it chooses in senatorial districts, the presumption of constitutionality attaches to apportionment acts in the same manner as it does to other statutes.—State v. Howell, 159 P. 777.

To show unconstitutionality of an apportionment act, the facts adduced must be clear and convincing, and establish beyond question a transgression of the constitutional limitations.—Id.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

§63(3) (Cal.) The power of the Legislature over school districts is plenary; and it may divide, change, or abolish them at pleasure, and

delegate to board of supervisors powers of annexation under certain conditions.—Worthington School Dist. v. Eureka School Dist., 159 P. 437.

§64 (Kan.) Laws 1909, c. 201, is not unconstitutional as conferring legislative powers on petitioners for construction or improvement of county road.—Stevenson v. Board of Com'rs of Shawnee County, 159 P. 5.

(B) Judicial Powers and Functions.

§68(1) (Wash.) The question of the integrity of political parties is a political rather than a judicial question.—State v. Howell, 159 P. 118.

§70(1) (Wash.) Courts will not intervene in any case to hinder or influence the process of legislation in any of its steps.—State v. Superior Court in and for Thurston County, 159 P. 92.

Neither the judicial nor the executive branches of the state can interfere to prevent a delegated member of the legislative body from introducing a bill or law, no matter how arbitrary, novel, or foolish.—Id.

The initiator of a bill under Const. art. 2, § 1, as amended in 1912, is not, under this system of direct legislation, a legislator with whose acts in proposing a bill the court cannot interfere.—Id.

§70(8) (Wash.) Courts will not afford relief against legislation on grounds of policy, expediency, or because a hardship is worked against any person.—State v. Superior Court in and for Thurston County, 159 P. 92.

(C) Executive Powers and Functions.

§77 (Wash.) Neither the judicial nor the executive branches of the state can interfere to prevent a delegated member of the legislative body from introducing a bill or law, no matter how arbitrary, novel, or foolish.—State v. Superior Court in and for Thurston County, 159 P. 92.

IV. POLICE POWER IN GENERAL.

§81 (Mont.) Though no specific provision of the Constitution forbids it, the Legislature is without authority to surrender altogether the police power.—Public Service Commission of Montana v. City of Helena, 159 P. 24.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

§89(1) (Ok.) The constitutional guaranty of liberty to enter into private contracts does not limit power of Congress so as to prevent it from legislating on contracts in restraint of interstate or foreign commerce.—Stewart v. W. T. Raleigh Medical Co., 159 P. 1187.

VI. VESTED RIGHTS.

§93(1) (Cal.App.) Under Pol. Code, § 3817, as amended by St. 1895, p. 333, and St. 1909, p. 42, section 3785, as amended by St. 1895, p. 328, and section 3788, as amended by St. 1895, p. 329, and by St. 1909, p. 122, and repealed by St. 1915, p. 605, §§ 1-3, held, that assignee of purchaser of school lands sold for delinquent taxes had no vested rights violated by repealing statute.—Curtin v. Kingsbury, 159 P. 830.

VII. OBLIGATION OF CONTRACTS.

(A) Powers of States in General.

§117 (Wash.) The clause of the federal Constitution which provides that no law shall be passed which impairs the obligation of a contract is not applicable to legislation, within the police power.—Raymond Lumber Co. v. Raymond Light & Water Co., 159 P. 133.

(C) Contracts of Individuals and Private Corporations.

§171 (Ok.) Rev. Laws 1910, § 644, limiting time for actions to set aside or enjoin assess-

ments, does not impair obligation of contracts.—*City of Chickasha v. O'Brien*, 159 P. 282.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

☞205(2) (Or.) Laws 1915, p. 124, providing for nominations for primary elections by payment of fee, as a method additional to that of Laws 1913, p. 183, providing for nominations without fee on petition, is not invalid as violating Const. art. 1, § 20, prohibiting privilege or immunity legislation.—*Patton v. Withycombe*, 159 P. 78.

XI. DUE PROCESS OF LAW.

☞268 (N.M.) Admission of certain evidence in criminal trial, though erroneous, is not deprivation of due process of law in violation of Const. art. 2, §§ 12, 18, and Const. U. S. Amend. 14, § 1.—*State v. Orfanakis*, 159 P. 674.

☞285 (Wash.) A special proceeding in rem for delinquent taxes, in the form of foreclosure of a delinquency certificate, not being a suit between the parties, but an exercise of the sovereign power to tax, does not in any way violate the constitutional guaranties of due process.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

☞290(3) (Kan.) Laws 1909, c. 201, relating to construction and improvement of roads, is not unconstitutional as imposing on township tax without giving it any hearing with respect thereto.—*Stevenson v. Board of Com'rs of Shawnee County*, 159 P. 5.

☞291 (Kan.) Laws 1909, c. 201, relating to construction and improvement of roads, is not unconstitutional on the ground that it makes no provision for notice to landowners of proceedings for improvement.—*Stevenson v. Board of Com'rs of Shawnee County*, 159 P. 5.

☞291 (Wyo.) Where the title to a right of way for a county road was acquired by proceedings to locate the road, and opportunity was given to the owner to present his claim for damages in the manner prescribed by statute, his property was not taken without due process of law.—*Kelly v. Board of Com'rs of Big Horn County*, 159 P. 1086.

☞293 (N.M.) Code 1915, § 1632, authorizing sale and seizure of calves and the young of domestic animals held in inclosures contrary to law without any provision for notice to owner of seizure and sale, is invalid as authorizing the taking of property without due process of law.—*Lacey v. Lemmons*, 159 P. 949.

☞305 (Wash.) Under Laws 1911, p. 538, an order of the commission that a water company should terminate a discriminatory contract with a sawmill and notice to the sawmill by the water company of compliance with such order, upon which action was brought by the sawmill, in which hearing was afforded, was due process of law under United States Constitution.—*Raymond Lumber Co. v. Raymond Light & Water Co.*, 159 P. 133.

☞307 (Cal.) Denial of remedy by suit by the owner of an equitable interest to quiet title does not deprive him of property without due process of law; there being other remedies.—*Aalwyns Law Institute v. Martin*, 159 P. 158.

☞308 (Ok.) Rev. Laws 1910, § 644, limiting time for actions to enjoin or cancel assessments, does not deprive persons of property without due process of law.—*City of Chickasha v. O'Brien*, 159 P. 282.

CONSTRUCTION.

See Attorney and Client, ☞144; Bills and Notes, ☞120-129; Chattel Mortgages, ☞138-150; Constitutional Law, ☞13-48; Contracts, ☞170-235; Deeds, ☞118-129; Elections, ☞10; Evidence, ☞443, 460; Guaranty, ☞36; Highways, ☞107-122; Judgment, ☞533; Landlord and Tenant, ☞

49; Logs and Logging, ☞8; Mortgages, ☞126-155; Municipal Corporations, ☞58, 120, 352; Pleading, ☞34; Principal and Surety, ☞59; Release, ☞37; Sales, ☞71, 81; Statutes, ☞181-260; Trial, 295-298, 404; Vendor and Purchaser, ☞58-79; Wills, ☞457, 601.

CONTEMPT.

See Criminal Law, ☞655; Injunction, ☞228-231.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

☞44 (Ok.) Cr.App.) Only that court in which a contempt is committed or whose order or authority is defied can punish the contempt, and for the purpose of punishing criminal contempts civil courts have jurisdiction.—*Smith v. State*, 159 P. 941.

CONTINUANCE.

☞12 (Ok.) Where cause is called for trial within a few days after settling of issues, refusal of continuance on showing that one of defendants who had sole knowledge of facts was absent from state by reason of serious illness, held an abuse of discretion.—*Wood v. Jones*, 159 P. 325.

☞14(1) (Ok.) If amended reply is filed and defendant is not prepared to proceed with trial, he should apply for reasonable time to prepare.—*Bly v. Poole*, 159 P. 511.

☞19 (Cal.) Even an unavoidable absence of plaintiff does not necessarily compel a court to grant a continuance.—*Canty v. Pierce & Anderson*, 159 P. 582.

☞49 (Wash.) Under Rem. & Bal. Code, §§ 299, 303, on objection by defendant to amendment of complaint and defendant's refusal to state whether it desired a continuance upon amendment being ordered, held error to order a continuance upon condition of defendant's paying witness fees of plaintiff and costs to that time.—*Phoenix Assur. Co. v. Columbia & P. S. R. Co.*, 159 P. 369.

☞51(4) (Cal.) Where suit, set for trial October 9th, was continued by consent until November 1st, and counsel were advised that no further continuance would be consented to, held not abuse of discretion to refuse continuance on November 1st because of absence of plaintiff.—*Canty v. Pierce & Anderson*, 159 P. 582.

CONTRACTORS' BONDS.

See Highways, ☞113; Municipal Corporations, ☞345.

CONTRACTS.

See Accord and Satisfaction; Account Stated; Adoption, ☞6; Alteration of Instruments; Arbitration and Award, ☞6; Assignments; Attachment, ☞5; Attorney and Client, ☞144; Bills and Notes, ☞92; Bonds; Cancellation of Instruments; Champerty and Maintenance; Chattel Mortgages; Compromise and Settlement; Constitutional Law, ☞89, 117, 171; Corporations, ☞573; Counties, ☞114; Covenants; Customs and Usages; Damages, ☞120; Evidence, ☞397; Exchange of Property; Frauds, Statute of; Garnishment, ☞33; Guaranty; Highways, ☞113; Indemnity; Insurance; Landlord and Tenant; Limitation of Actions, ☞46, 127; Mechanics' Liens; Mines and Minerals, ☞54; Money Received; Monopolies, ☞17; Municipal Corporations, ☞336-371, 864, 993; Partnership; Payment; Pledges; Principal and Agent; Principal and Surety; Reformation of Instruments; Release; Sales; Specific Performance; Telegraphs and Tele-

phones, **§52**; Undertakings; Usury; Vendor and Purchaser; Warehousemen; Wills, **§58**.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§9(1) (Or.) A contract is not void for indefiniteness when by taking into consideration the surrounding circumstances its true intent can be ascertained.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, Id. 576.

(B) Parties, Proposals, and Acceptance.

§27 (Cal.App.) Where parties contracted to furnish and haul sand, without reference to price, acceptance of that furnished raised implied agreement to pay for it at prevailing rates.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

§28(2) (Utah) Where defendants, railroad subcontractors, claimed that the terms of certain written contracts were incorporated into an oral agreement under which plaintiff did certain work for them, and there was evidence supporting the claim, *held* that the written contracts were admissible, although plaintiff was not a party to them.—*Straw v. Temple*, 159 P. 44.

(C) Formal Requisites.

§35 (Wash.) A contract signed by one party and accepted by the other need not bear the signature of the accepting party.—*Hunter v. Byron*, 159 P. 708.

(D) Validity of Assent.

§44(1) (Wash.) The law does not prohibit one learned in the intricacies of business from dealing with one utterly ignorant thereof, fairness alone being required, and that no unfair advantage be taken of ignorance or lack of experience.—*Conrads v. Green*, 159 P. 102.

(E) Legality of Object and of Consideration.

§108(1) (Or.) The power of citizens to make any kind of contract is unrestricted if the proposed contract is not against public policy.—*Patterson v. Chambers' Power Co.*, 159 P. 568. *City of Eugene v. Same*, Id. 576.

§108(2) (Cal.) Instrument whereby water company, in consideration of railroad's grant of right of way for its pipe line, was to furnish the railroad with water therefrom for railroad uses *held* not void as against public policy.—*Southern Pac. Co. v. Spring Valley Water Co.*, 159 P. 885.

§131 (Okla.) Contract by interested parties with owner of lot to pay rental so long as building on lot is occupied by post office, not exceeding 10 years, in absence of improper means in securing location of post office, is binding and not against public policy.—*Cherry v. City State Bank*, 159 P. 253.

§138(1) (Wash.) Where a contract recited a certain consideration, and no such amount was paid, but plaintiff claimed that it was represented by services performed and defendant claimed that the recitation was for purpose of inducing other contracts, plaintiff was not estopped to claim full consideration, having had no deceitful motive.—*Hunter v. Byron*, 159 P. 703.

§138(4) (Wash.) Where a contract recited a consideration, defendant could not plead that such consideration was recited for the purpose of inducing other contracts, and was not the true consideration, being estopped to plead his own fraud.—*Hunter v. Byron*, 159 P. 703.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§170(1) (Okla.) Where three parties entered into a contract to pay the proceeds of an earlier

contract between two of them alone to the third, and the term "proceeds" was not defined, the definition of the term is to be taken from the contract between the two.—*Severns v. English*, 159 P. 917.

§172 (Okla.) Contracts, optional as to one party, are strictly construed in favor of the party bound against the other.—*Warner v. Page*, 159 P. 264.

(B) Parties.

§184 (Or.) A joint and several contract is with each promisor, and also with all jointly, with result that they are all liable jointly, and each individual is liable upon his separate obligation, and that they may be sued jointly or severally as promisee elects.—*Anderson v. Stayton State Bank*, 159 P. 1033.

(F) Compensation.

§235 (Okla.) Under a contract providing for the deposit in a bank of money at a certain time, sending to the bank an unsigned check before the due date, or sending to the other party to the contract several days thereafter a signed check payable to him, is not such compliance as requires acceptance of the check.—*Warner v. Page*, 159 P. 264.

III. MODIFICATION AND MERGER.

§237(2) (Utah) Where conditions arise not contemplated under an excavation contract, a promise of extra pay is supported by promise to continue the work.—*Straw v. Temple*, 159 P. 44.

Where a railroad excavation contract provided that the sides of a cut be left vertical, but caving of the banks required the removal of additional dirt, *held* that the additional work was not contemplated in the original contract, and therefore furnished consideration for a promise of extra pay.—Id.

V. PERFORMANCE OR BREACH.

§295(1) (Cal.) A contract to erect a building for \$3,565 upon certain land is not substantially complied with by erecting it partly upon an adjoining street where the cost of correcting the fault would exceed \$660.—*Herdal v. Sheehy*, 159 P. 422.

§303(1) (N.M.) That one has reasonable cause to believe, and does believe, other party to contract will be unable to perform does not discharge or excuse the first party from performance.—*Gooch v. Coleman*, 159 P. 945.

§303(5) (Cal.) Where a contractor constructed a building foundation partly in the street and the second contractor erected a building thereon under a contract to build wholly upon the owner's lot, *held*, that the second contractor, rather than the owner, should bear the loss where both were ignorant of the first contractor's mistake.—*Herdal v. Sheehy*, 159 P. 422.

§316(1) (Okla.) Where money was due at a certain time, the return by bank, payee of an unsigned check, requesting that it be made payable to the lessor and properly signed, did not estop the lessor from declaring the lease at an end when again tendered after the due date, especially where waiver and estoppel were not pleaded.—*Warner v. Page*, 159 P. 264.

§322(2) (Utah) Where plaintiff sued defendants, railroad subcontractors, for excavating work done under a contract between them, it is immaterial that the railroad company allowed pay for a less amount of excavation than plaintiff claimed to have done.—*Straw v. Temple*, 159 P. 44.

§322(3) (Wash.) Evidence *held* to show no substantial compliance with, but repudiation of, contract to support plaintiff during his life in consideration of conveyance of land, so that, the contract being executory, plaintiff's suit to set aside the conveyance was repudiation by

him, and he was entitled to decree.—*Roudebush v. Gannon*, 159 P. 680.

VI. ACTIONS FOR BREACH.

⚡330(4) (Or.) A joint contract is with all promisors, so that all must be sued jointly if either promisor objects to suit brought against less than all.—*Anderson v. Stayton State Bank*, 159 P. 1033.

⚡333(6) (Utah) Where plaintiff sued on a railroad excavation contract, the claim that defendant later promised extra pay for removing additional dirt constitutes a separate cause of action, which should be pleaded in the complaint.—*Straw v. Temple*, 159 P. 44.

⚡349(3) (Utah) Where plaintiff sued on a contract for constructing a portion of a roadbed which concededly lay between portions covered by other contracts, the defendants could locate the portion involved by showing the boundaries named in the other contracts.—*Straw v. Temple*, 159 P. 44.

⚡350(1) (Wash.) Where plaintiff produced a contract wherein defendant acknowledged receipt of the consideration and agreed to repay it, if plaintiff failed to secure the land for which the contract was made, and showed that she had failed through no fault of hers, she made a prima facie case.—*Hunter v. Byron*, 159 P. 703.

⚡354 (Wash.) In action by assignee of an "exclusive concession to serve lunches," etc., for a season, "in and front of" a building, against his landlord and two other tenants, for competing with his business, findings held to support the judgment for plaintiff.—*Dobrental v. Piehl*, 159 P. 371.

CONTRADICTION.

See Witnesses, ⚡405, 406.

CONTRIBUTORY NEGLIGENCE.

See Negligence, ⚡65-101.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Chattel Mortgages; Deeds; Husband and Wife, ⚡14, 47-52, 267; Indiana, ⚡15; Logs and Logging; Mortgages.

CONVICTS.

⚡6 (Cal.App.) Under Pen. Code, § 673, touching suspension of the civil rights of a person sentenced during imprisonment, a defendant is not obliged to submit to pendency of a civil action against him, while plaintiff is undergoing sentence pursuant to a conviction of felony, but is entitled to have the case heard and determined.—*Castera v. Superior Court in and for Los Angeles County*, 159 P. 735.

CORPORATIONS.

See Banks and Banking, ⚡231; Bills and Notes, ⚡343; Carriers; Insurance; Municipal Corporations; Public Service Commissions; Railroads; Street Railroads; Telegraphs and Telephones; Waters and Water Courses, ⚡182-257.

I. INCORPORATION AND ORGANIZATION.

⚡3 (Mont.) The essential nature of a corporation as general or mutual cannot be affected by statements of its by-laws, but depends on its articles of incorporation.—*Canyon Creek Irr. Dist. v. Martin*, 159 P. 418.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

⚡86(10) (Cal.App.) Even if failure to resell stock at certain price were legitimate ground for rescission, the purchaser, after payment on the note and giving a new note after expiration of the time for resale, thereby waived that covenant, or was estopped from setting up breach thereof.—*Majors v. Girdner*, 159 P. 826.

⚡80(11) (Cal.App.) Evidence held insufficient to sustain finding that note in suit, given for corporate stock, was induced by fraud.—*Majors v. Girdner*, 159 P. 826.

⚡90(6) (Cal.App.) Evidence held to show executed contract for sale of corporate stock.—*Majors v. Girdner*, 159 P. 826.

⚡92 (Cal.App.) One who gave his note for corporate stock, and defended action thereon for alleged fraud, and sought rescission, was under the duty of returning, or offering to return, the stock, even if the certificate was never delivered to him.—*Majors v. Girdner*, 159 P. 826.

Where corporation failed to issue certificate of stock sold defendant, and he thereby lost dividends, his only remedy was to counterclaim for their amount against suit on his note given for price of stock.—*Id.*

(C) Issue of Certificates.

⚡94 (Cal.App.) A certificate for the stock of a corporation is only the evidence of the ownership thereof, and merely constitutes proof of property which may exist without it.—*Majors v. Girdner*, 159 P. 826.

When the corporation approves application for purchase of stock by accepting the applicant's note, the sale is complete, and title is in the applicant, though certificate does not issue.—*Id.*

(D) Transfer of Shares.

⚡123(11) (Okla.) A pre-existing indebtedness is not sufficient consideration as against the real owner to support an unauthorized or wrongful pledge of corporate stock; the certificate not being a negotiable instrument.—*State Nat. Bank v. Scales*, 159 P. 925.

Where shares of stock have been wrongfully pledged to a bank, and on the faith thereof the bank allows the obligor to overdraw his account, and such overdraft is thereafter paid, the bank cannot hold the stock against the real owner.—*Id.*

V. MEMBERS AND STOCKHOLDERS.

(C) Suing or Defending on Behalf of Corporation.

⚡207 (Cal.) Only a stockholder of record can maintain an action to quiet title for the benefit of the corporation.—*Aalwyns Law Institute v. Martin*, 159 P. 158.

(D) Liability for Corporate Debts and Acts.

⚡216 (Cal.) As a general rule, stockholder's liability for the debts of the corporation is determined by the charter of the company and the laws of the state in which incorporation was had.—*Provident Gold Mining Co. v. Haynes*, 159 P. 155.

Liability of stockholder for corporate debts according to laws of jurisdiction in which business is transacted rests upon stockholder's consent to be bound by such laws, inferred from fact that by becoming a stockholder he has authorized the officers to transact business in such state.—*Id.*

Stockholder who became such in company whose articles authorized it to do business in "any other state" impliedly consented that when they selected a place to transact corporate business they should have power to bind him so far as the laws of that place might require so as

to subject him to a liability for the company's debts.—Id.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

☞388(2) (Okl.) Where corporation president arranges with bank to borrow money for corporation on note executed by corporate treasurer and amount loaned is checked out by corporation, it is liable, regardless of whether note is executed as required by corporate by-laws.—Eureka Pub. Co. v. First Nat. Bank of Stigler, 159 P. 508.

(B) Representation of Corporation by Officers and Agents.

☞426(10) (Okl.) Where agents obtained stock subscription for corporation through fraud, if the company accepts benefits of misrepresentations, it is liable for the fraud.—McLean v. Southwestern Casualty Ins. Co. of Oklahoma, 159 P. 660.

VIII. INSOLVENCY AND RECEIVERS.

☞559(10) (N.M.) An assignee or trustee of an insolvent corporation cannot, without express authority, recover on stockholder's liability under Code 1915, § 403.—Clapp v. Smith, 159 P. 523.

☞563(2) (N.M.) The receiver of an insolvent corporation cannot, without express authority, recover on stockholder's liability under Code 1915, § 403.—Clapp v. Smith, 159 P. 523.

IX. REINCORPORATION AND REORGANIZATION.

☞573(3) (Wash.) Minority stockholders who by assent agree to exchange its shares for shares of a corporation taking over its assets and assuming its debts held estopped to complain two years after the conveyance of the assets.—Grant v. Monterey Gold Mining Co., 159 P. 895.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

☞592½ (Wash.) Rem. & Bal. Code, § 3715d, as to disposition of property of a corporation stricken and dissolved by secretary of state for nonpayment of license fees, held modified by section 3715a, as amended by Laws 1911, p. 135, § 1.—Grant v. Monterey Gold Mining Co., 159 P. 895.

☞617(1) (Cal.) When a corporation has failed to pay its license tax and a forfeiture of its charter has been declared, it ceases to be a corporation.—Aalwyns Law Institute v. Martin, 159 P. 158.

☞617(2) (Cal.) The title to property of a corporation whose charter has been forfeited vests in the former directors as trustees.—Aalwyns Law Institute v. Martin, 159 P. 158.

One becoming owner of shares in a corporation after forfeiture of its charter has a mere equitable interest in the assets thereof.—Id.

☞619 (Wash.) Rem. & Bal. Code, § 3715a, as amended by Laws 1911, p. 135, § 1, held to permit stockholders of corporation stricken and dissolved by secretary of state for nonpayment of license fees to close its affairs in a way other than by drastic sale of assets.—Grant v. Monterey Gold Mining Co., 159 P. 895.

☞619 (Wash.) Stockholders of a corporation, parties to a stipulation that all the assets of the corporation should be turned over to a trustee for administration, had no right to retain any of the assets or to divide them among themselves.—Jensen v. Kohler, 159 P. 978.

In action by trustee appointed under stipulation of stockholders to recover assets, held that the issues did not involve the trustee's administration, so that evidence for defendant as to

his excessive charges, bad faith, etc., were inadmissible.—Id.

In trustee's action to recover assets of corporation from stockholders where evidence as to an alleged understanding that trustee should abandon claim was conflicting, and where no stipulation was entered as required by superior court rule 10, and the trial court made no finding thereon, Supreme Court was not warranted in finding such understanding.—Id.

A trustee appointed by stipulation of stockholders, whose charges for his services were claimed to be excessive, was not bound to pursue summary method of adjustment provided by Rem. & Bal. Code, §§ 137, 138, but might maintain an action to enforce trust agreement against parties thereto.—Id.

CORROBORATION.

See Criminal Law, ☞510, 511; Witnesses, ☞414.

COSTS.

See Dismissal and Nonsuit, ☞37; Divorce, ☞189; Forcible Entry and Detainer, ☞47.

V. AMOUNT, RATE, AND ITEMS.

☞172 (Wash.) In special proceeding for substitution of attorneys, superseded attorney is not entitled to tax attorney's fee, although recovering a judgment against the client for services.—Gabrielson v. Gorin, 159 P. 387.

VI. TAXATION.

☞208 (Nev.) Under Rev. Laws, § 5387, requiring clerk to tax his fees, such fees should be taxed in favor of prevailing plaintiff, although his bill for costs was properly stricken.—Glock v. Elges, 159 P. 629.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

☞260(1) (Cal.) Where a long course of vexatious litigation in various cases reveals that prosecutor thereof is attempting to take advantage of unsuspecting persons by undue prolongation of cases, damages for frivolous appeal will be awarded the opposing party.—Crane v. State Savings & Commercial Bank, 159 P. 583.

☞264 (Nev.) Under Supreme Court, rule 6, par. 3 (154 Pac. viii), the court has no jurisdiction to consider an application for an order to retax the costs on appeal, except on appeal from a decision of the clerk of the court.—In re Hartung's Estate, 159 P. 864.

COTTON COMPRESS COMPANIES.

See Warehousemen, ☞24.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Certiorari, ☞24; Garnishment, ☞17; Highways; Municipal Corporations; Officers, ☞100; Process, ☞19; Statutes, ☞73.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

☞1 (Or.) Counties are governmental agencies of the state.—Mackenzie v. Douglas County, 159 P. 625.

II. GOVERNMENT AND OFFICERS.

(A) Organization and Powers of Government in General.

☞24 (Or.) Since counties are governmental agencies of the state, where the state by enact-

ment, imposes a constitutional obligation on the county, the county must fairly meet it.—*MacKenzie v. Douglas County*, 159 P. 625.

Laws 1913, p. 546, § 12, authorizes audit of county books for years prior to 1914 only if the county agrees to pay the expense thereof, and for years after 1914, only for special audits, other than the annual, and section 14, authorizing employment of experts, does not authorize the insurance commissioner to contract with expert accountants for a county, independent of its authorities, so as to render the county liable for the cost.—*Id.*

Laws 1913, p. 546, § 12, as to audit of books of any "city, county school district," etc., held to be construed as if a comma were present after the word "county," so as to apply to counties.—*Id.*

A claim for compensation of experts who audited county books cannot be allowed under Laws 1913, p. 545, unless the complaint shows that the insurance commissioner made the audit, or that the county officials agreed to pay therefor.—*Id.*

—24 (Or.) Under Laws 1913, p. 546, § 10, providing that the insurance commissioner shall at least once each year, make a careful audit of books of each county, such officer is not restricted to making examination for an entire year.—*Berridge v. Marion County*, 159 P. 628.

(D) Officers and Agents.

—65 (Wash.) Const. art. 6, § 8, requiring county officers' terms to be two years, must be construed in connection with article 11, § 5, empowering the Legislature to prescribe the duties of county officers and fix their terms, so that the Legislature may fix the term of justices of the peace, or even of executive and administrative officers, at a longer period than two years.—*State v. Hamilton*, 159 P. 879.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

—114 (Wyo.) Where a county board did not authorize an arbitration agreement entered into by county attorney, nor ratify such agreement, it was not binding upon the county.—*Kelly v. Board of Com'rs of Big Horn County*, 159 P. 1086.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

—191 (Or.) Budget Law, requiring county court to publish estimate of amount required for each department merely requires an estimate of how much of the general tax fund, as distinguished from the special road tax fund, will be used for road purposes.—*Roney v. Lane County*, 159 P. 73.

—195 (Or.) Under L. O. L. §§ 937, 6278, giving county courts authority over county roads and power to tax for general county purposes, the money so raised may be used upon county roads, for sections 6320, 6321, authorizing special tax levies for "building and improving" county roads is not an exclusive, but merely a supplementary, method of raising road funds.—*Roney v. Lane County*, 159 P. 73.

—196(4) (Kan.) Property owners and taxpayers affected by tax levied under Laws 1909, c. 201, may under Code Civ. Proc. § 265 (Gen. St. 1909, § 5859), enjoin county commissioners from constructing and improving road under that chapter.—*Stevenson v. Board of Com'rs of Shawnee County*, 159 P. 5.

—196(7) (Kan.) Petition to enjoin county board from improving a road under Laws 1909, c. 201, held to state a cause of action.—*Stevenson v. Board of Com'rs of Shawnee County*, 159 P. 5.

COUNTS.

See Pleading, —53.

COURTS.

See Admiralty; Appeal and Error, —185, 1198; Arbitration and Award, —73; Bankruptcy, —295; Certiorari, —28; Contempt; Criminal Law, —84-94, 1018; Divorce, —57, 827; Equity; Indians, —27; Intoxicating Liquors, —269; Judges; Justices of the Peace; Mandamus, —26-54; Removal of Causes; States, —9; Taxation, —588.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

—41 (Cal.App.) Prior to the enactment of Const. art. 11, § 8½, police courts could not be established by freeholders' charters.—*Ex parte Yee Kim Mah*, 159 P. 1060.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

—190(9) (Cal.App.) Code Civ. Proc. § 583, touching dismissal of actions not brought to trial, does not apply to an action transferred to the superior court from a recorder's court by appeal on questions of both law and fact, after a trial upon the issues joined by defendant's answer filed in the recorder's court.—*Long v. Superior Court in and for San Diego County*, 159 P. 734.

V. COURTS OF PROBATE JURISDICTION.

—202(5) (Ok.) Where notice is given and bond executed and approved for appeal in probate matter, district court cannot dismiss appeal till transcript provided by Rev. Laws 1910, § 6513, has been transmitted to district court for filing.—*In re Folsom's Estate*, 159 P. 751.

Where appellant in probate matter has neglected to have transcript provided by Rev. Laws 1910, § 6513, timely transmitted to district court, appellee may invoke remedy provided by section 6516, to have transcript transmitted and thereby confer jurisdiction on the District Court.—*Id.*

COVENANTS.

See Release, —7, 37.

III. PERFORMANCE OR BREACH.

—94 (Or.) An outstanding title does not breach a covenant of seisin going to a paramount right to the fee and possession until there is an eviction or something equivalent thereto.—*Kreinbring v. Mathews*, 159 P. 75.

An outstanding right of dower is an interest in fee covered by a covenant of seisin, instead of covenants against incumbrances.—*Id.*

—96(2) (Or.) An outstanding right of dower is not technically an incumbrance, but an interest in fee covered by a covenant of seisin, instead of covenants against incumbrances.—*Kreinbring v. Mathews*, 159 P. 75.

—96(4) (Or.) A mere incumbrance such as an outstanding mortgage breaches a covenant against incumbrances when the deed is delivered.—*Kreinbring v. Mathews*, 159 P. 75.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Appeal and Error, —994; Criminal Law, —823; Evidence, —588; Witnesses, —816, 380.

CREDITORS.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.

CRIMINAL LAW.

See Adultery; Arrest; Bail; Banks and Banking, ¶21; Constitutional Law, ¶48, 268; Contempt; District and Prosecuting Attorneys; Fines; Fish; Homicide; Indictment and Information; Intoxicating Liquors, ¶138-236; Jury, ¶118; Larceny; Parent and Child, ¶17; Physicians and Surgeons, ¶6; Rape; Receiving Stolen Goods; Robbery; Threats.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

¶21 (Cal.) Whether a criminal intent or guilty knowledge is an essential element of a statutory offense is often a matter of construction.—*Ex parte Ahart*, 159 P. 160.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

¶56 (Okla. Cr. App.) Intoxication is voluntary unless the intoxicated party be made to drink intoxicants by force or coercion, and where he merely drinks intoxicants offered him, his resulting intoxication is voluntary.—*Perryman v. State*, 159 P. 937.

IV. JURISDICTION.

¶84(1) (Cal. App.) Enactment of Pen. Code, § 1425 (St. 1905, p. 705), and repeal of Code Civ. Proc. § 115, by St. 1907, p. 682, held to repeal Whitney Act, giving police courts in cities of certain size exclusive jurisdiction over misdemeanors committed within the city, so any justice of county might hear prosecution for misdemeanors committed therein.—*Ex parte Yee Kim Mah*, 159 P. 1060.

Pen. Code, § 1425, held not repealed by the freeholders' charter of the city of Sacramento approved in 1911, creating a police court, so any justice of the county is entitled to jurisdiction over misdemeanors committed within city limits.—*Id.*

¶90(3) (Cal. App.) A justice of the peace is without jurisdiction of an offense where the punishment is imprisonment in the penitentiary.—*Ex parte Yee Kim Mah*, 159 P. 1060.

¶84 (Cal. App.) St. 1915, p. 606, amending Penal Code, § 636, as to illegal fishing, made a misdemeanor, held to prescribe a minimum punishment, so that section 19 as to maximum punishment does not apply, and therefore the district court has jurisdiction.—*People v. Anderson*, 159 P. 211.

VII. FORMER JEOPARDY.

¶178 (Wash.) Under Rem. & Bal. Code, §§ 2814-2316, 2414, 2415, held that dismissal of information in justice court, charging assault in third degree, a gross misdemeanor, did not bar prosecution in superior court on information charging assault in second degree, a felony.—*State v. Wickstrom*, 159 P. 753.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

¶224 (Nev.) Under Laws 1913, c. 209, § 2, and section 9, as amended by Laws 1915, c. 17, as to preliminary examination, information, etc., accused is entitled to opportunity to have or waive preliminary hearing.—*State v. Wells*, 159 P. 520.

¶238 (Nev.) Testimony on a preliminary hearing for larceny from the person, held in habeas corpus proceedings, not to make rea-

sonable or probable that the crime was committed by accused so as to constitute the sufficient cause necessary under Rev. Laws, § 6987, for holding them to answer.—*Ex parte Williams*, 159 P. 518.

¶252(1) (Cal. App.) A justice acquires jurisdiction of a prosecution for a misdemeanor, though the complaint be not what it ought to be as a criminal pleading.—*Albers v. Superior Court in and for Humboldt County*, 159 P. 453.

A justice is not ousted of jurisdiction of a prosecution by allowing motions of the district attorney to dismiss the first and second complaints for purpose of amending them, even if improper.—*Id.*

¶252(4) (Cal. App.) A justice was not ousted of jurisdiction because the complaint in a prosecution was duplicitous, and he erred in refusing to strike out one of the counts.—*Albers v. Superior Court in and for Humboldt County*, 159 P. 453.

¶254 (Cal. App.) A justice did not lose jurisdiction because of failure to bring the prosecution to trial within the period after filing of complaint provided by Pen. Code, § 1382, that being applicable only to criminal cases prosecuted by indictment or information.—*Albers v. Superior Court in and for Humboldt County*, 159 P. 453.

¶257 (Cal. App.) A justice was not ousted of jurisdiction because of the jury's failure to find on the plea of former jeopardy.—*Albers v. Superior Court in and for Humboldt County*, 159 P. 453.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

¶279 (Nev.) The objection that no preliminary hearing on the charge was had or waived, and that no leave of court was obtained for the filing of the information, should be made before entering plea of not guilty.—*State v. Wells*, 159 P. 520.

¶300 (Cal. App.) The plea of "not guilty" to a criminal charge admits of any defense which the facts justify except former jeopardy, so that defendant, to avail himself of intoxicated condition at time of offense, need not specially plead it.—*People v. Collis*, 159 P. 229.

¶301 (Nev.) A motion to set aside a plea of not guilty to interpose a plea in abatement is addressed to the sound judicial discretion of the trial court.—*State v. Wells*, 159 P. 520.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

¶354 (Wash.) Where one accused of murder pleaded insanity and showed in substantiation thereof his prior acts and conduct, the state was not limited to explanation of such acts, but could show other acts and conduct tending to show sanity.—*State v. Spangler*, 159 P. 810.

¶366(4) (Cal. App.) It is not error to refuse to strike testimony of officer to whom prosecuting witness complained of the robbery that such witness was excited and kept saying that accused was the one who robbed him.—*People v. Pasqueria*, 159 P. 173.

(C) Other Offenses, and Character of Accused.

¶369(4) (Cal.) Admission of accused's confession to officers of another forgery in which he was implicated is error, tending to prevent fair trial on the charge of forgery.—*People v. Canfield*, 159 P. 1046.

¶369(8) (Cal. App.) In prosecution for incest with one daughter, another daughter could not testify to his sexual relations with her, as tending to show disposition to commit such a crime.—*People v. Letoile*, 159 P. 1057.

§371(1) (Cal.App.) Criminal intent being an essential of the offense of making and uttering a check, knowing funds to be insufficient, under Pen. Code, § 476a, proof of other similar acts, before or after that charged, is relevant to show intent, where accused denies felonious intent.—*People v. Weir*, 159 P. 442.

§376 (Okla.Cr.App.) It is error to admit evidence of the general reputation of accused for the commission of the same or similar crimes as the one charged.—*Cantrell v. State*, 159 P. 1092.

(D) Materiality and Competency in General.

§393(1) (Wash.) Opinion of specialist in mental diseases as to defendant's sanity, based on examination prior to trial, though without consent of defendant's attorneys and without objection by defendant, is admissible.—*State v. Spangler*, 159 P. 810.

(E) Best and Secondary and Demonstrative Evidence.

§400(4) (Cal.App.) Witness may testify that accused signed a name other than his own to a hotel register, such evidence being of an act witnessed and not of the contents of the register.—*People v. Ferrara*, 159 P. 621.

(F) Admissions, Declarations, and Hearsay.

§414 (Cal.App.) It is not necessary to fix time, place, and circumstances of alleged statements of defendant by first questioning him thereon, since they are original evidence against him and the rules as to impeachment of witnesses do not apply.—*People v. Ferrara*, 159 P. 621.

§417(1) (Cal.App.) Statements of third persons and their conversations with accused and prosecuting witness, before the offense and on which defendant acted, are admissible.—*People v. Ferrara*, 159 P. 621.

(G) Acts and Declarations of Conspirators and Codefendants.

§422(1) (N.M.) Where there is evidence justifying conclusion that different persons charged with crime are acting with common purpose, actions and declarations of each are evidence against the others.—*State v. Orfanakis*, 159 P. 674.

(I) Opinion Evidence.

§484 (Wash.) Opinion of expert as to sanity of accused, based on testimony of a few witnesses in whose testimony there is no substantial conflict, is admissible if it is not probable that the expert and the jury understood the testimony differently.—*State v. Spangler*, 159 P. 810.

(J) Testimony of Accomplices and Codefendants.

§510 (Okla.Cr.App.) One cannot be convicted on uncorroborated testimony of an accomplice.—*Martin v. State*, 159 P. 940.

§511(2) (Cal.App.) Evidence held to sufficiently corroborate testimony of accomplice in larceny of automobile, being in itself sufficient to connect accused with the offense.—*People v. Hovis*, 159 P. 222.

§511(2) (Okla.Cr.App.) The corroborating evidence must in itself tend to connect defendant with commission of offense.—*Martin v. State*, 159 P. 940.

(K) Confessions.

§517(4) (N.M.) Under the evidence, motion to strike out testimony as to confession on ground that corpus delicti and connection of defendant with crime had not been shown held properly denied.—*State v. Orfanakis*, 159 P. 674.

§520(7) (N.M.) Where substance of confession was made before witness told accused it

might be easier on him to tell the truth, evidence of the confession was properly admitted.—*State v. Orfanakis*, 159 P. 674.

(L) Evidence at Preliminary Examination or at Former Trial.

§543(2) (Cal.App.) On a showing that the deponent had left the state and would not return, evidence in his deposition given at preliminary examination, so far as competent, was admissible under Pen. Code, § 869.—*People v. Pasqueria*, 159 P. 173.

(M) Weight and Sufficiency.

§560 (Okla.Cr.App.) A conviction cannot be rendered in a haphazard way, for, if it were allowed, no citizen's liberty would be secure, for even the most upright might become the victim of hearsay testimony.—*Taggart v. State*, 159 P. 940.

§571 (Okla.Cr.App.) Defendant was entitled to benefit of any reasonable doubt, either as to guilt of any offense, or of particular degree of offense.—*Smith v. State*, 159 P. 668.

XII. TRIAL.

(B) Course and Conduct of Trial in General.

§635 (Cal.App.) Under Const. art. 1, § 13, giving persons accused the right to public trial, the public cannot be wholly excluded, though some may be excluded to prevent crowding and disorder.—*People v. Letoile*, 159 P. 1057.

§643 (Okla.Cr.App.) The trial court must, on request of accused's counsel, have the official reporter report all proceedings at trial.—*Corliss v. State*, 159 P. 1015.

§655(5) (Okla.Cr.App.) Where the conduct of defendant's counsel is improper, the court should excuse the jury before administering a rebuke or threatening to fine or imprison him for contempt.—*Smith v. State*, 159 P. 941.

(C) Reception of Evidence.

§684 (Okla.Cr.App.) Prosecutor cannot introduce on rebuttal testimony which should have been introduced in chief, and an attempt on rebuttal to rehash the testimony is error.—*Corliss v. State*, 159 P. 1015.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§695(5) (Ariz.) Objection that no time was fixed as to when the examination took place is not included in the objection of incompetency, irrelevancy, and immateriality, to testimony of examination for weapons on the ground where the killing had taken place.—*Talley v. State*, 159 P. 59.

§696(3) (Ariz.) Refusal to strike out an answer to a leading question, not objected to before answer, held not an abuse of discretion; the answer, that defendant said he would get revenge, meaning the same as answer to another that he would get even.—*Talley v. State*, 159 P. 59.

(F) Province of Court and Jury in General.

§747 (Cal.App.) On a conflict of testimony, the jury were exclusively judges of the fact.—*People v. Bradfield*, 159 P. 443.

§761(12) (Cal.App.) Instructions as to effect of intoxication held not objectionable as invading the province of the jury by assuming that accused committed the crime, but that they were a mere abstract statement of principle.—*People v. Collis*, 159 P. 229.

Where there was evidence connecting accused with the homicide to show that it was deliberate, wanton, and without provocation, but there was evidence that he was intoxicated at the time, verdict of guilty of manslaughter did not show the other evidence to have been disregarded so as to indicate error in instructions on intoxica-

tion attacked as assuming that accused committed the homicide.—Id.

⚡763, 764(8) (N.M.) An instruction that if jury believe that defendant attempted to escape, the inference is strong or slight according to the surrounding facts, is properly refused as on the weight of evidence.—State v. Orfanakis, 159 P. 674.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⚡778(5) (Okla.Cr.App.) Instructions authorizing acquittal if jury believe beyond reasonable doubt that shooting was done in self-defense, or that defendant did not fire fatal shot, were erroneous as placing the burden of proof on defendant.—Smith v. State, 159 P. 668.

⚡783(1) (Cal.App.) Instruction that contradictory testimony is admissible only for the purpose of impeaching the credibility of the witness, and not to consider it as evidence of the truth of such statements, is properly refused, such evidence being of truth of facts stated therein.—People v. Ferrara, 159 P. 621.

⚡783½ (Cal.App.) Where, under general objection to testimony in a deposition and motion to strike it as incompetent, the court struck out statements of a third person not made in defendant's hearing, its refusal to instruct the jury to "disregard any statement" was not error.—People v. Pasqueria, 159 P. 173.

⚡789(2) (Mont.) It is not error to instruct that reasonable doubt must be founded on reason and not arise from caprice or conjecture.—State v. Lewis, 159 P. 415.

⚡800(2) (Mont.) Although some instructions during murder trial used the words "assault" and "assaultant," it was not error to refuse to define "assault," whose meaning may be considered to be understood by the average juror.—State v. Lewis, 159 P. 415.

⚡804(1) (Mont.) Oral directions as to conduct of the jury in the jury room and as to form of verdict, informing the jury that verdict must be unanimous, are not erroneous.—State v. Lewis, 159 P. 415.

⚡814(3) (Okla.Cr.App.) The court need not instruct the jury on defendant's theory unless there be evidence to support it.—Perryman v. State, 159 P. 937.

⚡814(6) (N.M.) Where there is evidence of motive, an instruction as to effect of absence of motive is properly refused.—State v. Orfanakis, 159 P. 674.

⚡814(10) (Cal.App.) Where defendant himself brought out the fact of his intoxication at the time of the offense, instructions as to effect of intoxication on responsibility for the crime are applicable, regardless of the motive with which such fact was shown.—People v. Collis, 159 P. 229.

⚡814(10) (N.M.) Evidence held insufficient to require instruction as to effect of drunken condition of accused at time of homicide.—State v. Orfanakis, 159 P. 674.

⚡815(9) (Utah) An instruction that the evidence must remove all reasonable doubt of defendant's guilt is improper because implying that defendant is attended only by a reasonable doubt of his guilt, whereas he is presumed innocent.—State v. Brown, 159 P. 545.

⚡823(9) (Utah) An instruction as to reasonable doubt ignoring the presumption of innocence is not reversible error where other portions of the charge correctly state the law.—State v. Brown, 159 P. 545.

⚡823(12) (Utah) Refusal to instruct that a conflict between a witness' previous statement and his testimony might be considered in determining his credibility is not cured by instructing that if he willfully testified falsely

his entire testimony might be disregarded.—State v. Brown, 159 P. 545.

⚡823(17) (Ariz.) In view of other instructions, held, conclusion of instruction defining murder in the first degree could not have been understood as a statement that defendant was guilty.—Talley v. State, 159 P. 59.

(H) Requests for Instructions.

⚡829(1) (N.M.) No error can be predicated on refusal of instruction, where instruction given completely covered the same ground.—State v. Orfanakis, 159 P. 674.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

⚡844(1) (N.M.) An exception to an instruction is not specific which asserts that it is contrary to law, without pointing out the grounds of legal objections.—State v. Orfanakis, 159 P. 674.

(K) Verdict.

⚡877 (N.M.) Where three defendants were indicted for murder, but only one was tried, verdict of conviction applies only to the one tried though caption names all defendants.—State v. Orfanakis, 159 P. 674.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

⚡911 (Cal.) Const. art. 6, § 4½, providing that no new trial shall be granted for erroneous admission of evidence unless it caused a miscarriage of justice, does not take from the trial court the discretion to grant a new trial, but is applicable only on behalf of the state to sustain the court in denying new trial.—People v. Canfield, 159 P. 1046.

⚡938(1) (Ariz.) Granting a new trial for newly discovered evidence is largely in the trial court's discretion.—Talley v. State, 159 P. 59.

⚡938(1) (Okla.Cr.App.) An application for new trial for newly discovered evidence is addressed to the sound discretion of the court, which discretion the law contemplates should be exercised in the interest of justice.—Cantrell v. State, 159 P. 1092.

⚡939(1) (Ariz.) Defendant held not entitled to new trial for newly discovered evidence, testimony of intimates, which he could have produced at the trial, as to condition of his finger before the homicide.—Talley v. State, 159 P. 59.

New trial should not be granted for newly discovered evidence, where diligence to discover and produce it at the trial is not shown.—Id.

⚡941(1) (Ariz.) New trial should not be granted for newly discovered evidence purely cumulative.—Talley v. State, 159 P. 59.

⚡942(1) (Ariz.) Refusal of new trial on affidavit that witness admitted perjury, though her testimony was corroborated, held not error.—Talley v. State, 159 P. 59.

New trial should not be granted for newly discovered evidence purely contradictory.—Id.

⚡944 (Ariz.) Refusal of new trial for newly discovered evidence, on affidavits, incredible in view of claim and evidence at trial, held not error.—Talley v. State, 159 P. 59.

⚡945(1) (Ariz.) New trial should not be granted for newly discovered evidence unless it is such as to render a different result probable.—Talley v. State, 159 P. 59.

⚡945(1) (Okla.Cr.App.) When a motion for new trial for newly discovered evidence is made on a showing that strong evidence for defendant has been discovered, the court should grant a new trial.—Cantrell v. State, 159 P. 1092.

⚡957(1) (Mont.) A verdict cannot be impeached by affidavits of jurors that another juror admitted prejudice while in the jury room, but such affidavits may impeach only when the verdict is decided by chance or by other means, preventing free expression, as provided

by Rev. Codes, §§ 6794, 9350.—*State v. Lewis*, 159 P. 415.

⇒961 (Cal.) It is for the trial judge, on motion for new trial, to determine prejudicial effect on the jury of evidence erroneously admitted.—*People v. Canfield*, 159 P. 1046.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

⇒1014 (Cal.App.) Judgment of a justice appealed to and affirmed by the superior court cannot be reviewed on certiorari by the Supreme Court, so long as the judgment of the superior court stands.—*Albers v. Superior Court in and for Humboldt County*, 159 P. 453.

⇒1014 (Or.) Where a defendant perfected his first appeal by serving and filing the notice required by the statute, he thereby exhausted his right of appeal, and it was not within the power of the parties to stipulate for a new notice and a new appeal.—*State v. Keeney*, 159 P. 1165.

⇒1018 (Cal.App.) The only grounds on which jurisdiction of the superior court, in a criminal case appealed under Pen. Code, § 1466, from a justice, can be assailed, are that the justice had not, or exceeded, jurisdiction, or that a vital rule of practice in taking the appeal, was not observed.—*Albers v. Superior Court in and for Humboldt County*, 159 P. 453.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⇒1036(1) (N.M.) Where court and counsel assume that testimony would be connected up to show conspiracy, and defense failed to direct attention of court to failure to do so, point cannot be raised on appeal.—*State v. Orfanakis*, 159 P. 674.

⇒1036(1) (Wash.) Objection to evidence on any ground not presented to the trial court is not available on appeal.—*State v. Spangler*, 159 P. 810.

⇒1036(2) (Ariz.) Objection to introduction of garments, that they were not in the same condition as when taken from deceased's body, made for first time on appeal, held too late.—*Talley v. State*, 159 P. 59.

⇒1038(1) (Mont.) Error alleged in giving oral instructions does not avail where no objection was made at the time, nor exception reserved, as required by Rev. Codes, § 9271.—*State v. Lewis*, 159 P. 415.

⇒1038(3) (N.M.) Instruction that there was no evidence as to involuntary manslaughter will not be considered on appeal, in absence of exception or requested instruction.—*State v. Orfanakis*, 159 P. 674.

⇒1048 (Mont.) Laws 1915, c. 135, § 1, dispensing with necessity of exceptions and enlarging scope of Rev. Codes, § 6784, stating what shall be deemed excepted to, does not apply to criminal cases in which exceptions must be taken under Rev. Codes, §§ 9340, 9346, 9347, 9271.—*State v. Lewis*, 159 P. 415.

⇒1048 (Okla.Cr.App.) In reviewing a capital conviction, the Criminal Court of Appeals not only reviews the errors of law raised by exceptions duly taken, but must consider the entire record, and, if satisfied that the verdict is contrary to the evidence and the law, a new trial should be granted regardless of exceptions.—*Anthony v. State*, 159 P. 934.

⇒1056(1) (N.M.) Instruction that there was no evidence as to involuntary manslaughter will not be considered on appeal, in absence of exception or requested instruction.—*State v. Orfanakis*, 159 P. 674.

⇒1056(2) (Mont.) Error alleged in giving oral instructions does not avail, where no objection was made at the time, nor exception reserved

as required by Rev. Codes, § 9271.—*State v. Lewis*, 159 P. 415.

(D) Record and Proceedings Not in Record.

⇒1086(11) (Okla.Cr.App.) To obtain reversal for failure of trial judge to have official reporter take down all proceedings at trial, it is only necessary to show request and refusal.—*Corliss v. State*, 159 P. 1016.

⇒1105(1) (Ariz.) The reporter's transcript will be considered in a capital case, though not approved by trial judge.—*Talley v. State*, 159 P. 59.

⇒1106(3) (Or.) Under L. O. L. §§ 1610, 1611, 1621, as amended by Laws 1913, p. 496, an appeal will be dismissed for failure to file the transcript within the time prescribed by law, unless the failure is shown to be due to the negligence of the clerk.—*State v. Keeney*, 159 P. 1165.

⇒1128(4) (Okla.Cr.App.) Where there is a controversy as to whether trial judge was requested by accused's counsel to have the proceedings at trial taken down by the official reporter, proof may be made by affidavit of persons familiar with the facts.—*Corliss v. State*, 159 P. 1015.

(E) Assignment of Errors and Briefs.

⇒1130(2) (Mont.) The court will not review sufficiency of evidence further than to examine it generally, where the appellant does not particularly point out its insufficiency.—*State v. Lewis*, 159 P. 415.

⇒1130(4) (Okla.Cr.App.) Where accused, who appealed from conviction of violating prohibitory law, filed no brief and made no appearance, on appeal, and it appeared that appeal was abandoned, it will be dismissed.—*Kindman v. State*, 159 P. 944.

(G) Review.

⇒1134(6) (Cal.App.) Though it was error to overrule objection to evidence of statement in deposition taken at the preliminary hearing, when deposition was offered at the trial, because not made below under Pen. Code, §§ 869, 1345, error was harmless where the objection to incompetency of the testimony of witness as to statement of defendant was groundless.—*People v. Pasqueria*, 159 P. 173.

⇒1137(3) (Cal.App.) Appellant cannot complain of error in instruction which he himself has prepared and asked the court to present to jury.—*People v. Bradfield*, 159 P. 443.

⇒1147 (Cal.App.) The sentence of 25 years imposed for rape, while equivalent to a life sentence in view of defendant's age, is a matter resting entirely in the conscience and discretion of the trial judge, and will not be disturbed on appeal however much the appellate court may doubt its propriety.—*People v. Deatrick*, 159 P. 175.

⇒1149 (Nev.) The decision of the trial court on motion to withdraw a plea to the merits of an information to interpose a plea in abatement should not be disturbed, where its discretion has been exercised without effecting a manifest injustice and without improper assumption of jurisdiction.—*State v. Wells*, 159 P. 520.

⇒1153(4) (Ariz.) Permitting leading questions in the discretion of the court is reviewable only for clear abuse of such discretion.—*Talley v. State*, 159 P. 59.

⇒1156(3) (Ariz.) Denial of a new trial for newly discovered evidence in the court's discretion will be disturbed only for abuse clearly disclosed in the record.—*Talley v. State*, 159 P. 59.

⇒1156(3) (Okla.Cr.App.) A failure of the trial court to properly exercise its discretion in granting a new trial for newly discovered evidence warrants reversal.—*Cantrell v. State*, 159 P. 1002.

⚡1159(2) (N.M.) Ordinarily the verdict will not be disturbed where it is supported by substantial evidence.—*State v. Orfanakis*, 159 P. 674.

⚡1160 (Cal.App.) If evidence against defendant, considered by itself without regard to conflicting evidence, supports the verdict, the question is one of fact upon which the decision of the jury and of the trial court is conclusive.—*People v. Pasqueria*, 159 P. 173.

⚡1166½(1) (Cal.App.) Where the court recalled the prosecuting witness and questioned him as to defendant's acts, such questions were not prejudicial, where they elicited only reiteration and were in the nature of cross-examination which might have been favorable to accused.—*People v. Pasqueria*, 159 P. 173.

⚡1166½(3) (Okla.Cr.App.) Failure of trial court to comply with request of accused's counsel that all proceedings at trial be reported by official reporter necessitates reversal.—*Corliss v. State*, 159 P. 1015.

⚡1168(4) (Cal.App.) In prosecution for assault with intent to murder, striking of testimony that upon prior meeting of parties third party had told defendant what other party had said, and that wife of other party had defendant covered with shotgun loaded with lead clippings during the meeting, *held* harmless error.—*People v. Bradfield*, 159 P. 443.

⚡1169(2) (Cal.App.) Error in a prosecution for rape in excluding correspondence tending to show illicit relations between prosecutrix and a man other than defendant *held* not prejudicial, where other evidence showed such illicit relations beyond dispute.—*People v. Deatrick*, 159 P. 175.

⚡1169(5) (Cal.App.) Error in requiring defendant in a rape case to answer on cross-examination whether he would submit to a physical examination to determine his impotency *held* not prejudicial, where the court instructed the jury that his refusal to be examined must not be considered as giving rise to any inference against him whatever.—*People v. Deatrick*, 159 P. 175.

⚡1169(11) (Okla.Cr.App.) It is prejudicial error to admit evidence of the general reputation of accused for the commission of the same or similar crimes as the one charged.—*Cantrell v. State*, 159 P. 1092.

⚡1170(4) (Cal.App.) Error in restricting cross-examination by sustaining objections to questions tending to elicit competent evidence of bias *held* harmless, where the same matters were fully covered by other questions to which answers were permitted.—*People v. Deatrick*, 159 P. 175.

⚡1170½(5) (Okla.Cr.App.) Examination of accused as to whether he had previously been arrested on similar charges *held* prejudicial.—*Corliss v. State*, 159 P. 1015.

⚡1172(2) (Utah) Refusal to instruct that a conflict between a witness' voluntary admissions and testimony might be considered in determining her credibility is prejudicial error, where the complaining witness had denied accused's guilt previous to the trial and her story is uncorroborated.—*State v. Brown*, 159 P. 545.

Refusal to instruct that if any witness had made statements material to issues conflicting with his testimony, such testimony might be disregarded except as corroborated by other credible evidence, is prejudicial error where the complaining witness had denied accused's guilt previous to the trial and her story was not corroborated.—*Id.*

(H) Determination and Disposition of Cause.

⚡1183 (Okla.Cr.App.) Under Rev. Laws 1910, § 6003, the Criminal Court of Appeals may modify any judgment and sentence in the furtherance

of justice by reducing the sentence.—*Anthony v. State*, 159 P. 934.

While the power to pardon is an act of grace, nevertheless the Criminal Court of Appeals may modify judgment in the interests of justice by reducing the punishment from death to life imprisonment.—*Id.*

XVII. PUNISHMENT AND PREVENTION OF CRIME.

⚡1213 (Cal.App.) A fine of \$500 for illegal fishing is not cruel or unusual punishment within the prohibition of Const. art. 1, § 6.—*People v. Anderson*, 159 P. 211.

CROPS.

See Agriculture; Landlord and Tenant, ⚡330.

CROSS-EXAMINATION.

See Witnesses, ⚡270.

CROSSINGS.

See Railroads, ⚡305-351.

CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, ⚡1213.

CUMULATIVE EVIDENCE.

See Criminal Law, ⚡941; New Trial, ⚡104.

CURATIVE ACTS.

See Marriage, ⚡38.

CUSTODY.

See Divorce, ⚡303, 312; Guardian and Ward, ⚡29, 30; Infants, ⚡19.

CUSTOMS AND USAGES.

See Railroads, ⚡356.

⚡12(1) (Cal.App.) Practice of defendant, unknown to plaintiffs, to charge more for fireproof storage than non-fireproof, *held* inadmissible on the issue of express contract for fireproof storage.—*Lynch v. Bekins Van & Storage Co.*, 159 P. 822.

Customs among warehousemen, undisclosed to plaintiffs, to limit liability in warehouse receipts, and to refuse to accept goods of a certain kind, *held* inadmissible in action for value of goods burned after delivery to warehouseman and before issuance of receipt; there being no question of misrepresentation of character of goods.—*Id.*

⚡14 (Wyo.) In case of sale with express agreement, custom among dealers as to methods of conducting sales and as to giving warranties is immaterial.—*Leitner v. Thayer*, 159 P. 1084.

⚡17 (N.M.) Evidence of a custom which is repugnant to terms of express contract is inadmissible.—*Gooch v. Coleman*, 159 P. 945.

CUTTING TIMBER.

See Injunction, ⚡52.

DAMAGES.

See Appeal and Error, ⚡1151; Bills and Notes, ⚡534; Death, ⚡91; Eminent Domain, ⚡124, 136, 203; Forcible Entry and Detainer, ⚡30; Landlord and Tenant, ⚡49; Master and Servant, ⚡385, 405; Municipal Corporations, ⚡400; New Trial, ⚡75;

Sales, **§418**; Vendor and Purchaser, **§351**; Waters and Water Courses, **§86**.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

§28 (Okla.) Prospective profits, proximately resulting from a breach of contract, are recoverable in an action for damages, where the amount is not contingent and speculative.—Muskogee Co. v. Yahola Sand Co., 159 P. 898.

§39 (Wash.) Where a riparian owner occupied a mill site and shore line with boom, injury to the shore line, with consequential damages to mill site, gives right to recover for injuries to mill site as well; the property being one entire property.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., 159 P. 774.

§40(4) (Cal.App.) In action for personal injuries, damages because plaintiff had been unable to keep up her payments upon land purchased, and so had lost the installments already paid, were too speculative and remote.—De Liere v. Goldberg, Bowen & Co., 159 P. 197.

§49 (Kan.) In general, there can be no recovery for fright or mental anguish unless resulting in or accompanied by bodily injury.—Whitsel v. Watts, 159 P. 401.

§52 (Cal.) Fright is an element of damages where it accompanies or follows a wrongful physical injury.—Easton v. United Trade School Contracting Co., 159 P. 597.

Mental suffering or fright alone will not support an action for damages.—Id.

§52 (Kan.) Recovery may be had for bodily injury proximately resulting from extreme fright caused by willful wrong or act so grossly negligent as to show utter indifference to consequence.—Whitsel v. Watts, 159 P. 401.

(B) Aggravation, Mitigation, and Reduction of Loss.

§62(2) (Mont.) A person bodily injured through another's fault is not necessarily bound to submit to a major surgical operation, which may or may not result in a betterment of his condition.—Stokes v. Long, 159 P. 28.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

§105 (Okla.) The measure of damages for loss of household goods and wearing apparel is such reasonable value as they had to the owner, considering the purposes to which they were adapted.—O. K. Transfer & Storage Co. v. Neill, 159 P. 272.

§109 (Wash.) Measure of damages for trespass, with impairment of riparian rights, is not difference between value before and after trespass; but where removable things were put on the property destroying its use, was the reasonable cost of removing and restoring the original condition.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., 159 P. 774.

(C) Breach of Contract.

§120(1) (Okla.) Where a construction company received in advance from plaintiff a sum for the construction of a spur track, held that, the construction company having defaulted in its contract with plaintiff and the railroad company having refused to carry it out, plaintiff was entitled to recover the amount advanced to construction company.—Muskogee Co. v. Yahola Sand Co., 159 P. 898.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§132(5) (Cal.) Five thousand dollars damages held not excessive where defendant's automobile knocked plaintiff out of her seat in a buggy and caused one or two miscarriages.—Easton v. United Trade School Contracting Co., 159 P. 597.

§138 (Wash.) Verdict of \$9,237.75, for impairment and destruction of mill site and riparian rights, held excessive, where cost of restoration to original condition would not exceed \$2,500.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., 159 P. 774.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§169 (Wash.) In a personal injury case a plaintiff's industrious habits may be shown as bearing upon his earning power and the amount of the damages.—Forsyth v. Wallace, 159 P. 696.

§174(3) (Okla.) In action for injuries to fruit trees upon plaintiff's land by fire started by locomotive, evidence of the value of the trees while growing on the land is competent to show the amount of damage.—Chicago, R. I. & P. Ry. Co. v. Swinney, 159 P. 484.

§185(3) (Wash.) Evidence held insufficient to warrant a finding that plaintiff's disability from tuberculosis of the shoulder joint was the result of an injury received while in the employ of defendant.—Anton v. Chicago, M. & St. P. Ry. Co., 159 P. 115.

Tuberculosis of shoulder joint of plaintiff, which developed more than seven months after injury suffered while in defendant's employ, held, under the evidence, not the natural and probable consequence of defendant's negligence.—Id.

(C) Proceedings for Assessment.

§208(2) (Utah) Where there was evidence that defendant's automobile hit plaintiff's buggy with some force, rendering her unconscious, held that whether the collision proximately caused a miscarriage, was a jury question.—Boeddcher v. Frank, 159 P. 634.

§208(7) (Mont.) It is always a question for the jury, on the evidence in any case, whether the plaintiff had used ordinary care and diligence to minimize the injurious consequences of his injury through another's fault.—Stokes v. Long, 159 P. 28.

§216(7) (Okla.) An instruction as to future pain and loss of future wages held not erroneous, as not requiring a finding that the damages were certain to result.—Lisle v. Anderson, 159 P. 278.

(D) Computation and Amount, Double and Treble Damages, and Remission.

§228 (Wash.) Error in ordering the payment of costs by defendant for continuance not requested, upon plaintiff's amendment, held not cured by ordering a remission by plaintiff of \$500 from its recovery.—Phoenix Assur. Co. v. Columbia & P. S. R. Co., 159 P. 389.

DEATH.

See Insurance, **§181**.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

§4 (Cal.) While a person unheard of for a time is presumed to be alive until expiration of seven years, the absence, coupled with other circumstances may be sufficient to prove death at a much earlier time.—Western Grain & Sugar Products Co. v. Pillsbury, 159 P. 423.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§25 (Wash.) The right in the widow and children to maintain an action under Rem. & Bal. Code, **§194**, and **§183**, providing for actions for personal injuries and death by widow and children and heirs or representatives, is barred by a release and satisfaction given by the person injured of his right of action for the

injury.—*Brodie v. Washington Water Power Co.*, 159 P. 791.

§32 (Cal.) In action for employe's death, proof that the action is prosecuted for the benefit of the class of dependents limited in Civ. Code, § 1970, is necessary only in actions based upon that section, and not in actions based upon Code Civ. Proc. § 877.—*Gonsalves v. Petaluma & S. R. Ry. Co.*, 159 P. 724.

A cause of action for death founded upon employer's negligence may be brought under Code Civ. Proc. § 877 and need not be brought for benefit of dependents under Civ. Code, § 1970.—Id.

(D) Pleading and Evidence.

§75 (Okla.) In action for negligent death of servant, recovery may be had on circumstantial evidence if sufficient to prove master's negligence culminating in death.—*Ft. Smith & W. R. Co. v. Knott*, 159 P. 847.

(E) Damages, Forfeiture, or Fine.

§81 (Okla.) In an action for wrongful death of plaintiff's son, an instruction that in considering damages the jury might consider the fact that plaintiff inherited an allotment belonging to the son is erroneous.—*Missouri, K. & T. Ry. Co. v. James*, 159 P. 1109.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances; Husband and Wife, §149; Partnership, §187; Principal and Surety, §159-172; Subrogation, §7.

DECEIT.

See Fraud.

DECLARATION.

See Pleading, §53.

DECLARATIONS.

See Criminal Law, §414-422; Evidence, §271; Principal and Agent, §22, 122.

DEEDS.

See Cancellation of Instruments; Champerty and Maintenance; Covenants; Fraudulent Conveyances; Indians, §15; Mortgages; Taxation, §788.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§90 (Cal.App.) A deed is to be construed like any other contract, and its intent arrived at by a consideration of the entire instrument.—*Whitcomb v. Worthing*, 159 P. 613.

(B) Property Conveyed.

§118 (Cal.App.) In city's condemnation proceeding, where defendant claimed title to part of the land sought to be condemned, evidence held not to show that the city's title had been divested by its deed to one under whose will defendant claimed.—*Johnston v. City of Los Angeles*, 159 P. 873.

(C) Estates and Interests Created.

§124(3) (Cal.) Where a deed conveys property to the grantees and their heirs, forever, a subsequent provision that the grantees may not sell or mortgage it during their natural lives, but may devise it is void because repugnant to the granting clause.—*Bonnell v. McLaughlin*, 159 P. 590.

§129(1) (Cal.App.) A deed providing that the grantee should hold the property until his

death, when it should revert to the grantor's heirs, held to convey only a life estate.—*Whitcomb v. Worthing*, 159 P. 613.

IV. PLEADING AND EVIDENCE.

§190 (Cal.) Where a wife, after separation, seeks to set aside a deed for fraud and duress, the issue of undue influence, not being pleaded, is not raised.—*Tanforan v. Tanforan*, 159 P. 709.

§194(2) (Kan.) Presumption of delivery arises from possession of deed by grantee, even in absence of evidence that it was obtained prior to death of grantor.—*Malaney v. Cameron*, 159 P. 19.

Evidence held insufficient to overcome presumption of delivery arising from possession of deed.—Id.

§208(1) (Wyo.) In action based upon award of arbitrators, and upon general allegation of damages caused by location of road, evidence held insufficient to show that deed executed by plaintiff when the arbitration agreement was made, conveying a right of way for road, was ever delivered to county.—*Kelly v. Board of Com'rs of Big Horn County*, 159 P. 1086.

§208(6) (Wyo.) In action based upon award of arbitrators, and upon general allegation of damages caused by location of road, evidence held insufficient to show that deed executed by plaintiff when the arbitration agreement was made conveying a right of way for road, was ever delivered to and accepted by county.—*Kelly v. Board of Com'rs of Big Horn County*, 159 P. 1086.

§211(4) (Cal.App.) In action by father to set aside a deed to his daughter, alleged to have been procured by fraud and misrepresentation and by undue influence upon him when feeble and incompetent, evidence held to support finding for plaintiff.—*Soule v. Wyatt*, 159 P. 447.

DEFAULT.

See Appeal and Error, §957; Judgment, §94-252.

DEFICIENCY JUDGMENT.

See Mortgages, §558, 559.

DELEGATION OF DUTY.

See Master and Servant, §103.

DELEGATION OF POWER.

See Constitutional Law, §63, 64; Eminent Domain, §10.

DELIVERY.

See Bills and Notes, §84; Deeds, §184, 208; Sales, §140-153.

DEMAND.

See Mandamus, §154; Vendor and Purchaser, §299.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, §400.

DEMURRER.

See Appeal and Error, §890, 927; Indictment and Information, §153; Pleading, §204-216; Trial, §156.

DEPARTURE.

See Pleading, §180.

DEPOSITARIES.

☞7 (Okl.) Where depositary bond, executed under Rev. Laws 1910, § 1540, contains statutory conditions and other conditions tending to limit liability, the statutory conditions will be upheld and the others treated as surplusage.—*Western Casualty & Guaranty Ins. Co. v. Board of Com'rs of Muskogee County*, 159 P. 655.

☞13 (Okl.) One who guarantees by bond the payment of public funds deposited in bank designated as county depositary under Rev. Laws 1910, § 1540, may not defeat liability by showing that such designation was irregular or illegal.—*Western Casualty & Guaranty Ins. Co. v. Board of Com'rs of Muskogee County*, 159 P. 655.

DEPOSITIONS.

☞8 (Cal.) Under Code Civ. Proc. § 595, in suit to quiet title, application of a defendant for a commission to take plaintiff's testimony held properly denied.—*Cobe v. Crane*, 159 P. 587.

DEPOSITS.

See Banks and Banking, ☞129; Taxation, ☞879.

DESCENT AND DISTRIBUTION.

See Adoption, ☞21, 22; Dower; Executors and Administrators; Taxation, ☞879, 893; Wills.

I. NATURE AND COURSE IN GENERAL.

☞1 (Cal.) Right of inheritance is governed wholly by statute.—*In re Darling's Estate*, 159 P. 606.

☞8 (Mont.) Right acquired by appropriation of certain number of miner's inches for irrigation of desert claim was property, and passed on appropriator's death to his successor.—*Moore v. Sherman*, 159 P. 966.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) Heirs and Next of Kin.

☞30 (Okl.) Under Rev. Laws 1910, § 8418 (Laws 1909, c. 35, § 1, subd. 3), where parents have separated, a parent cannot inherit as sole heir from a minor dying without issue, unless shown to have borne practically the entire burden of parental duty and maintenance toward such minor at his death during substantially the full period of separation.—*Bruce v. McIntosh*, 159 P. 261.

Under Rev. Laws 1910, § 8418 (Laws 1909, c. 35, § 1, subd. 3), where the parents of a deceased minor had been separated one or two years at the time of his death, a parent who had maintained him during that time took all his estate.—*Id.*

DESERTION.

See Indictment and Information, ☞125.

DETAINER.

See Landlord and Tenant, ☞288.

DETINUE.

See Replevin.

DILIGENCE.

See Criminal Law, ☞939.

DIRECTING VERDICT.

See Trial, ☞168, 178.

DISBARMENT.

See Attorney and Client, ☞44-61; Judges, ☞4.

DISCHARGE.

See Compromise and Settlement; Garnishment, ☞195; Master and Servant, ☞36-40; Principal and Surety, ☞100-129; Release.

DISCLAIMER.

See Estoppel, ☞71.

DISCOVERY.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

☞30 (Utah) Under the statute district court in condemnation action has ample power to make an order on plaintiff's motion requiring all the corporation defendants to permit plaintiff to obtain a full discovery and development of all relevant and material facts.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

☞51 (Utah) Motion of plaintiff in condemnation action for order requiring defendants to permit inspection of books, contracts, mortgages, documents, papers, memoranda, correspondence, bonds, etc., in possession or under control of any of defendants, was too sweeping and indefinite.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

DISCRETION OF COURT.

See Appeal and Error, ☞954-982; Continuance, ☞12; Criminal Law, ☞301, 911, 938, 1147-1156; Injunction, ☞135; Mandamus, ☞28; New Trial, ☞6; Pleading, ☞236; Trade-Marks and Trade-Names, ☞95.

DISFIGUREMENT.

See Master and Servant, ☞385.

DISMISSAL AND NONSUIT.

See Appeal and Error, ☞836, 480, 773-807; Criminal Law, ☞178, 1106; Judgment, ☞570; Trial, ☞163, 165, 419.

I. VOLUNTARY.

☞12 (Okl.) Under Rev. Laws 1910, § 5126, plaintiff on payment of costs may, at any time before a petition claiming affirmative relief has been filed, dismiss the action.—*Davis v. Mimey*, 159 P. 1112.

☞37 (Okl.) Voluntary dismissal by plaintiff does not become effective unless the costs are paid.—*Davis v. Mimey*, 159 P. 1112.

☞40 (Okl.) Voluntary dismissal by plaintiff before petition claiming affirmative relief has been filed becomes effective on filing of written dismissal, regardless of any entry of order.—*Davis v. Mimey*, 159 P. 1112.

II. INVOLUNTARY.

☞57 (Cal.App.) The remedy in case of alleged improper service is by motion to quash the summons and not by motion for dismissal of complaint.—*Roberts v. Superior Court of California*, in and for Stanislaus County, 159 P. 466.

☞58(3) (Or.) Where a complaint has been properly stricken for want of a verification, without leave to amend, dismissal of the suit follows as a matter of course, irrespective of the reasons therefor given by the presiding judge.—*Clark v. Clark*, 159 P. 969.

DISSOLUTION.

See Banks and Banking, ¶281; Corporations, ¶592½-619; Husband and Wife, ¶272.

DISTRIBUTION.

See Executors and Administrators, ¶815.

DISTRICT AND PROSECUTING ATTORNEYS.

¶2(5) (Cal.App.) Under Pol. Code, § 996, declaring an office vacant upon the occupant's resignation, and section 995, requiring a county officer's resignation to be given in writing to the supervisor's clerk, *held* that a district attorney's resignation was effective when delivered to the clerk, notwithstanding its revocation before acceptance by the board.—*People v. Marsh*, 159 P. 191.

Under Pol. Code, §§ 995, 996, *held*, that a district attorney's resignation was effective when delivered to the clerk, notwithstanding its revocation before acceptance by the board.—*Id.*

A resignation of a district attorney, stating that it was to be effective when filed with the clerk of the Board of Supervisors, is "filed" when delivered to the clerk and received by him for the purpose intended.—*Id.*

DISTRICTS.

See States, ¶27.

DIVERSION.

See Waters and Water Courses, ¶86.

DIVORCE.

See Marriage, ¶40.

I. NATURE AND FORM OF REMEDY.

¶3 (N.M.) The ecclesiastical law of England in regard to marriage and divorce has not been adopted, and does not apply unless incorporated into statutes; therefore, where there is no statutory authority to grant limited divorces, such divorce cannot be granted.—*Hodges v. Hodges*, 159 P. 1007.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(A) Jurisdiction, Venue, and Limitations.**

¶57 (Ok.) The tribal courts in the Choctaw Nation could grant divorces until the passage of Act Cong. April 24, 1904; Act Cong. June 23, 1898, § 28, never becoming effective.—*Zimmerman v. Holmes*, 159 P. 303.

(G) Appeal.

¶178 (Ok.) Where plaintiff was denied a divorce but her husband was granted a divorce, and plaintiff voluntarily accepted payment of the alimony awarded, she is estopped to appeal from the judgment.—*Yates v. Yates*, 159 P. 1107.

¶184(3) (Wash.) Since an action for divorce is triable de novo on the whole record on appeal, it is immaterial whether findings of fact by the court below support its decree.—*Clark v. Clark*, 159 P. 702.

¶184(4) (Cal.) On appeal from divorce judgment based on denial of motion to open default, bill of exceptions containing no record of oral testimony, which it appeared was given at hearing of motion, and order reciting that court was "fully advised in the premises," it was presumed that the undisclosed testimony was sufficient to support the order.—*McDonald v. McDonald*, 159 P. 426.

(H) Fees and Costs.

¶189 (N.M.) In divorce cases it is ordinarily the duty of the husband to furnish means to

the wife to maintain or defend her rights, and the costs therein will not be apportioned.—*Fullen v. Fullen*, 159 P. 952.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

¶252 (Cal.App.) Under Civ. Code, § 146, subd. 1, it is not improper where a husband obtains divorce for his wife's extreme cruelty to award him more than one-half of the community property, though the wife was a hard worker.—*Thomsen v. Thomsen*, 159 P. 1054.

Where the court, on a husband's procuring divorce for extreme cruelty, divides the property of the spouses, it may consider that at marriage husband was the possessor of several thousand dollars worth of property which was used in accumulating the marital property.—*Id.*

Where a husband obtained a divorce on account of his wife's extreme cruelty, and the foundation of the community property was the husband's separate property, which after marriage he had used in accumulating community property, a division which allowed him 58 per cent. of the title to the property *held* justified.—*Id.*

Court under its power to divide community estate may assign to one spouse whole of a tract of land belonging to the estate, and not divide it between them; all the property of the estate being treated as one asset or fund.—*Id.*

¶286 (Cal.App.) On appeal it will be presumed that the trial court in dividing the property of the spouses on divorce pursuant to Civ. Code, § 146, subd. 1, properly exercised its discretion.—*Thomsen v. Thomsen*, 159 P. 1054.

¶286 (N.M.) Where the court in divorce had power to divide common property, husband cannot complain that it erroneously found the furniture and household goods to belong to the wife.—*Hodges v. Hodges*, 159 P. 1007.

VI. CUSTODY AND SUPPORT OF CHILDREN.

¶303(2) (Ok.) Where a husband, being granted a divorce, was given exclusive custody of minor child of marriage, and he and his parents, with whom the child was placed did not allow the wife to visit her, *held* that, the wife's parents, being suitable, order might be modified so as to give them custody of child part of time to enable wife to see it.—*Copeland v. Copeland*, 159 P. 1122.

¶303(2) (Wash.) That the mother has been indiscreet with men subsequent to divorce, in the absence of proof of moral turpitude, is not sufficient to deprive her of custody of her child awarded by the decree.—*Freeland v. Freeland*, 159 P. 698.

Courts will not deprive the mother of custody of her child unless it be shown clearly that she is so unfit a person as to endanger the child's welfare.—*Id.*

¶312 (Wash.) The court, on appeal from an order refusing to modify decree as to custody of a child, made by the court which gave the decree, should not disturb such order unless the evidence makes it reasonably plain that welfare of the child demands it.—*Freeland v. Freeland*, 159 P. 698.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

¶322 (Or.) A divorce changes an estate by entirety to an estate in common.—*Chase v. McKenzie*, 159 P. 1025.

¶327 (Cal.App.) A divorce decree of a foreign state may be collaterally attacked for lack of jurisdiction because the plaintiff was not then residing within the foreign state, notwithstanding the necessary jurisdictional facts are recited in the record.—*Steinbroner v. Steinbroner*, 159 P. 235.

DOCKETS.

See Judgment, ¶766.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Evidence, ¶355-380.

DOWER.**I. NATURE AND REQUISITES.**

¶26 (Utah) Under Comp. Laws 1907, § 2826, the wife's dower right in her husband's property is subject to a purchase-money claim.—*Wheritt v. Dennis*, 159 P. 534.

DRAINS.

See Waters and Water Courses, ¶119.

DRAMSHOPS.

See Intoxicating Liquors.

DRUGGISTS.

See Intoxicating Liquors, ¶126.

DRUNKARDS.

See Homicide, ¶28, 180.

DUE PROCESS OF LAW.

See Constitutional Law, ¶268-308.

DUPLICITY.

See Indictment and Information, ¶125.

DURESS.

See Bills and Notes, ¶104; Husband and Wife, ¶52; Mortgages, ¶79-86; Payment, ¶87.

EASEMENTS.

See Highways; Waters and Water Courses, ¶154, 156.

I. CREATION, EXISTENCE, AND TERMINATION.

¶1 (Or.) A pure easement is one where the land of one person, which land is denominated the servient tenement, is subjected to some use or burden for the benefit of the lands of another person, whose lands are termed the dominant tenement.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, Id. 576.

¶12(1) (Or.) There is no rule of law prohibiting the grant of an easement to take effect or to be enjoyed in the future.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, Id. 576.

¶17(4) (Wash.) One who plats property upon which streets have been laid out, and who sells property with reference thereto, cannot, by any act of his own, defeat the right of his vendee to use the platted streets for the purposes intended.—*Van Buren v. Trumbull*, 159 P. 891.

As between grantees of common grantor who plats and sells land with streets laid out thereon, the rights of the parties are determinable by reference to the grantor's rights.—Id.

¶26(1) (Wash.) Ballinger's Ann. Codes & St. § 3803, vacating county roads unopened within five years of the order to open, does not apply to private rights acquired by conveyance or grant from a common grantor, who sells land under a plot showing streets which are not opened.—*Van Buren v. Trumbull*, 159 P. 891.

—A right of private easement may exist although the public right has been extinguished

by nonuser under statute vacating highways not opened within five years from the opening order.—Id.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

¶42 (Or.) The conveyance of an easement over land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, Id. 576.

¶55 (Wash.) Where plaintiff riparian owner deeded a right of way to defendant, and by separate contract reserved the right to use shore line as it was then occupied, defendant, in constructing a road along the right of way, was liable if it changed the shore line or impaired the use thereof.—*Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co.*, 159 P. 774.

ECCLESIASTICAL LAW.

See Divorce, ¶3.

EJECTMENT.**I. RIGHT OF ACTION AND DEFENSES.**

¶29 (Okl.) Pendency in federal courts of suit to cancel deed does not preclude subsequent action of ejectment in state courts to recover possession.—*Davis v. Mimey*, 159 P. 1112.

III. PLEADING AND EVIDENCE.

¶81 (Okl.) Under Rev. Laws 1910, § 4928, judgment for plaintiff in ejectment can be had only upon proof of allegations of his petition, irrespective of defendant's default, appearance, demurrer, or other action.—*Buell v. U-Par-Har-Ha*, 159 P. 507.

¶84(1) (Okl.) After issues in an ejectment suit have been made up, defendants obtained a deed from plaintiff. Held that where plaintiff claimed on trial that deed was procured through fraud, evidence thereof was admissible.—*Davis v. Mimey*, 159 P. 1112.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

¶142(1) (Wash.) Under Rem. & Bal. Code § 797, defendants in ejectment held entitled to reimbursement for taxes on land paid after it had been patented by the United States, and to the value of a pipe line constructed after such patent and constituting a permanent betterment.—*Skinner v. McCrackan*, 159 P. 977.

¶142(2) (Wash.) Under Rem. & Bal. Code, §§ 790, 797, defendants in ejectment, holding in good faith under color of title and making improvements while the title was in the United States, had no right to claim betterments for such improvements which went with the land under a subsequent patent.—*Skinner v. McCrackan*, 159 P. 977.

¶148 (Okl.) A determination of the rights of an occupying claimant has no proper place in trial of action of ejectment, though parties consent to its consideration.—*Scott v. Potts*, 159 P. 932.

ELECTIONS.

See Constitutional Law, ¶48; Justices of the Peace, ¶8, 10; Mandamus, ¶74; Pleading, ¶369; Statutes, ¶125.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

¶10 (Nev.) Election laws are to be liberally construed to enable the largest participation of qualified electors in all elections.—*Turner v. Fogg*, 159 P. 56.

¶21 (Or.) Laws 1915, p. 124, providing for nominations for primary elections by payment

of fee, as a method additional to that of Laws 1913, p. 183, providing for nominations without fee on petition, is not invalid as violating Const. art. 2, § 1, requiring all elections to be free and equal.—Patton v. Withycombe, 159 P. 78.

§22 (Wash.) Rem. & Bal. Code, § 4809, in denying to a less than 10 per cent. party the right to participate in the primary election, does not, in view of section 4826, imperil its party integrity and thus impinge Const. U. S. Amend. 14, and Const. art. 1, § 19, and article 11, § 5.—State v. Howell, 159 P. 118.

Rem. & Bal. Code, § 4809, does not impinge the rule of uniformity in the election of officers prescribed in Const. art. 11, § 5, which relates to election of officers and not to nominations.—Id.

V. REGISTRATION OF VOTERS.

§95 (Nev.) St. 1915, c. 283, §§ 12 and 14, requiring electors to register their party affiliation as a prerequisite to the right to vote at primary election, is a reasonable regulation and valid exercise of the legislative power.—Turner v. Fogg, 159 P. 56.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

§120 (Or.) Although Laws 1913, p. 183, forbids nomination of candidates for public office by political parties except as provided by L. O. L. §§ 3349-3391, inclusive, as to direct primaries, the Legislature by Laws 1915, p. 124, provided an additional method for nomination by filing and payment of fees, which is valid in view of the facts that the Legislature may amend an initiated statute, and that there is no conflict.—Patton v. Withycombe, 159 P. 78.

§126(1) (Cal.) Under Direct Primary Law, § 5, subd. 4, and section 10 thereof, one who had announced that he would accept a nomination for an office held to have a right to withdraw as a candidate and to have his name removed from the ballot to be used in forthcoming primary election.—Bordwell v. Williams, 159 P. 869.

§126(4) (Nev.) Under St. 1915, c. 283, §§ 12 and 14, which was not repealed by St. 1915, c. 285, § 8, the names of electors which appear upon the certified registration list as copied from the register of the last general election, together with the names that appear on the supplemental list, constitute the list of electors qualified to vote at the primary election.—Turner v. Fogg, 159 P. 56.

§126(5) (Wash.) Under Rem. & Bal. Code, § 4809, a party must have polled 10 per cent. of the vote cast at the last preceding general election for some state-wide office to be entitled to a state-wide primary ticket.—State v. Howell, 159 P. 118.

Under Rem. & Bal. Code, § 4809, the office of United States Senator is a state-wide office.—Id.

Under Rem. & Bal. Code, § 4809, if at any general election no office requiring a state-wide vote is to be filled, the vote at such election cannot be taken as a criterion as to the state-wide status of any political party; but the election could only fix the status of the different political parties in the separate subdivisions of the state.—Id.

§130 (Wash.) Rem. & Bal. Code, § 4809, does not deprive a party failing to poll 10 per cent. of the total votes cast of the power thereafter to call a convention.—State v. Howell, 159 P. 118.

§146 (Cal.) The right to seek election to any office is open to all persons possessing the constitutional or statutory qualifications, but a citizen is under no obligation to seek an election to any office, and may be a candidate or refuse to be such at his option.—Bordwell v. Williams, 159 P. 869.

§147 (Or.) Under L. O. L. §§ 3343-3345, 3367, 3389, as to nominations, direct primary nominating elections and powers of precinct committeemen, where a state senator for balance of term to 1919 resigned after direct primary nominating election, no nomination for the office could be made.—Coovert v. Olcott, 159 P. 974.

ELECTRICITY.

§14(1) (Ok.) A telephone company is liable to its subscribers for injury resulting from failure to exercise the highest care, where its wires are apt to sag and come in contact with wires charged with a high current.—Pioneer Telephone & Telegraph Co. v. Tulsa Vitified Brick & Tile Co., 159 P. 477.

§19(3) (Ok.) Where it appeared that sagging wires of a telephone company became charged from traction company's wires causing injury, the rule of res ipsa loquitur did not apply.—Pioneer Telephone & Telegraph Co. v. Tulsa Vitified Brick & Tile Co., 159 P. 477.

ELECTRIC RAILROADS.

See Eminent Domain, §10, 20.

ELEVATORS.

See Master and Servant, §97, 129, 155, 159, 236, 286; Negligence, §45.

EMINENT DOMAIN.

See Discovery, §80, 51; Estoppel, §68; Jury, §19; Limitation of Actions, §32; Mandamus, §4, 48, 54.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§10(1) (Cal.App.) Since by Civ. Code, § 465a, all steam roads are authorized to use electric motive power, electric railroads, in their principal essentials, have the same legal status as steam roads, including the power of eminent domain.—City of Los Angeles v. Los Angeles Pac. Co., 159 P. 992.

§20(1) (Cal.App.) Land used for pole line for transmission of power to a public railway is used for a public use, although indirectly.—City of Los Angeles v. Los Angeles Pac. Co., 159 P. 992.

Where an electric railway acquired land for construction of subway, the use of that acquired was no less public because it had not acquired the entire amount needed, or had not actually begun construction.—Id.

§28 (Kan.) City of second class may exercise eminent domain to supply inhabitants with water.—Wallace v. City of Winfield, 159 P. 11.

§47(6) (Cal.App.) Los Angeles Charter, § 119b, providing that all park lands shall remain inviolate as park land, and no part shall be used for any other purpose, does not prevent condemnation of right to use land in common under Code Civ. Proc. § 1240, subd. 4, when land condemned is already burdened with a public use.—City of Los Angeles v. Los Angeles Pac. Co., 159 P. 992.

§59 (Kan.) City of second class, exercising eminent domain to supply inhabitants with water, did not exhaust power nor prevent subsequent condemnation, if officers determine in good faith that public interests require it.—Wallace v. City of Winfield, 159 P. 11.

§68 (Cal.App.) In view of St. 1909, p. 1066, and Code Civ. Proc. §§ 1241, 1247a, making conclusive the determination of the city of the public necessity for condemnation of land, is modified by section 1240, subd. 4, so that the court need not accept as final the decision of the city to take the fee, but may declare the terms on

which the land may be taken.—*City of Los Angeles v. Los Angeles Pac. Co.*, 159 P. 992.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

⇒85 (Cal.App.) Where electric railroad entered upon lands without objection by owners, and erected pole line for transmission of power, the easement it acquired was a substantial property right, and on condemnation landowners could not have entire compensation, but railroad should share therein.—*City of Los Angeles v. Los Angeles Pac. Co.*, 159 P. 992.

(C) Measure and Amount.

⇒124 (Cal.App.) Under Code Civ. Proc. § 1249, party whose land is condemned is not entitled to allowance for taxes accruing between commencement of action and decree.—*City of Los Angeles v. Los Angeles Pac. Co.*, 159 P. 992.

⇒136 (Okla.) Measure of damages on condemnation of private property is market value of property actually taken, together with depreciation resulting to remainder of property.—*Incorporated Town of Sallisaw v. Priest*, 159 P. 1093.

(D) Persons Entitled and Payment.

⇒158 (Cal.App.) Where land was sold on execution against one claiming to have an interest in the land, but having none in fact, and the execution purchaser thereafter paid sewer assessments and had the amount thereof included in the redemption charge, such execution debtor by redeeming and paying the assessment was not entitled to recover the amount thereof in condemnation proceedings by the city against him and the actual owner of the property.—*Johnston v. City of Los Angeles*, 159 P. 873.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

⇒166 (Utah) Condemnation proceedings were created so that the title or ownership of real property which is claimed and needed for some public use may be transferred from one person to another against the will of the owner.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

⇒169 (Cal.App.) It is sufficient that corporation in charge of public use, in its enterprise, has lawfully obtained property necessary therefor, with reasonable prospect that work will be completed and prior ownership of franchise relating to street crossings is not essential to right to condemn, or to hold for proposed use, other portions of right of way.—*City of Los Angeles v. Los Angeles Pac. Co.*, 159 P. 992.

⇒177 (Wash.) In a proceeding to change grade of street, it is not incumbent upon city to institute condemnation proceedings against any others than those who it believes will be damaged, as the law affords an owner claiming to be damaged opportunity to protect himself by intervention.—*State v. City of Spokane*, 159 P. 805.

⇒191(3) (Mont.) Petition under Rev. Codes, § 7331, for condemnation of lands by a power company, held to sufficiently allege the purposes and uses of the land sought to be acquired, without showing a present or prospective demand for the power produced by plaintiff.—*Interstate Power Co. v. Anaconda Copper Mining Co.*, 159 P. 408.

⇒191(6) (Mont.) An allegation of the petition, having described the land sought to be acquired by naming the metes and bounds on three sides and a river known to be navigable as a boundary on the fourth side, held a sufficient description of the land; the fourth boundary under Rev. Codes, § 4529, being the low-water line of such river.—*Interstate Power Co. v. Anaconda Copper Mining Co.*, 159 P. 408.

Under Rev. Codes, § 7337, the area of land

sought to be acquired by condemnation proceedings is not required to be stated in the petition.—*Id.*

⇒191(6) (Utah) In a condemnation action, plaintiff may acquire the title subsequent to the institution thereof, and, if he does, may plead such fact.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

⇒195 (Utah) On pleadings and issues in condemnation action, held, that defendant was not entitled to a dismissal on ground that plaintiff was asserting paramount title in itself, and that there was nothing to condemn.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

⇒196 (Cal.App.) A railway company claiming land as in public use has burden of proving that use is public, but party seeking to condemn it then has burden of proving that the proposed new use is inconsistent with existing use.—*City of Los Angeles v. Los Angeles Pac. Co.*, 159 P. 992.

⇒198(1) (Cal.App.) In condemnation proceedings it is for court to determine as question of fact whether land is already devoted to public use, if so alleged, and whether existing and proposed use are inconsistent.—*City of Los Angeles v. Los Angeles Pac. Co.*, 159 P. 992.

⇒198(1) (Utah) Under Const. art. 8, § 19, and Comp. Laws 1907, § 3596, held, that district court in condemnation action, without requiring determination of issue of title in a separate trial, was authorized to determine all issues arising in action whether legal or equitable.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

⇒203(1) (Mont.) In proceedings for the condemnation of lands by a power company, evidence as to the practicability of plaintiff's power plant and the method of its installation, held properly excluded as having no bearing on the quantum of damages.—*Interstate Power Co. v. Anaconda Copper Mining Co.*, 159 P. 408.

⇒203(1) (Okla.) On appeal from award of commissioners in condemnation proceedings, evidence as to effect of operation of enterprise located on the land taken as it existed at the time of trial held admissible.—*Incorporated Town of Sallisaw v. Priest*, 159 P. 1093.

⇒205 (Mont.) Evidence held to sustain a verdict which fixed the damages to defendant's land in condemnation proceedings well within the extremes fixed by conflicting evidence.—*Interstate Power Co. v. Anaconda Copper Mining Co.*, 159 P. 408.

⇒205 (Okla.) In a proceeding for the condemnation of land for sewage disposal plant, award of \$2,000 damages held warranted.—*Incorporated Town of Sallisaw v. Priest*, 159 P. 1093.

⇒243(2) (Utah) That plaintiff in action to condemn strip of land had the legal right to condemn, and that condemnation was for a public use, was settled by lower court's order of condemnation authorizing plaintiff to take possession of and improve the strip.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

⇒249 (Utah) Application, though in form an application to punish for contempt of court, construed as an application to enforce a judgment or order of the district court in a condemnation proceeding and to protect plaintiff's right thereunder from interference.—*Ketchum Coal Co. v. Christensen*, 159 P. 541.

⇒253(4) (Okla.) An order setting aside the report of commissioners, appointed to assess damages sustained in condemnation proceedings, and directing a new appraisal is interlocutory, and an appeal will not lie therefrom.—*City of Eufaula v. Ahrens*, 159 P. 327.

⇒255 (Mont.) Ruling in condemnation requiring plaintiff to prove the amount of damages, thus giving it the right to open and close, cannot be urged as error where no objection with

the reasons therefor was urged below as required by Rev. Codes, § 6785.—*Interstate Power Co. v. Anaconda Copper Mining Co.*, 159 P. 408.

↪262(4) (Mont.) A verdict on conflicting evidence for damages in condemnation proceedings which was approved by the trial court is conclusive.—*Interstate Power Co. v. Anaconda Copper Mining Co.*, 159 P. 408.

↪263 (Mont.) Defendants cannot complain that plaintiff was given the right to open and close by an order directing it to assume the burden of proving damages, since it required proof by plaintiff by a preponderance of the evidence, and no prejudice could have resulted to defendant, as required by Rev. Codes, § 6593, to justify a reversal.—*Interstate Power Co. v. Anaconda Copper Mining Co.*, 159 P. 408.

IV. REMEDIES OF OWNERS OF PROPERTY.

↪271 (Wash.) Where a city, in a proceeding to regrade a street, damaged relator's property without instituting condemnation proceedings as against her, she had a right of action for damages.—*State v. City of Spokane*, 159 P. 805.

↪315 (Wyo.) In action for damages from location of road over plaintiff's land, the evidence being conflicting, held that judgment for defendant will be affirmed.—*Kelly v. Board of Com'rs of Big Horn County*, 159 P. 1086.

EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

See Master and Servant, ↪204, 361-417; Negligence, ↪101.

ENCROACHMENT.

See Constitutional Law, ↪70.

ENTIRETY, ESTATE BY.

See Divorce, ↪322; Husband and Wife, ↪14.

ENTRY.

See Judgment, ↪120; Mandamus, ↪51.

ENTRY, WRIT OF.

See Ejectment.

EQUITABLE ESTOPPEL

See Estoppel.

EQUITY.

See Appeal and Error, ↪1065, 1176; Cancellation of Instruments; Discovery; Fraudulent Conveyances; Injunction; Judgment, ↪407; Partition; Pleading, ↪248; Quieting Title; Receivers; Reformation of Instruments; Set-off and Counterclaim; Specific Performance; Subrogation; Trial, ↪370; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

↪29 (N.M.) A chancery court cannot pass upon right of city to acquire and hold lands outside its territorial limits.—*Stamm v. Southwestern Presbyterian Sanatorium*, 159 P. 857.

ESCROWS.

See Mortgages, ↪32.

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Landlord and Tenant; Life Estates; Wills, ↪601.

ESTOPPEL

See Appeal and Error, ↪165; Constitutional Law, ↪43; Contracts, ↪138, 316; Corporations, ↪80, 388, 573; Criminal Law, ↪1137; Evidence, ↪208; Insurance, ↪77; Judgment, ↪563-743; Mortgages, ↪83; Municipal Corporations, ↪488, 489, 493; Principal and Agent, ↪137; Principal and Surety, ↪129.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

↪53 (Mont.) Mere silence cannot work an estoppel, but, to be effective for such purpose, the person to be estopped must have had an intent to mislead or a willingness that another might be deceived, and such other must have been thereby misled.—*Moore v. Sherman*, 159 P. 966.

↪58 (Mont.) Constructive fraud underlies every equitable estoppel, that is, the person estopped is considered as having by his admissions, declarations, or conduct misled another to his prejudice, so that it would work a fraud to allow the true state of facts to be proved.—*Moore v. Sherman*, 159 P. 966.

(B) Grounds of Estoppel.

↪68(5) (Utah) Ordinarily, where condemnor does not assert title in land sought to be condemned, he may not dispute title of condemnee, and condemnor cannot dispute title of party in possession against whom proceedings have been instituted, unless such party has acquired paramount title.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

↪70(1) (Cal.App.) The fact that a certificate of sale and tax title deeds were issued "without any objection on the part of the owner of the property" is not in itself sufficient to establish estoppel.—*Bruschi v. Cooper*, 159 P. 728.

↪71 (Cal.App.) Previous ex parte statements that they claimed no interest in a certain lot does not estop the defendants in a suit to quiet title from asserting an interest.—*Whitcomb v. Worthing*, 159 P. 613.

↪71 (Or.) A disclaimer, in order to estop, must be so publicly made as to mislead another into believing that the person making it intended to abandon a right and thereby induce that other to act to his injury in respect thereto.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, Id. 576.

A raceway easement is not lost by acquiescence in denial by adjoining landowners of rights in easement owner which he does not possess.—*Id.*

↪90(2) (Wash.) Sellers of mining claim, to be paid from net profits, who received no statements from the buyer relative to an increased charge for water used on the claim, to be deducted in figuring profits, until more than half of all expense ever incurred for water had been created held not estopped by their consent, silence, and acquiescence to deny buyer's right to charge them the amounts.—*Blanck v. Pioneer Mining Co.*, 159 P. 1077.

↪95 (Wash.) Mere silence without positive acts, to effect an estoppel, must have operated as a fraud, must have been intended to mislead, and must have actually misled; the party keeping silent must have known or had reasonable grounds for believing that the other would rely and act on his silence.—*Blanck v. Pioneer Mining Co.*, 159 P. 1077.

(E) Pleading, Evidence, Trial, and Review.

⚡107 (Utah) In an action under Comp. Laws 1907, § 1206, for goods furnished defendant's wife, plaintiff cannot recover on the ground that though the family relation had ceased to exist at the time of the sale, the defendant was estopped by his conduct to deny liability, where such estoppel was not pleaded.—*Berow v. Shields*, 159 P. 538.

⚡116 (Wash.) The burden of proving the necessary elements of an estoppel by mere silence, which must have operated as a fraud, rests upon the party invoking the estoppel.—*Blanck v. Pioneer Mining Co.*, 159 P. 1077.

ET AL

See Appeal and Error, ⚡417.

EVIDENCE.

See Criminal Law, ⚡354-571; Depositions; Discovery; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ⚡684; Trial, ⚡84.

I. JUDICIAL NOTICE.

⚡23(1) (Utah) The court takes judicial notice that it has always been the legislative policy and purpose to provide all the revenue necessary to carry on the public schools for a period of at least nine months in each year.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

II. PRESUMPTIONS.

⚡59 (Cal.) An applicant under the Workmen's Compensation Act is entitled to the presumption that a deceased employé did not commit suicide, where the circumstances are consistent with accidental death and there is nothing to suggest suicide.—*W. R. Rideout Co. v. Pillsbury*, 159 P. 435.

⚡80(1) (Wash.) Where the marital property laws of another state or territory are not in proof, they are conclusively presumed the same as local laws.—*Marston v. Rue*, 159 P. 111.

⚡89 (Or.) Under L. O. L. § 868, subd. 2, and Portland City Charter, § 404, relating to presumptions, held that, where affidavit of notice of proposed improvement admitted in evidence was defective, it overcame presumption of regularity of official acts and required city to show by another affidavit regular in form the posting of notices.—*Hancock Land Co. v. City of Portland*, 159 P. 969.

V. BEST AND SECONDARY EVIDENCE.

⚡177 (Okl.) The best evidence the nature of the case will admit of is required, if possible to be had, but where not available, secondary evidence is admissible.—*Farmers' Nat. Bank v. Hartoon*, 159 P. 844.

⚡181 (Okl.) Where a written contract is material, the writing itself is the best evidence and where not produced, its absence must be accounted for before secondary evidence of its contents can be received.—*Farmers' Nat. Bank v. Hartoon*, 159 P. 844.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

⚡208(6) (Cal.App.) In condemnation proceeding allegation of answer of cross-defendant, afterwards abandoned, held not to prevent him from raising question that land the title to which was in dispute was not included in city's deed to party under whose will cross-complain-

ant claimed.—*Johnston v. City of Los Angeles*, 159 P. 873.

(D) By Agents or Other Representatives.

⚡242(1) (Wash.) Declarations of an agent not authorized to bind the principal as to the scope of another agent's authority are not admissible.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

(E) Proof and Effect.

⚡265(7) (Or.) On appeal in suit to cancel an assessment of realty, held, on admissions by defendant's counsel, that it would be assumed on appeal that the proof of the posting of notices of the proposed improvement as required by Portland City Charter, § 376, were inadequate.—*Hancock Land Co. v. City of Portland*, 159 P. 969.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⚡271(7) (Cal.App.) Entry by defendant's agent in its order book when the order was given, not known to plaintiffs, held self-serving and inadmissible to corroborate the agent on the issue of there being an express contract for fireproof storage.—*Lynch v. Bekins Van & Storage Co.*, 159 P. 822.

⚡271(11) (Wash.) In an action for the rent of furniture, plaintiff's letter held inadmissible as an offer of compromise and self-serving.—*Munson v. Baldwin*, 159 P. 1070.

X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

⚡355(5) (Cal.App.) Advertising by defendant of fireproof storage held admissible to corroborate plaintiffs' evidence of an express contract for fireproof storage.—*Lynch v. Bekins Van & Storage Co.*, 159 P. 822.

⚡359(1) (Mont.) A photograph is competent evidence to prove a condition which can be shown by a representation of that sort, when shown by a competent witness to be correct.—*Stokes v. Long*, 159 P. 28.

⚡359(4) (Mont.) In malpractice action for treatment of broken leg, X-ray plates of condition of plaintiff's leg at time of trial were competent, they being taken by practicing physicians, who showed they understood and were accustomed to the use of X-ray process, and possessed the required skill and knowledge.—*Stokes v. Long*, 159 P. 28.

(D) Production, Authentication, and Effect.

⚡380 (Okl.) Before X-ray plates are admissible in evidence, they must be identified and their accuracy established.—*Bartlesville Zinc Co. v. Fisher*, 159 P. 476.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

⚡397(1) (N.M.) Parol evidence cannot be admitted to contradict or vary terms of written contract.—*Gooch v. Coleman*, 159 P. 945.

⚡411 (Okl.) Where an oral contract is partially reduced to writing and the writing is not a complete statement of the transaction, parol evidence, not inconsistent with the written contract, is admissible.—*O. K. Transfer & Storage Co. v. Neill*, 159 P. 272.

⚡423(6) (Kan.) Where notes are transferred from one bank to another by indorsement, evidence to show the contracts between the banks, as to the purpose of the transfer, is competent.—*Northrup Nat. Bank v. Yates Center Nat. Bank*, 159 P. 408.

(B) Invalidating Written Instrument.

⚡434(8) (Ok.) Evidence that a written contract was induced and obtained by material false and fraudulent representations does not contradict or vary terms of contract, and is admissible.—*McLean v. Southwestern Casualty Ins. Co. of Oklahoma*, 159 P. 660.

(C) Separate or Subsequent Oral Agreement.

⚡441(8) (Cal.) Under Code Civ. Proc. § 1856, in action against railroad which sold lots in town for its failure to prevent sale of liquor in the town, testimony that the road's agent, during negotiations attending sale, stated to plaintiff there would never be any liquor sold in the town held inadmissible as varying written agreement.—*Ayers v. Southern Pac. R. Co.*, 159 P. 144.

⚡443(1) (Cal.) To justify admission of parol evidence of a contract between parties who have made an agreement in writing on the ground that it is collateral, it must be upon a subject distinct from that to which the subject relates.—*Ayers v. Southern Pac. R. Co.*, 159 P. 144.

(D) Construction or Application of Language of Written Instrument.

⚡448 (Wash.) Failure of sellers of mining claim, to be paid from net profits, to object to a statement rendered them by the buyer, containing deductions to be made from gross production in ascertaining net profits, could not affect clear terms of the contract of sale, unambiguous and in writing.—*Blanck v. Pioneer Mining Co.*, 159 P. 1077.

⚡460(8) (Cal.) Where a government survey recited the distances and lamed the monuments, parol evidence was admissible to show that the actual distance was different from that given in the notes of the survey, under Code Civ. Proc. § 2077, subd. 2.—*Cords v. Goodwin*, 159 P. 188.

XII. OPINION EVIDENCE.**(A) Conclusions and Opinions of Witnesses in General.**

⚡488 (Ok.) The question of the value of agricultural land is not one for expert testimony, and persons living in the vicinity may testify thereto.—*Incorporated Town of Sallisaw v. Priest*, 159 P. 1093.

⚡489 (Ok.) A witness is not required to be an expert to testify to the reasonable or market value of goods, such as ordinary wearing apparel and household furniture; the value of such articles being within the knowledge of ordinary experience.—*O. K. Transfer & Storage Co. v. Neill*, 159 P. 272.

⚡492 (Ok.) Witness who testified that he did not observe or know speed of train was not qualified to testify with regard thereto.—*Chicago, R. I. & P. Ry. Co. v. Barton*, 159 P. 250.

(B) Subjects of Expert Testimony.

⚡512 (Cal.App.) Expert testimony in a servant's action for injury in moving a heavy shafting as to proper or more skillful mode of moving it, held proper.—*Fonts v. Southern Pac. Co.*, 159 P. 215.

⚡528(2) (Cal.) A physician's testimony that in his opinion plaintiff's second miscarriage, as well as the first, was due to the injury, is admissible.—*Easton v. United Trade School Contracting Co.*, 159 P. 597.

(F) Effect of Opinion Evidence.

⚡568(1) (Wash.) Testimony of a party, which is a bare repetition of allegations of legal conclusions in his pleading, does not tend to prove any fact.—*Balkema v. Grolimund*, 159 P. 127.

XIV. WEIGHT AND SUFFICIENCY.

⚡588 (Cal.App.) It is within the discretion of the trial court to reject in toto the testimony of any witness, if not done arbitrarily.—*Pacific Coast Dried Fruits Co. v. Sheriffs*, 159 P. 986.

⚡591 (Or.) Where a party calls a witness, he thereby represents him to be worthy of credit, or at least not so infamous as to be wholly unworthy of it.—*Sabin v. Kyniston*, 159 P. 69.

⚡597 (Ok.) A verdict must be reasonably supported by the evidence.—*Ingram v. Dunning*, 159 P. 927.

A verdict based on mere conjecture is not based on sufficient evidence.—*Id.*

EXAMINATION.

See Criminal Law, ⚡484, 1170½; Witnesses, ⚡240-270.

EXCEPTIONS.

See Appeal and Error, ⚡248-263; Criminal Law, ⚡844, 1048, 1066; Indictment and Information, ⚡111.

EXCEPTIONS, BILL OF.

See Appeal and Error, ⚡511, 544.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

⚡28 (Cal.) A bill of exceptions settled for use on motion for new trial may be used in support of an appeal from the judgment, although it was not regularly used on the motion for new trial.—*Vore v. Ephraim*, 159 P. 719.

II. SETTLEMENT, SIGNING, AND FILING.

⚡57 (N.M.) A bill of exceptions must be filed with the clerk of the district court.—*Milliken v. Martinez*, 159 P. 932.

⚡58(3) (Utah) A defaulting contractor need not be served with the bill of exceptions in a mechanic's lien case, since a reversal or modification of the judgment would not adversely affect him.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

EXCESSIVE DAMAGES.

See Damages, ⚡182, 188.

EXCHANGE OF PROPERTY.

⚡10 (Cal.App.) Where on exchange of property there were no express statements as to the value of bonds by defendant, and he did not vouch for reliability of letters relating thereto shown to plaintiff, he was not liable for statements therein.—*Gleason v. Proud*, 159 P. 885.

EXCLUSIVE AGENCIES.

See Monopolies, ⚡17.

EXCUSE.

See Appeal and Error, ⚡771; Contracts, ⚡308.

EXECUTION.

See Attachment; Exemptions; Garnishment; Landlord and Tenant, ⚡25; Mandamus, ⚡55.

II. PROPERTY SUBJECT TO EXECUTION.

⚡56 (Or.) Judgment against joint and several promisors does not give judgment creditor any

rights for collection of debt not possessed by owner of judgment against persons who are merely joint debtors and who have been served with summonses.—*Anderson v. Stayton State Bank*, 159 P. 1033.

Where all promisors on joint obligation are served with summonses and judgment secured against them, judgment creditor is not obliged to exhaust joint property before seizing separate property of individual promisors, since joint obligor is liable in solido for whole debt.—*Id.*

Under L. O. L. §§ 61, 181, 188, judgment against those jointly liable on contract on service on some of them may be satisfied from joint property of all or individual property of those served.—*Id.*

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

☞158(1) (Cal.App.) An order staying execution, for ten days, entered on the day the cause was decided, commenced to run from that date, though judgment was not entered till three days later.—*Garrett v. Garrett*, 159 P. 1050.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

☞242 (Wash.) Where, after default judgment for plaintiff and a certificate of a sheriff's sale to it, and the sheriff's satisfaction of judgment, homestead exemption was set off to defendant on his petition in bankruptcy, the validity of the judgment may be considered on motion to confirm the sale.—*Mowbray Pearson Co. v. Pershall*, 159 P. 682.

☞249 (Cal.App.) Expression in a certificate of sale under execution, that the sheriff offered the property for a certain sum, is not ground for setting aside the sale, the certificate as a whole showing the property was sold at public auction to the highest bidder, as required by Code Civ. Proc. § 694.—*Morris v. Winans*, 159 P. 213.

☞253(1) (Wash.) Allowance of amendment of defendant's motion to vacate a sheriff's sale, made before its confirmation, by showing that on his petition in bankruptcy the realty had been set off to him as exempt, *held* within court's discretion.—*Mowbray Pearson Co. v. Pershall*, 159 P. 682.

(B) Title and Rights of Purchaser.

☞275(2) (Cal.App.) Execution sale will not be set aside against a bona purchaser for a defect in the writ that is amendable, as wrong date of entry of judgment, otherwise sufficiently identified.—*Morris v. Winans*, 159 P. 213.

XI. EXECUTION AGAINST THE PERSON.

☞423 (Or.) Where the pleadings in an action for money disclose no fraudulent actions on the part of defendant, his imprisonment under an execution against his person is unlawful.—*Ex parte Level*, 159 P. 558.

☞425 (Or.) The imprisonment of petitioner by virtue of an execution under a decree finding that he fraudulently and unlawfully retained money belonging to another, rendered on unauthorized findings of fact and conclusions of law by the referee, no other evidence being received and the decree not being based on any issue found in the pleadings, is unlawful, and petitioner is entitled to release in habeas corpus proceedings.—*Ex parte Level*, 159 P. 558.

EXECUTIVE POWER.

See Constitutional Law, ☞77.

EXECUTORS AND ADMINISTRATORS.

See Abatement and Revival; Descent and Distribution; Limitation of Actions, ☞100; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

☞22(3) (Cal.App.) An order appointing a special administrator and purporting to be made in a formal proceeding on a written application is outside the court's jurisdiction, where no application was on file, though the petitioners for general letters had orally requested the appointment.—*Scott v. Superior Court of City and County of San Francisco*, 159 P. 225.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(B) Presentation and Allowance.

☞222(2) (Cal.) Where plaintiff sued for breach of contract of sale, and defendant died pending action, and plaintiff presented claim against decedent's estate for breach of contract, and judgment against administrator was reversed, and plaintiff amended complaint alleging fraud, evidence thereof was inadmissible under Code Civ. Proc. §§ 1500, 1502; providing that claims shall be presented to administrator before action thereon, and the claim presented not alleging fraud.—*Pearson v. Parsons*, 159 P. 1173.

VII. DISTRIBUTION OF ESTATE.

☞315(5) (Cal.) Decree of distribution *held* to give widow of testator absolute fee-simple estate in real property free from any condition restraining alienation.—*Drexler v. Washington Development Co.*, 159 P. 166.

☞315(6) (Cal.) A decree of distribution not appealed from is the conclusive muniment of title under a will, and controls any language of the will inconsistent therewith.—*Drexler v. Washington Development Co.*, 159 P. 166.

X. ACTIONS.

☞431(2) (Wash.) Rem. & Bal. Code, § 1472, relating to presentation of claims against estates of decedents, *held* a statute of limitation, without exception, so that ignorance of facts constituting claim would not postpone limitation.—*Harvey v. Pocock*, 159 P. 771.

Under Rem. & Bal. Code, § 1479, claimant could not recover in an action against the estate of her deceased father, where no claim had been presented to his administratrix prior to the action.—*Id.*

☞443(7) (Wash.) Allegation of complaint in action by plaintiff individually and as executrix to recover from estate of her deceased father the interest of her deceased mother in community property not disposed of by divorce decree is an allegation that plaintiff presented a claim both individually and as executrix of her mother's estate.—*Harvey v. Pocock*, 159 P. 771.

☞444(2) (Wash.) In action against estate of plaintiff's deceased father, allegation *held* to sufficiently show that plaintiff was the legally qualified and acting executrix of her mother's estate.—*Harvey v. Pocock*, 159 P. 771.

☞451(3) (Okla.) An instruction that when one presenting an administrator with a claim in proper form must request him to either allow or reject it is erroneous in view of Rev. Laws 1910, § 6342.—*Spaulding v. Thompson*, 159 P. 500.

XI. ACCOUNTING AND SETTLEMENT.

(E) Stating, Settling, Opening, and Review.

☞509(4) (Kan.) The heirs of an intestate may sue in the district court to set aside an order of probate court approving administrator's final account, on ground it was procured by use of release obtained by false representations and

to have an accounting.—*Pickens v. Campbell*, 159 P. 21.

⚡509(5) (Kan.) Heirs suing to set aside final account of administrator, procured on a release executed by them, are not charged with knowledge of falsity of administrator's statement that real estate, the record title to which stood in deceased, had not been sold him, on the theory that the matter could have been discovered by inquiry of purchasers.—*Pickens v. Campbell*, 159 P. 21.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

⚡519(1) (Cal.App.) Surrender before local ancillary administration by domestic corporation of stock belonging to estate of testator of another state, to his foreign domiciliary executor and legatee, held a defense to action therefor against the corporation by local ancillary administrator.—*Union Trust Co. of San Francisco v. Pacific Telephone & Telegraph Co.*, 159 P. 820.

EXEMPTIONS.

See Appeal and Error, ⚡1064; Homestead; Taxation, ⚡210.

I. NATURE AND EXTENT.

(C) Property and Rights Exempt.

⚡48(1) (Okla.) Under Rev. Laws 1910, § 3342, subd. 16, all current wages and earnings for personal or professional services earned within 90 days is reserved to the head of every family, exempt from attachment, execution, or other forced sale for debts.—*Barteldes Seed Co. v. Gunn*, 159 P. 502.

Under Rev. Laws 1910, § 5199, the earnings of a resident debtor at any time within three months before execution, garnishment, or attachment cannot be applied to his debts when necessary for the maintenance of a family supported wholly or partly by his labor.—Id.

⚡48(2) (Okla.) The object of the exemption statutes is to give the head of a family his current wages or personal earnings, and he is entitled thereto though the earnings may be reserved to him under contract whereby he is to receive so much for the job performed.—*Barteldes Seed Co. v. Gunn*, 159 P. 502.

III. WAIVER OR FORFEITURE.

⚡93 (Wash.) Where the plaintiff, after two cows and their calves and a wagon had been seized on execution and noticed for sale, without any express waiver at the time of the levy, as provided by Rem. & Bal. Code, § 571, told sheriff to postpone sale because he thought he might be able to pay judgment, no inference of waiver could be drawn therefrom.—*Shell v. Svensson*, 159 P. 1076.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

⚡119(1) (Wash.) The principal defendant, though knowing of the proceeding, having delayed his answer, claiming the statutory exemption, till after entry of decision striking allegation from garnishee's answer and giving judgment on the pleadings, is too late in his claim.—*Hanson v. Hodge*, 159 P. 388.

⚡119(2) (Wash.) A claim for exempt property may be made within a reasonable time before sale.—*Shell v. Svensson*, 159 P. 1076.

⚡125 (Wash.) Where cows and calves and wagon were seized on execution against plaintiff and noticed for sale, it was sheriff's duty, on the filing of plaintiff's affidavit claiming them as exempt, to release them, where no demand was made for an appraisement, as provided by Rem. & Bal. Code, § 573.—*Shell v. Svensson*, 159 P. 1076.

⚡150 (Wash.) In action to recover value of two cows and their calves and a wagon claimed as exempt from execution, held that instruction, while not technically correct, might be understood to require that the jury find plaintiff to be a farmer, and within Rem. & Bal. Code, § 563.—*Shell v. Svensson*, 159 P. 1076.

EXPENSES.

See Officers, ⚡94.

EXPERT TESTIMONY.

See Criminal Law, ⚡484; Evidence, ⚡512, 528.

EXTENSION.

See Principal and Surety, ⚡104, 128, 129.

FACTORS.

⚡6 (Cal.App.) Contract to deliver to a factor a certain amount of goods to sell held not canceled by the principal afterwards negotiating with the factor to handle all its goods and be declining the offer.—*Williams v. Parrott & Co.*, 159 P. 824.

FAILURE OF CONSIDERATION.

See Guaranty, ⚡17.

FAINTING.

See New Trial, ⚡28.

FALSE IMPRISONMENT.

See Malicious Prosecution.

FALSE PRETENSES.

See Banks and Banking, ⚡21.

FALSUS IN UNO, FALSUS IN OMNIBUS.

See Trial, ⚡236.

FAMILY EXPENSES.

See Husband and Wife, ⚡19.

FEDERAL COURTS.

See Removal of Causes.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant, ⚡204.

FEES.

See Attorney and Client, ⚡144-192.

FEE SIMPLE.

See Deeds, ⚡124.

FELLOW SERVANTS.

See Master and Servant, ⚡159.

FILING.

See Appeal and Error, ⚡624, 771, 773; Criminal Law, ⚡1106; Exceptions, Bill of, ⚡57; Mechanics' Liens, ⚡132, 271; Pleading, ⚡172.

FINAL JUDGMENTS AND DECREES.

See Appeal and Error, ⚡78.

FINDINGS.

See Appeal and Error, ¶1001-1015; Mechanics' Liens, ¶290; Reference, ¶86; Trial, ¶391-405.

FINES.

¶12 (Okl.Cr.App.) Before Sess. Laws 1913, c. 112, § 1, went into effect, a defendant was allowed credit on his fine if laid out in jail in accordance with Rev. Laws 1910.—Smith v. State, 159 P. 941.

FIRE INSURANCE.

See Insurance.

FISH.

See Criminal Law, ¶94, 1213; Indictment and Information, ¶111.

¶15 (Cal.App.) An information charging casting nets within a bay for purpose of taking fish in violation of Pen. Code, § 636, held sufficient without alleging in the waters thereof.—People v. Anderson, 159 P. 211.

FIXTURES.

¶7 (Okl.) Under Rev. Laws 1910, § 6592, a thing is deemed affixed to land when it is permanently attached to what is thus permanent, as by cement, plaster, etc.—Etchen v. Ferguson, 159 P. 306.

¶9 (Okl.) Under Rev. Laws 1910, § 6590, when one affixes his property to land of another without agreement permitting removal, the thing affixed belongs to the owner of the land.—Etchen v. Ferguson, 159 P. 306.

¶35(2) (Okl.) Articles affixed to land in fact, though only slightly, are prima facie realty.—Etchen v. Ferguson, 159 P. 306.

FOLLOWING TRUST PROPERTY.

See Trusts, ¶357.

FORCIBLE ENTRY AND DETAINER.

See Landlord and Tenant, ¶288.

I. CIVIL LIABILITY.

¶29(1) (Nev.) In action to recover damages for forcible entry, plaintiff must prove his title or right to possession of property where pleadings raise that issue.—Glock v. Elges, 159 P. 629.

¶30(5) (Nev.) Rev. Laws, § 5508, providing that in forcible entry cases, judgment "may" be entered for treble the actual damages, permits, but does not require, such penalty to be imposed.—Glock v. Elges, 159 P. 629.

¶43(7½) (Nev.) Supreme Court will not modify judgment to allow treble damages in forcible entry case, under Rev. Laws, § 5508, where facts are not before it.—Glock v. Elges, 159 P. 629.

¶47 (Nev.) Rev. Laws, § 5377, allowing plaintiff costs on favorable judgment in action involving title or possession of real estate, applies to recovery of damages for forcible entry, where plaintiff's title or right of possession was disputed.—Glock v. Elges, 159 P. 629.

FORECLOSURE.

See Mechanics' Liens, ¶271-291; Mortgages, ¶395-579; Taxation, ¶708.

FOREIGN ADMINISTRATION.

See Executors and Administrators, ¶519.

FOREIGN DIVORCE.

See Divorce, ¶327.

FOREIGN JUDGMENTS.

See Judgment, ¶323.

FOREIGN LAWS.

See Evidence, ¶80.

FORFEITURES.

See Bail; Infants, ¶12¼; Insurance, ¶349, 360; Intoxicating Liquors, ¶247-251.

FORGERY.

See Criminal Law, ¶369.

FORMER ADJUDICATION.

See Judgment, ¶563-743.

FORMER JEOPARDY.

See Criminal Law, ¶178, 257.

FRATERNAL INSURANCE.

See Insurance, ¶693-819.

FRAUD.

See Bills and Notes, ¶84, 520; Compromise and Settlement, ¶8; Contracts, ¶94; Corporations, ¶80, 426; Evidence, ¶434; Frauds, Statute of; Fraudulent Conveyances; Husband and Wife, ¶52; Insurance, ¶723; Limitation of Actions, ¶100, 192; Reformation of Instruments, ¶21; Sales, ¶50, 94, 126.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

¶3 (Okl.) The essentials of fraud are a material representation by defendant which is false or made with reckless disregard of the truth with the intention that it should be acted upon, and that plaintiff acted thereon to his injury.—Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141.

¶9 (Wash.) To constitute fraud, representations must be material, false, known to maker to be false, or made recklessly as facts without knowledge with intent to be acted on and acted on in reliance upon them to another's injury.—Hamilton v. Mihills, 159 P. 887.

¶12 (Cal.) Under Civ. Code, § 1572, subd. 4, defining actual fraud, breach of a railroad's promise "that no intoxicating liquor would ever be sold or given away" in a town which it was developing, held not to amount to actionable fraud.—Ayers v. Southern Pac. R. Co., 159 P. 144.

¶12 (Okl.) While ordinarily statement on which fraud may be predicated must be of existing fact, promise made to induce written contract without intention to perform constitutes fraud.—McLean v. Southwestern Casualty Ins. Co. of Oklahoma, 159 P. 660.

¶13(2) (Wash.) Fact that one, making material and inducing statement susceptible of knowledge, as made on his own knowledge, believed such statement to be true, but did not know it, is no excuse in law.—Hamilton v. Mihills, 159 P. 887.

¶20 (Okl.) To recover for fraud and deceit, it is not necessary that the fraudulent representations were the sole inducement moving plaintiff to take the action from which the injury ensued if without such representations plaintiff would not have acted.—Allen v. Pendarvis, 159 P. 1117.

¶22(1) (Cal.App.) A contracting party is entitled to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement, and is not bound to investigate statements which the other party, with full means of knowledge, has deliberately made.—Gleason v. Proud, 159 P. 885.

II. ACTIONS.**(B) Parties and Pleading.**

⇒42 (Cal.) In pleading false representations, as fraud, allegations that a promise was made without any intention of performing it, or that it was made with the intent to deceive or defraud the plaintiff, or to induce her to buy the property, are necessary.—*Ayers v. Southern Pac. R. Co.*, 159 P. 144.

(C) Evidence.

⇒50 (Ok.) Fraud is a fact to be established by evidence as any other fact.—*Chicago, R. I. & P. Ry. Co. v. Penix*, 159 P. 1141.

(E) Trial, Judgment, and Review.

⇒65(4) (Ok.) In an action for damages for fraud and deceit in the sale of bank stock, an instruction that, if plaintiff was induced to buy the stock because of other influences than representations made by defendant, he could not recover, is erroneous.—*Allen v. Pendarvis*, 159 P. 1117.

FRAUDS, STATUTE OF.**VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.**

⇒75 (Or.) An agreement to devise real property is not within the statute of frauds (L. O. L. § 808).—*Woods v. Dunn*, 159 P. 1158.

IX. OPERATION AND EFFECT OF STATUTE.

⇒139(2) (Cal.App.) An antenuptial contract that deceased would make plaintiff his beneficiary in an insurance policy is executed by their marriage and insertion of plaintiff's name as beneficiary.—*Freitas v. Freitas*, 159 P. 611. The statute of frauds (Civ. Code, § 1624, and Code Civ. Proc. § 1973) is inapplicable to an executed antenuptial oral contract.—*Id.*

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⇒148(2) (Cal.App.) Where a complaint alleges an antenuptial contract, required to be in writing under statute of frauds (Civ. Code, § 1624, and Code Civ. Proc. § 1973), held that the agreement will be presumed to be written.—*Freitas v. Freitas*, 159 P. 611.

FRAUDULENT CONVEYANCES.**I. TRANSFERS AND TRANSACTIONS INVALID.****(B) Nature and Form of Transfer.**

⇒24(1) (Cal.) Civ. Code, § 1039, defining transfer, applies to the Code sections declaring certain transfers void against creditors.—*Scholle v. Finnell*, 159 P. 1179.

⇒32 (Cal.) That live stock of debtor was mingled with that of his sons and sold by them does not give creditors right of action against sons to set aside transfer as fraudulent.—*Scholle v. Finnell*, 159 P. 1179.

(D) Indebtedness, Insolvency, and Intent of Grantor.

⇒57(1) (Cal.App.) A solvent person may transfer property with intent to defraud creditors: so that it need not always be inquired whether the grantor is insolvent.—*S. E. Slade Lumber Co. v. Derby*, 159 P. 881.

(E) Consideration.

⇒74(1) (Cal.) The purchase of corporate stock by a debtor which he caused to be transferred to defendant without consideration, if accompanied by a fraudulent intent as to debtors, would constitute a transfer to defendant assailable by the creditors.—*Scholle v. Finnell*, 159 P. 1179.

(I) Retention of Possession or Apparent Title by Grantor.

⇒147(1) (Wash.) Checking over lumber conveyed to creditor by bill of sale as security, arrangement for hauling and notice to assignee for creditors, held a sufficient change of possession as against the assignee and other creditors.—*Haskins v. Fidelity Nat. Bank*, 159 P. 1198.

⇒154(2) (Wash.) Where a vendee of personalty takes possession before other claims are made thereon, he is entitled thereto, though his bill of sale may be invalid because not properly recorded.—*Haskins v. Fidelity Nat. Bank*, 159 P. 1198.

(J) Knowledge and Intent of Grantee.

⇒156(1) (Or.) Actual notice of fraudulent intent by vendor must be shown to avoid a sale to a purchaser paying a valuable consideration.—*Sabin v. Kyniston*, 159 P. 69.

⇒168 (Or.) The title of a purchaser is protected from attack as based on fraudulent conveyance where, without knowledge or notice of vendor's bad intent or of fraud, he has paid a valuable consideration, under L. O. L. §§ 7897, 7400, 7401.—*Sabin v. Kyniston*, 159 P. 69.

III. REMEDIES OF CREDITORS AND PURCHASERS.**(G) Evidence.**

⇒271(2) (Or.) One alleging fraud or any other material matter must prove it.—*Sabin v. Kyniston*, 159 P. 69.

⇒276 (Cal.) In an action under Civ. Code, §§ 3439, 3440, to set aside a transfer as fraudulent, it is essential, to make out the case alleged, for plaintiff to establish that there has been a transfer of the property.—*Scholle v. Finnell*, 159 P. 1179.

That court did not accept defendant's contention as to title to property did not relieve plaintiff from necessity of proving transfer alleged to have been fraudulently made.—*Id.*

⇒282 (Or.) Under L. O. L. § 7401, one of the essentials which the plaintiff must establish is that the purchaser had previous notice of the fraudulent intent of his grantor.—*Sabin v. Kyniston*, 159 P. 69.

⇒287 (Cal.App.) A judgment creditor, suing to subject transferred property to his judgment, may introduce his judgment, writs, and execution as the basis for maintaining his suit.—*S. E. Slade Lumber Co. v. Derby*, 159 P. 881.

⇒295(2) (Or.) It is not essential that there be direct proof of fraud, but the deceit may be proven by circumstantial evidence.—*Sabin v. Kyniston*, 159 P. 69.

⇒298(3) (Cal.App.) Evidence, together with legitimate inferences, held to justify finding that gift of corporation stock to owner's wife was made with intent to hinder and delay creditors.—*S. E. Slade Lumber Co. v. Derby*, 159 P. 881.

⇒300(1) (Or.) Testimony of grantee, called as plaintiff's witness, of payment of valuable consideration, and of his son as to remittances to him for use in buying the land, held sufficient to show payment by grantee of valuable consideration.—*Sabin v. Kyniston*, 159 P. 69.

⇒301(1) (Or.) Evidence held not sufficient to show grantee's knowledge of fraud.—*Sabin v. Kyniston*, 159 P. 69.

Actual notice to grantee of fraudulent intent by vendor may be proven by circumstantial evidence.—*Id.*

FREIGHT TRAINS.

See Carriers, ⇒244.

FRIGHTENING ANIMALS.

See Railroads, ⇒306.

FRIVOLOUS APPEAL

See Costs, ¶280.

FUMIGATION.

See Agriculture, ¶11.

GAME.

See Fish.

GARNISHMENT.

See Appeal and Error, ¶173, 877; Attachment; Officers, ¶100; States, ¶6.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

¶17 (Kan.) Proceeding to subject to payment of judgment salary due from county to deputy sheriff cannot be maintained under Code Civ. Proc. § 522 (Gen. St. 1909, § 6117).—Haddock v. McDonald, 159 P. 402.

Laws 1889, c. 151, exempting municipal corporations from garnishment, exempts counties and similar bodies, as well as cities.—Id.

¶33 (Wash.) Salary earned is money due in a sum certain and owing, relative to being subject to garnishment, though it may not be a debt in the common-law sense.—Hanson v. Hodge, 159 P. 388.

¶63 (Wash.) Laws 1915, p. 357, making counties and municipalities subject to garnishment, held by necessary implication to abrogate common-law immunity from garnishment of salaries of public officers.—Hanson v. Hodge, 159 P. 388.

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

¶105 (Wash.) A creditor by garnishment can get no better right or title to property than the debtor has.—First Nat. Bank of Everett v. Neilson, 159 P. 113.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

¶195 (Okla.) Where undertaking is executed by defendant pursuant to Rev. Laws 1910, § 4838, and garnishment proceeding is thereby discontinued, defendant is estopped from questioning regularity of garnishment proceedings.—Munson v. First Nat. Bank of Okmulgee, 159 P. 486.

GIFTS.

I. INTER VIVOS.

¶49(5) (Cal.App.) In husband's action to have two gifts of money made by his deceased wife set aside, evidence held insufficient to establish any sort of trust relation between decedent and defendants; that the gifts were secured by undue influence, etc.—Lovejoy v. Hart, 159 P. 170.

GRAND JURY.

See Indictment and Information.

GRANTS.

See Public Lands.

GUARANTY.

See Indemnity; Principal and Surety.

I. REQUISITES AND VALIDITY.

¶7(2) (Okla.) Delivery of guaranty to guarantee in response to offer by latter completes contract, without notice of acceptance and of intention to act thereunder.—Oklahoma City Nat. Bank v. Ezard, 159 P. 267.

¶17 (Wash.) A guaranty of account of K. store held not effective as to past-due indebtedness; there having been no subsequent sale to it on credit, the expressed consideration, or indul-

gence on the past-due indebtedness.—Western Dry Goods Co. v. Hamilton, 159 P. 373.

II. CONSTRUCTION AND OPERATION.

¶86(5) (Wash.) A guaranty of payment of the account of K. store, in consideration of sale to it on credit, held not a guaranty of payment of price of goods sold to its management under control of its creditors in the course of liquidation.—Western Dry Goods Co. v. Hamilton, 159 P. 373.

GUARDIAN AND WARD.

See Infants, ¶77; Limitation of Actions, ¶72.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

¶10 (Cal.) A comparison of the benefits to the child's welfare from the different surroundings is required by Civ. Code § 246, in determining whether an infant will be taken from parents and given to custody of guardians.—In re Lew Choy Foon, 159 P. 440.

¶13(4) (Cal.) Evidence, in a proceeding for appointment of a guardian of an infant, held to support a finding that it was an abandoned child.—In re Lew Choy Foon, 159 P. 440.

¶17 (Okla.) The appointment of a guardian for a minor by the county court imports general jurisdiction to so do; and, the record being regular on its face, it will be presumed that all facts necessary to vest it with jurisdiction, including determination of qualifications of a guardian, were found to exist before appointment was made.—Johnson v. Johnson, 159 P. 1121.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

¶29 (Kan.) Right of mother to custody of child is not impaired by order of probate court appointing guardian, notwithstanding recital that guardianship extends to person, where no issue concerning mother's fitness was actually presented or determined.—Ex parte Brown, 159 P. 405.

¶30(1) (Okla.) A father who has been appointed guardian of minor children is entitled to their custody, services, and earnings, and is charged with duty of supporting and educating them; and, when he cannot reasonably afford to do so, he may, under direction of court, apply income of minors thereto.—Donnell v. Dansby, 159 P. 317.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

¶107 (Okla.) Judgment appointing guardian and ordering sale of minors' land, proceedings being regular on their face, is not subject to collateral attack in ejectment by the minors on ground that they were not residents of county in which guardian was appointed.—Scott v. Abraham, 159 P. 270.

¶107 (Okla.) A sale of minor's land under order of the county court by a guardian cannot be attacked in ejectment by evidence that the guardian at the time of appointment was a minor; the county court as to such matter being one of general jurisdiction and the attack being collateral.—Johnson v. Johnson, 159 P. 1121.

¶108 (Okla.) Purchaser at guardian's sale, all proceedings being regular on their face, may not be ousted because of fraud of guardian inducing the sale where purchaser did not participate therein.—Scott v. Abraham, 159 P. 270.

VI. ACCOUNTING AND SETTLEMENT.

¶165 (Okla.) Petition by ward against former guardian and surety, charging that order approving final report of guardian and releasing

surety was procured by fraud, is a direct attack on such order.—*Brewer v. Dodson*, 159 P. 329.

VIII. LIABILITIES ON GUARDIANSHIP BONDS.

☞174 (Okl.) Surety on guardian's sale bond after sale and disposition of proceeds will not be permitted to deny validity of guardian's appointment or of proceedings for sale, or to deny that he received proceeds in fiduciary capacity.—*Donnell v. Dansby*, 159 P. 317.

☞182(1) (Okl.) Where guardian dies without accounting and settlement, his former wards may maintain action against his personal representatives and sureties on his bond for such accounting and settlement.—*Donnell v. Dansby*, 159 P. 317.

Where father who had been appointed guardian made no charge for expenditures in behalf of minors, and obtained no authority from county court therefor, no credits can be allowed after his death in action against sureties on his bond.—*Id.*

☞182(2) (Okl.) Claim for a fund wrongfully misappropriated by guardian need not be presented to his administrator before action for recovery thereon.—*Donnell v. Dansby*, 159 P. 317.

☞182(6) (Okl.) Evidence held to show execution of bond of guardian by defendant surety company.—*Donnell v. Dansby*, 159 P. 317.

☞182(7) (Okl.) In action against representatives of deceased guardian for accounting, the court may state account and hear evidence, and allow defendants any credits and determine balance due, and render judgment against sureties therefor.—*Donnell v. Dansby*, 159 P. 317.

GUARDS.

See Master and Servant, ☞121.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

☞73½ (Okl.) Under Rev. Laws 1910, §§ 4889-4892, where officer charged with unlawful restraint neglects to make return to writ of habeas corpus or offer excuse for his failure, and petition shows illegal restraint, petitioner is entitled to discharge.—*Ex parte Wood*, 159 P. 433.

☞85(1) (Kan.) Evidence as to fitness of mother held not to warrant depriving her of custody of child.—*Ex parte Brown*, 159 P. 405.

HARMLESS ERROR.

See Appeal and Error, ☞1033-1071; New Trial, ☞41.

HEARING.

See Trial, ☞185, 178.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Constitutional Law, ☞64, 290, 291; Counties, ☞191, 195, 196; Railroads, ☞95; Statutes, ☞21.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

☞107(1) (Kan.) In absence of fraud or misconduct equivalent thereto, finding of board of county commissioners on sufficiency of petition under Laws 1909, c. 201, for construction and improvement of road, is conclusive on property owners and taxpayers affected thereby.—*Steven-*

son v. Board of Com'rs of Shawnee County, 159 P. 5.

Rule as to conclusiveness of decision of county board on sufficiency of petition for construction and improvement of road applies to legality and authenticity of signatures to petition.—*Id.* And to determination concerning boundaries of district as set forth in petition.—*Id.*

Also to cost of proposed improvement.—*Id.*

Laws 1909, c. 200, does not repeal chapter 201, relating to construction and improvement of roads.—*Id.*

Laws 1909, c. 201, relating to construction and improvement of roads, is not unconstitutional on the ground that the county board has no discretion as to the improvement to be ordered.—*Id.*

☞113(3) (Wash.) There being no prohibition in 3 Rem. & Bal. Code, § 5879-9, as to State Aid Roads, against the contract for construction providing for retention of 20 per cent. of price to satisfy liens, such condition is binding both on the surety and the county.—*Maryland Casualty Co. v. Washington Nat. Bank*, 159 P. 689.

☞113(5) (Wash.) Where county obtained state warrants for state road construction and allowed them to pass to a bank, which loaned money thereon to the contractor, the county was liable to surety on contractor's bond for amount thereof, when it did not show money loaned was used on the work.—*Maryland Casualty Co. v. Washington Nat. Bank*, 159 P. 689.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

☞122 (Kan.) Laws 1909, c. 201, relating to construction and improvement of roads, is not unconstitutional as requiring township board to levy tax which it has no voice in creating.—*Stevenson v. Board of Com'rs of Shawnee County*, 159 P. 5.

HISTORY.

See Statutes, ☞217.

HOLIDAYS.

See Fish, ☞15; Sunday.

HOLOGRAPHIC WILLS.

See Wills, ☞130.

HOMESTEAD.

See Exemptions.

II. TRANSFER OR INCUMBRANCE.

☞117 (Utah) A husband, with his wife's consent, may incur her homestead under the local statute.—*Wherritt v. Dennis*, 159 P. 534.

HOMICIDE.

See Criminal Law, ☞761, 778, 823.

II. MURDER.

☞28 (Okl.Cr.App.) Where accused was voluntarily intoxicated so that he was unable to form a premeditated design, and there was no evidence of malice, his killing of another is manslaughter in the first degree, and not murder.—*Perryman v. State*, 159 P. 937.

Mere temporary insanity resulting from voluntary intoxication is no defense to a charge of homicide, but insanity, to be a defense, must be permanent from chronic intoxication.—*Id.*

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

☞116(3) (Cal.App.) Person acting in self-defense and resorting to use of deadly weapon must believe that it is absolutely necessary for him to so act in order to justify under the law.—*People v. Bradfield*, 159 P. 443.

VII. EVIDENCE.

(B) Admissibility in General.

☞157(2) (Wash.) In prosecution for uxoricide evidence of quarrel ten days prior to offense is admissible against the husband.—*State v. Spangler*, 159 P. 810.

☞166(3) (Ariz.) Evidence of deceased having two years before objected to defendant keeping company with his daughter held admissible on motive, notwithstanding remoteness.—*Talley v. State*, 159 P. 59.

As showing feeling, motive, or malice, letter from defendant reflecting on deceased's lack of care of daughters, and their virtue, held admissible.—*Id.*

Defendant held not entitled to show truth of his letter reflecting on deceased, introduced to show feeling, motive, or malice; the truth being immaterial.—*Id.*

☞180 (Okla. Cr. App.) While involuntary intoxication is no defense to a prosecution for homicide, it may be considered on the question of premeditation.—*Perryman v. State*, 159 P. 937.

(B) Weight and Sufficiency.

☞253(1) (Ariz.) Evidence held sufficient to support a conviction of murder in the first degree.—*Talley v. State*, 159 P. 59.

VIII. TRIAL.

(C) Instructions.

☞286(2) (Cal. App.) In prosecution for assault with intent to murder, it was proper for the court to advise the jury that evidence of former difficulties between the parties might be considered to show malice on defendant's part against complainant.—*People v. Bradfield*, 159 P. 443.

☞300(3) (Cal. App.) In prosecution for assault with intent to murder, instruction on influence of previous threats on right of self-defense held to properly state the law.—*People v. Bradfield*, 159 P. 443.

In prosecution for assault with intent to murder, court properly instructed that if jury believed that there had been previous difficulties between parties, they should consider such testimony only to determine state of mind of parties at time of alleged assault, and to show malice, if any, that defendant had at the time.—*Id.*

In prosecution for assault with intent to murder, instruction on self-defense held not improper as declaring that in proving justification for attack on ground of self-defense it need appear that it was absolutely necessary for person to resort to means adopted.—*Id.*

☞307(3) (Mont.) Where defendant killed deceased, but alleged accidental discharge of his revolver, used as a club in a fight in which the two engaged, he was not entitled to a definition of "assault," since he was guilty of unlawful manslaughter, or should have been acquitted entirely.—*State v. Lewis*, 159 P. 415.

X. APPEAL AND ERROR.

☞342 (Okla. Cr. App.) One convicted of manslaughter is not entitled to a reversal, in the absence of errors of law, because the proof shows that the jury should have convicted him of murder.—*Willis v. State*, 159 P. 1014.

☞347 (Okla. Cr. App.) In a homicide case, evidence held to show that in the interests of justice the punishment should be reduced from death to life imprisonment.—*Anthony v. State*, 159 P. 934.

HORTICULTURE.

See Agriculture, ☞11.

HOSPITALS.

☞8 (Cal.) Evidence held to justify finding that burns were inflicted on patient while unconscious and under exclusive care of defend-

ant's nurses.—*Meyer v. McNutt Hospital*, 159 P. 436.

Under contract of hospital with patient, the corporation owes her duty of protection, which it violates by use of any instrumentality producing painful burns, so that proof of accident carries with it presumption of negligence, regardless of whether injury was caused by carelessness of competent nurses or negligence in selecting incompetent nurses.—*Id.*

HUMANITARIAN DOCTRINE.

See Railroads, ☞390.

HUSBAND AND WIFE.

See Banks and Banking, ☞129; Divorce, ☞252, 322; Dower; Homestead, ☞117; Marriage; Mechanics' Liens, ☞57; Principal and Agent, ☞22; Witnesses, ☞56.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

☞14(2) (Or.) An estate by the entirety is recognized in Oregon.—*Chase v. McKenzie*, 159 P. 1025.

☞19(1) (Utah) To make either spouse liable for goods furnished the other, the relation of husband and wife must exist and the indebtedness must be for legitimate and proper family expenses.—*Berow v. Shields*, 159 P. 538.

☞19(3) (Utah) Under Comp. Laws 1907, § 1206, while liability of husband for family expenses incurred by his wife may exist during a temporary separation, no liability can exist where the separation is permanent in its nature; no "family" then existing.—*Berow v. Shields*, 159 P. 538.

☞19(14) (Utah) Under Comp. Laws 1907, § 1206, providing that both husband and wife shall be liable for indebtedness for family expenses incurred by either, the question whether the indebtedness was for necessities is immaterial if it was for proper family expenses.—*Berow v. Shields*, 159 P. 538.

☞23¾ (Cal. App.) Where defendant's wife gave her note as part of the price of an automobile purchased by and delivered to her, the balance being charged to her personally, held, the vendor could not, on husband's alleged admissions, hold him upon the contract in view of Civ. Code, § 158, and Code Civ. Proc. § 1835.—*Rouillard v. Gray*, 159 P. 457.

☞23¾ (Wash.) A husband cannot be held liable personally for his wife's note without plaintiff's showing whether the husband knew of it, authorized it, or ratified it, or whether the community estate ever got the proceeds.—*Balkema v. Grolimund*, 159 P. 127.

The presumption is that a wife has no right to disburse family money except for necessities.—*Id.*

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

☞47(1) (Cal. App.) By Civ. Code, § 158, either husband or wife may enter into any engagement or transaction with the other respecting property which they might if unmarried, and a husband may convey realty or personally to his wife.—*Crowley v. Savings Union Bank & Trust Co.*, 159 P. 194.

☞48(1) (Wash.) Burden is on husband to show that transfer to him by his wife for inadequate consideration was made freely and that the transaction was fair.—*Thompson v. Brozo*, 159 P. 105.

☞52 (Wash.) Wife who conveyed to husband on his proposition that if she would do so he would secure divorce on lesser grounds than adultery, having choice to contest the divorce and secure property settlement through courts, or to accept decree on lesser grounds, held un-

able to set aside the conveyance for fraud and duress.—*Thompson v. Brozo*, 159 P. 106.

In wife's action to set aside for fraud and duress her deed of community property to her husband, made in anticipation of divorce, where the decree was not attacked, nor did the wife complain of the grounds upon which it rested the court's refusal to admit her testimony as to her husband's treatment of her throughout their married life was proper.—*Id.*

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

☞131(3) (N.M.) Under Code 1915, §§ 2757, 2758, 2764, property acquired by a wife under the Desert Land Act, for which she received a patent, will be conclusively presumed in favor of an incumbrancer in good faith and for a valuable consideration to be her separate property.—*State Nat. Bank of Artesia v. T aylor*, 159 P. 1006.

☞133(1) (Cal.App.) In widow's action against bank for a decree adjudging her the owner of an undivided half interest in notes and mortgages, evidence held to support findings that plaintiff was the owner of such an interest as her separate property; the bank, as executor of her deceased husband, being the owner of a like interest.—*Crowley v. Savings Union Bank & Trust Co.*, 159 P. 184.

(C) Liabilities and Charges.

☞149(1) (N.M.) Under Code 1915, §§ 2757-2759, 2762, 2764, and 2765, creditors of a debtor husband cannot reach his property, which was purchased by the wife with money borrowed on her personal credit, and which was repaid out of her separate estate.—*Morris v. Waring*, 159 P. 1002.

VI. ACTIONS.

☞232(3) (Cal.App.) Evidence held to justify decree that wife took deed to land from husband and held an undivided one-half thereof for his use and benefit.—*Hagan v. Hagan*, 159 P. 825.

☞238(2) (Cal.) In an action by a husband and wife for injuries sustained by the wife, there can be no recovery for expenses incurred by the husband or for the value to him of his wife's services, etc.—*Easton v. United Trade School Contracting Co.*, 159 P. 597.

VII. COMMUNITY PROPERTY.

☞262(1) (Wash.) An automobile, acquired after marriage, is presumptively community property, although prior to its acquisition certain property has been divided between the husband and wife under Rem. & Bal. Code, § 8766.—*Marston v. Rue*, 159 P. 111.

☞262(2) (Cal.App.) Under Civ. Code, §§ 164, 686, where husband, with consent of wife, drew money from their joint savings account, whether husband intended to transmute money into separate or community property was immaterial; there being presumption the wife's interest in the investment was that of a tenant in common.—*Crowley v. Savings Union Bank & Trust Co.*, 159 P. 194.

☞262(2) (Wash.) Where a husband asserts exclusive title to property bought after marriage, the burden of proof is on him to show it was not acquired as community property.—*Marston v. Rue*, 159 P. 111.

☞264 (Wash.) In replevin by husband of automobile sold by wife as community property, evidence held to support finding that it was a family asset.—*Marston v. Rue*, 159 P. 111.

☞265 (Wash.) A wife's rights in family personality are not of the contingent sort, like dow-

er or survivorship, but a present estate.—*Marston v. Rue*, 159 P. 111.

Where a husband gave an automobile which was community property to his mistress, and, returning to Alaska left it at a garage subject to her order, the wife had the right to take it from the garage.—*Id.*

☞267(1) (Wash.) Although by statute the husband is made manager with power to sell and dispose of community personality, he cannot waste it or give it away, especially to evil associates.—*Marston v. Rue*, 159 P. 111.

☞267(2) (Wash.) A wife may, if reasonable prudence require, sell perishable personality of the community, such as an automobile, in case of husband's absence.—*Marston v. Rue*, 159 P. 111.

A sale by wife of community personality is not voidable by husband because of insufficient consideration, where the consideration was not fraudulently low.—*Id.*

☞267(8) (Wash.) In a plain case of wrongful giving away of community personality by husband, the wife may have redress either by damages or by recovery of the thing itself from his fraudulent donee.—*Marston v. Rue*, 159 P. 111.

The vendee of community personality is not affected by mental reservations of the selling spouse.—*Id.*

☞270(7) (Wash.) Complaint in action to recover interest of plaintiff's deceased mother in community property undisposed of by divorce decree held to sufficiently allege such community property was not brought into such divorce action and disposed of by the decree.—*Harvey v. Pocock*, 159 P. 771.

☞270(8) (Wash.) Where a wife seeks to interfere with a husband's disposal of community personality, she has the burden of proof.—*Marston v. Rue*, 159 P. 111.

The title of those buying from a wife community personality in her husband's absence is not presumptively good, as she can deliver title in only an unusual situation; and they have the burden of proving the exception.—*Id.*

☞272(1) (Wash.) Community property undisposed of by decree of divorce remains undisturbed so far as the respective interests of the members of the community therein are concerned, and is recoverable in another action; personal property of one spouse constituting no exception.—*Harvey v. Pocock*, 159 P. 771.

X. ENTICING AND ALIENATING.

☞333(4) (Wash.) Defendant's letter to wife of plaintiff suing for alienation of affections, expressing his affection for her is admissible; whether, as claimed by defendant, it was written at plaintiff's request to aid in getting a divorce, being a question for the jury.—*Backman v. Holman*, 159 P. 125.

IDEM SONANS.

See Names, ☞16.

IDENTITY.

See Judgment, ☞685, 624, 956.

ILLEGALITY.

See Contracts, ☞108-138.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPEACHMENT.

See Criminal Law, ☞942; Witnesses, ☞330.

IMPLIED CONTRACTS.

See Account Stated; Contracts, **§27**; Money Received.

IMPRISONMENT.

See Arrest; Habeas Corpus.

IMPROVEMENTS.

See Constitutional Law, **§290**; Highways, **§107-122**; Mechanics' Liens; Municipal Corporations, **§70, 269-513, 768**.

IMPUTED NEGLIGENCE.

See Negligence, **§89, 93, 136**.

INADEQUATE DAMAGES.

See New Trial, **§75**.

INCEST.

See Criminal Law, **§369**.

INCRIMINATION.

See Criminal Law, **§393**.

INCUMBRANCES.

See Covenants, **§96**; Homestead, **§117**.

INDEMNITY.

See Guaranty; Principal and Surety.

§14 (Wash.) Insurance agents, tendered by their company the defense of action on policies which they failed to cancel as directed, though refusing it, are bound by the judgment on the question litigated of due proof of loss.—*National Union Fire Ins. Co. of Pittsburg v. Dickinson*, 159 P. 125.

INDEPENDENT CONTRACTORS.

See Master and Servant, **§367**; Negligence, **§55**.

INDIANS.

See Divorce, **§57**; Limitation of Actions, **§72**; Marriage, **§38, 40**; Taxation, **§210**.

§13 (Okla.) Act Cong. May 27, 1908, § 3, does not establish that one enrolled on records of commissioner of Five Civilized Tribes as 9 years old was a minor when he made a conveyance one month less than 12 years thereafter.—*Heffner v. Harmon*, 159 P. 650.

§13 (Okla.) Commissioner of Five Civilized Tribes, Commissioner of Indian Affairs and Secretary of Interior have duty of allotting lands in Indian Nation, and their action will not be reviewed unless they have committed error of law, have been imposed on by fraud, or are guilty of fraud.—*Higgins v. Waters*, 159 P. 1129.

The courts will not disturb decisions of the allotting powers where their findings in allotting Indian lands are based on testimony submitted and no fraud or error of law is apparent.—*Id.*

In a suit involving allotment of lands to Indians, the decision of the allotting authorities held warranted under the evidence and the law.—*Id.*

§15(1) (Okla.) Where allotted and inherited lands of minor Creek freedman allottee are sold by his guardian through the county court, there is a mere change in form of property, which is still charged with the trust, and is subject to court's jurisdiction during minority of ward.—*Brewer v. Dodson*, 159 P. 329.

Judgment, conferring rights of majority on minor Creek freedman allottee, regardless of fraud, is void in so far as it empowers him to transact business as adult with reference to

proceeds of allotted and inherited lands, or to personally maintain action therefor.—*Id.*

§15(2) (Okla.) Under Act Cong. April 26, 1906, § 22, the deed of a full-blood Indian husband succeeding to possession of his wife's allotment on her death by curtesy must have been approved by the Secretary of the Interior to be valid; he being an "heir" under such statute.—*Zimmerman v. Holmes*, 159 P. 803.

§27(2) (Okla.) Under Act Cong. May 27, 1908, district court cannot decree judgment of \$672 a lien against rents and profits accruing from allotment of minor Creek freedman.—*Tiger v. Read*, 159 P. 499.

INDICTMENT AND INFORMATION.

See Adultery; Intoxicating Liquors, **§202**; Threats, **§6**.

V REQUISITES AND SUFFICIENCY OF ACCUSATION.

§111(1) (Cal.App.) An indictment for fishing in violation of Pen. Code, § 636, need not negative defendant being a member of the game and fish commission, excepted by subdivisions 10 and 12.—*People v. Anderson*, 159 P. 211.

VI JOINDER OF PARTIES, OFFENSES AND COUNTS, DUPLICITY, AND ELECTION.

§125(4) (Wash.) Under 3 Rem. & Bal. Code, § 5933, subd. 1, as to family desertion, an information may allege desertion and nonsupport, and it does not then charge two offenses.—*State v. Gipson*, 159 P. 792.

VII MOTION TO QUASH OR DISMISS AND DEMURRER.

§153 (Cal.App.) Where, on demurrer to information, court made order that demurrer was sustained, and directed that district attorney might file new information on proceedings had, or any other proceedings that he might elect, as prescribed by Pen. Code, § 1008, such order was sufficient to justify district attorney's proceeding further by procuring indictment.—*Ex parte June*, 159 P. 452.

IX. ISSUES, PROOF, AND VARIANCE.

§171 (Okla. Cr. App.) A conviction cannot be upheld where evidence wholly fails to establish offense charged in information.—*Taggart v. State*, 159 P. 940.

INDORSEMENT.

See Bills and Notes, **§343, 378**.

INDUSTRIAL ACCIDENT COMMISSION.

See Master and Servant, **§367**.

INFANTS.

See Adoption; Guardian and Ward; Indians, **§13**; Limitation of Actions, **§72**; Master and Servant, **§288**; Negligence, **§136**; Parent and Child.

II. CUSTODY AND PROTECTION.

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(Or.) Under Laws 1913, pp. 75, 76, §§ 1, 5, a mother did not forfeit her right to a pension by working away from the family some hours of the day, if such labor was necessary to contribute to their subsistence.—*Finley v. Marion County*, 159 P. 557; *In re Wolfe*, *Id.* 558.

Under Laws 1913, p. 75, an applicant's right to a mother's pension accrued from the date of her application in proper form.—*Id.*

Under Laws 1913, p. 75, the county court sitting as juvenile court can grant no other relief than that provided for in the act.—*Id.*

The passage of mother's pension act of 1915

did not repeal any provisions of the mother's pension act of 1913 so as to affect amounts then due and accrued under the 1913 act.—Id.

No person disqualified by the 1915 amendatory mother's pension act is entitled to have her pension continued after that law went into effect.—Id.

⚡19 (Cal.) Decision of the juvenile court, in a proceeding to have an infant declared an abandoned child, that it was not such is not binding on the superior court in a subsequent proceeding in guardianship.—In re Lew Choy Foon, 159 P. 440.

VII. ACTIONS.

⚡77 (Okla.) Where guardian of infant is removed for failure to account, and no successor is appointed, action on bond for benefit of infant may be brought by next friend.—First State Bank of Vinita v. Fay, 159 P. 505.

INFERIOR COURTS.

See Courts, ⚡190.

INFRINGEMENT.

See Trade-Marks and Trade-Names, ⚡95.

INHERITANCE.

See Descent and Distribution.

INHERITANCE TAX.

See Taxation, ⚡879, 893.

INITIATIVE AND REFERENDUM.

See Injunction, ⚡88; Statutes, ⚡35½, 180, 150.

INJUNCTION.

See Appeal and Error, ⚡100, 954; Counties, ⚡196; Intoxicating Liquors, ⚡269; Municipal Corporations, ⚡513; Nuisance, ⚡80; Trade-Marks and Trade-Names, ⚡95; Waters and Water Courses, ⚡177.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

⚡16 (Okla.) As Laws 1915, c. 117, § 1, authorizes any person aggrieved at the action of the county commissioners in allowing claims to appeal to the district court upon the filing of a required bond, equitable relief against apprehended action of the commissioners cannot be granted.—Black v. Geissler, 159 P. 1124.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

⚡47 (Okla.) Where oil refinery is in actual possession of land, claiming title, and adverse claimant takes forcible possession and, on being ousted, threatens to do so again, he should be restrained by injunction till title is determined.—Burnett v. Sapulpa Refining Co., 159 P. 360.

⚡52 (Or.) Cutting and removal of brush and timber in a swale through land which defendant had no right to use and which would allow a river to encroach on plaintiff's land held a willful trespass which equity would enjoin.—Mathews v. Chambers Power Co., 159 P. 564.

(E) Public Officers and Boards and Municipalities.

⚡88 (Wash.) The initiator of direct legislation under Const. art. 2, § 1, as amended in 1912, must proceed in accordance with the positive law prescribing the method of such legislation, and courts will interfere by injunction

in proper cases to prevent submission in disregard of such laws.—State v. Superior Court in and for Thurston County, 159 P. 92.

The courts will enjoin the publication at the expense of the state of a proposed preamble containing purely argumentative matter in support of an act initiated under Const. art. 2, § 1, as amended in 1912.—Id.

⚡88 (Wash.) A portion of the preamble in a proposed act initiated under Const. art. 2, § 1, amendatory to 3 Rem. & Bal. Code, § 6604, known as the Workmen's Compensation Act, containing argumentative matter was improper under Laws 1913, p. 418, providing for the publication of such arguments at the expense of proponent, and the publication of such preamble as a part of the proposed law at the expense of the state will be enjoined.—State v. Superior Court in and for Thurston County, 159 P. 101.

III. ACTIONS FOR INJUNCTIONS.

⚡128 (Okla.) Where party testifies that he is worth from \$12,000 to \$15,000, and trespass threatened by him will result in suspension of extensive oil refinery, finding that he could not respond in damages if trespass were carried out was warranted.—Burnett v. Sapulpa Refining Co., 159 P. 360.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

⚡132 (Okla. Cr. App.) A temporary injunction embodies a restraint which continues unless modified at hearing; while a restraining order is not an injunction at all, but merely an order to maintain matters in statu quo until the question can be determined.—Smith v. State, 159 P. 941.

⚡135 (Cal. App.) The grant of a preliminary injunction is addressed to the sound discretion of the court.—Temple v. Gordon, 159 P. 983.

⚡137(4) (Okla.) A temporary injunction should never be granted because of mere apprehension that injury will be done.—Burnett v. Sapulpa Refining Co., 159 P. 360.

⚡151 (Cal. App.) On motion for preliminary injunction, the court, to warrant its refusal, need not examine the merits, if the essential facts are in dispute.—Temple v. Gordon, 159 P. 983.

V. PERMANENT INJUNCTION AND OTHER RELIEF.

⚡191 (Or.) Injunction against cutting and removing brush and timber from banks of swale in plaintiff's land in order to prevent repetition of a former trespass in cutting brush and trees held properly made perpetual.—Mathews v. Chambers Power Co., 159 P. 564.

VII. VIOLATION AND PUNISHMENT.

⚡228 (Cal.) Code Civ. Proc. § 388, authorizes action against members, officers, etc., of association in associate name to restrain picketing, binding all members and officers, etc., having knowledge of an injunction granted.—Armstrong v. Superior Court of California, in and for City and County of San Francisco, 159 P. 1176.

⚡230(2) (Cal.) In contempt proceedings for violation of restraining order, allegation held to support finding that effective restraining order was made, though not stating specifically that bond was given.—Armstrong v. Superior Court of California, in and for City and County of San Francisco, 159 P. 1176.

⚡231 (Cal.) That restraining order is too broad is not ground for sustaining certiorari to review order adjudging defendant in contempt for violation of it, no question of jurisdiction being involved.—Armstrong v. Su-

perior Court of California, in and for City and County of San Francisco, 159 P. 1176.

INSANE PERSONS.

See Criminal Law, ¶354, 484.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Banks and Banking, ¶54; Corporations, ¶550, 563; Fraudulent Conveyances, ¶57.

INSTRUCTIONS.

To jury, see Criminal Law, ¶761-844; Trial, ¶191-296.

INSURANCE.

See Indemnity, ¶14; Money Received, ¶5; Trial, ¶391.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

¶76 (Wash.) Where the insurer denies the power of one assuming to write a policy as agent, the party so dealing with him must prove either that such person was the actual agent, or that the insurer is estopped to deny the agency.—*Violette v. Insurance Co. of the State of Pennsylvania*, 159 P. 896.

¶77 (Wash.) The insurer having appointed M., a woman, and its manager, having dealt with C., her husband, who conducted the business and wrote policies in the name of M., and held himself out as the agent, as against one dealing with him as such, the insurer was estopped to deny his authority.—*Violette v. Insurance Co. of the State of Pennsylvania*, 159 P. 896.

¶83(2) (Wash.) Insurance agents having, when directed by their company to cancel policies, undertaken to do so, cannot, when sued for loss from not doing so, deny it was their duty to do it.—*National Union Fire Ins. Co. of Pittsburg v. Dickinson*, 159 P. 125.

Evidence in action by an insurance company against its agents held to authorize a finding that they had not canceled policies as directed by it, or even used ordinary care to do so.—*Id.*

(B) Agency for Applicant or Insured.

¶96 (Cal.App.) Direction of owner of furniture to an insurance broker to take care of her insurance, and see that she was covered to a certain amount constituted the broker a general agent to keep her insured in such amount.—*Farrar v. Western Assur. Co.*, 159 P. 609.

¶112 (Cal.App.) A ratification of the action of an insurance broker in procuring a policy for the insured, though made subsequent to a loss, is valid.—*Farrar v. Western Assur. Co.*, 159 P. 609.

Insured, by filing her claim of loss and demanding payment, thereby ratified the action of her broker in accepting notice of cancellation and in procuring a policy in defendant, another company.—*Id.*

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

¶138(1) (Wash.) 3 Rem. & Bal. Code, § 6059-36, making it unlawful for an insurance company to write a policy unless countersigned by its duly authorized agent, does not make a policy signed by one assuming to act as agent, void, though he was not its licensed agent.—*Violette v. Insurance Co. of the State of Pennsylvania*, 159 P. 896.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

¶181 (Okl.) On death of principal an executor's bond furnished by a surety company

can earn no further premiums.—*American Surety Co. of New York v. Cabell*, 159 P. 862.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

¶229(1) (Wash.) Provision of policy requiring five days' written notice of cancellation may be waived by the insured.—*Violette v. Insurance Co. of the State of Pennsylvania*, 159 P. 896.

¶229(2) (Wash.) Where insurer ordered cancellation of policy requiring five days' written notice of cancellation, and the agent verbally notified the insured, who requested that the risk be written in another company, the first policy was canceled when the new policy issued.—*Violette v. Insurance Co. of the State of Pennsylvania*, 159 P. 896.

¶229(3) (Cal.App.) A general agent to keep one insured to a certain amount was authorized, as an incident of his employment, to accept and act upon a notice of cancellation, and to procure insurance in another company.—*Farrar v. Western Assur. Co.*, 159 P. 609.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(C) Matters Relating to Person Insured.

¶291(1) (Cal.App.) An applicant for life insurance is bound to disclose such changes in his physical condition pending the negotiation as would influence the insurer's judgment as to advisability of accepting risk.—*Security Life Ins. Co. of America v. Booms*, 159 P. 1000.

Under Civ. Code, § 2577, where application for life policy denied that applicant had any of certain diseases named, and after the application, and before delivery of the policy, she was attacked with typhoid fever, the policy was properly rescinded, in the absence of knowledge of the insurer of such sickness at the time of its delivery.—*Id.*

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(E) Nonpayment of Premiums or Assessments.

¶349(3) (Kan.) Where note is taken for life insurance premium and policy provides that note is not payment, but only extension of time, and that failure to pay at maturity shall forfeit policy, default in payment of note relieves insurer.—*Marshall v. Farmers' & Bankers' Life Ins. Co.*, 159 P. 17.

Where note is taken for life insurance premium, payable to agent, and is delivered to company, the company is the owner from the inception, and if note is not paid the forfeiture clause in the policy will protect the company.—*Id.*

Where note is taken for premium and is delivered to insurer, and agent is charged the company's part thereof, the charge to be remitted if note is not paid, the note belongs to insurer from inception of transaction, though payable to agent.—*Id.*

¶360(1) (Okl.) Where plaintiff insured in mutual fire insurance company was in default when fire occurred, subsequent payment of dues to bank, having no knowledge of loss, which payment was not accepted by the company, did not render it liable.—*Wolf v. German-American Farmers' Mut. Ins. Co.*, 159 P. 480.

XIV. NOTICE AND PROOF OF LOSS.

¶540 (Okl.) Substantial compliance with requirements of proof of loss is sufficient.—*Insurance Co. of North America v. Cochran*, 159 P. 247.

¶560(1) (Okl.) Where proof of loss, though defective, was retained by insurer and no com-

plaint made or notice given insured, defects were waived.—Insurance Co. of North America v. Cochran, 159 P. 247.

XVIII. ACTIONS ON POLICIES.

⚡645(3) (Okla.) Unless estoppel or waiver of conditions in a mutual fire insurance policy is distinctly pleaded by insured in action thereon, evidence thereof is inadmissible.—Wolff v. German-American Farmers' Mut. Ins. Co., 159 P. 480.

⚡665(2) (Cal.App.) Evidence in action for amount of a fire policy upon certain furniture, held to sustain finding that it was covered by a parol contract of insurance at the time of the fire.—Farrar v. Western Assur. Co., 159 P. 609.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

⚡693 (Kan.) Since Laws 1898, c. 23, providing for fraternal benefit societies, took effect, constitutions of societies theretofore organized are to be treated as charters under the act so far as they relate to the same subjects.—Kirkpatrick v. Abrahams, 159 P. 13.

Plan of organization of fraternal benefit society set forth in its constitution cannot be amended by simple by-law not enacted according to provision of constitution relating to its amendment.—Id.

By-law of benefit society, providing that appointments by the National President to certain committees shall not become effective until approved by the National Council, contravenes provision of constitution of the order, giving president unconditional power to make such appointments.—Id.

(B) The Contract in General.

⚡712 (Cal.App.) It is presumed that the right of an insurance company of another state to make by-laws is governed by the laws of that state, with which, as provided by Civ. Code, § 801, they must not be inconsistent.—Garrett v. Garrett, 159 P. 1050.

⚡723(2) (Kan.) Absolute literal interpretation must not be placed on provisions of life policy with respect to untruthful answers, and where there is no suppression of facts, and death results from causes wholly unrelated to that about which alleged untruthful answer was given, defense based thereon cannot avail.—Farragher v. Knights and Ladies of Security, 159 P. 3.

(C) Beneficiaries and Benefits.

⚡781 (Cal.App.) Under Code Iowa, § 1789, authorizing change of beneficiary at the pleasure of insured, by-law requiring consent of association to change of beneficiary is invalid.—Garrett v. Garrett, 159 P. 1050.

⚡782 (Cal.App.) A complaint, alleging that deceased, pursuant to an antenuptial agreement, made plaintiff his beneficiary in an insurance policy, but later substituted his children as beneficiaries, states a cause of action against the children.—Freitas v. Freitas, 159 P. 611.

⚡784(1) (Cal.App.) Presentation to insurance company of original certificates of membership with indorsement of change of beneficiary was as effective as presentation of copies required by by-laws, especially where company stated that it had made copies for its records.—Garrett v. Garrett, 159 P. 1050.

Where insured having right to change beneficiary has done all in his power, there is an effectual change of beneficiary.—Id.

⚡789(1) (Okla.) Where beneficiary of fraternal benefit certificate made proofs of death in accordance with rules of association, its officers could not require additional proofs not authorized by its laws and regulations.—Haskew v. Knights of Modern Maccabees, 159 P. 493.

⚡789(2) (Okla.) Where proofs of death are retained without condition or objection except to make additional demands which association had no authority to make, it waives any objections to the proofs.—Haskew v. Knights of Modern Maccabees, 159 P. 493.

(F) Actions for Benefits.

⚡805(1) (Okla.) Failure of fraternal association to comply with by-laws as to disapproval of death claims excuses beneficiary from compliance with provision requiring claims to be submitted to proper tribunals within order before suit on certificate.—Haskew v. Knights of Modern Maccabees, 159 P. 493.

⚡817(1) (Okla.) In action on fraternal benefit certificate, plaintiff must prove reasonable compliance with requirements of association as to furnishing proofs of loss.—Haskew v. Knights of Modern Maccabees, 159 P. 493.

⚡817(2) (Okla.) In an action on a benefit certificate, where liability was denied on the ground of a false statement in the application and plaintiff claimed that insured did not execute the application, defendant has the burden of proving insured's execution of the application and the falsity of the statement.—Sovereign Camp of Woodmen of the World v. Hutchins, 159 P. 920.

⚡819(2) (Kan.) In action on benefit certificate, evidence held to sustain finding that defendant failed to show intentional suppression of any circumstance which deceased naturally supposed would tend to influence defendant.—Farragher v. Knights and Ladies of Security, 159 P. 3.

INSURANCE COMMISSIONER.

See Counties, ⚡24.

INTENT.

See Constitutional Law, ⚡13; Criminal Law, ⚡21, 371; Estoppel, ⚡53; Fraud, ⚡42; Fraudulent Conveyances, ⚡158, 282, 298; Intoxicating Liquors, ⚡188, 202; Statutes, ⚡181; Wills, ⚡72.

INTEREST.

See Appeal and Error, ⚡54; Mandamus, ⚡23; Usury.

INTERLOCUTORY JUDGMENT.

See Judgment, ⚡564.

INTERNAL REVENUE.

See Intoxicating Liquors, ⚡236.

INTERROGATORIES.

See Depositions; Discovery.

INTERSTATE COMMERCE.

See Commerce.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

V. REGULATIONS.

⚡126 (Wash.) The words "druggist or pharmacist," as used in Laws 1915, p. 2, permitting the sale of intoxicating liquors by druggists or pharmacists only, means such druggists or pharmacists as are actively engaged in business and the possession of an excess quantity of liquor by a registered pharmacist not engaged in business is unlawful.—State v. Martin, 159 P. 88.

VI. OFFENSES.

☞138 (Cal.) An ordinance, making it a misdemeanor to transport intoxicating liquors to certain prohibited places, construed to apply only where there is evidence of a wrongful intent, not where the act is merely inadvertent.—*Ex parte Ahart*, 159 P. 160.

☞139 (Wash.) Initiative Measure No. 3, Laws 1915, p. 2, § 22, making it unlawful to have possession of over a certain amount of intoxicating liquor, does not render unlawful the possession of a greater amount if acquired prior to the act's effective date and held only for personal use.—*State v. Eden*, 159 P. 700.

VIII. CRIMINAL PROSECUTIONS.

☞202 (Cal.) A complaint that defendant "willfully and unlawfully" transported intoxicating liquors sufficiently charges a wrongful intent.—*Ex parte Ahart*, 159 P. 160.

☞236(1) (Okla.Cr.App.) In a prosecution for unlawfully conveying intoxicating liquor, evidence held sufficient to sustain conviction.—*Mocabee v. State*, 159 P. 944.

☞236(5) (Okla.Cr.App.) Sess. Laws, 1913, c. 26, § 6, declaring that the keeping in excess of a certain amount of intoxicating liquors shall be prima facie evidence of an intention to convey or dispose of such liquors, does not render it obligatory on the jury to convict, though defendant does not offer rebutting evidence, but merely makes such evidence sufficient to authorize conviction.—*Butler v. State*, 159 P. 1090.

☞236(6) (Okla.Cr.App.) Proof of possession of large quantities of intoxicating liquors and of a federal retail liquor license is, in absence of reasonable explanation, sufficient to warrant conviction for violation of prohibitory law.—*Rhoads v. State*, 159 P. 945.

☞236(7) (Okla.Cr.App.) Proof of possession of intoxicating liquors of any kind at a place where such liquors are kept and sold is, in absence of reasonable explanation, sufficient to warrant conviction of violation of prohibitory law.—*Rhoads v. State*, 159 P. 945.

☞236(7) (Okla.Cr.App.) In a prosecution for having possession of intoxicating liquors with intent to sell same, evidence held to sustain a conviction.—*Nichols v. State*, 159 P. 1091.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

☞247 (Wash.) The provisions of Laws 1915, p. 2, prohibiting the possession of excess quantities of intoxicating liquor, operates in rem so that any such quantity is contraband and subject to condemnation, regardless of the finding as to the owner.—*State v. Martin*, 159 P. 88.

☞250 (Wash.) Intoxicating liquors in the possession of any person in excess of the quantities allowed by Laws 1915, p. 2, regulating the sale and use of intoxicating liquors, is presumed to be contraband, and the burden is on the owner to justify his possession of such liquors.—*State v. Martin*, 159 P. 88.

☞251 (Wash.) Under Laws 1915, p. 2, regulating the sale and use of intoxicating liquor, a registered pharmacist not actually engaged in business cannot reclaim an excess quantity of liquors seized, on the ground that he intends to keep them for private consumption.—*State v. Martin*, 159 P. 88.

X. ABATEMENT AND INJUNCTION.

☞269 (Okla.Cr.App.) District courts have jurisdiction of injunction proceedings to abate as a nuisance places where persons congregate for the purpose of drinking.—*Smith v. State*, 159 P. 941.

INTOXICATION.

See Criminal Law, ☞56, 814; Homicide, ☞28, 180.

INVITED ERROR.

See Criminal Law, ☞1137.

IRRIGATION:

See Waters and Water Courses, ☞216-257.

JOINDER.

See Action, ☞50.

JOINT AND SEVERAL CONTRACTS.

See Contracts, ☞184; Judgment, ☞628.

JOINT DEBTORS.

See Bills and Notes, ☞120.

JOINT LIABILITIES.

See Partnership, ☞165.

JOINT RESOLUTIONS.

See Statutes, ☞220.

JOINT TENANCY.

See Banks and Banking, ☞129; Taxation, ☞879.

JUDGES.

See Criminal Law, ☞655; Justices of the Peace; Witnesses, ☞246.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

☞4 (Wash.) Const. art. 4, § 17, providing that no person shall be eligible to the office of judge of the Supreme Court unless he shall have been admitted to practice in the state courts, makes ineligible an attorney suspended from the bar for one year; suspension during its operation being in effect disbarment.—*State v. Monfort*, 159 P. 889.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

☞22(5) (Okla.) Salary of judge of superior court of Custer county is governed by General Fee and Salary Bill, § 28, fixing salaries of judges of superior courts according to population of counties.—*Board of Com'rs of Custer County v. Lawter*, 159 P. 289.

JUDGMENT.

See Execution; Limitation of Actions, ☞2; Mandamus, ☞61, 54; Pleading, ☞8, 343-350.

For judgments in particular actions or proceedings, see also the various specific topics.
For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

☞17(4) (Or.) Under L. O. L. §§ 61, 181, 188, plaintiff, though service cannot be obtained on all those jointly liable on contract, may have judgment against all.—*Anderson v. Stayton State Bank*, 159 P. 1033.

☞24 (Cal.App.) A judgment of a competent court, such as it was authorized to make, on a subject-matter within its jurisdiction, against a party properly before it, appearing on the face of the judgment roll, is not void.—*California Central Creameries Co. v. Crescent City Light, Water & Power Co.*, 159 P. 209.

IV. BY DEFAULT.

(A) Requisites and Validity.

☞94 (Cal.) A so-called cross-complaint, seeking rescission of sale contract for fraud and return of money paid, is not an action arising on contract for money or damages only within

Code Civ. Proc. § 585, and the clerk's entry of default thereon is void, and may be disregarded or set aside.—*Farrar v. Steenbergh*, 159 P. 707.

⇒120 (Cal.) In entering default judgment as provided for by Code Civ. Proc. § 585, the clerk acts ministerially and without judicial functions, and must conform strictly to the statute, or his proceedings are void.—*Farrar v. Steenbergh*, 159 P. 707.

(B) Opening or Setting Aside Default.

⇒143(17) (Cal.) Vacating default entered on cross-complaint is justified where the cross-complaint was entitled "answer" and was long and involved, and the only indication of its character was allegation of matter appropriate to a counterclaim as constituting a cross-complaint, in view of supposed friendly relations of the attorneys and stipulations for trial filed before default.—*Farrar v. Steenbergh*, 159 P. 707.

Courts should not encourage practices of attorneys in securing defaults by misleading the adverse attorneys by labeling a cross-complaint an "answer" and by breach of stipulations for trial on a certain date.—*Id.*

⇒143(17) (Cal.App.) Setting aside a default judgment is within court's discretion, where there was no direct denial of defendant's claim that he orally stipulated with a deceased attorney for plaintiff that no judgment would be entered against him and where none was entered for several years after such attorney's death.—*MacGillivray v. Owen*, 159 P. 452.

⇒159 (Cal.) That an affidavit for vacation of default did not specifically allege that the attorney had no knowledge that a pleading entitled "answer" was in fact a cross-complaint until too late to answer it, does not render it insufficient, where the facts alleged justified a clear inference to that effect.—*Farrar v. Steenbergh*, 159 P. 707.

⇒162(1) (Cal.) While it is not competent to try merits of defense upon hearing of motion to open default, plaintiff may always rebut if possible excuse offered by defaulting party.—*McDonald v. McDonald*, 159 P. 426.

⇒163 (Cal.) On motion to open default courts will not examine into truth of defense, where an affidavit of merits contains statement of facts sufficient to constitute defense.—*McDonald v. McDonald*, 159 P. 426.

VI. ON TRIAL OF ISSUES.

(C) Conformity to Process, Pleadings, Proof, and Verdict or Findings.

⇒251(1) (Okla.) A judgment which is entirely outside the issues raised by the pleadings should be reversed.—*Champion v. Oklahoma City Land & Development Co.*, 159 P. 854.

⇒251(1) (Okla.) That part of a judgment in an ancillary suit by a receiver to obtain possession of property which appointed the receiver permanent custodian is beyond the issues and will be set aside, the extent of the power of the receiver being properly justiciable in the main action.—*Severns v. English*, 159 P. 917.

⇒252(2) (Cal.) Under Code Civ. Proc. § 580, defendant, by answering, may enlarge the scope of the relief to any extent consistent with the pleadings and embraced within the issue.—*Woods Central Irrigating Ditch Co. v. Porter Slough Ditch Co.*, 159 P. 427.

VII. ENTRY, RECORD, AND DOCKETING.

⇒279 (Cal.App.) Direction of court to counsel to prepare findings is not part of the judgment roll; Code Civ. Proc. § 870, enumerating other papers as constituting it.—*California Central Creameries Co. v. Crescent City Light, Water & Power Co.*, 159 P. 200.

⇒279 (Nev.) Judgment roll includes pleadings and judgment.—*Glock v. Elges*, 159 P. 629.

IX. OPENING OR VACATING.

⇒363 (Okla.) A judgment will not be vacated because defendant or his attorney was not notified of the time the case was set for trial.—*Tracy v. State*, 159 P. 496.

⇒384 (Okla.) A defendant's motion to vacate a judgment must set up a valid defense.—*Tracy v. State*, 159 P. 496.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

⇒407(2) (Okla.) The enforcement of an alleged void judgment will not be enjoined, where plaintiff had an adequate and complete remedy at law by proceeding to vacate the judgment, of which he had not availed himself or been deprived.—*Frost v. Akin*, 159 P. 762.

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

⇒485 (Cal.App.) To hold a judgment void on its face the fact must appear from an inspection of the judgment roll.—*California Central Creameries Co. v. Crescent City Light, Water & Power Co.*, 159 P. 200.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

⇒533 (Cal.App.) An adjudication that plaintiff's predecessor was granted only a life estate in certain lots except one, as to which no determination was made, did not operate to decree in him the absolute title to that lot.—*Whitcomb v. Worthing*, 159 P. 612.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

⇒563(1) (Wash.) A court cannot assume that another court has adjudicated anything not expressly comprehended in its judgment.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

⇒564(2) (Cal.App.) An interlocutory decree finding that plaintiff was not entitled to an accounting or to have trustees removed, but that defendants held property as trustees for plaintiff, is not a final adjudication of the rights of the parties nor conclusive against right to accounting two years later.—*Schneider v. Moncur*, 159 P. 459.

⇒570(11) (Okla.) Where plaintiff is allowed to dismiss without prejudice before expiration of time for election to plead, after order sustaining demurrer, such order will not defeat another action in another court on the same facts as set forth in the petition demurred to.—*Lisle v. Anderson*, 159 P. 278.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

⇒585(4) (Cal.) Where defendants had brought a prior action to quiet title to the land which plaintiff held under alleged right of location, defendants having a patent from the government, and such action resulted in defendants' favor, it was res adjudicata in plaintiff's action to quiet title to the same land.—*Vore v. Ephraim*, 159 P. 719.

⇒585(4) (Wash.) In an action for the rent of furniture, owner's claim held not barred by his failure to set it up as defense in a former suit, in which the owners of the apartment in which the furniture was in use recovered judgment against him for rentals of the apartment for two months.—*Munson v. Baldwin*, 159 P. 1070.

(C) Persons Who may Take Advantage of the Bar.

⇒624 (Cal.) Where a second action was not between the same parties as a first, demurrer to

the plea in abatement grounded on judgment in the first action was properly sustained.—Cobe v. Crane, 159 P. 587.

⚡628 (Or.) If judgment is obtained without objection against less than all of those jointly liable on a joint contract, the entire debt is merged in the judgment.—Anderson v. Stayton State Bank, 159 P. 1033.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) Persons Concluded.

⚡682(1) (Nev.) One who purchases property after a suit in which the title to it is involved is privy to the judgment, which is admissible in his replevin action against the plaintiff in the former suit to show title and right of possession in such plaintiff.—Bank of Italy v. Burns, 159 P. 803.

⚡682(1) (Okla.) Judgment in ejectment by grantee in champertous deed is not conclusive in subsequent action by grantors in a champertous deed for the use and benefit of the grantee for the same land.—Butler v. Fryer, 159 P. 367.

There is no such privity of estate between the grantee in a champertous deed and his grantor as to render judgment in ejectment by the grantee conclusive in subsequent action by grantors for possession.—Id.

(C) Matters Concluded.

⚡743(2) (Cal.App.) Judgment against city in action to quiet title from which no appeal was taken estopped it in its condemnation proceeding from claiming as against the successor of the plaintiff in the former action that it was the owner of the parcel.—City of Los Angeles v. Moore, 159 P. 872.

⚡743(2) (Or.) Decree of title in R. in suit between E. and R. held to estop E., suing to enjoin a city, grantee of R., from paying R. the purchase price, to assert that R. had no title.—Elwert v. Knapp, 159 P. 1027.

XV. LIEN.

⚡766 (Or.) Where judgment of the United States court was not docketed in the county where land was situated until long after conveyance from judgment debtor to purchaser, there was no imputed notice to the purchaser of the determination of the cause in the United States court, under L. O. L. §§ 210-212.—Sabin v. Kyniston, 159 P. 69.

⚡779(2) (Wash.) Where an action to rescind a sale of land and to quiet title was brought against the vendees and their attaching creditor, and by stipulation between plaintiff and vendees a decree was entered as prayed, a subsequent judgment in the attachment suit, the attachment having been dissolved, was not a lien on the land.—Danner v. Ritchie, 159 P. 87.

XVII. FOREIGN JUDGMENTS.

⚡828(1) (Or.) Judgment of state court in an action in which a trustee in bankruptcy is a party and appears and contests bankrupt's property rights is conclusive upon bankrupt's estate and estops his creditors from controverting such final determination even in federal court which has secured jurisdiction of bankruptcy proceeding.—Van Zandt v. Parson, 159 P. 1153.

XXI. ACTIONS ON JUDGMENTS.

(A) Domestic Judgments.

⚡903 (Okla.) Action may be maintained on judgment, though the judgment creditor has right to issue execution thereon.—Davis v. Foley, 159 P. 646.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

⚡951(2) (Okla.) In actions for conversion, exclusion of records and files in former suit plead-

ed in estoppel was error.—Pierce v. Barks, 159 P. 828.

⚡956(2) (Cal.App.) Under plea of former adjudication of title to a parcel of land involved in city's condemnation proceeding, the pleadings and findings in an action by defendant's predecessor to quiet title against the city were admissible to illustrate the issues presented in the former suit.—City of Los Angeles v. Moore, 159 P. 872.

JUDGMENT ROLL.

See Judgment, ⚡279.

JUDICIAL NOTICE.

See Evidence, ⚡23.

JUDICIAL POWER.

See Constitutional Law, ⚡68, 70.

JUDICIAL SALES.

See Bankruptcy, ⚡200; Execution, ⚡242-275; Guardian and Ward, ⚡107, 108.

JURISDICTION.

See Admiralty; Appeal and Error, ⚡21, 23, 185, 1198; Appearance; Arbitration and Award, ⚡73; Bankruptcy, ⚡296; Certiorari, ⚡28; Contempt; Courts; Criminal Law, ⚡84-94, 257, 1018; Divorce, ⚡57, 327; Equity; Justices of the Peace, ⚡53; Taxation, ⚡588.

JURY.

See Criminal Law, ⚡957; Trial, ⚡189-178, 370.

II. RIGHT TO TRIAL BY JURY.

⚡10 (Wash.) Although the Constitution provides that the right to jury trial shall remain inviolate (Const. art. 1, § 21), that provision applies only where the right existed on adoption of the Constitution, so that, no provisions as to license of physician and revocation of license having then existed, no constitutional right to jury trial in such case exists.—State Board of Medical Examiners v. Macy, 159 P. 801.

⚡14(1) (Wash.) Rem. & Bal. Code, § 8399, providing for trial de novo on appeal from medical board in license revocation proceedings, and that they shall stand for trial as ordinary civil actions, does not give the right to a jury trial; "civil action" being a generic term, not necessarily implying jury trial.—State Board of Medical Examiners v. Macy, 159 P. 801.

⚡14(9) (Cal.) In suit to quiet title by a plaintiff in possession, the judgment making no mention of possession, defendants were not entitled to a jury trial.—Cobe v. Crane, 159 P. 587.

⚡19(3) (Utah) Upon questions of fact raised in a mandamus proceeding, either party is entitled to a jury trial.—Ketchum Coal Co. v. Christensen, 159 P. 541.

⚡19(11) (Utah) District court's determination of both the issues of title and of damages in a condemnation action would not necessarily deprive a party of a jury trial.—Ketchum Coal Co. v. District Court of Carbon County, 159 P. 737.

⚡28(7) (Wash.) Where the court under Rem. & Bal. Code, § 422, takes jurisdiction to determine a controversy upon the failure of arbitrators to return a proper award, the trial must be without jury.—Dickie Mfg. Co. v. Sound Construction & Engineering Co., 159 P. 129.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

⚡118 (Ariz.) Under Pen. Code 1913, §§ 1017, 1018, challenge to the panel must set forth facts showing material departure from pre-

scribed forms for drawing and return of jury.—*Talley v. State*, 159 P. 59.

JUSTICES OF THE PEACE.

See Criminal Law, ¶90, 257, 1018; New Trial, ¶2; Statutes, ¶64, 73, 125, 138.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

¶2 (Wash.) Under Laws 1899, p. 135, and Const. art. 4, § 10, as to police judges and justices of the peace in cities of the first class, the justice who is appointed police judge holds but one office.—*State v. Superior Court of Pierce County*, 159 P. 84.

A justice of the peace takes his office and powers from Constitution and Legislature, and neither can be taken away, except as provided by law.—*Id.*

¶8 (Or.) Within Const. art. 7, §§ 1, 2, as amended November 8, 1910, as to courts and tenure of judges, a justice's court is a "court," and a justice of the peace a "judge."—*Webster v. Boyer*, 159 P. 1166.

¶8 (Wash.) Laws 1915, p. 316, making term of justices of the peace four years, does not violate Const. art. 11, §§ 4, 5, requiring uniformity in county government, and article 6, § 8, requiring county officers to be elected biennially, such sections applying only to executive and administrative officers.—*State v. Hamilton*, 159 P. 370.

¶10 (Wash.) Under Laws 1899, p. 135, providing that in cities of the first class justices of the peace shall be elected at each general election, and the mayor shall within 10 days thereafter name one of them as police judge, and in view of Rem. & Bal. Code, § 3860, declaring the tenure of office of certain officers, the mayor cannot remove the police judge from office.—*State v. Superior Court of Pierce County*, 159 P. 84.

In the absence of legislation, power to remove a justice of the peace must be taken from the Constitution, which by article 5, §§ 2, 3, provides for removal only for misconduct or malfeasance, in the manner provided by law.—*Id.*

Under Const. art. 5, § 3, declaring that all incumbents of offices created or recognized by Constitution are subject to removal only as provided by law, justices of the peace, as judicial officers, cannot be removed from office arbitrarily by the mayor, but only after clearly implied charge, hearing, and finding.—*Id.*

Removal of justice of peace from office of police judge by mayor who appointed him cannot be justified on the ground of public policy, in that the mayor is the chief executive, charged with enforcement of ordinances.—*Id.*

III. CIVIL JURISDICTION AND AUTHORITY.

¶53 (Cal.App.) Under Code Civ. Proc. §§ 832, 848, if an obligation is incurred in the county of defendant's residence and he later removes, summons issued in justice court of residence and served in another county is valid.—*Roberts v. Superior Court of California, in and for Stanislaus County*, 159 P. 465.

¶53 (Ok.) Justice of the peace for one county is without jurisdiction to issue summons to defendant in another county wherein both parties are residents, wherein service was had; and judgment on such service is absolutely void.—*Haney v. De Long*, 159 P. 468.

IV. PROCEDURE IN CIVIL CASES.

¶72 (Cal.App.) Under Code Civ. Proc. §§ 832, 848, if an obligation is incurred in the county of defendant's residence and he later removes, there being no written contract, suit in justice court of such county is proper.—*Roberts v.*

Superior Court of California, in and for Stanislaus County, 159 P. 465.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

¶159(5) (Cal.App.) Under Code Civ. Proc. § 978a, notice of exception to sufficiency of sureties on an undertaking on appeal from judgment in justice court must be filed with justice, and it is not necessary that it be served upon party or his attorney.—*McCarty v. Superior Court in and for Los Angeles County*, 159 P. 736.

¶159(5) (Nev.) Where sureties, on appeal from justice to district court, are not excepted to within five days, as required by Rev. Laws, § 5792, district court acquires jurisdiction, notwithstanding appellant later admits due service of such exceptions before justice certifies case.—*Yowell v. District Court of Fourth Judicial District in and for Elko County*, 159 P. 632.

¶159(6) (Cal.App.) When it is demanded that sureties justify, under Code Civ. Proc. § 978a, on notice within five days after demand, it is no excuse for total failure of notice that traffic is halted by a storm; there being nothing to show that the notice could not have been given in some manner.—*Peters v. Superior Court of California in and for San Bernardino County*, 159 P. 875.

Under Code Civ. Proc. § 978a, as to justification of sureties, justification without notice to the adverse party is ineffective for any purpose, and the appeal must be considered as if no bond had ever been given.—*Id.*

¶159(6) (Cal.App.) Where parties having notice of time and place of justification of sureties on appeal from justice failed to appear they waived objection, and affidavits of sureties as to their qualifications are sufficient prima facie justification.—*Fletcher Collection Agency v. Superior Court of California in and for Los Angeles County*, 159 P. 1049.

¶159(6) (Nev.) Under Rev. Laws, § 5792, providing that appeal from justice to district court will be regarded as if no undertaking was given, unless challenged sureties justify after notice, etc., held such justification is necessary to district court's jurisdiction where sureties are properly challenged.—*Yowell v. District Court of Fourth Judicial Dist. in and for Elko County*, 159 P. 632.

¶161(3) (Ok.) On rendition of judgment by justice of the peace on void service of process, counsel for defendant who appeared specially to object to jurisdiction did not enter appearance on nonjurisdictional grounds by giving notice of appeal in open court.—*Haney v. De Long*, 159 P. 468.

¶164(4) (Cal.App.) Although Code Civ. Proc. § 975, requires the statement on appeal to the superior court to contain the grounds of appeal, and, conceding that a statement is insufficient, the court is not thereby deprived of its appellate jurisdiction.—*Fletcher Collection Agency v. Superior Court of California in and for Los Angeles County*, 159 P. 1049.

¶174(18) (Utah) Complaint in justice's court held to sufficiently allege that the injury was in the precinct of the suit to permit amendment on appeal to comply with Comp. Laws 1907, §§ 3668, 3685, 3685x, as to pleading in justices' courts, so that the judgment was not void.—*Heninger v. Oregon Short Line R. Co.*, 159 P. 904.

JUSTIFIABLE HOMICIDE.

See Homicide, ¶118, 800.

LACHES.

See Waters and Water Courses, ¶247.

LANDLORD AND TENANT.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

§25(1) (Wash.) Under the statutes an unacknowledged lease for over a year is void except as it creates a tenancy from month to month, or other rent period.—*Jamison v. Reilly*, 159 P. 699.

(B) Construction and Operation.

§49(2) (Wash.) Evidence held sufficient to sustain finding that landlord was entitled to damages for tenant's abandonment without just cause of leased premises.—*Brown v. Hayes*, 159 P. 89.

In an action for damages for the wrongful abandonment of leased premises, held, the exclusion of the rental value of premises and an order granting a nonsuit was error.—*Id.*

§49(3) (Wash.) Where a tenant abandons leased premises without just cause and the landlord re-enters, the measure of damages is not the rent reserved, but the difference between that amount and the rental value of the premises to the end of the term.—*Brown v. Hayes*, 159 P. 89.

III. LANDLORD'S TITLE AND REVERSION.

(A) Rights and Powers of Landlord.

§55(2) (Wash.) Under terms of lease of lot, tenant's use of it for depositing sand, gravel, etc., from excavation on its adjoining lot, all of which was removed except a small amount, held not such waste as would authorize forfeiture of the lease.—*Moore v. Twin City Ice & Cold Storage Co.*, 159 P. 779.

IV. TERMS FOR YEARS.

(D) Termination.

§94(1) (Wash.) A landlord, by recognizing an assignment of the lease and accepting rent from the sublessees, waives, as to the lessee, notice of the lease's termination.—*Jamison v. Reilly*, 159 P. 699.

§109(1) (Cal.) A surrender is the yielding up of an estate for life or years to the remaindermen or reversioner, and is created by law when parties to a lease do some act so inconsistent with the relation of landlord and tenant as to imply consent to termination thereof, and estop the parties to dispute the fact of surrender.—*Triest & Co. v. Goldstone*, 159 P. 715.

§109(1) (Wash.) A surrender of leased premises may be implied from acts and conduct of the parties indicating an intention on the part of the tenant to abandon, and on the part of the landlord to resume possession of the premises.—*Brown v. Hayes*, 159 P. 89.

§110(2) (Wash.) Where tenant surrenders keys but landlord refuses to accept possession except on condition that he find another acceptable tenant, he does not waive right to damages for abandonment of lease.—*Brown v. Hayes*, 159 P. 89.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§194(1) (Cal.) Facts held to show that there was a surrender of the premises to the landlord, after which the corporation tenant was released from any liability for rent.—*Triest & Co. v. Goldstone*, 159 P. 715.

The rule that where a tenant by lease specifically agrees to pay rent, he is not absolved from such obligation by assignment of his lease rights does not apply, where the transaction is not an assignment, but a surrender of the premises by operation of law.—*Id.*

§195(1) (Wash.) Where a tenant without just cause abandons leased premises and refuses

to pay rent, the landlord may either treat the term as still subsisting and sue for installments of rent as they accrue, or, treating the lease as terminated by the tenant's breach, re-enter and sue for damages.—*Brown v. Hayes*, 159 P. 89.

§208(1) (Wash.) A landlord, by recognizing the assignment of the lease and accepting rent from the sublessee, surrenders his right to collect rent from the lessee.—*Jamison v. Reilly*, 159 P. 699.

§213(3) (Wash.) Where defendant's check in payment for rent due contained a notation "Lot C," when that covered by the lease was "Lot A," not owned by the landlord, he must have known that the check was intended as a payment for "lot A."—*Moore v. Twin City Ice & Cold Storage Co.*, 159 P. 779.

(B) Actions.

§233(2) (Cal.) Whether there has been a surrender of the premises is a question of fact to be determined in the first instance by the trial court.—*Triest & Co. v. Goldstone*, 159 P. 715.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§288 (Wash.) The action of unlawful detainer is an exclusive legal substitute for the common-law right of personal re-entry for breach of lease covenants, and the serving of notice of default and notice to surrender on tenant is not a waiver of damages for subsequent abandonment of premises.—*Brown v. Hayes*, 159 P. 89.

X. RENTING ON SHARES.

§330(1) (Cal.App.) Under lease requiring lessee to cut and bale the alfalfa and deliver half as rent, he is the owner of crop till division, and so may sue another for its injury.—*Hicks v. Butterworth*, 159 P. 224.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, §238, 511; Receiving Stolen Goods; Robbery.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§1 (Okl. Cr. App.) Where evidence shows course of conduct between appellant and codefendants justifying conclusion that they were confederates in plan for codefendants to steal cattle and plaintiff to conceal and market them, appellant was properly prosecuted for larceny, not for receiving stolen property.—*Martin v. State*, 159 P. 940.

LAST CLEAR CHANCE.

See Railroads, §390.

LAUNDRIES.

See Master and Servant, §108.

LAW OF THE CASE.

See Appeal and Error, §1195.

LAWYERS.

See Attorney and Client.

LEADING QUESTIONS.

See Witnesses, §240.

LEASE.

See Landlord and Tenant.

LEAVE OF COURT.

See Receivers, ¶174.

LEGACY TAX.

See Taxation, ¶879, 893.

LEGISLATIVE DISTRICTS.

See States, ¶27.

LEGISLATIVE POWER.

See Constitutional Law, ¶63-77.

LEGISLATURE.

See Municipal Corporations, ¶64, 70.

LETTERS.

See Evidence, ¶271; Husband and Wife, ¶333; Threats, ¶6.

LIBEL AND SLANDER.**I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.**

¶15 (Okl.) When words in an alleged libelous article are unambiguous and expose a person to public hatred, contempt, ridicule, or obloquy, or tend to deprive him of public confidence, or injure him in his occupation, the article is libelous per se under Comp. Laws 1909, § 2338.—Dimmitt v. McDowell, 159 P. 290.

LIBERTY OF CONTRACT.

See Constitutional Law, ¶89.

LICENSES.

See Intoxicating Liquors, ¶236; Physicians and Surgeons, ¶11; Railroads, ¶358.

LIENS.

See Agriculture; Attorney and Client, ¶182-192; Brokers, ¶77; Chattel Mortgages, ¶138-150; Judgment, ¶766, 779; Mechanics' Liens; Pledges; Taxation, ¶508, 509, 531; Vendor and Purchaser, ¶250-299.

LIFE ESTATES.

See Deeds, ¶129; Dower.

¶8 (Cal.App.) Possession by the purchaser of a life estate is not adverse to the reversioner's heirs, and the statute does not run against them until the life tenant's death.—Whitcomb v. Worthing, 159 P. 613.

LIFE INSURANCE.

See Insurance.

LIGHTS.

See Municipal Corporations, ¶419.

LIMITATION OF ACTIONS.

See Adverse Possession; Appeal and Error, ¶346-356; Constitutional Law, ¶171, 308; Executors and Administrators, ¶431; Usury, ¶109.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

¶2(1) (Okl.) Where note was executed and payable in Indian Territory, limitations prescribed by Mansfield's Dig. Ark. § 4483, and not the laws of Oklahoma Territory, extended over the state by Constitution, applied in an action in the state of Oklahoma.—Patterson v. Rousney, 159 P. 636.

¶2(1) (Okl.) Ten-year limitation prescribed by Mansf. Dig. Ark. § 4487, applies to actions on judgment of United States court for Indian Territory.—Davis v. Foley, 159 P. 646.

(B) Limitations Applicable to Particular Actions.

¶32(1) (Wash.) Under Rem. & Bal. Code, § 159, action for immediate damage by trespasses held barred in three years, and not governed by section 157, as to breach of written contract, or section 165, as to actions not otherwise provided for.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., 159 P. 774.

¶32(2) (Wash.) Where a city damaged property in regrading a street without instituting condemnation proceedings, an action for damages, brought more than two years thereafter, was barred.—State v. City of Spokane, 159 P. 805.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

¶46(2) (Cal.App.) Where vendor promised to repay purchase money on sale to another party, and where such sale was made on April 21, 1911, limitation did not begin to run against purchaser's action until that date.—Hay v. Casey, 159 P. 726.

(C) Personal Disabilities and Privileges.

¶72(4) (Okl.) Where action is commenced by Creek freedman allottee while still a minor, as defined by Act Cong. May 27, 1908, against former guardian and surety for proceeds of sale of allotted lands, limitations have not been set in motion to bar relief sought.—Brewer v. Dodson, 159 P. 329.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

¶100(9) (Kan.) In an action to set aside an order approving an administrator's final account based on a release procured through fraud, limitations do not run until discovery of the fraud.—Pickens v. Campbell, 159 P. 21.

¶100(13) (Wash.) Rem. & Bal. Code, § 159, providing that a fraud action must be commenced within three years after the fraud is discovered, bars such an action if plaintiff had reasonable opportunity to discover the fraud more than three years previous.—Hoy v. Burk, 159 P. 701.

An action against vendors of land for fraudulent misrepresentations as to soil and drainage is barred under the three-year limitation statute (Rem. & Bal. Code, § 159), by plaintiffs' constructive notice of the fraud, where they lived on the land five years before commencing suit.—Id.

(H) Commencement of Action or Other Proceeding.

¶127(4) (Cal.App.) An amended complaint which corrected the description of the note sued upon regarding its maturity and interest provisions, does not change the cause of action and relates back, so far as the statute of limitations is concerned, to the filing of the original complaint.—Hunt v. Glassell, 159 P. 227.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

¶170 (Wash.) Abutting owner permitting action against city for damages in regrading of street, to be barred by two years' statute of limitations, held not entitled to mandamus to compel city through its officials to institute condemnation proceedings to assess and pay his damages.—State v. City of Spokane, 159 P. 805.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⌚192(3) (Kan.) The petition in an action on fraud, brought more than 2 years after its perpetration, need not set out manner of discovery to avoid bar of limitations.—*Pickens v. Campbell*, 159 P. 21.

LIMITATION OF INDEBTEDNESS.

See Municipal Corporations, ⌚864.

LIMITATION OF LIABILITY.

See Carriers, ⌚149½-180; Warehousemen, ⌚24.

LIQUIDATION.

See Banks and Banking, ⌚281.

LIQUOR SELLING.

See Intoxicating Liquors.

LOGS AND LOGGING.

See Injunction, ⌚52.

⌚3(10) (Or.) A conveyance of all the timber on designated land, coupled with a condition that it should be removed within ten years from the date thereof, amounted only to a sale of all the timber the grantee could cut and remove before that date.—*Kreinbring v. Mathews*, 159 P. 75.

MACHINERY.

See Master and Servant, ⌚108, 121.

MAIL.

See Appeal and Error, ⌚426.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

See Homicide, ⌚286.

MALICIOUS PROSECUTION.**II. WANT OF PROBABLE CAUSE.**

⌚15 (Cal.) "Probable cause" is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that charge is true.—*Lee v. Levison*, 159 P. 438.

⌚18(1) (Cal.) Evidence held to warrant ruling as a matter of law that facts did not establish want of probable cause.—*Lee v. Levison*, 159 P. 438.

V. ACTIONS.

⌚56 (Cal.) The burden is on plaintiff in malicious prosecution to prove both malice and want of probable cause.—*Lee v. Levison*, 159 P. 438.

⌚71(2) (Cal.) Where plaintiff in action for malicious prosecution fails as matter of law to establish want of probable cause, the court is justified in granting nonsuit.—*Lee v. Levison*, 159 P. 438.

MALPRACTICE.

See Physicians and Surgeons, ⌚14-18.

MANDAMUS.

See Jury, ⌚19; Limitation of Actions, ⌚170; Municipal Corporations, ⌚371; States, ⌚191.

I. NATURE AND GROUNDS IN GENERAL.

⌚3(1) (Utah) The court may not have recourse to mandamus merely because there is no other remedy.—*Ketchum Coal Co. v. Christensen*, 159 P. 541.

⌚3(2) (Wash.) Where an owner whose property was damaged by regrading a street had an adequate remedy at law to recover damages, mandamus to compel the city to institute a condemnation proceeding to assess and pay the damage would not lie.—*State v. City of Spokane*, 159 P. 806.

⌚4(1) (Utah) A writ of mandamus may not be issued as a substitute for a writ of error or the right of appeal.—*Ketchum Coal Co. v. Christensen*, 159 P. 541.

⌚4(1) (Utah) Where mandamus is sought to compel action on the part of a court, there must be a lack of an adequate remedy by appeal.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

Ordinarily the court acts judicially in dismissing an action or complaint, and its error therein may be reviewed on appeal if the action has passed to final judgment.—*Id.*

In condemnation action remedy by appeal from erroneous dismissal as against a defendant held inadequate, so that mandamus would lie requiring district court to reinstate the case against such defendant, to determine the issues and to enter judgment thereon.—*Id.*

⌚4(3) (Utah) Mandamus held not to lie to compel the district court in condemnation action to vacate its order denying plaintiff's motion for inspection of defendants' contracts, etc., and requiring it to consider the motion upon its merits and to pass upon it.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

⌚4(5) (Cal.App.) Under Pol. Code, § 4290, in which the Legislature declared the conditions on which compensation should be allowed to sheriffs, the right of a sheriff, whose claim has been found to be correct and allowed, to mandamus the Board of Control to order payment thereof is not affected by section 671, allowing an appeal from disapproval of claims to the Legislature.—*Hammel v. Neylan*, 159 P. 618.

⌚10 (Utah) Where mandamus is sought to compel action on the part of a court, the legal right to such particular action must be clear, and the legal duty to do the act or thing demanded on the part of the court must be equally clear.—*Ketchum Coal Co. v. District Court of Carbon County*, 159 P. 737.

⌚22 (Wash.) Under Rem. & Bal. Code, § 1035, fact that petitioner for order to compel prosecuting attorney to institute quo warranto proceedings against a banking corporation was the attorney of other banks of which it was a potential competitor held no ground for a denial of petition.—*State v. Union Sav. Bank of Spokane*, 159 P. 761.

⌚23(1) (Cal.) Under St. 1915, p. 1040, providing a flat salary of \$1,800 to supervisors, amending Pol. Code, § 4271, allowing salary of \$1,200 and fees of \$600, although compensation was not increased, and incumbent is a person "beneficially interested" so as to entitle him to a writ of mandate.—*Galeener v. Honeycutt*, 159 P. 595.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

⌚26 (Utah) In a case which has not proceeded to judgment, the inferior court may merely be compelled to act or go forward in case it refuses or fails to do so.—*Ketchum Coal Co. v. Christensen*, 159 P. 541.

⌚28 (Utah) The Supreme Court may not by means of a writ of mandate control the discretion of an inferior court.—*Ketchum Coal Co. v. Christensen*, 159 P. 541.

⌚31 (Utah) Mandamus may issue to compel a court to take jurisdiction of a cause and to proceed to hear and determine it, where the court, without legal authority therefor, refuses

jurisdiction.—Ketchum Coal Co. v. District Court of Carbon County, 159 P. 737.

Mandamus will issue to compel a court to proceed when through mere mistake of law it declines to take jurisdiction and refuses to proceed to try a case or to hear and determine the issues therein.—Id.

—48 (Utah) Where district court refused to determine issues in the condemnation action, mandamus would lie to compel it to proceed to trial and determine the case upon the issues, and to enter final judgment thereon.—Ketchum Coal Co. v. District Court of Carbon County, 159 P. 737.

—51 (Utah) Where a court has heard a case and has made its findings, mandamus will lie to compel it to enter final judgment.—Ketchum Coal Co. v. District Court of Carbon County, 159 P. 737.

—54 (Utah) On original application, mandate of Supreme Court issued requiring district court to enforce its judgment in a condemnation proceeding instituted for plaintiff and to prevent interference with plaintiff's rights.—Ketchum Coal Co. v. Christensen, 159 P. 541.

—54 (Utah) Mandamus will lie to compel courts to enforce their own judgments.—Ketchum Coal Co. v. District Court of Carbon County, 159 P. 737.

—55 (Utah) Where a judgment can be enforced merely by issuing a writ of execution, a mandate will issue to require the execution to issue.—Ketchum Coal Co. v. Christensen, 159 P. 541.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

—63 (Wash.) Mandamus will lie to compel arbitrators appointed under Rem. & Bal. Code, § 420, to file an award upon their refusal to do so.—Dickie Mfg. Co. v. Sound Construction and Engineering Co., 159 P. 129.

—72 (Cal.App.) Where an officer, board, or tribunal is vested with power to determine a question upon which a right depends, mandamus will not lie to control the discretion exercised.—Hammel v. Neylan, 159 P. 618.

Mandamus will lie where, in determining a matter confided to a board, its discretion has been controlled by a consideration of questions not relating to the subject involved.—Id.

—73(1) (Wash.) Under Rem. & Bal. Code, § 1035, prosecuting attorney has no final discretion as to instituting a proceeding in the nature of quo warranto against a banking corporation, but may be compelled by mandamus to institute such proceeding.—State v. Union Sav. Bank of Spokane, 159 P. 761.

—74(3) (Cal.) Under Direct Primary Law, §§ 10, 12, 27, Supreme Court may by mandamus compel county clerk to omit name of candidate, who has withdrawn, from ballots to be prepared by him for use in forthcoming primary election.—Bordwell v. Williams, 159 P. 860.

—98(3) (Cal.App.) Where a council refused permission to move a house through the streets after public hearing at a regular session, no dishonesty or arbitrary action being shown, its action was conclusive upon application for writ of mandate.—Robinson v. Otis, 159 P. 441.

—101 (Cal.App.) Where usual procedure involves allowance of claim by supervisors, mandamus lies to compel their observance of usual custom, although their action may not be necessary.—Burr v. Board of Sup'rs of City and County of San Francisco, 159 P. 458.

—101 (Cal.App.) Duties of board vested with powers of auditor in respect to claims against the state may be controlled by the courts and compelled by writs of mandate.—U'Ren v. State Board of Control, 159 P. 615.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

—154(7) (Cal.App.) In mandamus to compel allowance of claim for taxes illegally collected, complaint, outlining nature of claim and alleging that plaintiff presented it to defendant supervisors, sufficiently shows presentation.—Burr v. Board of Sup'rs of City and County of San Francisco, 159 P. 458.

—164(3) (Utah) A defendant in a mandamus proceeding may file an answer and raise issues of fact, yet, where the question presented to the Supreme Court turns on facts admitted by demurrer in the district court, he cannot for the first time in the Supreme Court deny the truth of such facts.—Ketchum Coal Co. v. Christensen, 159 P. 541.

—172 (Wash.) On original application for mandamus, the Supreme Court cannot go outside the pleadings and determine an issue not presented by them.—State v. Howell, 159 P. 118.

—172 (Wash.) Under Rem. & Bal. Code, § 1064, and section 8 of Banking Act effective July 12, 1907, as amended by section 5 of Act March 19, 1909 (Rem. & Bal. Code, § 8317), on petition for mandamus to compel prosecuting attorney to institute proceeding in nature of quo warranto against a state savings bank, making a prima facie showing that the bank had forfeited its right to do business, the truth of the allegations as to the bank could not be determined.—State v. Union Sav. Bank of Spokane, 159 P. 761.

MANGLES.

See Master and Servant, —108.

MARRIAGE.

See Divorce; Husband and Wife.

—38 (Okla.) Act Cong. May 2, 1890, § 38, was intended to validate Indian marriages, which for want of formality might not have been considered valid, and to legitimize the issue.—Crickett v. Hardin, 159 P. 275.

—40(1) (Cal.) There is a strong presumption of the legality of marriage.—In re Pusey's Estate, 159 P. 433.

—40(1) (Okla.) With respect to marriages contracted according to the common law or conformably to Indian custom, the courts will exercise all presumptions in favor of validity in the endeavor to sustain the marriage.—Crickett v. Hardin, 159 P. 275.

—40(6) (Okla.) The living together for years of a man and woman who hold themselves out as married and have children, even though it appears that one had a living husband or wife, raises the presumption, in the absence of proof to the contrary, that there was divorce, and that the second marriage was legal.—Zimmerman v. Holmes, 159 P. 308.

—40(11) (Cal.) When a marriage has been shown, one attacking it has the burden of proving it illegal.—In re Pusey's Estate, 159 P. 433.

—50(1) (Cal.) Will of wife being contested by husband as revoked by her subsequent marriage to him by Civ. Code, § 1800, invalidity of this marriage was not shown by evidence of two prior marriages from which alleged invalid divorces were secured, respectively 20 and 7 years before the marriage attacked, without evidence that either former wife was alive at time of marriage attacked.—In re Pusey's Estate, 159 P. 433.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

See Agriculture; Appeal and Error, —374, 1064; Compromise and Settlement, —3;

Evidence, ¶59, 512; Municipal Corporations, ¶220; Negligence, ¶101; Statutes, ¶35½; Trial, ¶194, 252; 295, 296.

I. THE RELATION.

(B) Statutory Regulation.

¶16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ¶ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

(C) Termination and Discharge.

¶33 (Okl.) Any employé of a public service corporation doing business in the state, on his discharge or voluntary termination of his services, is entitled, under Rev. Laws 1910, § 3769, to have issued to him a service letter.—Chicago, R. I. & P. Ry. Co. v. Hall, 159 P. 851.

Before public service corporation will be guilty of breach of duty in failing to issue service letter, request therefor must be made orally or in writing, served personally or by mail on superintendent, manager, or contractor of the corporation.—Id.

¶36 (Cal.App.) Servant, expressing himself as dissatisfied, on being told by defendant's secretary that defendant would release him, could not then sue as for discharge without presenting himself as ready to perform and being refused by defendant.—Winsor v. Silica Brick Co., 159 P. 877.

¶39(1) (Cal.App.) Allegation of complaint for breach of employment contract that defendant refused to perform, and plaintiff was by such refusal prevented from performing, is insufficient to charge a discharge or breach for which plaintiff could recover salary unearned for the term of the contract.—Winsor v. Silica Brick Co., 159 P. 877.

¶40(3) (Cal.App.) Evidence held insufficient to show discharge of plaintiff by secretary of defendant corporation in breach of employment contract.—Winsor v. Silica Brick Co., 159 P. 877.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

¶85 (Okl.) As between master and servant, three elements are essential to constitute actionable negligence, when the wrong charged is not willfully and wantonly done, viz.: (1) The existence of the duty on the part of the master to protect the servant from the injury; (2) failure of the master to perform that duty; (3) injury to the servant resulting from said failure.—Ft. Smith. & W. R. Co. v. Knott, 159 P. 847.

¶87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ¶ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

¶94 (Okl.) The Factory Act being a mandatory statute, a violation of which is an offense, a violation constitutes negligence per se.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833.

¶97(2) (Or.) In relation to the law of master and servant, an "accident" is an incident that could not have been reasonably foreseen, anticipated, prevented, or provided against, and for it the master is not liable.—Nelson v. Brown & McCabe, 159 P. 1163.

¶97(2) (Wash.) The master must anticipate and guard against acts of a servant in the exercise of ordinary prudence when near an open elevator shaft which might result in his injury.—Remnsnyder v. Lowman & Hanford, 159 P. 107.

(B) Tools, Machinery, Appliances, and Places for Work.

¶101, 102(1) (Okl.) The master is bound to exercise reasonable care to provide a reasonably safe place in which a servant is to work, and also reasonably safe appliances.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833; Chicago, R. I. & P. Ry. Co. v. Rogers, Id. 1132.

¶101, 102(5) (Okl.) An employer has discretion concerning the tools and appliances which he will furnish to his employé, provided those furnished are sound and perform the work they were designed to do.—Palmer v. Wichita Falls & N. W. Ry. Co., 159 P. 1115.

¶101, 102(8) (N.M.) The master owes duty to servant to exercise reasonable care to furnish safe place to work, as well as safe instrumentalities.—Singer v. Swartz, 159 P. 745.

¶101, 102(8) (Or.) Under Employers' Liability Act, § 1, elevator company, employing constructor's helper in repairs upon premises of realty company, and which had charge of such work and control of the situation, was bound to use every practicable device and care for his protection and safety.—Gunnell v. Van Emon Elevator Co., 159 P. 971.

¶101, 102(8) (Wash.) A master must exercise reasonable care to furnish a reasonably safe place to work and reasonably safe appliances and enforce rules reasonably calculated to keep the place safe.—Hull v. Davenport, 159 P. 1072.

¶103(1) (Okl.) A master cannot delegate the duty to furnish a servant with a reasonably safe place and reasonably safe tools.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132.

¶103(1) (Wash.) The positive duty to furnish a safe place to work and safe appliances is a nondelegable duty of the master.—Hull v. Davenport, 159 P. 1072.

¶108 (N.M.) Owner of laundry mangle held under duty of adjusting safety roller so as to minimize danger to operators employed thereon.—Singer v. Swartz, 159 P. 745.

¶121(2) (Okl.) Under Rev. Laws 1910, §§ 3746, 3756, a master is, under penalty, required to guard machinery.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833.

Under Rev. Laws 1910, § 3746, declaring that all vats, gearing, belting, setscrews, etc., and "machinery of every description," shall be guarded, the word "machinery" is not limited by the previous enumeration.—Id.

¶129(1) (Wash.) Where an employé was injured on elevator by having his foot caught in an inset or recess of the wall of an open elevator shaft, held, that such defect was the proximate cause of his injury.—Remnsnyder v. Lowman & Hanford, 159 P. 107.

(C) Methods of Work, Rules, and Orders.

¶146 (Cal.) Where a railroad's agent, or a fellow servant in the road's roundhouse, left a cold chisel about two feet from the edge of the locomotive pit, where chisels were never placed for any proper purpose connected with the work, there being a rule that chisels should be put in a box, it was an act of negligence.—Lassen v. Southern Pac. Co., 159 P. 143.

(D) Warning and Instructing Servant.

¶150(4) (Cal.App.) For the city engineer in charge of construction of a sewer to send a laborer to work in a place concededly dangerous, without special warning, held culpable negligence.—Porterfield v. City of Modesto, 159 P. 205.

¶155(1) (Wash.) Inset in the wall of an open elevator shaft in which an employé's foot caught, resulting in his injury, held not so open and obvious a defect that the employé, who had worked in the place but a short time, and did not know of the defect, was bound to guard against it.—Remnsnyder v. Lowman & Hanford, 159 P. 107.

⇒155(1) (Wash.) An employer need not warn an experienced laborer against the obvious risk of pinching his finger while unloading rails from a flat car and piling them.—Swanson v. Oregon-Washington R. & Nav. Co., 159 P. 379.

(E) Fellow Servants.

⇒159 (Wash.) Where plaintiff, with another employé, was in an elevator, and plaintiff was injured by his foot being caught in an inset in the wall of the open elevator shaft, *held*, the rule of fellow servant does not apply, since such other employé had no connection with the accident.—Remnsnyder v. Lowman & Hanford, 159 P. 107.

(F) Risks Assumed by Servant.

⇒203(1) (Okla.) "Assumption of risk" and "contributory negligence" are not synonymous, the first arising out of contractual relations, and the latter not.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132.

⇒203(1) (Wash.) The doctrine of assumption of risk should not be extended beyond reasonable limits.—Hull v. Davenport, 159 P. 1072.

⇒203(3) (Cal.App.) Employers' Liability Act 1911, eliminating the defense that the employé "assumed the risk of the hazard complained of" includes both the ordinary and extraordinary risks of employment.—Tubbs v. Stone & Webster Const. Co., 159 P. 242.

⇒203(3) (N.M.) Servant assumes all ordinary risks incident to employment, but not extraordinary risks, unless he knew and appreciated them.—Singer v. Swartz, 159 P. 745.

⇒204(1) (Or.) In actions for personal injuries by employés coming within the scope of the Employers' Liability Act, the doctrine of assumption of risk by the employé is abrogated.—Nelson v. Brown & McCabe, 159 P. 1163.

⇒204(1) (Wash.) Assumption of risk is a defense where no violation of a statute enacted for the employé's safety is alleged, whether the action lies under the federal Employers' Act or not.—Swanson v. Oregon-Washington R. & Nav. Co., 159 P. 379.

⇒219(5) (Wash.) An experienced laborer assumes the obvious risk of having his finger pinched while unloading rails from flat car and piling them.—Swanson v. Oregon-Washington R. & Nav. Co., 159 P. 379.

⇒221(6) (Okla.) Where a master promises to remedy a defect, the servant does not assume the risk of injury therefrom by remaining in the employment for a reasonable time after the promise.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132.

⇒222(2) (Cal.App.) An employé does not assume a risk created by his foreman's order unless he appreciated the danger of obeying it.—Tubbs v. Stone & Webster Const. Co., 159 P. 242.

⇒222(3) (Wash.) It is only where danger is not only obvious to man and master, but so plain that reasonable men could not differ, and so imminent that a reasonably prudent man would not act at all, that the servant assumes the risk in obeying the master's order.—Hull v. Davenport, 159 P. 1072.

⇒226(3) (Okla.) A servant does not assume risk resulting from master's failure to provide safe place of work and safe appliances, unless danger is so obvious that a careful person would have observed it.—Ft. Smith & W. R. Co. v. Knott, 159 P. 847.

(G) Contributory Negligence of Servant.

⇒227(1) (Okla.) "Assumption of risk" and "contributory negligence" are not synonymous, the first arising out of contractual relations, and the latter not.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132.

⇒236(11) (Wash.) Employé *held* not guilty of contributory negligence where his injury occurred by reason of his foot catching in an inset or recess in the wall of an open elevator shaft; he having no reason to anticipate the dangerous defect.—Remnsnyder v. Lowman & Hanford, 159 P. 107.

(H) Actions.

⇒250½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⇒ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

⇒258(17) (Cal.App.) The complaint alleging that defendant negligently directed plaintiff to work at a place or with an appliance not safe, by implication, and sufficiently alleges defendant knew of the danger.—Poor v. W. P. Fuller & Co., 159 P. 233.

⇒265(3) (Wash.) If injury to a servant occurs through lack of elevator signals, it must be assumed that, if there had been signals, the injury would have been averted.—Hull v. Davenport, 159 P. 1072.

⇒265(5) (Okla.) Where an employer furnishes tools for his servant and an accident results, there is no presumption that the tools furnished were insufficient.—Palmer v. Wichita Falls & N. W. Ry. Co., 159 P. 1115.

That an employé is injured in the course of his employment raises no presumption of the master's negligence.—Id.

⇒267(1) (Cal.App.) Description of the immediate surroundings of the place is admissible in a servant's action for injury from being put at work at an insecure chute.—Poor v. W. P. Fuller & Co., 159 P. 233.

⇒270(4) (Cal.App.) Evidence of the condition of the place where plaintiff was injured within a reasonable time before or after the accident is admissible to show its condition at the time of the injury.—Poor v. W. P. Fuller & Co., 159 P. 233.

⇒276(11) (Wash.) If employment of signals in elevator operation is not customary, that is mere defensive matter, admissible on the issue of reasonable care.—Hull v. Davenport, 159 P. 1072.

⇒278(1) (Okla.) In action for death of railroad brakeman, evidence *held* sufficient to support judgment for plaintiff.—Ft. Smith & W. R. Co. v. Knott, 159 P. 847.

⇒278(3) (Cal.) In servant's action for injury by falling from bridge, when a large timber on which he was exerting a leverage was pulled away, evidence *held* to show that defendant failed to furnish suitable appliances for the prosecution of the work.—Fahey v. Panama-California Exposition, 159 P. 1045.

⇒278(20) (Cal.) In servant's action for injury, evidence *held* to show that the sudden moving of a timber upon which he was exerting a leverage, without warning to him, causing him to lose his balance and fall from a bridge, was negligence.—Fahey v. Panama-California Exposition, 159 P. 1045.

⇒278(20) (Cal.App.) Evidence in a servant's action for injury in moving a heavy shaft *held* sufficient to support a finding of negligence of the foreman in not giving warning of his intended act.—Fonts v. Southern Pac. Co., 159 P. 215.

⇒280 (Wash.) Evidence *held* insufficient to charge employé with assumption of risk where his injury was caused by his foot being caught in inset of the wall of an open elevator shaft, of which he did not know, and which was not so open or obvious as to put him on notice.—Remnsnyder v. Lowman & Hanford, 159 P. 107.

⇒284(2) (Or.) In action by employé of elevator company for injury while repairing elevator on premises of realty company, evidence that

employer assumed control of elevator by which plaintiff was injured *held* sufficient to take case to jury on issue of safe place to work.—Gunnell v. Van Emon Elevator Co., 159 P. 971.

—286(1) (Ok.) In servant's action, question of master's negligence *held* for jury.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833.

—286(3) (Cal.) In action against railroad by its roundhouse machinist's helper for injuries received when he dropped a "binder" on a cold chisel, causing it to fly up and strike him in the eye, defendant's negligence *held* for the jury under the evidence.—Lassen v. Southern Pac. Co., 159 P. 143.

—286(8) (Wash.) Custom cannot as a matter of law relieve the master from the positive duty to furnish a reasonably safe place and appliances to work, and promulgate rules, so that, where the question is one of reasonable human conduct, it is always for the jury if on the facts reasonable men might differ.—Hull v. Davenport, 159 P. 1072.

—286(15) (Ok.) Whether maintenance by railway of temporary water plug or other obstruction near track, endangering operatives in their usual and necessary duties, is negligence, is for the jury.—Midland Valley R. Co. v. Ogden, 159 P. 256.

—286(18) (Wash.) Evidence *held* to make a question for the jury whether the master was negligent in providing an elevator improperly guarded and without warning bells.—Hull v. Davenport, 159 P. 1072.

—286(39) (Cal.App.) Where employes, after emptying their wheelbarrows, ordinarily continued around an elevated circular runway to the refilling point, an order that plaintiff return the way he came, which resulted in his falling off the runway while passing another employe, *held* to make the employer's negligence a jury question.—Tubbs v. Stone & Webster Const. Co., 159 P. 242.

—288(1) (N.M.) Where evidence is such that different opinions may be reasonably formed as to proper inferences, whether servant assumed risk is question for jury.—Singer v. Swartz, 159 P. 745.

—288(2) (Ok.) Where a caretaker of a locomotive was injured in starting a fire therein, the question whether by continuing in the employment he assumed the risk of injury from defects in the locomotive *held* for the jury.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132.

—288(11) (N.M.) Where servant is of immature years, the cases in which the court may instruct as matter of law that servant assumed risk are much more limited than where servant is of mature years.—Singer v. Swartz, 159 P. 745.

—288(14) (Ok.) In action by railroad employe injured in starting fire in locomotive, question whether the servant to whom complaint was made and who promised to remedy defects had authority to bind the company *held*, under the evidence, for the jury.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132.

—288(16) (Cal.App.) Plaintiff's assumption of risk in obeying a foreman's order to return the way he came on an elevated runway was a jury question where it was not clear that he realized the danger in doing so until he saw another employe approaching.—Tubbs v. Stone & Webster Const. Co., 159 P. 242.

—289(1) (Ok.) Where it is contended that injured servant was guilty of negligence, that question is for jury under proper instructions.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833.

In servant's action, question of servant's contributory negligence *held* for jury.—Id.

—289(1) (Wash.) Evidence *held* not to warrant saying as matter of law that plaintiff serv-

ant was contributorily negligent.—Hull v. Davenport, 159 P. 1072.

—289(6) (Cal.App.) Plaintiff's contributory negligence in stepping to the edge of an elevated runway to allow another employe passage room, which resulted in plaintiff falling off, was a jury question.—Tubbs v. Stone & Webster Const. Co., 159 P. 242.

—289(22) (Cal.) In an action against a railroad by a machinist's helper, whether plaintiff was guilty of contributory negligence in failing to observe a cold chisel on the floor near the edge of a locomotive pit, upon which he dropped a steel "binder," causing the chisel to fly up and strike his eye, was a question for the jury under the evidence.—Lassen v. Southern Pac. Co., 159 P. 143.

—289(37) (Wash.) When there is room for reasonable difference of opinion whether, in spite of order to use an elevator, the servant appreciated the danger so as to make its use reckless, the question is for the jury.—Hull v. Davenport, 159 P. 1072.

—291(1) (Ok.) Instructions in servant's action *held* to substantially state the law applicable to case.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833.

—293(8) (Ok.) In an action by a railroad employe injured in lighting a fire in a locomotive, instructions as to the duty of the railroad company to provide safe place to work and implements *held* proper.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132.

—293(8) (Ok.) In personal injury action by servant, instruction to return verdict for servant if place of work was not a reasonably safe place is proper.—Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141.

—293(8) (Or.) Under the Employers' Liability Act, § 1, in an action for personal injuries by the employe of a stevedore company, instruction as to safe place to work *held* properly refused.—Nelson v. Brown & McCabe, 159 P. 1163.

—293(11) (Ok.) In personal injury action by servant, who contended that machinery was not properly guarded, it was not reversible error, in charging jury on duty of master under the Factory Act, to charge them as to the master's common-law duty.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833.

—293(13) (Cal.App.) Instruction in a servant's action for injury in moving a heavy shafting, that it was the master's duty to exercise reasonable and ordinary care to adopt safe rules and methods of work, *held* proper.—Fonts v. Southern Pac. Co., 159 P. 215.

—296(3) (Or.) Under the Employers' Liability Act, § 6, in an action for personal injuries by the employe of a stevedore company, instruction making contributory negligence a bar *held* properly refused.—Nelson v. Brown & McCabe, 159 P. 1163.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

—301(1) (Cal.) A school, teaching automobile driving, is liable where its employe allows a student to operate a machine during an instruction trip, and his inexperience results in injury to plaintiff.—Easton v. United Trade School Contracting Co., 159 P. 597.

(C) Actions.

—330(2) (Cal.) Where defendant's employe allowed a student to operate a machine during an instruction trip, testimony that such student was not a qualified driver is material on the question whether the car had a competent driver.—Easton v. United Trade School Contracting Co., 159 P. 597.

VL. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

☞361 (Cal.) Where the applicant had a contract for stipulated wage for service, during the whole of business hours, as a rental and insurance agent and a further contract with his employer for commission on renewals and new business, he was an employé, whether engaged in the regular work or under his commission contract, all the work being in the course of his employment.—*Cameron v. Pillsbury*, 159 P. 149.

☞361 (Cal.) Under Compensation Act, § 14, providing that the term "employé," as used in sections 12 to 35, shall mean every person in the service of an employer, as defined by section 13, under any appointment or contract of hire or apprenticeship, *held*, a "contract of hire" means a contract for personal services.—*Western Indemnity Co. v. Pillsbury*, 159 P. 721.

Under Civ. Code, § 2009, defining a servant as one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who, in such service, remains entirely under the direction and control of the master, the word "servant" is generally synonymous with the word "employé" (citing 3 Words and Phrases, 2369, 2376; 7 Words and Phrases, 6426).—*Id.*

☞367 (Cal.) Where one was killed while cutting firewood at a certain price per cord under employment by agent of contractor with landowner to have the wood cut, deceased furnishing his own working tools, determining his own hours of labor, and his compensation depending on measurement of his work, relation of master and servant did not exist.—*Donlon Bros. v. Industrial Acc. Commission of State of California*, 159 P. 715.

☞367 (Cal.) The authority of the Industrial Accident Commission to award compensation is limited to injured employées, and cannot include independent contractors.—*Western Indemnity Co. v. Pillsbury*, 159 P. 721.

One who furnished teams and drivers to a contractor, and who received a certain sum per day for the work of each team and driver, and who himself drove one of such teams, *held* not a servant of such contractor entitled to compensation for injuries, notwithstanding that control was exercised by the contractor in directing the drivers as to the materials to be hauled.—*Id.*

☞373 (Cal.) A deck hand who helped load and unload a barge at its terminal *held* drowned in the course of his employment, where he fell off on a trip between such termini, although he had no duties to perform during the trip.—*W. R. Rideout Co. v. Pillsbury*, 159 P. 435.

☞375(2) (Cal.) Under Workmen's Compensation Act, § 12(a), engineer of tugboat who was drowned in making his way to a boat after having, through mistake in its location, gone on another boat to reach his vessel, *held* not killed in course of his employment, so no compensation could be allowed.—*Ocean Accident & Guarantee Co. v. Industrial Accident Commission of California*, 159 P. 1041.

Under Workmen's Compensation Act, § 12(a), seaman injured in embarking or debarking from a ship may recover where using the means provided by master, or if injured where no particular means are provided.—*Id.*

☞375(2) (Kan.) Injury to miner proceeding from place of work to foot of shaft and coming in contact with hanging slate was one "arising out of and in the course of employment" within Workmen's Compensation Act, § 1, and section 9, as amended by Laws 1913, c. 218, § 4.—*Sedlock v. Carr Coal Mining & Mfg. Co.*, 159 P. 9.

☞380 (Cal.) Act of miner finishing work in a shaft and coming to surface to wait another assignment of work and who was temporarily resting in shade of an ore bin, and who was killed by its collapse, *held* not willful misconduct within Workmen's Compensation, Insurance and Safety Act 12, subd. 8.—*Brooklyn Mining Co. v. Industrial Accident Commission of State of California*, 159 P. 162.

☞380 (Cal.) Where a deck hand who fell off a barge and drowned was last seen leaning against a post near the barge's edge, apparently asleep, *held* he was not guilty of willful misconduct, barring recovery under the Workmen's Compensation Act.—*W. R. Rideout Co. v. Pillsbury*, 159 P. 435.

(B) Compensation.

☞385(1) (Cal.) Under Workmen's Compensation Act, § 17a, providing that where claimant has worked substantially all the preceding year, his compensation shall be calculated upon his average daily wage, *held* that his earnings for the preceding year should be divided by the number of days he actually worked.—*Frankfort General Ins. Co. v. Pillsbury*, 159 P. 150.

☞385(8) (Cal.) Under Workmen's Compensation Act, § 15, subd. 2, the workman's ability to do the same work as before the accident is not the sole test, but his disfigurement and age may also be considered.—*Frankfort General Ins. Co. v. Pillsbury*, 159 P. 150.

(C) Proceedings.

☞403 (Cal.) The burden is on the applicant for compensation to establish by competent proof the death of the servant.—*Western Grain & Sugar Products Co. v. Pillsbury*, 159 P. 423.

Claimant need not negative that night watchman's death was result of conflict brought on by himself, when circumstances point to his murder.—*Id.*

☞405(1) (Cal.) Evidence *held* to sustain a finding of the Industrial Commission that the employer had no specific rule requiring barge deck hands to remain within the cabin during the trip between wharves.—*W. R. Rideout Co. v. Pillsbury*, 159 P. 435.

☞405(4) (Cal.) The death of the servant may be proved by circumstantial evidence, finding the body not being indispensable to conclusion of violent death.—*Western Grain & Sugar Products Co. v. Pillsbury*, 159 P. 423.

Evidence *held* sufficient to support finding of commission that servant met his death by violence, though the body was not found.—*Id.*

Award of compensation cannot be defeated on the ground that though the evidence warranted finding of violent death by murder, it failed to show that it was accidental and in the course of employment of the watchman, who disappeared while on duty, the traces indicating murder.—*Id.*

☞405(8) (Cal.) Evidence held to sustain the Commission's finding that the loss of a first finger between the knuckle and proximal joint permanently disabled a 65 year old carpenter and cabinetmaker 20¼ per cent. despite a stipulation that he was doing same work at same pay, as before accident.—*Frankfort General Ins. Co. v. Pillsbury*, 159 P. 150.

☞405(6) (Kan.) Testimony of plaintiff that loss of eye had impaired efficiency as workman because he could not gauge distances as well as before, is sufficient for finding of partial disability under Compensation Act.—*Oliver v. Christopher*, 159 P. 397.

☞412 (Kan.) Refusal to strike out allegations regarding negligence in proceeding under Workmen's Compensation Act *held* not reversible error where issues as to extent of workman's disability were covered by special findings, and

general verdict was disregarded.—*Oliver v. Christopher*, 159 P. 397.

In action under Workmen's Compensation Act, where duration of total disability and existence of partial disability are fixed by special findings, judgment for minimum allowances cannot be reversed because general verdict or other findings are not supported by evidence.—*Id.*

—415 (Cal.) Under Workmen's Compensation Act, § 24, subd. "b," the Commission is not confined to a stipulation between the parties, but may take further testimony in making its award.—*Frankfort General Ins. Co. v. Pillsbury*, 159 P. 150.

—417(6) (Cal.) Under Workmen's Compensation Act, § 77, providing that informalities in taking testimony shall not invalidate the Commission's order, and section 84, specifying the grounds of review, held that a referee's exclusion of certain cross-examination while taking testimony for the Commission cannot be reviewed by certiorari.—*Frankfort General Ins. Co. v. Pillsbury*, 159 P. 150.

—417(7) (Cal.) The Industrial Accident Commission's determination on a question of fact is not subject to review by the courts, unless clearly contrary to the undisputed evidence.—*Frankfort General Ins. Co. v. Pillsbury*, 159 P. 150.

—417(7) (Cal.) Where jurisdiction of the Industrial Accident Commission depends on violent death of an employé, the court on review of award of compensation may determine sufficiency of evidence to show such a death.—*Western Grain & Sugar Products Co. v. Pillsbury*, 159 P. 423.

—417(7) (Cal.) Upon review of an award of the Industrial Accident Commission, the existence of the relationship of master and servant is jurisdictional.—*Donlon Bros. v. Industrial Acc. Commission of State of California*, 159 P. 715.

Upon review of award of Industrial Accident Commission, determination of board as to existence of relationship of master and servant is reviewable.—*Id.*

—417(7) (Cal.) The finding of the Industrial Accident Commission awarding compensation will not be disturbed, where there is a substantial conflict of testimony as to the status of the person claiming compensation.—*Western Indemnity Co. v. Pillsbury*, 159 P. 721.

MATERIALS.

See Mechanics' Liens, —47.

MEASURE OF DAMAGES.

See Damages, —105-120.

MECHANICS' LIENS.

See Appeal and Error, —197; Exceptions, Bill of, —58; Mortgages, —151; Pleading, —403; Statutes, —117.

II. RIGHT TO LIEN.

(B) Services Rendered and Materials Furnished.

—47 (Cal.App.) One who furnishes lumber used in erecting concrete forms without which building could not have been erected, and which were destroyed or given away after use, being then of no value, has a lien therefor, although the rule cannot be given general application, but is controlled by particular facts.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

(C) Agreement or Consent of Owner.

—57(2) (Utah) Under Comp. Laws 1907, § 2826, a wife's interest in her husband's property other than homestead is subject to a mechanic's lien claim.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

(B) Subcontractors, and Contractors' Workmen and Materialmen.

—99 (Utah) A subcontractor is entitled to a mechanic's lien upon complying either with Comp. Laws 1907, § 1388, by filing a claim for work, etc., to be thereafter furnished, or with section 1386 by filing a notice within 40 days after the work, etc., is performed.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

—103 (Utah) A contract provision that the contractor should keep the building free from liens, etc., does not affect a materialman's right to a lien upon complying with Mechanic's Lien Law.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

III. PROCEEDINGS TO PERFECT.

—132(1) (Wash.) Where Rem. & Bal. Code, § 1134, required mechanics' lien claims to be filed with county auditor within 90 days, and Torrens law, required filing with registrar of titles, but set no time limit, held that court, even after 90 days, could allow claim filed under section 1134 to be amended by filing with registrar.—*McMullen & Co. v. Croft*, 159 P. 375.

—132(9) (Cal.App.) Where building contract was abandoned before completion on July 20th, and owner then took possession, and no notice of cessation of labor was filed, but a new contract was made on August 4th, under which building was finished November 16th, notice of lien under original contract if filed December 14th was in time.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—132(10) (Utah) Where an owner exercised his contract right to change contractors, a mechanic's lien notice is in time when filed over 40 days after the first contractor quit, but within 40 days after delivering material to the second contractor, for the contract is continuing.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

—132(14) (Utah) A subcontractor is entitled to a mechanic's lien upon complying either with Comp. Laws 1907, § 1388, by filing a claim for work, etc., to be thereafter furnished, or with section 1386 by filing a notice, within 40 days after the work, etc., is performed.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

—134 (Cal.App.) Claim for lien alleging materials furnished at contractor's request on agreement to pay on delivery without terms or condition of reasonable value of \$3,000, which were actually used in, on or about premises held sufficient.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—142 (Cal.App.) Claim of mechanic's lien cannot be defeated on ground that it fails to state terms and conditions of contract, where agreement was merely to furnish and haul sand, and there was only an implied contract to pay therefor at the prevailing rates on delivery.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

IV. OPERATION AND EFFECT.

(A) Amount and Extent of Lien.

—161(3) (Cal.App.) Where claimant under lump sum contract actually furnished work and materials of specified value and based his lien on same figures as used in figuring original contract, he could claim full value of materials furnished, regardless of cost of completion under new contract.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—163 (N.M.) Under Code 1915, § 3328, a contractor may recover on a lien only such amount as may be due him under terms of contract.—*Nickle v. Coulter*, 159 P. 673.

—164(1) (Cal.App.) Prior to 1911, under Code Civ. Proc. § 1200, as to mechanics' liens, where contractor fails to perform, the amount of the contract price subject to liens of materialmen is not the difference between amount paid the contractor and actual value of work and ma-

terials already used, but between such amount paid and the value estimated as nearly as may be by the standard of the whole contract price.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—164(1) (Utah) Under Mechanic's Lien Law, providing that the lien shall extend to the entire contract price, or the amount remaining due thereunder when the claimant commences work, a subcontractor's lien cannot be enforced beyond those amounts.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

(C) Priority.

—198 (Okla.) One in open, undisputed possession of land, who afterwards receives conveyance of legal title, may create mechanics' liens thereon as against his mortgagees and grantees.—*Everest v. Gault Lumber Co.*, 159 P. 910.

VII. ENFORCEMENT.

—271(15) (Cal.App.) Requirement of Code Civ. Proc. § 1187, that complaint alleges that mechanic's lien contained statement of terms, time given, and conditions of contract is sufficiently met by stating that notice was filed, referring to it and incorporating it in the pleading, if the notice actually contained the necessary averments.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—277(5) (Cal.App.) Where complaint in mechanic's lien action stated facts raising implied contract to pay for materials furnished, mere reference to a contract did not present a variance, since it cannot be assumed that any contract save that implied at law was meant.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—277(6) (Cal.App.) Claim of lien, complaint, and evidence held not at variance as to agreements to pay value of materials furnished.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—281(4) (Cal.) Evidence held sufficient to sustain a finding of the reasonable value of work and material furnished by subcontractor seeking a mechanic's lien, as against his contention that it was more.—*Brandt Bros. v. Fresno Hotel Co.*, 159 P. 434.

—281(4) (Cal.App.) Evidence held to sustain the court's finding as to amount of whole contract price subject to mechanic's lien on failure of contractor to complete work.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—281(4) (Utah) Evidence held to sustain a finding that a mechanic's lien claim could be satisfied without exhausting the sum specified in the contract between the owner and the principal contractor.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

—290(1) (Cal.App.) In arriving at amount of contract price to be subject to mechanics' liens under Code Civ. Proc. § 1200, where contractor fails to perform, it is unnecessary to make a finding as to the cost of completing the work.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

—290(2) (Utah) A finding that a mechanic's lien claimant had not been paid, sufficiently meets a contention that the claimant had been paid by work done for it by the contractor.—*Langton Lime & Cement Co. v. Peery*, 159 P. 49.

—290(2) (Wash.) Findings in foreclosure of mechanic's lien held to sustain the conclusions and decree.—*Morgan v. Ohltenden Land Co.*, 159 P. 129.

—291(5) (Cal.) Where a complaint to foreclose a mechanic's lien alleged performance of the contract, but the building was actually erected, in part, on other land than that specified in the contract, held, that plaintiff, having pleaded full compliance with the contract, could not

recover by showing an excuse for his nonperformance.—*Herdal v. Sheehy*, 159 P. 422.

—291(5) (Cal.App.) Where a claim of mechanic's lien for cement furnished stated contract price and number of barrels furnished, claimant could not have a lien for freight and storage charges not mentioned therein, but was limited to contract stated.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

MENTAL SUFFERING.

See Damages, —49, 52.

MINES AND MINERALS.

See Master and Servant, —375, 380; Specific Performance, —57, 59.

I. PUBLIC MINERAL LANDS.

(B) Location and Acquisition of Claims.

—38(2) (Cal.) Plaintiff, who sued to quiet title to mineral lands originally located by him, but for which patent issued to defendant, held to have no title sufficient to support the action.—*Vore v. Ephraim*, 159 P. 719.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Conveyances in General.

—54(2) (Wash.) Contract, whereby buyer of mining claim undertook to pay sellers from net profits up to a certain sum, such profits to be computed by making specified deductions from the gross amount of gold produced, "including the wages of the men," etc., held not to include in the deductions the cost of all materials necessary to enable the laborers to work.—*Blanch v. Pioneer Mining Co.*, 159 P. 1077.

Under contract for sale of mining claim, providing that buyer should pay from net profits up to a certain amount, buyer held unauthorized to charge seller for any of the water used on the claim more than 25 cents per miner's inch of 11½ gallons for each 24 hours of water, as specified.—Id.

Where mining claim was sold, buyer contracting to pay from net profits, fact that it was soon demonstrated the claim could not be worked at a profit except by the hydraulic method is not ground whereon equity can refuse to enforce as unconscionable the contract of sale, providing the deductions from the gross amount of gold produced the buyer might make on account of water used.—Id.

Rendition to sellers of mining claim by buyer of statements of account containing deductions to be made from gross production in figuring net profits, from which part of the price was to be paid, though the statements were not objected to, held not to operate as an estoppel against the sellers to dispute the account and rely on their contract with the buyer.—Id.

MINORS.

See Infants.

MISREPRESENTATION.

See Fraud.

MISTAKE.

See Partnership, —311.

MISUSER.

See Easements, —55.

MODIFICATION.

See Appeal and Error, —1151; Bills and Notes, —137; Contracts, —237.

MONEY RECEIVED.

See Payment, ¶87; Vendor and Purchaser, ¶335-341.

¶5 (Cal.App.) Where plaintiff a former beneficiary, was entitled to insurance proceeds which the insurer had paid to substituted beneficiaries, *held* that plaintiff could recover from such beneficiaries upon an implied promise, although there was no privity of contract between them.—*Freitas v. Freitas*, 159 P. 613.

MONOPOLIES.

See Constitutional Law, ¶89.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

¶17(1) (Okla.) A contract of absolute sale, in which the purchaser agrees to sell the goods at regular retail prices indicated by his vendor, where the entire product is sold only through similar contracts, is a restraint of trade unlawful as to interstate commerce under Anti-Trust Act of July 2, 1890.—*Stewart v. W. T. Raleigh Medical Co.*, 159 P. 1187.

Where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to control the price to consumers is not determined by the circumstance, whether they were produced by several manufacturers or by one.—*Id.*

¶17(2) (Kan.) Under Gen. St. 1909, § 1649, it is no violation of law to appoint sole agent for sale of goods in a particular community.—*Zellner Mercantile Co. v. Farlin & Orendorff Plow Co.*, 159 P. 391.

¶23 (Okla.) The defense that a contract violates Anti-Trust Act July 2, 1890, may be set up by a private individual sued thereon.—*Stewart v. W. T. Raleigh Medical Co.*, 159 P. 1187.

MOOT QUESTIONS.

See Appeal and Error, ¶153, 162.

MORTGAGES.

See Appeal and Error, ¶1121; Attorney and Client, ¶186; Bills and Notes, ¶104; Chattel Mortgages; Covenants, ¶98; Mechanics' Liens, ¶198; Public Lands, ¶136; Reformation of Instruments, ¶45; Taxation, ¶531, 697.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

¶32(3) (Okla.) Deed to mortgagee, placed in escrow for delivery if prior mortgages were not paid on a certain date, must be treated as mortgage.—*Messner v. Carroll*, 159 P. 362.

(D) Validity.

¶79 (Or.) Notes and mortgages, given by parents under the influence of threats that otherwise their son will be sent to the penitentiary for embezzlement of moneys of the mortgagee, are voidable for duress.—*Baldwin Co. v. Savage*, 159 P. 80.

¶83 (Or.) Where defendants, to save their son from the penitentiary, executed notes and mortgages in payment of money embezzled by him, the taking by them of a chattel mortgage from such son as partial indemnity on the suggestion of the mortgagee's agent does not estop them from interposing the defense of duress in an action to foreclose a real estate mortgage.—*Baldwin Co. v. Savage*, 159 P. 80.

In an action for the foreclosure of mortgages, defendants are not estopped from asserting the invalidity of the mortgages by reason of duress, consisting of threats to imprison their son for embezzlement, by the payment of a chattel mort-

gage after the statute of limitations (L. O. L. § 1377) had barred the prosecution of such son.—*Id.*

¶86(3) (Or.) Evidence *held* sufficient to sustain a finding that notes and mortgages should be set aside as procured by duress and executed under threats that defendants' son would be sent to the penitentiary for embezzling money while agent of the mortgagee.—*Baldwin Co. v. Savage*, 159 P. 80.

Evidence *held* insufficient to warrant a finding that defendants waived their defense of duress to the foreclosure of mortgages by securing a postponement of the trial by promising to pay the amount.—*Id.*

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates of Parties Therein.

¶126 (Utah) A mortgage given by one partner to secure a note purchasing the other partner's undivided half interest in their property, and which covered an undivided half interest in the partnership property, *held* to cover the mortgagor's rather than the mortgagee's interest, where the mortgagee retained title to his share.—*Wherritt v. Dennis*, 159 P. 534.

¶137 (Wash.) A mortgage conveys no title to real estate, but is mere security.—*Gerber v. Heath*, 159 P. 691.

(D) Lien and Priority.

¶151(3) (Okla.) Where stockholder contracted with corporation to erect a house on one of its lots on conveyance to him, or to sell to a third party who should erect the house, and the third party erected the house and gave a mortgage to secure the conveyance to him, mechanics' liens take priority over the mortgage.—*Everest v. Gault Lumber Co.*, 159 P. 910.

¶154(1) (Cal.) Facts *held* insufficient to show that defendant at time of taking a mortgage, had knowledge of insolvency or interest of corporation of which mortgagors were owners.—*Tripler v. MacDonald Lumber Co.*, 159 P. 591.

¶155 (Cal.) Extension of time on debt is sufficient consideration for mortgage given to secure it, and mortgagee may therefore be an innocent purchaser for value.—*Tripler v. MacDonald Lumber Co.*, 159 P. 591.

IV. RIGHTS AND LIABILITIES OF PARTIES.

¶218 (Wash.) In action on note, disregarding realty mortgage given therewith, makers *held* to have burden of establishing alleged agreement that plaintiff would look entirely to mortgage for the payment of his debt and that they should not be personally liable.—*Sappington v. Owens*, 159 P. 785.

In action on note, disregarding a realty mortgage given therewith, evidence *held* to sustain the finding of an agreement that makers would not be personally liable on the note and that payee was to look solely to the mortgage.—*Id.*

In action on mortgage note, plaintiff claiming that makers misrepresented value of mortgaged premises, and hence could not in equity ask for reformation of note and mortgage in respect to provision for deficiency judgment, had burden of proving such claim by fair preponderance of evidence.—*Id.*

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

¶309(3) (Cal.) Where the purchaser gave a purchase-money mortgage on sale of 797 acres, and the question arose whether the parcel contained only 704 acres, his agreement to pay the mortgage to the value of 704 acres was sufficient consideration, in the absence of mutual mistake, for a release of that amount of land and for the agreement of the vendor's assignee to sue to

determine ownership of the balance of the acreage.—*Cords v. Goodwin*, 159 P. 188.

Where vendee paid amount of purchase-money mortgage for release of such mortgage, which covered described land part of which was held adversely, in the action by the mortgagee's assignee to which the adverse holder was not made a party, the mortgage could not be decreed satisfied.—*Id.*

☞316 (Or.) Bid on execution sale which had been credited on account of judgment held an intervening right which could not be set aside so as to restore a canceled mortgage to its original lien.—*Chase v. McKenzie*, 159 P. 1025.

X. FORECLOSURE BY ACTION.

(B) Right to Foreclose and Defenses.

☞395 (Wash.) Should the mortgagor or his successor in interest fail to keep up current charges against the property and permit it to depreciate or become lost, the mortgagee may elect to foreclose his mortgage.—*Gerber v. Heath*, 159 P. 691.

☞415(2) (Or.) Outstanding and unexpired right of third party to cut and remove timber from land conveyed to plaintiff held a breach of the covenant against incumbrances which would have to be disposed of before equity would foreclose the purchase-money mortgage.—*Kreinbring v. Mathews*, 159 P. 75.

(F) Pleading and Evidence.

☞454(3) (Or.) In suit to foreclose purchase-money mortgage, answer, if insufficient as counterclaim, held to contain all the elements of valid defense.—*Kreinbring v. Mathews*, 159 P. 75.

☞456 (Utah) In foreclosure, no reply is necessary to an answer claiming a homestead right, where plaintiff contends the acts pleaded do not state a defense, for Comp. Laws 1907, § 2980, requires a reply only to a counterclaim, or where plaintiff confesses and avoids.—*Wherritt v. Dennis*, 159 P. 534.

(G) Injunction and Receiver.

☞473 (Wash.) Rents and profits collected by a receiver in foreclosure proceeding pending the litigation and up to the time of the sale held payable not to the mortgagee, but to the successor of the mortgagor holding the legal title.—*Gerber v. Heath*, 159 P. 691.

(K) Deficiency and Personal Liability.

☞556 (Wash.) Under Rem. & Bal. Code, § 1119, relating to judgment for deficiency in mortgage foreclosure, the mere erasure from the note of the clause providing for a deficiency judgment would be ineffective, and such judgment could be had, unless it was expressly provided that there could be none.—*Sappington v. Owens*, 159 P. 785.

☞559(5) (Wash.) Under Rem. & Bal. Code, §§ 1119-1121, 1123, a money judgment contained in decree of mortgage foreclosure is a final judgment, and there is no necessity for the entry of a foreclosure judgment and also a deficiency judgment.—*Codd v. Von Der Ahe*, 159 P. 686.

☞559(7) (Wash.) In action for reformation of notes and a mortgage and for foreclosure, where provision for attorney's fees in the notes and mortgage was but part of the general obligation of the notes, governed by the terms of the mortgage, limiting the amount of the deficiency judgment, the refusal of personal recovery for such fees was proper.—*Conrads v. Green*, 159 P. 102.

(M) Review.

☞579 (Utah) A mortgage foreclosure decree cannot be affirmed where the findings and conclusions must be corrected to show that plain-

tiff had a mortgage on half the property, and a vendor's lien on the remainder.—*Wherritt v. Dennis*, 159 P. 534.

XI. REDEMPTION.

☞600(3) (Wash.) Under Rem. & Bal. Code, § 600, one redeeming from foreclosure sale need not pay the certificate holder amounts charged for looking after, selling, and disposing of crops where such amount was not actually expended, and can recover charges paid by him on an accounting.—*Woods v. Netherlands American Mortgage Bank*, 159 P. 123.

Under Rem. & Bal. Code, § 600, the holder of a mortgage sale certificate upon redemption has the right to payment for actual work done in preparing the land for future crops and on redemption between April 1st and December 1st, has the option to demand such payment or to hold possession until December 1st.—*Id.*

Under Rem. & Bal. Code, § 600, where the crops for the current year had been removed by the holder of the mortgage sale certificate and money expended by him in fall plowing, held that upon redemption he was entitled to payment of money so expended but not to possession for another year.—*Id.*

MOTHERS' PENSIONS.

See Infants, ☞12½.

MOTIONS.

See Appeal and Error, ☞237; Judgment, ☞163, 384; Mandamus, ☞4; New Trial, ☞128-155; Pleading, ☞343-369; Process, ☞157; Trial, ☞163, 165.

MOTIVE.

See Criminal Law, ☞814; Homicide, ☞166.

MOVING HOUSES.

See Mandamus, ☞98; Municipal Corporations, ☞703.

MUNICIPAL CORPORATIONS.

See Counties; Eminent Domain, ☞28; Equity, ☞29; Master and Servant, ☞150; Schools and School Districts; Statutes, ☞92; Street Railroads.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

☞47 (Wash.) An extension or limitation of municipal power takes effect on the date the statute takes effect.—*State v. Superior Court of Whitman County*, 159 P. 383.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

☞57 (Wash.) Municipalities have no power except such as is expressly delegated by the state.—*State v. Superior Court of Whitman County*, 159 P. 383.

☞58 (Cal.App.) Where words have been given by the courts a particular meaning, it must be presumed that they were used with such meaning in framing a city charter, in the absence of limiting clauses.—*West v. City of Oakland*, 159 P. 202.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

☞64 (Mont.) However positive the terms of the grant of police power to the municipality, the state will be held to have retained its original jurisdiction over the same subject and to possess the authority to exercise it concurrently with the municipality.—*Public Service*

Commission of Montana v. City of Helena, 159 P. 24.

Statutes relating to municipalities will be construed in harmony with municipal self-government and retention of police power by the state.—Id.

☞70 (Mont.) Where the city acquires a water supply system without resort to indebtedness or taxation beyond 3 per cent. of the taxable property of the city, it stands on an equal footing with individuals and is subject to all reasonable regulation and control by the state under the police power.—Public Service Commission of Montana v. City of Helena, 159 P. 24.

Laws 1913, c. 52, as to powers of the Public Service Commission, does not destroy the municipal power of regulation and control, but merely subjects it to the control of the commission.—Id.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(A) Meetings, Rules, and Proceedings in General.

☞100 (Cal.App.) A municipal board, in making a record of its action in rejecting bids for contract for public work, need not also make an entry of its reason for so doing.—West v. City of Oakland, 159 P. 202.

(B) Ordinances and By-Laws in General.

☞120 (Cal.) Under St. Sp. Sess. 1911, p. 400, § 270, charter of Sacramento, the effect of declaring an urgency in an ordinance when there is none is not to void the ordinance, but merely to postpone its taking effect until 30 days have elapsed.—Michelson v. City of Sacramento, 159 P. 431.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(C) Agents and Employees.

☞220(9) (Wash.) Seattle City Charter, art. 16, § 32, relating to payment of persons disabled while in civil service, establishes a pension system, so that, notwithstanding his previous recovery against the third party whose negligence disabled him, an employé might recover the benefits accruing thereunder.—Engstrom v. City of Seattle, 159 P. 816.

Under Seattle City Charter, art. 16, § 32, a civil service employé, who, while working upon streets was injured by the negligence of a third party, held injured in line of his employment.—Id.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

☞269(1) (Cal.) Under Const. art. 12, § 23, article 11, § 6, Public Utilities Act 1911, §§ 43, 82, Code Civ. Proc. § 1247, held that city of Los Angeles, under its amended charter of March 25, 1911 (St. 1911, p. 2061), might open street across railroad without permission of Railroad Commission.—City of Los Angeles v. Central Trust Co. of New York, 159 P. 1169.

☞271 (Mont.) The power exercised by the city under Rev. Codes, § 3259, subd. 64, to issue bonds and provide, own, and control a water system, is proprietary in character as distinguished from the governmental capacity.—Public Service Commission of Montana v. City of Helena, 159 P. 24.

(C) Contracts.

☞336(4) (Cal.App.) Under Oakland City Charter, §§ 126, 130, the council may award a public works contract to the lowest bidder whose offer best responds to the requirements of the work.—West v. City of Oakland, 159 P. 202.

The honest exercise of discretion of a city council, in considering the adaptability to the use required of goods offered, in determining who is the lowest responsible bidder under a

charter calling for award of public works contract to such bidder, is not reviewable.—Id.

☞345 (Cal.) St. 1897, p. 201, as amended by St. 1911, p. 1422, requiring a bond for payment of work and material of a contractor for city sewer work, held inconsistent with a city's freeholders' charter as to conditions imposed on a contractor for city sewer, and so under Const. art. 11, § 6, inapplicable to such work in such city.—Loop Lumber Co. v. Van Loben Sels, 159 P. 600.

☞352 (Wash.) Where a municipality requested separate bids for clearing and for filling certain low lands, but the same concern secured both jobs, which were covered by a single written instrument, held there was only one contract.—City of Aberdeen v. Equitable Surety Co., 159 P. 683.

☞371 (Wash.) Under Rem. & Bal. Code, §§ 8005-8010, ordinance for construction of water system held to create two funds, so that contractor, performing work not contemplated by original plan, was entitled to mandamus to compel the city to issue special water fund warrants, payable out of system's earnings.—State v. City of Tacoma, 159 P. 765.

(D) Damages.

☞400 (Cal.) Contractor employed by city to regutter street is not liable for damages to basement of adjoining owner from rainfall while old gutter was removed, where work of contractor was done in workmanlike manner.—Norton v. Ransome-Crummey Co., 159 P. 1177.

(E) Assessments for Benefits, and Special Taxes.

☞407(1) (Okl.) Rev. Laws 1910, § 644, limiting time for actions to enjoin or collect assessments, is not unconstitutional.—City of Chickasha v. O'Brien, 159 P. 282.

☞419 (Wash.) Laws 1911, p. 442, as amended by Laws 1913, p. 409, authorizing a city, on petition, to order the construction of a lighting system and assess its cost, together with the expense of electrical energy, to abutting owners, held not to violate Const. art. 7, § 9, relating to local improvements by special assessments.—Ankeny v. City of Spokane, 159 P. 806.

Under Laws 1911, p. 442, as amended by Laws 1913, p. 409, authorizing city council to direct installment of lighting system, lamp posts, the only part of the plant designed for ornament, held not such a departure from ordinary construction as to be an abuse of council's discretion.—Id.

The remedy for city council's abuse of its discretion by attempting to levy special assessments to meet the cost of ornamental features of a lighting system would be to allow assessments only up to the value of a proper system.—Id.

☞488, 489(1) (Wash.) Where a property owner recovered judgment for damages in condemnation proceedings for street improvements, and plaintiff, as successor in interest, recognized assessment by asking for its reduction, plaintiff is estopped to question validity of assessment as reduced.—Metropolitan Bldg. Co. v. City of Seattle, 159 P. 793.

☞488, 489(5) (Wash.) Local Improvement Code (Laws 1911, p. 455, § 23), providing for objections to assessment roll, etc., held to apply to roll in improvement proceedings initiated prior to its passage but confirmed subsequent thereto, so that one not objecting thereunder could not maintain action in equity to have roll adjudged void.—Shaser v. City of Olympia, 159 P. 756.

☞493(6) (Wash.) A city agreeing to reduction in assessment for benefits for street improvements held estopped from claiming any other assessment but reduced assessment.—Metropolitan Bldg. Co. v. City of Seattle, 159 P. 793.

☞513(5) (Okl.) Under Rev. Laws 1910, § 644, action to enjoin assessments to pay bonds issued under paving act and to cancel bonds, cannot

be maintained after 60 days from passage of ordinance making final assessment.—*City of Chickasha v. O'Brien*, 159 P. 282.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

☞703(1) (Cal.App.) Under St. 1907, p. 1059, and Const. art. 11, § 11, the city of Alameda has power by ordinance to regulate the moving of buildings upon streets.—*Robinson v. Otis*, 159 P. 441.

☞706(6) (Utah) Defendant's negligence in running his automobile into plaintiff's vehicle held a jury question.—*Boeddecher v. Frank*, 159 P. 634.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

☞733(1) (Kan.) Maintenance of a zoological garden in public park by city is governmental function, so that city is not liable for injuries to visitors by animals through negligence of officers or agents in not properly confining them.—*Hibbard v. City of Wichita*, 159 P. 399.

(C) Defects or Obstructions in Streets and Other Public Ways.

☞768(2) (Utah) If improvements of streets or sidewalk are in the condition made in following plans adopted by a city, it is ordinarily not liable for injury therefrom to a traveler.—*Shugren v. Salt Lake City*, 159 P. 530.

☞818(9) (Utah) Evidence that other persons had previously stumbled, though they had not fallen, over the projection in a sidewalk on which plaintiff had tripped, causing her to fall, is competent both as notice to the city, and as characterizing the defect.—*Shugren v. Salt Lake City*, 159 P. 530.

☞821(5) (Utah) Ordinarily whether maintenance of a particular defect in a street or sidewalk constitutes negligence of the city is a question for the jury.—*Shugren v. Salt Lake City*, 159 P. 530.

☞821(6) (Utah) Ordinarily whether maintenance of a particular defect in a street or sidewalk constitutes negligence of the city is a question for the jury.—*Shugren v. Salt Lake City*, 159 P. 530.

It cannot be said as matter of law that a city was not negligent in maintaining in the residence portion of a city a sidewalk with one of the cement blocks raised 2 to 2½ inches, on the edge of which a pedestrian was tripped.—*Id.*

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

☞864(1) (Cal.App.) Claim to recover taxes illegally exacted, held not required to be paid out of particular year's revenue, and therefore not affected by San Francisco charter provision limiting payment of claims to city's current revenue.—*Burr v. Board of Suprs of City and County of San Francisco*, 159 P. 458.

☞864(6) (Okla.) Under Const. art. 10, § 26, a town council has no power, without express vote of the people authorizing it, to create present indebtedness to be paid out of the revenues of future years.—*Eureka Fire Hose Mfg. Co. v. Town of Granite*, 159 P. 308.

(D) Taxes and Other Revenue, and Application Thereof.

☞958 (Or.) Eugene City Charter, §§ 114, 115, exempting it from road taxes levied by the county court, refers only to road taxes levied

under L. O. L. §§ 6320, 6321, and is inapplicable to general taxes raised under sections 937, 6278, although they are used for road purposes.—*Roney v. Lane County*, 159 P. 73.

☞958 (Wash.) Tekoa Ordinance of 1905, No. 100, enacted pursuant to Rem. & Bal. Code, § 7768, authorizing imposition of street poll tax on all males over 21, became void or was amended by Laws 1913, p. 315, § 1, subd. 7, limiting subjects of tax in cities of third class to males between ages of 21 and 50, so that the city could neither collect the tax nor impose the penalty for refusal to pay by a male over 50 years of age.—*State v. Superior Court of Whitman County*, 159 P. 383.

☞980(3) (Cal.) Under Bakersfield Ordinance No. 9, §§ 71, 73, 75, substantially following Pol. Code, §§ 3776, 3780, 3785, 3786, where a certificate of tax sale on December 28, 1898, recited that the purchaser would be entitled to deed on December 28, 1903, proceedings subsequent thereto were void for the error in cutting off one redemption day.—*Hinds v. Clark*, 159 P. 153.

Where a city ordinance required the notice of sale for delinquent taxes to state the day and hour when sale would be made, and that the sale be made at the city hall, a notice, in a city of the fifth class, merely fixing the place as the city hall, is sufficiently definite, and the exact room need not be stated.—*Id.*

☞982 (Cal.) Where a certificate of tax sale was void for error in reciting the day on which the purchaser would be entitled to a deed contrary to ordinance, it is not material that the owner actually allowed several years to elapse after expiration of the redemption period before suing to quiet title.—*Hinds v. Clark*, 159 P. 153.

☞986 (Mont.) Under Const. art. 13, § 6, authorizing the Legislature to empower municipalities to provide waterworks, providing they be owned and controlled by the city, the revenues therefrom to be devoted to discharge the indebtedness, "revenues" means the gross receipts less necessary operating expenses, against which expenses of regulation, if it is reasonable, are properly chargeable.—*Public Service Commission of Montana v. City of Helena*, 159 P. 24.

(E) Rights and Remedies of Taxpayers.

☞993(2) (Cal.App.) A taxpayer interested in an unsuccessful bidder for contract for public improvement, whose bid was lowest, suing to enjoin award to a higher bidder, could not claim that, because the specifications did not provide for comparison of devices to be offered, the council had no authority to investigate their merits in awarding the contract, where such unsuccessful bidder co-operated with the council in making such comparisons.—*West v. City of Oakland*, 159 P. 202.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, ☞693-819.

NAMES.

See Trade-Marks and Trade-Names.

☞16(2) (Cal.App.) Under Code Civ. Proc. § 1963, subd. 25, providing that the identity of a person from the identity of name is to be presumed unless controverted by other evidence, and the rule idem sonans, the name "Dimetra" may be said to mean the name "Demetra."—*Brunski v. Cooper*, 159 P. 723.

NATIONAL BANKS.

See Banks and Banking, ☞261, 281.

NECESSARIES.

See Husband and Wife, ¶19.

NEGATIVE PREGNANT.

See Pleading, ¶126.

NEGLIGENCE.

See Carriers, ¶149½-346; Death; Electricity; Hospitals, ¶8; Master and Servant, ¶85-417; Municipal Corporations, ¶700-821; Physicians and Surgeons, ¶14-18; Railroads, ¶265-391; Street Railroads, ¶114; Trial, ¶295, 296; Warehousemen, ¶24.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

¶1 (Okl.) To constitute actionable negligence of defendant, there must be a duty owing plaintiff, a breach, and some injury proximately resulting from breach.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833.

¶1 (Okl.) Essentials of negligence are duty on part of defendant, failure to perform that duty, and injury to plaintiff proximately resulting.—Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141.

¶2 (Okl.) Irrespective of the legal relationship of the parties, one is liable for failure to exercise reasonable care to prevent injury which will probably result from lack of such care.—Lisle v. Anderson, 159 P. 278.

(C) Condition and Use of Land, Buildings, and Other Structures.

¶45 (Or.) Owner of building in which an elevator was operated was bound to take reasonable care and precaution against injuries to a constructor's helper employed by an elevator company engaged in repairing such elevator.—Gunnell v. Van Emon Elevator Co., 159 P. 971.

¶55 (Okl.) An independent contractor, putting up joists in a school building and knowing that another contractor would install a water tank thereon, was liable to a servant of the latter for injuries caused by breaking of a defective joist.—Lisle v. Anderson, 159 P. 278.

II. PROXIMATE CAUSE OF INJURY.

¶58 (Okl.) The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any independent cause, produces that event, and without which that event would not have occurred.—Shearman and Redfield on Negligence.—Lusk v. Pugh, 159 P. 855.

¶61(2) (Okl.) Where the negligence of defendant and the act of a third person concur to produce the injury, so that it would not have happened in the absence of either, the negligence is the proximate cause.—St. Louis & S. F. R. Co. v. Bell, 159 P. 336.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

¶65 (Okl.) "Contributory negligence" is act or omission of plaintiff amounting to want of ordinary care, which concurring with negligence of defendant is proximate cause of injury, and presupposes negligence of defendant.—Chicago, R. I. & P. Ry. Co. v. Barton, 159 P. 250.

¶67 (Or.) An invitee at a sawmill held negligent, where he saw that a plank was about to be thrown down to a platform on which he was standing, and then looked away without taking further precautions.—Young v. Prouty Lumber & Box Co., 159 P. 565.

(C) Imputed Negligence.

¶89(1) (Okl.) Persons are not engaged in a joint enterprise within the law of negligence,

unless there be community of interest in the purpose of the undertaking, and an equal right to direct and govern the conduct of each other with respect thereto.—St. Louis & S. F. R. Co. v. Bell, 159 P. 336.

¶93(1) (Okl.) Contributory negligence of a chauffeur cannot be imputed to a person traveling in the vehicle with him by invitation of the owner.—St. Louis & S. F. R. Co. v. Bell, 159 P. 336.

To render one liable for the negligence of a chauffeur, it is essential that the relation of master and servant or principal and agent exists, or that the parties be engaged in a joint enterprise making each responsible for the other's acts.—Id.

(D) Comparative Negligence.

¶97 (Wash.) Where contributory negligence was proximate cause of decedent's death in defendant railroad's switchyard, fact that defendant was negligent is immaterial; as the doctrine of comparative negligence does not obtain.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

¶101 (Cal.) By the Employers' Liability Act contributory negligence does not bar recovery for personal injuries, if it is slight and that of the employer and fellow servant gross in comparison; and the jury may diminish the damages according to the proportion of negligence chargeable to the employee.—Lassen v. Southern Pac. Co., 159 P. 143.

¶101 (Cal.App.) Under Employers' Liability Act 1911, recovery is not barred where the employee's contributory negligence is slight and the employer's negligence is comparatively gross, but the damages may be reduced.—Tubbs v. Stone & Webster Const. Co., 159 P. 242.

¶101 (Or.) Under Employers' Liability Act, § 6, the contributory negligence of the person injured is not a defense, but may be taken into account in fixing the amount of the damages.—Gunnell v. Van Emon Elevator Co., 159 P. 971.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

¶110 (Okl.) A complaint for negligence must show injury to plaintiff from violation of duty by defendant.—Lisle v. Anderson, 159 P. 278.

¶116 (Okl.) The defense of an "act of God" in actions of negligence must be pleaded, being a special defense.—Sand Springs Ry. Co. v. Baldrige, 159 P. 487.

¶119(6) (Okl.) Where petition negated contributory negligence and answer alleged that if plaintiff received any injuries they were the result of her own negligence, the issue of contributory negligence was raised; reply denying that plaintiff's injuries were the result of her own negligence.—Pioneer Telephone & Telegraph Co. v. Kophart, 159 P. 355.

(B) Evidence.

¶134(2) (Cal.) Negligence may be established by circumstantial evidence.—Meyer v. McNutt Hospital, 159 P. 436.

(C) Trial, Judgment, and Review.

¶136(9) (Okl.) Where reasonable men can draw different conclusions as to negligence, question is for the jury, and verdict cannot be directed.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132.

¶136(9) (Wash.) What is reasonable care, whether as applied to the question of primary negligence or that of contributory negligence, is always a question for the jury whenever upon the evidence reasonable minds might reach different conclusions.—Hull v. Davenport, 159 P. 1072.

¶136(10) (Okl.) In a negligence suit, where the evidence as to defendant's primary liability conflicted, the question should be left to the jury.

—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1182.

⇒136(19) (Wash.) In an action for personal injuries received by a child six years and eight months old while playing with a wheel scraper, whether defendant was negligent in leaving scraper unguarded, either on school grounds or within a few feet of boundary, *held* for the jury. —Jorgenson v. Crane, 159 P. 796.

⇒136(26) (Okla.) Williams' Const. art. 23, § 6, making contributory negligence question for jury, does not take from courts right to ascertain whether necessary elements of primary negligence exist. —Chicago, R. I. & P. Ry. Co. v. Barton, 159 P. 250.

⇒136(29) (Wash.) In an action for personal injuries received by a child six years and eight months old while playing with a wheel scraper left unguarded by defendant, whether plaintiff was negligent *held* for jury. —Jorgenson v. Crane, 159 P. 796.

⇒136(30) (Okla.) Whether the negligence of the chauffeur was to be imputed to deceased, who was riding with him on invitation of the owner of the car, *held* a question of law for the court and not one of contributory negligence for the jury, under Const. art. 23, § 6. —St. Louis & S. F. R. Co. v. Bell, 159 P. 336.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See Appeal and Error, ⇒981; Criminal Law, ⇒938-945; New Trial, ⇒104, 108, 150.

NEWSPAPERS.

See Process, ⇒87-96.

NEW TRIAL

See Appeal and Error, ⇒301-305, 706, 933, 977, 981, 1015; Criminal Law, ⇒911-961, 1158.

I. NATURE AND SCOPE OF REMEDY.

⇒2 (Okla.) On trial de novo of a case appealed from justice court, county court has power for proper causes to grant new trial. —Horton v. Prague Nat. Bank, 159 P. 930.

⇒5 (Okla.) Defendant did not waive motion for new trial filed in due time by subsequently filing an unauthorized supplemental motion for new trial. —Pinkston v. Marlow, 159 P. 488.

⇒6 (Okla.) Trial courts are vested with large discretion in granting new trials whenever it may appear that substantial justice has probably not been done. —Missouri, K. & T. Ry. Co. v. James, 159 P. 1109.

II. GROUNDS.

(B) Misconduct of Parties, Counsel, or Witnesses.

⇒28 (Cal.App.) That plaintiff in a personal injury case fainted while on the witness stand, there being no simulation, is not ground for giving defendant a new trial. —Fonts v. Southern Pac. Co., 159 P. 215.

(C) Rulings and Instructions at Trial.

⇒41(3) (Okla.) In an action for damages for wrongful death of his son, an instruction that in considering damages, jury might consider the fact that plaintiff inherited an allotment belonging to the son is prejudicial, and warrants new trial. —Missouri, K. & T. Ry. Co. v. James, 159 P. 1109.

(F) Verdict or Findings Contrary to Law or Evidence.

⇒70 (Okla.) On motion for new trial challenging the verdict as contrary to the evidence, the court must disapprove the verdict if he cannot conscientiously approve it. —White v. Dougal, 159 P. 907.

Not only must the evidence satisfy the jury, but it must be such as the trial court can approve of the verdict rendered thereon. —Id.

⇒70 (Okla.) Where a verdict is not sustained by sufficient evidence, or is based on conjecture, a new trial should be granted. —Ingram v. Dunning, 159 P. 927.

⇒72 (Okla.) On motion for new trial on the ground that the verdict is contrary to the evidence, the trial court must weigh the evidence. —White v. Dougal, 159 P. 907.

⇒72 (Okla.) In courts of record, trial judge must either approve verdict, or grant new trial, when verdict is not sustained by weight of evidence. —Horton v. Prague Nat. Bank, 159 P. 930.

⇒75(4) (Wash.) Under Rem. & Bal. Code, § 399, subd. 5, concerning new trial for inadequate or excessive damages, in an action for personal injuries sustained by a child 6 years and 8 months old, where the femur of the left leg was broken, causing pain for several weeks, and the cost of proper care was \$362, *held*, the court did not abuse its discretion in granting plaintiff a new trial on the ground that a verdict for \$368 was inadequate. —Jorgenson v. Crane, 159 P. 796.

(H) Newly Discovered Evidence.

⇒104(1) (Wash.) A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative. —Shell v. Svenasson, 159 P. 1076.

⇒108(2) (Wash.): In an action for reformation of notes and a mortgage, where the weight of the evidence was clearly that plaintiff understood the instruments when he accepted them, he was not entitled to new trial for newly discovered evidence that he could not read or write English. —Conrads v. Green, 159 P. 102.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

⇒128(5) (Okla.) A motion for new trial, assigning as grounds that verdict was unsupported by evidence and is contrary to weight thereof, authorizes trial court to set aside verdict which is contrary to weight of evidence. —Horton v. Prague Nat. Bank, 159 P. 930.

⇒147 (Cal.App.) An affidavit which merely states that a certain witness did not testify, as counsel for plaintiff understood she would testify, and that she had made statements inconsistent with her testimony, *held* to show no ground for granting a new trial. —Gaskill v. Pacific Electric Ry. Co., 159 P. 200.

⇒150(2) (Cal.App.) An affidavit by counsel for plaintiff that he had discovered evidence which would establish a particular fact, but which did not state what particular evidence would be procured upon that point, was insufficient to call for a new trial. —Gaskill v. Pacific Electric Ry. Co., 159 P. 200.

⇒150(4) (Cal.App.) An affidavit in support of a motion for new trial on the ground of newly discovered evidence was insufficient where it did not appear therefrom whether the witness had communicated her knowledge to counsel during the progress of the trial or thereafter. —Gaskill v. Pacific Electric Ry. Co., 159 P. 200.

⇒155 (Okla.) Where motion for new trial was filed within three days after verdict, but was not disposed of at that term, court did not lose jurisdiction, and might dispose of motion at follow-

ing term.—Horton v. Prague Nat. Bank, 159 P. 930.

§163(2) (Cal.App.) Written order, granting defendant's motion for new trial on various grounds, including insufficiency of evidence to sustain findings, which sets out certain argument, the opinion of the court upon one question of law involved, must be treated as general, and it must be assumed that the court, not having expressly limited its order to other definite grounds, may have granted the motion for insufficiency of evidence.—Brode v. Clark, 159 P. 1048.

NEXT FRIEND.

See Infants, §77.

NOMINATION.

See Elections.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NOTICE.

See Animals, §14½; Appeal and Error, §411-430; Bills and Notes, §343, 396; Chat-tel Mortgages, §149, 150; Fraudulent Con-veyances, §156, 232, 301; Guaranty, §7; Insurance, §229; Landlord and Ten-ant, §94; Mechanics' Liens, §99, 271; Mortgages, §154; Municipal Corporations, §980; Principal and Surety, §123; Sales, §81; Street Railroads, §86; Taxation, §363; Trial, §6; Vendor and Purchaser, §231, 299.

NUISANCE.

II. PUBLIC NUISANCES.

(C) Abatement and Injunction.

§80 (Cal.App.) Where threatened acts, if committed, in addition to being indictable, will constitute a public nuisance, equity may enjoin them to prevent injury which will result from their maintenance thereof.—Weis v. Superior Court of San Diego County, 159 P. 464.

The act of causing women to exhibit their naked persons to the public for a general ad-mission fee, although a crime, is so detrimental to public morals and offensive to the senses as to constitute a public nuisance, and may be restrained by injunction.—Id.

NURSES.

See Hospitals, §8.

OBJECTIONS.

See Appeal and Error, §185-242; Criminal Law, §695, 1036, 1038; Municipal Corpo-rations, §488, 489; Pleading, §406-422; Trial, §84.

OBLIGATION OF CONTRACTS.

See Constitutional Law, §117, 171.

OBSCENITY.

See Nuisance, §80.

OBSTRUCTIONS.

See Waters and Water Courses, §119.

OFFICERS.

See Arrest; Banks and Banking, §54; Coun-ties, §65; District and Prosecuting Attor-neys, §2; Garnishment, §63; Judges; Justices of the Peace; Mandamus, §63-101; Public Service Commissions; Receiv-

ers; Schools and School Districts, §63; States, §27, 67; Statutes, §125; Wa-ters and Water Courses, §227.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(F) Term of Office, Vacancies, and Hold-ing Over.

§55(1) (Cal.App.) Pol. Code, § 879, providing that officers must continue to act, after their term has expired, until their successors are quali-fied, does not prevent a vacancy from existing upon the filing of a resignation which may be at once filled by the appointing power.—People v. Marsh, 159 P. 191.

(G) Resignation, Suspension, or Removal.

§61 (Cal.App.) Prior to enactment of Const. art. 28, § 1, empowering recall of officers, the Legislature had power to provide for the re-call.—Wigley v. South Joaquin Irr. Dist., 159 P. 985.

Const. art. 4, § 18, providing for impeachment of certain officers, does not deprive the Legis-lature of power to provide also for their re-call.—Id.

As Const. art. 23, § 1, as to recall of specified officers is not a grant of power to the Legisla-ture, it will not be held to remove from the Legislature the power to pass acts for removal of public officers.—Id.

§71 (Wash.) An officer holding for a term is not subject to removal by arbitrary will of the executive, although an appointee.—State v. Superior Court of Pierce County, 159 P. 84.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§94 (Or.) The right of an officer to demand expenses incurred by him in the performance of official duty must be found in the Constitu-tion or the statute conferring it, either directly or by necessary implication; and a private citi-zen cannot have any greater right.—Mackenzie v. Douglas County, 159 P. 625.

§100(1) (Cal.) The Legislature may change the mode of compensation of an officer after his election, from fees or per diem to salary, but cannot, in view of Const. art. 11, § 9, increase his compensation.—Galeener v. Honeycutt, 159 P. 595.

St. 1915, p. 1040, amending Pol. Code, § 4271, as to compensation of supervisors, does not in-fringe Const. art. 11, § 9, prohibiting increase in compensation of county officer during term.—Id.

No express finding by the Legislature that an act does not increase compensation of county officers is necessary to validate the act.—Id.

Although St. 1915, p. 1040, as to compensa-tion of supervisors, in terms applied to all in-cumbents, the mere fact that two of six mem-bers were elected under an earlier statute at a lower compensation does not invalidate the act under Const. art. 11, § 9, prohibiting increase of compensation during term, nor prevent ap-plication of the act to competent parties; the disability being personal.—Id.

§100(1) (Wash.) Laws 1915, p. 357, subject-ing to garnishment the earned salary of county officers, held not to diminish his compensation contrary to Const. art. 11, § 8.—Hanson v. Hodge, 159 P. 388.

§100(2) (Cal.App.) Under Const. art. 11, § 9, a township justice of peace held an "officer," an increase in whose pay during his term of office was forbidden, so that he could not re-cover additional compensation provided by Act Aug. 8, 1915 (St. 1915, p. 1029), effective after his term of office had commenced.—Cox v. Je-rome, 159 P. 884.

§103 (Or.) Acts conferring statutory powers on an officer are strictly construed.—Mackenzie v. Douglas County, 159 P. 625.

OPENING.

See Judgment, ¶148-168.

OPINION EVIDENCE.

See Criminal Law, ¶484; Evidence, ¶488-568.

OPTIONS.

See Brokers, ¶31; Sales, ¶24, 71, 81; Specific Performance, ¶57.

ORDERS.

See Master and Servant, ¶286; Public Service Commissions, ¶19.

ORDINANCES.

See Municipal Corporations, ¶120.

OVERDRAFTS.

See Banks and Banking, ¶21.

PARDON.

See Criminal Law, ¶1183.

PARENT AND CHILD.

See Adoption; Bastards; Death, ¶91; Descent and Distribution; Divorce, ¶308, 312; Guardian and Ward; Habeas Corpus, ¶85; Infants.

¶17(1) (Wash.) 3 Rem. & Bal. Code, § 5983, subd. 1, providing that every person who: First, having a dependent child under age of 16 years, deserts such child with intent to abandon it; second, willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance—shall be guilty of a gross misdemeanor, defines the offenses disjunctively, and must be read as if "or" occurred between the subdivisions.—State v. Gipson, 159 P. 792.

PARI MATERIA.

See Statutes, ¶224, 225.

PARKS.

See Eminent Domain, ¶47.

PAROL EVIDENCE.

See Evidence, ¶397-460.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.

For parties to particular proceedings or instruments, see also the various specific topics.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

¶95(1) (Okla.) Under Rev. Laws 1910, § 4768, forbidding change of title of cause, does not conflict with section 4790, authorizing amendment as to parties.—Zahn v. Obert, 159 P. 298.

PARTITION.**II. ACTIONS FOR PARTITION.****(B) Proceedings and Relief.**

¶53 (Cal.) In partition suit by plaintiff against tenants in common with him of land and a well and pumping plant, appointment of receiver held not justified by facts that plaintiff had land needing irrigation, that his only source of water was the well and pump and that the owners of the plant could not agree on its operation.—Reas v. Clemence, 159 P. 432.

A receiver may be appointed in a partition

suit whenever facts appear which justify such appointment.—Id.

PARTNERSHIP.

See Bankruptcy, ¶165; Shipping, ¶20.

I. THE RELATION.**(C) Evidence.**

¶44 (Okla.) The burden of proving partnership is upon the party alleging it.—Moning Dry Goods Co. v. Wiseman, 159 P. 259.

A presumption of partnership arises from the use of a firm name.—Id.

¶55 (Okla.) In action against alleged partners, evidence of written agreement of partnership is prima facie proof of partnership.—Moning Dry Goods Co. v. Wiseman, 159 P. 259.

Partnership is prima facie proved by evidence that defendants share in profits pursuant to agreement, that they have described themselves as partners in a writing, or by evidence of common management and profit.—Id.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.**(B) Individual Transactions.**

¶95 (Wash.) The fiduciary relationship existing between partners ceases to exist when they undertake negotiations for the sale or purchase of each other's interest, in the absence of a showing that the complaining partner was not sui juris or had a right to rely on the other partner.—Elmore v. McConaghy, 159 P. 108.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(B) Nature and Extent of Firm Liabilities.**

¶165 (Or.) Joint notes, on their face purporting to be obligations of partnership and of individual partners, were intended to give holder, not only security afforded by partnership as such, but security of individual partners.—Anderson v. Stayton State Bank, 159 P. 1033.

(C) Application of Assets to Liabilities.

¶178 (Or.) Individuals constituting partnership, signing joint and several notes, were jointly and severally liable, so that payee might look to the partnership estate for payment, where notes arose out of partnership indebtedness.—Anderson v. Stayton State Bank, 159 P. 1033.

¶185 (Or.) Partners signing joint and several notes were jointly and severally liable so that payee might look to their individual assets for payment.—Anderson v. Stayton State Bank, 159 P. 1033.

¶187 (Or.) A partnership debt is primarily the obligation of partnership, and secondarily the obligation of individual partners, and therefore liability of individual is contingent, and partnership assets must be exhausted before he is obliged to pay out of his own estate.—Anderson v. Stayton State Bank, 159 P. 1033.

(D) Actions by or Against Firms or Partners.

¶204 (Wash.) Under Rem. & Bal. Code, § 241, the answer stating "come now defendants R. and C. as a member of the firm of D. & Co., and not otherwise," held there was a general appearance by C., not only as a partner, but an individual.—National Union Fire Ins. Co. of Pittsburg v. Dickinson, 159 P. 125.

¶218(3) (Okla.) The questions of the existence of the partnership, the purchase of goods, and whether plaintiff had knowledge of dissolution of partnership under Rev. Laws 1910, §§ 4462, 4463, are for the jury.—Moning Dry Goods Co. v. Wiseman, 159 P. 259.

The existence of a partnership when doubt-

ful is for the jury, and the court should not nonsuit or direct a verdict.—Id.

↪219(3) (Cal.App.) Under Code Civ. Proc. § 578, though the complaint allege the contract to be partnership obligation of defendants, it may be proved the individual obligation of one of them, and recovery had of him.—McNeil v. Kreda, 159 P. 818.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(A) Causes of Dissolution.

↪259 (Okla.) Where it is shown that a partnership existed, it will be presumed to continue in the absence of testimony to the contrary.—Moning Dry Goods Co. v. Wiseman, 159 P. 259.

(C) Distribution and Settlement Between Partners and Their Representatives.

↪311(5) (Wash.) Where partners have an equal opportunity to know the condition of the business when one sells his interest to the other, the failure of purchaser to investigate the condition of the business is negligence and relief will not ordinarily be granted for mistakes in such transaction.—Elmore v. McConaghy, 159 P. 108.

Fraud or mistake is sufficient ground for setting aside a partnership settlement and retaking the account.—Id.

Before opening a partnership settlement, whether for fraud or mistake, the specific actions of fraud, or the particular mistakes, must be shown by clear and satisfactory proof.—Id.

A partnership settlement wherein one partner purchased the interest of another will not be set aside merely because of mistake resulting from reliance by one partner on an inventory prepared by the bookkeeper of the firm, in the absence of a showing of collusion between the bookkeeper and the other partner.—Id.

(D) Actions for Dissolution and Accounting.

↪334 (Wash.) In an action on notes given in a partnership settlement by one partner in payment of the interest of the other, the court properly refused to set off credits due the defendant under such settlement, where owing to the unfinished nature of the items a complete adjustment was impossible.—Elmore v. McConaghy, 159 P. 108.

PART PAYMENT.

See Accord and Satisfaction.

PASSENGERS.

See Carriers, ↪244-346.

PATENTS.

See Public Lands, ↪110.

PAYMENT.

See Accord and Satisfaction; Adverse Possession, ↪94; Appeal and Error, ↪153, 162; Compromise and Settlement; Insurance, ↪349, 360; Landlord and Tenant, ↪213; Principal and Agent, ↪105; Principal and Surety, ↪117; Subrogation; Taxation, ↪531; Tender; Vendor and Purchaser, ↪170, 176.

I. REQUISITES AND SUFFICIENCY.

↪22 (Wash.) Where tender of rent in the form of a check was not refused because it was not made in cash, the landlord, in his action for a forfeiture could not claim that the tender should have been made in money and not by check.—Moore v. Twin City Ice & Cold Storage Co., 159 P. 779.

II. APPLICATION.

↪39(1) (Wash.) The holder of several notes secured by insurance policies as collateral, on

payment of the policies, may apply the proceeds as he chooses to any of the notes, in the absence of contract to the contrary.—American Sav. Bank & Trust Co. v. Munson, 159 P. 1195.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

↪59 (Okla.) Payment is an affirmative defense, and must be expressly pleaded, not being available under a general denial.—Standard Fashion Co. v. Joels, 159 P. 846.

↪65(1) (Okla.) Payment is not presumed.—Standard Fashion Co. v. Joels, 159 P. 846.

↪65(6) (Okla.) When antecedent existence of a debt is shown, the burden of proving payment is upon the debtor.—Standard Fashion Co. v. Joels, 159 P. 846.

V. RECOVERY OF PAYMENTS.

↪87(2) (Or.) A payment voluntarily made in the discharge of a note and mortgage, cannot be recovered, although the note and mortgage were procured by duress, consisting of threats of imprisonment.—Baldwin Co. v. Savage, 159 P. 80.

PENALTIES.

See Master and Servant, ↪121.

PENSIONS.

See Infants, ↪12½; Municipal Corporations, ↪220.

PERSONAL INJURIES.

See Carriers, ↪292-346; Damages, ↪132, 169, 185, 216; Electricity; Evidence, ↪512, 528; Hospitals, ↪8; Master and Servant, ↪85-417; Negligence; New Trial, ↪75; Railroads, ↪265-301; Street Railroads, ↪114; Sunday, ↪28.

PERSONAL PROPERTY.

See Property.

PETITION.

See Highways, ↪107; Pleading, ↪53; Statutes, ↪35½.

PHOTOGRAPHS.

See Evidence, ↪359, 380.

PHYSICAL EXAMINATION.

See Rape, ↪43.

PHYSICIANS AND SURGEONS.

See Compromise and Settlement, ↪8; Evidence, ↪528; Jury, ↪10, 14; Witnesses, ↪211.

↪2 (Wash.) Statutes relating to practice of medicine are within the police power of the Legislature, and not in violation of any constitutional provision.—State Board of Medical Examiners v. Harrison, 159 P. 769.

↪2 (Wash.) Rem. & Bal. Code, § 8397½, subd. 3, as to deceitful medical advertising, held not unconstitutional as so vague and uncertain, as to leave determination to arbitrary personal opinion of the medical board.—State Board of Medical Examiners v. Macy, 159 P. 801.

↪6(1) (Idaho) A chiropractor, who charges compensation for his services as such, is not thereby engaged in the practice of medicine and surgery as defined in Rev. Codes, § 1353.—State v. Fite, 159 P. 1183.

↪11(1) (Wash.) Rem. & Bal. Code, §§ 8397, 8397½, providing for revocation of physician's license, is a valid enactment, whether it states a rule of substantive law or rule of evidence.—

State Board of Medical Examiners v. Harrison, 159 P. 769.

Under Rem. & Bal. Code, § 8397, providing for revocation of license to practice medicine on showing of unprofessional conduct, there is no discretion in a board of examiners if conviction of offense involving moral turpitude is shown.—Id.

Rem. & Bal. Code, §§ 8397, 8397½, providing for revocation of license to practice medicine on showing conviction of offense involving moral turpitude, the term "moral turpitude" is not so vague and uncertain as to render the law unreasonable and void.—Id.

—11(3) (Wash.) Where the record fails to show that sufficiency of a complaint before the medical examiners for revocation of license was challenged before the board or on appeal to the superior court, it must be given a liberal construction to sustain the judgment.—State Board of Medical Examiners v. Macy, 159 P. 801.

Complaint for revocation of physician's license, in statutory words of Rem. & Bal. Code, § 8397½, though indefinite, but supplemented by stipulation filed on appeal to the superior court, serving as bill of particulars, held sufficient to support revocation, in the absence of attack before the board or in the superior court.—Id.

—14(1) (Mont.) Where two physicians are employed on the same case and by agreement divide the services between them, each is bound to furnish ordinary professional care and skill and give his best personal attention.—Stokes v. Long, 159 P. 28.

—16 (Mont.) A physician, recommending during his temporary absence another physician with whom he is not financially connected, is not liable for the latter's negligence or want of skill.—Stokes v. Long, 159 P. 28.

Where two physicians are employed on the same case and by agreement divide the services between them, one is liable for negligent errors by the other which he observed or could have observed.—Id.

Where a physician calls in another to assist in treating a broken leg and gives the latter exclusive charge of the case only after he leaves temporarily, and the treatment of the leg is vicious from the start, the first physician is liable.—Id.

—18(4) (Mont.) A complaint, alleging in traversable form the acts or omissions of defendant physician on which recovery was sought, showing they occurred through defendant's negligence, held sufficient, under Rev. Codes, § 6532.—Stokes v. Long, 159 P. 28.

—18(7) (Mont.) In malpractice action for treatment of broken leg, evidence of the cost of an operation that would minimize the suffering due to plaintiff's condition at time of trial was admissible.—Stokes v. Long, 159 P. 28.

Evidence of treatment by associated physician for several weeks after defendant had left town was competent to inform the jury that the course of treatment approved by defendant was continued without change.—Id.

—18(9) (Mont.) In malpractice action, evidence of the injury, treatment, and results held to make a case for the jury.—Stokes v. Long, 159 P. 28.

PLEA.

See Criminal Law, —279-301.

PLEADING.

See Judgment, —94, 251, 252.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

—8(2) (Ok.) Defendant's petition to vacate judgment, averring that he has a good defense, as shown by his answer on file in the cause, but not making such answer a part of the petition, is insufficient as stating a mere legal conclusion.—Tracy v. State, 159 P. 496.

—8(8) (Wash.) In action against husband and wife, an allegation that when the wife gave the note she was acting for herself and the community, is mere legal conclusion.—Balkema v. Grolimund, 159 P. 127.

—11 (Cal.) In action to set aside transfers of personalty, amendment introducing allegations as to transfers of realty to show conspiracy to defraud held properly excluded as merely evidentiary.—Scholle v. Finnell, 159 P. 1179.

—34(7) (Wash.) Where defendants jointly answered a complaint and proceeded to trial on the merits, the complaint will not be narrowly scanned on appeal for defects in stating a cause of action.—Jensen v. Kohler, 159 P. 978.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

—53(2) (Cal.) The pleader may set forth the same cause of action in varied and inconsistent counts with strict legal propriety, as a cause for fraud and misrepresentation and for duress.—Tanforan v. Tanforan, 159 P. 709.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(C) Traverses or Denials and Admissions.

—126 (Cal.) In action to enforce a stockholder's liability, answers to allegation, of complaint that when the liability was incurred the total subscribed stock of the company was 19,159 shares, held evasive and not good traverses and admitted the allegation of the complaint.—Provident Gold Mining Co. v. Haynes, 159 P. 155.

(D) Matter in Avoidance.

—136 (Or.) Defendant county, having denied approval of water master's claims for services, a further answer that the claims were conditionally approved, but wrongfully filed contrary to the conditions, is demurrable; such matter being admissible under general denial.—Brewster v. Crook County, 159 P. 1031.

(E) Set-Off, Counterclaim, and Cross-Complaint.

—142 (Or.) In an action on notes, a counterclaim alleging that notes were procured by false representations, but not alleging that plaintiff's officer who made the false representations was then acting within the scope of his authority, held not to state a defense.—Meadow Valley Land & Investment Co. v. Manerud, 159 P. 559.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

—172 (Ok.) Under Rev. Laws 1910, § 6005, defendant cannot complain that on the day of trial plaintiff was allowed to file reply to answer.—Sulzberger & Sons Co. of Oklahoma v. Strickland, 159 P. 833.

—180(2) (Utah) Where plaintiffs sued on a railroad excavation contract, they could not enlarge their complaint by alleging an extra pay agreement in the reply.—Straw v. Temple, 159 P. 44.

V. DEMURRER OR EXCEPTION.

—204(3) (Cal.App.) A count as a whole, on at least one ground of negligence, stating sufficient facts, is good against a general demurrer, though insufficient on another ground attempted to be set up.—Foor v. W. P. Fuller & Co., 159 P. 238.

⇒214(8) (Okla.) A demurrer admits the allegations of the petition only for the purpose of testing the demurrer.—*Buell v. U-Par-har-ha*, 159 P. 507.

⇒216(1) (Cal.App.) On hearing on demurrer, the court cannot determine whether its allegations are true, nor does Code Civ. Proc. § 1875, subd. 3, permit the court on demurrer to notice judicially as against allegation in complaint, that no final receipt ever issued from the land office for the land in controversy.—*Colm v. Francis*, 159 P. 237.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⇒236(3) (Okla.) It is no abuse of discretion to permit amended reply, which does not change issues, to be filed before final judgment.—*Bly v. Poole*, 159 P. 511.

⇒236(9) (Wash.) In action by trustee for corporation to recover balance of money collected by defendant, denial of defendant's request to amend to put in issue a claim for services rendered, already known to the trustee, in view of liberal rule as to amendments imposed by Rem. & Bal. Code, § 303, held an abuse of discretion.—*Jensen v. Kohler*, 159 P. 978.

⇒237(1) (Utah) If evidence is received without objection upon a claim which should have been pleaded, the complaint may thereafter, by leave of the court, be amended to conform to the proof.—*Straw v. Temple*, 159 P. 44.

⇒248(4) (Cal.App.) Changing a complaint upon a note, by amendment, to one for goods sold and delivered, does not set up a different and new cause of action where the note was given for the goods.—*Rouillard v. Gray*, 159 P. 457.

⇒248(16) (Cal.) In action to set aside transfers of personality, amendment to complaint, construed as attempting to attack conveyances of realty, was properly excluded as setting forth new and distinct cause of action.—*Scholle v. Finnell*, 159 P. 1179.

⇒248(17) (Cal.) In action by landowner praying that a water company be directed to supply him with water sufficient for 160 acres, to use at will on any part of his 200 acres, without designation of a specific tract, cause of action stated in original complaint held same as that stated in second and amended complaint, though 40-acre tract described in the original complaint for which defendant refused to furnish water was different than that described in second complaint.—*Stone v. Imperial Water Co. No. 1*, 159 P. 164.

⇒259 (Cal.) Where a second action was not between the same parties as the first, the court properly refused to permit a defendant to amend another defendant's so-called plea in abatement grounded on judgment in the first action, under his statement that he was "able to amend the said plea in abatement and state facts sufficient to constitute a plea in abatement to said action."—*Cobe v. Crane*, 159 P. 587.

XI. MOTIONS.

⇒343 (Okla.) Where the petition states a cause of action and the answer alleges no new matter, rendition of judgment for defendant on the pleadings is improper.—*Leighton v. Crowell*, 159 P. 1119.

⇒345(2) (Okla.) In replevin, answer by defendant, pleading general denial, and also affirmative defense admitting execution of note and mortgage on which claim for possession was based, raises question of fact, so that judgment on pleadings is improper.—*Williams v. Gibson Bros.*, 159 P. 649.

⇒347 (Okla.) Where, in action on note, the answer admitted execution by several defendants, and oral agreement to receive a fixed sum as defendant's liability and payment thereof and a reply denied allegations of answer as "inconsistent" with petition, motion for judgment on the pleadings was properly denied where

no motion to strike was made.—*Lambert v. Sloop*, 159 P. 482.

⇒350(8) (Utah) Where plaintiff moves for judgment upon the pleadings, the answer must be construed most favorably to the defendant.—*Johnson v. Mountain States Telephone & Telegraph Co.*, 159 P. 526.

⇒355 (Or.) It is proper to strike a pleading from the files when it is not properly verified.—*Clark v. Clark*, 159 P. 980.

⇒356(1) (Okla.) If amended reply is filed and defendant is not prepared to proceed with trial, he should not move to strike amended reply.—*Bly v. Poole*, 159 P. 511.

⇒362(5) (Okla.) Where plaintiffs obtained leave to amend petition to make it more definite and certain and the amendment fails to do so, the amendment is properly stricken.—*Long v. McFarlin*, 159 P. 653.

⇒364(8) (Okla.) In petition to cancel deeds by full-blood Indians and quiet title on ground that county court was without jurisdiction to approve the deeds, and that they were void and not supported by consideration, allegations that consideration named was never paid held surplusage and properly stricken.—*Long v. McFarlin*, 159 P. 653.

⇒369(1) (Cal.) Since inconsistent causes may be pleaded, it is error to require plaintiff to elect upon which he will rely, but plaintiff can produce evidence on all causes set forth, and it is for the jury to say which has been sustained, although defendant may move for nonsuit on any cause not sustained by the evidence.—*Tanforan v. Tanforan*, 159 P. 709.

⇒369(1) (Kan.) Where party pleads facts constituting two causes of action, one for rescission of contract and one for damages for breach of warranty, it is proper to require election between the causes.—*Muenzenmayer v. Hay*, 159 P. 1.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⇒403(5) (Cal.App.) Contradictory averments, or statements not true in complaint in mechanic's lien action, when at variance with findings, are not fatal to recovery, where answer cures misstatements, and findings are supported by uncontradicted evidence.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

⇒406(9) (Cal.App.) Although the complaint in a mechanic's lien action failed to allege that on cessation of work there was a fund subject to lien, trial of such issue without objection cured the defect.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 159 P. 178.

⇒406(9) (Wash.) Any insufficiency in complaint in not alleging that certain defendants had in their possession the money claimed by plaintiff as trustee was cured by the testimony of another defendant that he had collected the money and turned it over to such other defendants.—*Jensen v. Kohler*, 159 P. 978.

⇒417 (Cal.) Where demurrer to complaint was sustained because including several causes of action not separately stated, and plaintiff amended by stating such causes of action in separate counts and went to trial on amended complaint, he waived objection that demurrer was improperly sustained.—*Pearson v. Parsons*, 159 P. 1173.

⇒418(1) (Okla.) Defendant who files answer within time granted therefor after overruling of demurrer, waives any error in overruling the demurrer.—*Munson v. First Nat. Bank of Okmulgee*, 159 P. 486.

⇒422 (Okla.) Rev. Laws 1910, § 4759, providing that allegation of indorsement on written instrument, not met by verified denial, shall be taken as true may be waived by the pleader's introducing evidence thereon.—*Spaulding v. Thompson*, 159 P. 509.

PLEDGES.

See Corporations, ¶123.

¶25 (Wash.) Any act of a creditor by which he disregards his right under a pledge or lien and seeks to obtain a lien by other means will constitute an implied waiver.—*First Nat. Bank of Everett v. Neilsen*, 159 P. 113.

Where bank held insurance policy as collateral security for a loan, and thereafter instituted garnishment proceedings against the proceeds of this policy and others, *held*, it thereby waived its equitable lien to such insurance policy.—*Id.*

Where debtor had agreed with mortgagee that all insurance policies should stand as security for the payment of the mortgage debt, and thereafter pledged such policies as collateral security to plaintiff bank, *held*, that plaintiff waived its equitable lien to the proceeds of one of said policies not payable by its terms to the mortgagee by instituting proceedings against the proceeds of all the policies.—*Id.*

¶33 (Kan.) Where notes are indorsed by one bank to another as collateral security for credit, on agreement that, if unsatisfactory, they may be returned, a delay of nearly three months is not unreasonable as a matter of law, though in the meantime the bank obtaining the credit had gone into receivership.—*Northrup Nat. Bank v. Yates Center Nat. Bank*, 159 P. 403.

¶44 (Cal.App.) Where the payee pledged a note to secure a smaller amount and the maker subsequently paid the pledgee and got possession of the note, the payee retained a general interest in the note for the balance above the amount paid.—*Hunt v. Glassell*, 159 P. 227.

¶51 (Cal.App.) A complaint that payee pledged a note to a creditor who sued both the maker and payee, which suit the maker settled by paying the pledgee's claim, was not demurrable because implying that the payee joined in the settlement and consented to the note's surrender to defendant maker.—*Hunt v. Glassell*, 159 P. 227.

¶55 (Wash.) Evidence *held* to warrant the finding that collateral was given to secure the entire indebtedness and not a single note.—*American Sav. Bank & Trust Co. v. Munson*, 159 P. 1195.

POLICE COURTS.

See Courts, ¶41.

POLICE JUDGES.

See Justices of the Peace, ¶2, 10.

POLICE POWER.

See Constitutional Law, ¶81, 117.

POLICY.

See Insurance.

POLITICAL PARTIES.

See Constitutional Law, ¶68.

POLITICAL QUESTIONS.

See Constitutional Law, ¶68.

POLLING JURORS.

See Trial, ¶325.

POSSESSION.

See Adverse Possession; Intoxicating Liquors, ¶236; Pledges, ¶33; Quieting Title; Vendor and Purchaser, ¶157.

POWER COMPANIES.

See Eminent Domain, ¶191, 203.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREAMBLE.

See Injunction, ¶88; Statutes, ¶35½, 210.

PRE-EXISTING DEBT.

See Mortgages, ¶155.

PRE-EXISTING INDEBTEDNESS.

See Corporations, ¶123.

PREFERENCES.

See Bankruptcy, ¶185, 168.

PRELIMINARY EXAMINATION.

See Criminal Law, ¶224, 238.

PREMIUMS.

See Insurance, ¶349, 360.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESENTATION.

See Executors and Administrators, ¶222.

PRESUMPTIONS.

See Appeal and Error, ¶927-934; Evidence, ¶59-89; Statutes, ¶212.

PRICE.

See Sales, ¶359; Vendor and Purchaser, ¶170, 176.

PRIMARY ELECTIONS.

See Elections.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Corporations, ¶426; Evidence, ¶242; Factors; Husband and Wife, ¶23¾; Insurance, ¶76-112, 229; Witnesses, ¶56.

I. THE RELATION.**(A) Creation and Existence.**

¶22(1) (Cal.App.) The agency of a wife for a husband in the purchase of goods not necessities cannot be proved by evidence of what the wife said in making such purchases.—*Roullard v. Gray*, 159 P. 457.

¶22(3) (Wash.) The fact of agency cannot be established by declarations of the agent in the absence of the principal.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.**(A) Execution of Agency.**

¶63(1) (Wash.) Evidence *held* to sustain a finding that plaintiff's selling agent did not agree to pay certain freight charges, contrary to the usual trade custom.—*Bergman v. Idaho Lime Co.*, 159 P. 702.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(A) Powers of Agent.**

¶103(12) (Cal.) Agent to sell lots in town for railroad, authorized to sell on terms the road should instruct him to make, was not authorized to agree for the road to forever prevent the sale of intoxicants by any and all persons with-

in the area of the town.—*Ayers v. Southern Pac. R. Co.*, 159 P. 144.

⇒105(4) (Wash.) An agent employed to make sales on credit is not authorized subsequently to collect the price in the name of the principal, nor will payment to him discharge the purchaser in the absence of showing of authority in the agent other than that necessarily implied in mere power to make sales.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

The fact that an agent by whom property is sold has possession of the bill or account for such goods, does not authorize the purchaser to make payment to him.—*Id.*

⇒105(9) (Wash.) While as a general rule the collecting power of an agent is limited to receiving legal tender, he may, in collecting from a school district, accept warrants of such district.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

⇒119(1) (Wash.) The burden of proving the scope of the agent's apparent authority is upon persons dealing with him.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

⇒122(1) (Wash.) The scope of an agent's authority cannot be established by declarations of the agent in the absence of the principal, nor does the fact that the agency is admitted for one purpose make the agent's admissions not known to or acquiesced in by the principal admissible to show scope of agency.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

⇒124(3) (Kan.) Evidence held to present question for jury whether general sales agent had authority to accept return of goods in payment of purchase price.—*United States Tire Co. of New York v. Kirk*, 159 P. 392.

⇒124(3) (Wash.) A school district having purchased a clock from the seller's agent, held, that the court could not say as a matter of law that the agent had no apparent authority to receive warrants in payment.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

⇒137(1) (Wash.) Estoppel extends only to so much of the act as is affected by the conduct working the estoppel.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

(C) Unauthorized and Wrongful Acts.

⇒147(2) (Wash.) Persons who deal with an agent cannot rely on his representations as to the extent of his authority nor assume the existence of authority, but must make inquiry and use all proper diligence to learn the scope of authority, and if they fail so to do they deal with the agent at their peril.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

(D) Ratification.

⇒171(4) (Cal.App.) Plaintiff's acceptance of fruits of C's unauthorized promotion of exchange of properties between plaintiff and defendant does not make plaintiff liable, on theory of ratification, for C's misrepresentations to defendant of plaintiff's property, unknown to plaintiff.—*Huffman v. Knapp*, 159 P. 456.

⇒173(3) (Wash.) Evidence held insufficient to show acquiescence in or ratification of the agent's acts in accepting payment for goods sold by the principal.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

⇒175(3) (Wash.) Ratification and estoppel are not equivalent terms, the first being retroactive and validating all of the act involved, and the second extending only to so much of the act as is affected by the conduct working the estoppel.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

(F) Actions.

⇒194(2) (Wash.) Where the alleged agent did not have possession of the property at the time

the sale was made and it was billed to the purchaser, it is improper to instruct that where an agent has exclusive possession of property with authority to sell, a purchaser from him could rely on his having authority to receive payment.—*Woodworth v. School Dist. No. 2, Stevens County*, 159 P. 757.

PRINCIPAL AND SURETY.

See Action, ⇒50; Appeal and Error, ⇒1236; Assignments; Bail; Bonds; Guaranty; Indemnity; Justices of the Peace, ⇒159; Undertakings.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

⇒59 (Or.) The rule of strictissimi juris, usually available to sureties without compensation, is generally relaxed when applied to a paid surety, so that bonding company must show that its rights have been injuriously affected before it can defeat its contract.—*Neilson v. Title Guaranty & Surety Co.*, 159 P. 1151.

III. DISCHARGE OF SURETY.

⇒100(4) (Ok.) In action on paid surety's building contract bond, the contract held to authorize aggregate changes not exceeding 10 per cent. of the penal sum of the bond without consent of surety, "aggregate" meaning net increase in cost because of changes.—*National Surety Co. v. Haley*, 159 P. 292.

⇒104(1) (Ok.) Extension of note for definite period by agreement between holder and principal, supported by valid consideration, without consent of surety, discharges surety.—*Kremke v. Radamaker*, 159 P. 475.

⇒104(5) (Ok.) Under Negotiable Instruments Act (Rev. Laws 1910, §§ 4169-4175), one who signs note as principal, though in fact surety, and known to payee to be such, is not discharged by grant of extension to principal debtor without his consent.—*Cleveland Nat. Bank v. Bickel*, 159 P. 302.

⇒117 (Ok.) Failure by obligee of paid surety's building contract bond to perform contract stipulation not to pay more than 85 per cent. of the value of the work until completion defeats recovery on the bond only to the extent the surety has been injured thereby.—*National Surety Co. v. Haley*, 159 P. 292.

⇒117 (Or.) Under clearing contract, and under contractor's surety bond, payments by owner without information on which to base stipulated estimates amounting to one-half of contract price, when no part of work was completed, and when it was abandoned when only one-eighth was done, held to relieve surety.—*Neilson v. Title Guaranty & Surety Co.*, 159 P. 1151.

⇒123(1) (Ok.) Where an agent who gave bond to secure moneys collected notified his employer of defalcations and was continued in his employment on promise to make restitution, agent's sureties who were not notified were freed from liability on all collections made after employer had knowledge of the offense.—*Phoenix Ins. Co. of Hartford v. Newell*, 159 P. 1127.

⇒128(2) (Ok.) Stipulation in note that time of payment may be extended without notice is met by one extension, and if more than one extension is given for valid consideration without consent of surety, surety is discharged.—*Kremke v. Radamaker*, 159 P. 475.

⇒129(4) (Ok.) If, after extensions of note by payee, surety accepts security to protect himself, he waives the extensions and is estopped from asserting release because of them.—*Kremke v. Radamaker*, 159 P. 475.

IV. REMEDIES OF CREDITORS.

⇒159 (Ok.) In action on paid surety's building contract bond, defendant has burden of showing extent of injury from failure of ob-

ligee to observe contract stipulation not to pay more than 85 per cent. of value of work finished.—*National Surety Co. v. Haley*, 159 P. 202.

⚡161 (Okl.) In action on paid surety's building contract bond, evidence held not to show defendant had been injured from failure of obligee to observe contract stipulation not to pay more than 85 per cent. of value of work finished.—*National Surety Co. v. Haley*, 159 P. 292.

V. RIGHTS AND REMEDIES OF SURETY.

(A) As to Creditor.

⚡172 (Wash.) In surety's suit to conserve fund in hands of the indemnified party, direct judgment may be rendered against the surety in favor of any claimants against the principal brought into the case.—*Maryland Casualty Co. v. Washington Nat. Bank*, 159 P. 689.

(B) As to Principal.

⚡175 (Okl.) Forbearance by surety company from withdrawing from bond of executor is sufficient consideration to support contract of indemnity against loss on the bond.—*American Surety Co. of New York v. Cabell*, 159 P. 352.

Where application for surety bond provided that indemnity would save surety harmless from counsel fees, including fee of special counsel whenever deemed necessary by surety, it imposed no duty on indemnitor to pay for attorney employed by the surety to procure the contract of indemnity.—*Id.*

Contract of indemnity in favor of surety on executor's bond, held not to render indemnitor liable for attorney's fees in action by legatee against executor, not on his bond, wherein surety was made party.—*Id.*

PRIORITIES.

See Assignments; Bankruptcy, ⚡351; Chattel Mortgages, ⚡138-150; Dower; Mechanics' Liens, ⚡198; Mortgages, ⚡151; Taxation, ⚡509.

PRIVATE ROADS.

See Easements.

PRIVILEGED COMMUNICATIONS.

See Witnesses, ⚡211.

PROBABLE CAUSE.

See Malicious Prosecution, ⚡15, 18, 71.

PROBATE.

See Wills, ⚡324.

PROBATE COURTS.

See Courts, ⚡202.

PROCESS.

See Action, ⚡64; Appeal and Error, ⚡257, 424-430; Appearance; Attachment, ⚡209; Dismissal and Nonsuit, ⚡57; Exceptions, Bill of, ⚡58; Execution; Garnishment; Injunction; Judgment, ⚡17; Mandamus; Replevin.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

⚡19 (Okl.) Where action is rightfully commenced in any county, summons may issue to any other county and be there served on one or more defendants.—*Oklahoma City Nat. Bank v. Ezzard*, 159 P. 267.

II. SERVICE.

(C) Publication or Other Notice.

⚡87 (Wash.) A necessary defendant may not be served by publication where personal service might have been had by the exercise of ordinary diligence.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

⚡96(2) (Cal.App.) A superior court cannot disregard an order for service by publication and service thereunder, where the supporting affidavit conforms to the statute and no fraud is shown.—*Porter v. Superior Court of California in and for Los Angeles County*, 159 P. 222.

⚡96(4) (Cal.App.) An affidavit for publication alleging that defendant never resided in California, but that her home and residence was a certain address in Massachusetts, held sufficient to support an order for publication, under Code Civ. Proc. § 412.—*Porter v. Superior Court of California in and for Los Angeles County*, 159 P. 222.

Failure of an affidavit for publication to give the information upon which the statement of defendant's nonresidence is based, as required by superior court rule 28, does not invalidate an order for publication based upon it.—*Id.*

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

⚡157 (Cal.App.) The remedy in case of alleged improper service is by motion to quash the summons, and not by motion for dismissal of the complaint.—*Roberts v. Superior Court of California, in and for Stanislaus County*, 159 P. 465.

PROHIBITION.

See Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PROOF OF LOSS.

See Insurance, ⚡540, 560, 789.

PROPERTY.

See Fixtures.

⚡9 (Nev.) Introduction in evidence of bill of sale from the consignor of a car did not show that the purchaser had a stronger claim to it than could have been asserted by the consignor, as against the consignee in possession prior to the bill of sale.—*Bank of Italy v. Burns*, 159 P. 863.

PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

PROTEST.

See Statutes, ⚡35½.

PROVISOS.

See Statutes, ⚡228.

PROXIMATE CAUSE.

See Master and Servant, ⚡129; Negligence, ⚡58, 61.

PUBLICATION.

See Process, ⚡87-96.

PUBLIC DEBT.

See Municipal Corporations, ⚡864-903.

PUBLIC IMPROVEMENTS.

See Highways, ¶107-122; Municipal Corporations, ¶70, 269-513, 768.

PUBLIC LANDS.

See Constitutional Law, ¶93; Mines and Minerals, ¶38; Municipal Corporations, ¶289.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.**(J) Patents.**

¶110 (Cal.App.) Issuance of receiver's final receipt constitutes a conveyance of the equitable title, and until issuance of patent the government merely holds legal title as trustee for the holder of the receipt, although in case of fraud, it might still refuse to issue patent.—*Colm v. Francis*, 159 P. 237.

(M) Conveyances, Contracts, and Exemptions.

¶136 (Okl.) A mortgage by a homestead entryman to secure loan to enable entryman to commute his land, executed after final receipt, though the final certificate was canceled and another certificate and patent issued after further proof, is valid.—*Pittsburg Mortgage Inv. Co. v. Sneed*, 159 P. 515.

PUBLIC POLICY.

See Contracts, ¶108, 181.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE COMMISSIONS.

¶2 (Mont.) Laws 1913, c. 52, creating and defining the powers of the Public Service Commission, does not infringe Const. art. 5, § 36, prohibiting delegation of powers to special commissions.—*Public Service Commission of Montana v. City of Helena*, 159 P. 24.

¶8 (Mont.) Any regulation made by the Public Service Commission under Laws 1913, c. 52, defining its duties, must be reasonable.—*Public Service Commission of Montana v. City of Helena*, 159 P. 24.

¶19(1) (Cal.) Public Utilities Act, § 61a, providing the effective date of certain orders of the Commission, applies only to proceedings instituted by persons or corporations against public utilities, and not to proceedings instituted by the public utility itself.—*Clemmons v. Railroad Commission of State of California*, 159 P. 713.

In the absence of any statutory provision to the contrary, the Public Utilities Commission may provide in its discretion the time when its orders shall take effect.—*Id.*

¶27 (Cal.) Since the Legislature might have withheld from the courts of the state any power of reviewing the acts of the Public Utilities Commission, the power of review which is given must be exercised within the limits and upon the conditions fixed by the Legislature.—*Clemmons v. Railroad Commission of State of California*, 159 P. 713.

¶29 (Cal.) Under Public Utilities Act, § 66, an aggrieved party who fails to apply for rehearing of an order of the Public Utilities Commission before its effective date loses his right to have such order reviewed in the courts.—*Clemmons v. Railroad Commission of State of California*, 159 P. 713.

¶35 (Cal.) Where after objection to order to show cause for want of jurisdiction, writ of certiorari issued, defendants were not precluded from insisting on the preliminary objection raised in response to the order to show cause, the merits not having been passed upon by the

issuance of the writ.—*Clemmons v. Railroad Commission of State of California*, 159 P. 713.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain.

PUBLIC UTILITIES.

See Public Service Commissions.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, ¶182-257.

PUNCTUATION.

See Statutes, ¶200.

PUNISHMENT.

See Criminal Law, ¶90, 94; Fines.

PURCHASE MONEY MORTGAGE.

See Mortgages, ¶415.

QUALIFICATIONS.

See Judges, ¶4.

QUASHING.

See Process, ¶157.

QUIETING TITLE.

See Appeal and Error, ¶78; Depositions, ¶8; Judgment, ¶585, 743; Jury, ¶14; Mines and Minerals, ¶38; Waters and Water Courses, ¶247.

I. RIGHT OF ACTION AND DEFENSES.

¶10(2) (Cal.) An action to quiet title is not the proper remedy for the owner of an equitable interest to invoke against the owner of the legal title.—*Aalwyns Law Institute v. Martin*, 159 P. 158.

¶12(1) (Cal.) The owner of land does not have to be in possession to enable him to maintain his action to quiet title.—*Cobe v. Crane*, 159 P. 537.

¶12(1) (Okl.) In suit for cancellation of deeds and to quiet title, though plaintiffs were not in possession, where defendant asks affirmative relief and asks to have his own title quieted, the court has jurisdiction.—*Gafford v. Davis*, 159 P. 490.

¶16 (Kan.) Vendor of land from whom vendees demanded return of purchase money for failure to deliver possession has interest to maintain action to quiet title against his grantors who claimed that their deed was in fact mortgage.—*Farmers' & Merchants' Bank of Courtland v. Tipton*, 159 P. 1016.

II. PROCEEDINGS AND RELIEF.

¶34(5) (Nev.) Neither under Rev. Laws, § 5514, nor independently of it, does a complaint state a cause of action to quiet title; it not alleging that defendants claim an interest in the property adverse to plaintiffs.—*Clay v. Scheeline Banking & Trust Co.*, 159 P. 1061.

¶44(2) (Cal.) In suit to quiet title, since defendant may effectually resist decree against himself by showing plaintiff to be without title, a city ordinance, certificate of sale and tax deed under which he claims are admissible.—*Ilinds v. Clark*, 159 P. 153.

¶52 (Cal.App.) Judgment for plaintiff in action to quiet title, following the description of the complaint and showing one side to be bound-

ed by dotted lines, *held* not so ambiguous as to be void.—City of Los Angeles v. Moore, 159 P. 872.

RAILROAD COMMISSION.

See Municipal Corporations, ¶269.

RAILROADS.

See Carriers; Eminent Domain; Master and Servant; Public Service Commissions, ¶19; Street Railroads.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

¶95(2) (Okl.) Comp. Laws 1909, § 7498, relative to the construction and maintenance of railroad crossings, *held* applicable to a railway crossing constructed subsequent to its enactment.—St. Louis & S. F. R. Co. v. Bell, 159 P. 336.

X. OPERATION.

(C) Companies and Persons Liable for Injuries.

¶265 (Kan.) Receivers of a railroad company, having been in possession of the road for more than a year, are liable for injuries resulting from a defective culvert on the right of way, which existed before they entered into possession of the property.—Sheat v. Lusk, 159 P. 407.

¶265 (Okl.) Receivers of railroad, operating train on track of another company by mere license without lease, are not liable for killing of stock, resulting not from negligence in operation of train, but from omission to inclose road with lawful fence.—Lusk v. Eddington, 159 P. 491.

(F) Accidents at Crossings.

¶305(1) (Okl.) A traveler whose horse was frightened by noises incident to operation of railroad train cannot recover for injuries resulting from runaway; the noises not being unnecessary.—Lusk v. Pugh, 159 P. 855.

¶316(4) (Okl.) Where speed of trains in town is not regulated by ordinance, railroad may run train at any speed consistent with safety of trains and of persons rightfully on premises, but not in disregard of their safety.—Chicago, R. I. & P. Ry. Co. v. Barton, 159 P. 250.

¶329 (Okl.) Negligence cannot be based on failure to ring bell and sound whistle, where plaintiff shows that while in safe position he knew train was approaching.—Chicago, R. I. & P. Ry. Co. v. Barton, 159 P. 250.

¶337(1) (Okl.) To give right of action to individual for violation of ordinance requiring railroad to keep a flagman at a city crossing, causal connection between the failure of the company to comply with the ordinance and the injury must be shown.—Lusk v. Pugh, 159 P. 855.

¶337(2) (Okl.) The negligence of a railway company in leaving a hole in the highway into which an automobile slipped when the chauffeur inadvertently deflected the car, *held* to have been the proximate cause of the accident.—St. Louis & S. F. R. Co. v. Bell, 159 P. 336.

¶346(7) (Okl.) Whether excessive speed of train is proximate cause of injury is never presumed, but must be established by evidence.—Chicago, R. I. & P. Ry. Co. v. Barton, 159 P. 250.

¶348(1) (Okl.) In crossing accident case, evidence *held* insufficient to support judgment for plaintiff.—Lusk v. Pugh, 159 P. 855.

¶348(6) (Okl.) Evidence in action for injuries to pedestrian by train *held* insufficient to support doctrine of last clear chance.—Chicago, R. I. & P. Ry. Co. v. Barton, 159 P. 250.

¶350(3) (Okl.) Under the evidence in an action against a railroad company, for injuries from failure to restore a highway to proper condition, *held*, that whether the highway had

been restored, as required by Comp. Laws 1909, §§ 1360, 7498, was for the jury.—St. Louis & S. F. R. Co. v. Bell, 159 P. 336.

¶350(11) (Okl.) Evidence *held* to present question for jury whether there was excessive speed of train by which plaintiff crossing the track was injured.—Chicago, R. I. & P. Ry. Co. v. Barton, 159 P. 250.

¶351(5) (Okl.) An instruction that it was the duty of the defendant railroad to keep free from obstructions a hole made by it in the highway, and erect barriers reasonably calculated to prevent persons traveling on the highway from driving into the hole, *held* not erroneous as placing too high a degree of care on defendant.—St. Louis & S. F. R. Co. v. Bell, 159 P. 336.

(G) Injuries to Persons on or near Tracks.

¶356(3) (Wash.) Decedent, killed while walking on the tracks of defendant's switchyard, which until two days before the accident had been necessarily used as a thoroughfare because a parallel street was impassable, *held* a naked licensee using the switchyard by sufferance of defendant.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

¶358(1) (Wash.) The naked licensee or trespasser who is injured upon the tracks or right of way of a railway company can recover for such negligence only as arises from wantonness on part of railway or its employees.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

¶377 (Wash.) The operators of a train have a right to rely on a bare licensee or trespasser to perform primary duty upon him to keep out or get out of danger.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

¶381(3) (Wash.) In making use of a railway switching yard, a pedestrian was under a duty to exercise highest degree of care, choose safer of two paths, and make constant use of his sight and hearing.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

¶387 (Wash.) Where decedent on entering defendant's switchyard and after looking at switching engine then standing still proceeded walking between the rails, although there was a clear space upon which he could have walked with safety, his own negligence *held* the proximate cause of the accident.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

¶390 (Wash.) Where contributory negligence of decedent in walking on tracks in defendant's switchyard continued up to the moment of his death, and defendant had no actual knowledge of his danger, *held*, that the doctrine of last clear chance had no application.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

¶391(3) (Wash.) Willfulness or wantonness cannot be imputed to the defendant because its engine before striking decedent had no forward lookout and did not sound any bell or other warning signal.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

¶391(4) (Wash.) Where it was impossible for the engineer of a motor engine to see the deceased on the track ahead of the engine, and the switchman riding on the footboard had not seen him after a time when he had ample opportunity to leave the track, although there was no warning by bell or other signal, defendant was not wantonly or willfully negligent in causing his death.—Scharf v. Spokane & I. E. R. Co., 159 P. 797.

RAPE.

See Criminal Law, ¶1147, 1169.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

¶43(1) (Cal.App.) It is error in a prosecution for rape to require the defendant to answer a question on cross-examination as to whether he

will submit to a physical examination by a physician to be designated by the court to determine whether he was capable of performing an act of sexual-intercourse.—*People v. Deatrick*, 159 P. 175.

⇒52(1) (Cal.App.) Evidence *held* sufficient to sustain conviction for statutory rape.—*People v. Deatrick*, 159 P. 175.

⇒52(2) (Cal.App.) In a prosecution for rape, the testimony of defendant and his physicians as to defendant's lack of sexual power to commit an act of intercourse *held* not conclusive on the issue of impotency against positive and direct testimony that he did commit the act.—*People v. Deatrick*, 159 P. 175.

(C) Trial and Review.

⇒57(1) (Cal.App.) In a prosecution for rape, the question of defendant's impotency or sexual ability to commit the offense is for the jury.—*People v. Deatrick*, 159 P. 175.

RATIFICATION.

See Insurance, ⇒112; Principal and Agent, ⇒171-175.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer.

REAL PROPERTY.

See Trover and Conversion, ⇒2.

REASONABLENESS.

See Public Service Commissions, ⇒3.

REBUTTAL

See Criminal Law, ⇒684; Evidence, ⇒89.

RECALL.

See Officers, ⇒61; Waters and Water Courses, ⇒227.

RECEIPTS.

See Public Lands, ⇒110.

RECEIVERS.

See Admiralty, ⇒7; Corporations, ⇒553, 563; Mortgages, ⇒473; Railroads, ⇒265.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(A) Administration in General.

⇒86 (Wash.) The duties of a receiver are to take charge of, and safely keep and account for, all of the assets of the estate, and to abide all orders of the court with reference thereto.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

VI. ACTIONS.

⇒174(3) (Wash.) Objection that action was begun against receiver without leave of court does not go to the jurisdiction, but is an irregularity that may be waived, or cured, at any stage of the proceedings.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

⇒174(5) (Wash.) An order entered after action begun against a receiver would likely cure the irregularity of its commencement without leave of court.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

IX. LIABILITIES ON BONDS OR UNDERTAKINGS.

⇒212 (Wash.) Where receiver replevied launch, in which action party in possession was decreed to have lien, and such party recovered judgment from surety on replevin bond, such surety could recover from surety on receiver's bond amount of the loss sustained through re-

ceiver's conversion of the launch pending replevin by sale thereof.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

In such case the replevin surety could recover only the sum that the property, if sold and turned into money, would have liquidated upon the claim if treated as that of a general creditor.—*Id.*

⇒214 (Wash.) It is a breach of duty for which the receiver's surety is liable if the receiver, pending replevin of launch alleged to belong to the estate, sells the launch; that being in law a conversion.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

⇒216 (Wash.) Where receiver replevied launch, in which action party in possession was decreed to have lien, but value of property was not found, and such party recovered judgment from surety on replevin bond, the receiver's surety, though liable to the replevin surety, was not bound as to extent of its liability.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

RECEIVER'S RECEIPTS.

See Public Lands, ⇒110.

RECEIVING STOLEN GOODS.

⇒1 (Cal.App.) One who receives the fruits of a burglary from the actual perpetrator thereof, knowing them to be stolen, is guilty of receiving stolen goods.—*People v. Day*, 159 P. 457.

⇒6 (Cal.App.) Where the proof would warrant conviction of burglary as an accessory, and also of receiving stolen property, defendant cannot complain that he was charged with the latter rather than with burglary.—*People v. Day*, 159 P. 457.

RECEPTION OF EVIDENCE.

See Master and Servant, ⇒415; Trial, ⇒84.

RECLAMATION DISTRICTS.

See Waters and Water Courses, ⇒218, 222.

RECORDS.

See Appeal and Error, ⇒494-715; Chattel Mortgages, ⇒150; Criminal Law, ⇒1086-1128; Fraudulent Conveyances, ⇒154; Municipal Corporations, ⇒100; Vendor and Purchaser, ⇒231.

RECOUPMENT.

See Set-off and Counterclaim.

REDEMPTION.

See Mortgages, ⇒600; Pledges, ⇒51; Taxation, ⇒696-708.

REDUCTION.

See Officers, ⇒100.

REFERENCE.

See Arbitration and Award.

III. REPORT AND FINDINGS.

⇒85 (Or.) Under L. O. L., § 838, a referee in an equitable proceeding has no authority to make findings of fact or conclusions of law.—*Ex parte Level*, 159 P. 558.

REFERENDUM.

See Statutes, ⇒35½.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

§21 (Wash.) In action to reform notes and a mortgage, where all plaintiff's actions would and did lead defendants to believe that he could read and write English, he could not rely on the claim that they took advantage of his illiteracy.—*Conrads v. Green*, 159 P. 102.

Seller of land taking notes secured by mortgage on other lands in part payment held not entitled to reformation of the instruments, which rendered the mortgagors personally liable for \$3,000, to bind them for \$5,000.—*Id.*

II. PROCEEDINGS AND RELIEF.

§45(1) (Wash.) The equitable remedy of reformation will be granted only upon clear and convincing evidence.—*Conrads v. Green*, 159 P. 102.

§45(8) (Utah) Reformation of a mortgage will be granted only upon clear proof of mutual mistake.—*Wherritt v. Dennis*, 159 P. 534.

REGISTRATION.

See Elections, §95.

REINSTATEMENT.

See Attorney and Client, §61; Mortgages, §316.

RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Death, §25; Mortgages, §309; Payment; Principal and Surety, §100-120.

I. REQUISITES AND VALIDITY.

§7 (Okla.) A writing that, "I do agree and covenant that I shall never institute or prosecute any suit on account of my said injuries against said * * * L * * * and * * * K, or either of them," is a covenant not to sue, and not a release.—*Lisle v. Anderson*, 159 P. 278.

II. CONSTRUCTION AND OPERATION.

§37 (Okla.) A covenant not to sue will not discharge another joint tort-feasor from liability.—*Lisle v. Anderson*, 159 P. 278.

REMAINDERS.

See Life Estates.

REMISSION.

See Appeal and Error, §1151; Damages, §228.

REMOVAL.

See Justices of the Peace, §10; Officers, §61, 71; Schools and School Districts, §141.

REMOVAL OF CAUSES.**I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.**

§12 (Okla.) Where plaintiff, a resident of the Western federal district of Oklahoma sued in a state district court lying in the Eastern district, defendant, a nonresident, is not entitled to remove the cause to the federal court of the Eastern district on ground of diversity of citizenship.—*Ft. Smith & W. R. Co. v. Knott*, 159 P. 847.

REMOVAL OF CLOUD.

See Quieting Title.

RENT.

See Landlord and Tenant, §194-233.

REORGANIZATION.

See Corporations, §573.

REPEAL.

See Statutes, §150-170.

REPLEVIN.

See Receivers, §212.

II. JURISDICTION, VENUE, AND PARTIES.

§21 (Okla.) An agent authorized to exchange a chattel for realty who delivered it to one with whom he contracted for conveyance of land to his principal held not real party in interest within Rev. Laws 1910, § 4681, and so not entitled, in his own name, to replevin chattel.—*Essex v. Fife*, 159 P. 1009.

IV. PLEADING AND EVIDENCE.

§69(2) (Wash.) Allegations of complaint in replevin as to value of property do not determine its value, but under Rem. & Bal. Code, § 434, the court must determine the value.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

§69(4) (Okla.) Under general denial in replevin, defendant may make any defense which will defeat plaintiff's claim of right to possession as against defendant.—*Williams v. Gibson Bros.*, 159 P. 649.

§69(5) (Okla.) In an action to recover a certificate of corporate stock pledged with defendant by one who obtained the certificate from plaintiff's husband, her agent, held, that a variance between an averment that the pledgor was a trustee and proof that he wrongfully obtained possession of the stock was immaterial.—*State Nat. Bank v. Scales*, 159 P. 925.

§71(2) (Okla.) In replevin against a cropper for crops, evidence that the landlord had surrendered or abandoned his title under contract to purchase under which he claimed when he made contract with the cropper is admissible.—*Merchants' Nat. Bank of Sallisaw v. Frazier*, 159 P. 647.

In replevin, any evidence is admissible which properly determines ownership and the right of possession of the property.—*Id.*

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§86 (Okla.) In replevin it is the policy of the law to settle in one action all the conflicting claims of the parties for the possession of the property or for damages for detention or loss.—*Brown v. Chowning*, 159 P. 323.

REPLY.

See Pleading, §172, 180.

REPUDIATION.

See Arbitration and Award, §16.

REPUTATION.

See Criminal Law, §376.

REQUESTS.

See Trial, §260.

RESCISSION.

See Cancellation of Instruments; Husband and Wife, ¶52; Insurance, ¶229, 291; Sales, ¶96-126; Vendor and Purchaser, ¶87.

RES GESTÆ.

See Criminal Law, ¶363.

RESIGNATION.

See District and Prosecuting Attorneys, ¶2.

RES IPSA LOQUITUR.

See Electricity, ¶19.

RES JUDICATA.

See Judgment, ¶563-743.

RESTRAINT OF TRADE.

See Monopolies.

RETURN.

See Habeas Corpus, ¶73½.

REVENUE.

See Taxation.

REVERSIONS.

See Landlord and Tenant, ¶55.

REVIEW.

See Appeal and Error, ¶837-1099; Certiorari; Criminal Law, ¶1134-1172; Master and Servant, ¶412, 417; Public Service Commissions, ¶27, 29.

REVIVAL.

See Abatement and Revival.

REVOCATION.

See Physicians and Surgeons, ¶11.

RIGHT OF WAY.

See Easements.

RIPARIAN RIGHTS.

See Waters and Water Courses, ¶20.

RISKS.

See Master and Servant, ¶203-226, 280, 288.

ROADS.

See Highways.

ROBBERY.

¶24(1) (Cal.App.) Evidence held sufficient to justify conviction of robbery where all elements of the offense as defined by Pen. Code, § 211, were present.—People v. Pasqueria, 159 P. 173.

¶24(1) (Cal.App.) Evidence held sufficient to justify conviction of crime of robbery.—People v. Ferrara, 159 P. 621.

¶24(4) (Cal.App.) Evidence that prosecuting witness got two checks, had them cashed, and that the money in his pocket, when attacked, was a part of their proceeds, is sufficient to show that the money was his property.—People v. Ferrara, 159 P. 621.

¶24(5) (Cal.App.) Evidence held to justify finding that money was taken from person of prosecuting witness by force and fear.—People v. Ferrara, 159 P. 621.

¶27(6) (Cal.App.) Under Pen. Code, § 211, defining robbery as felonious taking of personalty from person against his will by force or fear, instruction permitting conviction if the

offense was accomplished by "force or fear" is proper, though the information alleged "force and fear."—People v. Ferrara, 159 P. 621.

ROLLS.

See Judgment, ¶279.

RULES.

See Master and Servant, ¶101, 102, 146; Public Service Commissions, ¶2-8.

RUNAWAYS.

See Railroads, ¶305.

SAFE PLACE TO WORK.

See Master and Servant, ¶101-103, 286, 288.

SALARY.

See Garnishment, ¶83, 63; Judges, ¶22; Officers, ¶94, 100.

SALES.

See Execution, ¶242-275; Fraudulent Conveyances, ¶154; Guardian and Ward, ¶107, 108; Logs and Logging, ¶83; Mines and Minerals, ¶54; Municipal Corporations, ¶980; Principal and Agent, ¶68, 103; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

¶24 (Okl.) Plaintiff sold defendant gasoline to be delivered in stated time, contract giving defendant option of ordering additional gasoline during its continuance. Held, that agreement to furnish additional gasoline was an enforceable option based on consideration.—Waters-Pierce Oil Co. v. Progressive Gas Co., 159 P. 349.

¶50 (Cal.) Where a buyer aware of fraud perpetrated upon him suggests, if he does not demand, a rescission, and on its refusal enters into a new and modified agreement covering the subject-matter of the first contract, the new agreement waives the fraud.—Brown v. Domestic Utilities Mfg. Co., 159 P. 163.

The only fact which would relieve a buyer from the legal effect of his waiver of a fraud by making a new contract would be allegation and proof that he was induced to enter into the new agreement by undue influence, fraud, or mistake, or that the terms of such agreement were not lived up to by the defendant.—Id.

¶52(5) (Cal.App.) Evidence held sufficient to sustain finding that defendants had made no contract of sale with plaintiff.—Pacific Coast Dried Fruits Co. v. Sheriffs, 159 P. 986.

II. CONSTRUCTION OF CONTRACT.

¶71(5) (Cal.) Contract for sale of orange trees, with option to purchase additional number on same terms, held sufficiently certain.—Pearson v. Parsons, 159 P. 1171.

Under contract for sale of orange trees with option to take additional number on same terms, buyer's notice held to constitute exercise of option to buy additional trees.—Id.

¶81(5) (Cal.) Under contract for sale of orange trees with option to take an equal number of trees at same terms, buyer's notice of his exercise of the option held given within reasonable time after making of contract.—Pearson v. Parsons, 159 P. 1171.

¶81(5) (Cal.) Under contract for cultivating, budding, and selecting orange trees, act of seller, defendant's intestate, in budding trees in April, 1908, after notice of varieties required by buyer in the following year, held to show no fraud against plaintiff; the notice being too late to affect budding done in such month.—Pearson v. Parsons, 159 P. 1173.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

↪94 (Wash.) If a party enters into a contract of sale and thereafter consents to its surrender, he cannot repudiate the consideration paid for such surrender in the absence of fraud, if made with his full knowledge.—*Forrer v. John Davis & Co.*, 159 P. 696.

(B) Rescission by Seller.

↪96 (Cal.) A contract to buy and sell personal property, silent as to its duration, is terminable by either party after a reasonable time and upon reasonable notice.—*Southern Pac. Co. v. Spring Valley Water Co.*, 159 P. 865.

(C) Rescission by Buyer.

↪113 (Cal.) A contract to buy and sell personal property, silent as to its duration, is terminable by either party after a reasonable time and upon reasonable notice.—*Southern Pac. Co. v. Spring Valley Water Co.*, 159 P. 865.

↪126(1) (Cal.) Where buyer of washing machines discovered seller's alleged fraud in January, 1911, and did not attempt to rescind contract until January, 1912, the inexcusable delay was fatal to buyer's action to enforce a rescission.—*Brown v. Domestic Utilities Mfg. Co.*, 159 P. 163.

Though a contract received by a buyer was of no value, he was not thereby excused from making his demand for rescission seasonably, which would give notice to the seller that he had decided to rescind.—*Id.*

↪126(3) (Cal.) Where the buyers of goods were adults, familiar with the English language, and able to understand business transactions, and there was no relation of confidence between them and the seller, *held*, that there was nothing to sustain a finding of undue influence excusing delay of a year in bringing action within Civ. Code, § 1601.—*Brown v. Domestic Utilities Mfg. Co.*, 159 P. 163.

IV. PERFORMANCE OF CONTRACT.

(B) Bills of Sale.

↪140 (Wash.) A sale of personal property is good by mere delivery.—*Marston v. Rue*, 159 P. 111.

(C) Delivery and Acceptance of Goods.

↪150(1) (N.M.) One who has agreed to perform an act impliedly agrees to perform whatever is necessary; hence where a seller contracts to sell goods f. o. b. cars, he must procure the cars and load the goods thereon.—*Culp v. Sandoval*, 159 P. 956.

↪153 (N.M.) Where a seller has the option to deliver the goods sold on any one of a number of days, it being the duty of the buyer to furnish cars or vessel, the seller must inform the buyer on what day he proposes to make delivery.—*Culp v. Sandoval*, 159 P. 956.

↪179(4) (Ok.) A buyer accepting property after inspection with full opportunity to examine, in the absence of express warranty, cannot claim damages because it does not comply with description.—*Talley v. Harrison*, 159 P. 808.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

↪359(1) (Cal.App.) Evidence *held* to sustain judgment for defendant in action on alleged contract of sale, based on ground that plaintiff was not the real party in interest.—*Pacific Coast Dried Fruits Co. v. Sheriffs*, 159 P. 986.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

↪418(1) (Ok.) Where a seller breached its contract to furnish gasoline, buyer is entitled to recover difference between contract price and market price of gasoline at the time of order.—*Waters-Pierce Oil Co. v. Progressive Gin Co.*, 150 P. 349.

(D) Actions and Counterclaims for Breach of Warranty.

↪426 (Wyo.) Provision of contract of sale that if the stallion sold proves not to be as warranted, the sellers on return of him will furnish another *held* not to prevent the buyers retaining him and recovering for the breach.—*Leitner v. Thayer*, 159 P. 1084.

IX. CONDITIONAL SALES.

↪481 (Wash.) The seller having, after injury by a third person of an article held under a conditional bill of sale, taken possession of the article for broken condition of payment, the buyer cannot recover of the third person for the injury or the amount paid on purchase price.—*Peterson v. Chess*, 159 P. 894.

SATISFACTION.

See Accord and Satisfaction; Payment; Release.

SCHOOLS AND SCHOOL DISTRICTS.

See Constitutional Law, ↪68; Evidence, ↪23; Statutes, ↪93.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

↪22 (Cal.) The power of the Legislature over school districts is plenary; and it may divide, change, or abolish them at pleasure.—*Worthington School Dist. v. Eureka School Dist.*, 159 P. 437.

↪37(1) (Cal.) Complaint to restore territory taken by county supervisors from plaintiff school district and attached to defendant school district *held* not to show change was not made according to Pol. Code, § 1576.—*Worthington School Dist. v. Eureka School Dist.*, 159 P. 437.

(C) Government, Officers, and District Meetings.

↪63(1) (Cal.App.) Board of trustees of union school district, regardless of School Code Cal. § 1617, *held* empowered to require that a librarian, to whom an offer of employment was made, accept within 20 days, and where there was no acceptance such librarian was not entitled to the salary.—*Hopkins v. Sanderson*, 159 P. 1064.

(D) District Property, Contracts, and Liabilities.

↪65 (Ok.) Under Laws 1913, c. 219, art. 6, § 3, the boards of education of cities of the first class have power to sell and convey real estate, and may exercise such power without making any finding as to the reason or necessity prompting their acts.—*Cosden v. Board of Education of City of Tulsa*, 159 P. 1108.

(E) District Debt, Securities, and Taxation.

↪101 (Utah) Laws 1915, c. 115, increasing the school tax rate of cities of a certain class, taking effect May, 1915, and Laws 1915, c. 111, reducing such rate, but taking effect January, 1916, *held* not conflicting.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

Laws 1915, c. 115, amending the proviso of Comp. Laws 1907, § 1936, fixing the rate of

taxes for school purposes so far as conflicting with Laws 1915, c. 111, thereafter effective, was repealed in so far as its provisions were in conflict with chapter 111.—Id.

(G) Teachers.

⚡141(4) (Or.) Under Laws 1913, c. 172, § 1, subd. 7, 22, 23, L. O. L. §§ 3950, 4057, *held*, that power of school directors to dismiss teacher was not limited to breaches of contract of teaching, but extended to acts rendering a teacher objectionable.—Foreman v. School Dist. No. 25 of Columbia County, 159 P. 1155.

⚡141(5) (Or.) Under Laws 1913, c. 172, § 1, subd. 22, fact that minute of teacher's dismissal was actually made upon piece of paper would not defeat the school board's action where its clerk was sick, on which account the minute was not made in his record book.—Foreman v. School Dist. No. 25 of Columbia County, 159 P. 1155.

SECONDARY EVIDENCE.

See Evidence, ⚡177, 181.

SECRETARY OF THE INTERIOR.

See Indians, ⚡18, 15.

SELF-DEFENSE.

See Homicide, ⚡116, 800.

SELF-SERVING DECLARATIONS.

See Evidence, ⚡271.

SENATORS.

See States, ⚡27.

SENTENCE.

See Criminal Law, ⚡1183, 1213; Homicide, ⚡847.

SEPARATE ESTATE.

See Husband and Wife, ⚡131-149.

SERVANTS.

See Master and Servant.

SERVICE.

See Process, ⚡87-157.

SERVICE LETTERS.

See Master and Servant, ⚡33.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

See Bills and Notes, ⚡534; Partnership, ⚡384; Pleading, ⚡142; States, ⚡199.

II. SUBJECT-MATTER.

⚡29(1) (Or.) In an action on a note, an answer alleging that defendant leased a horse to plaintiff, which died through plaintiff's want of care, *held* to state a counterclaim on contract under L. O. L. § 74.—Meadow Valley Land & Investment Co. v. Manerud, 159 P. 559.

⚡35(2) (Ok.) Under Rev. Laws 1910, § 4746, plaintiff cannot plead as counterclaim in action on notes unliquidated damages from unlawful suing out of attachment in former suit in settlement of which notes were executed.—Phillips v. Hargadine-McKittrick Dry Goods Co., 159 P. 320.

SETTING ASIDE.

See Judgment, ⚡143-163, 363, 384.

SETTLEMENT.

See Account Stated; Payment; Release.

SEWERS.

See Master and Servant, ⚡150.

SHERIFFS AND CONSTABLES.

See Garnishment, ⚡17; Mandamus, ⚡4.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(B) Constables.

⚡9 (Wash.) Under Laws 1915, p. 316, as to justices of the peace and constables, it was the intention that there should be one constable for each justice, so that in cities of less than 500,000, justices being limited in number to five, there can be but five constables.—State v. Hamilton, 159 P. 379.

III. POWERS, DUTIES, AND LIABILITIES.

⚡138(1) (Cal.App.) Under Code Civ. Proc. § 558, touching amendment of writs of attachment, *held*, that burden was on chattel mortgagee, in an action against the sheriff, to prove that a defective undertaking for attachment filed before his mortgage and subsequently amended was abandoned by a new affidavit and undertaking filed after the mortgage was given.—Bone v. Trafton, 159 P. 819.

IV. LIABILITIES ON OFFICIAL BONDS.

⚡157(4) (Wash.) A constable's action in arresting and assaulting plaintiffs without a warrant or reasonable grounds for believing that they committed a felony is an act done by virtue of his office, so as to render his surety liable.—Greenius v. American Surety Co. of New York, 159 P. 384.

SHIPPING.

See Admiralty.

II. TITLE.

⚡20 (Cal.) Part owners of a ship as such are not partners, but tenants in common; any partnership arising only by special contract.—Fischer v. Carey, 159 P. 577.

SIDEWALKS.

See Municipal Corporations, ⚡768, 821.

SIGNALS.

See Railroads, ⚡391.

SIGNATURES.

See Contracts, ⚡35.

SILENCE.

See Estoppel, ⚡53, 95.

SPECIFICATION OF ERRORS.

See Appeal and Error, ⚡362; New Trial, ⚡128.

SPECIFIC PERFORMANCE.

II. CONTRACTS ENFORCEABLE.

⚡57 (Ok.) An oil and gas lease providing for annual commutation payment in lieu of beginning operations, otherwise the lease to be void, was a mere option not entitling lessee to specific performance, at least until he had per-

formed or placed himself in a position where he could be compelled to perform.—*Warner v. Page*, 159 P. 264.

⚡59 (Cal.App.) The obligee under contract to lease land if oil was discovered and on consummation of patent proceedings may have specific performance when final receipt issues, though no patent has been granted.—*Colm v. Francis*, 159 P. 237.

⚡86 (Kan.) Since the proceeding prescribed by Gen. St. 1909, § 5084, for adopting a child includes consent of probate judge, no legal adoption results from mere contract of parties, though property rights growing out of such contract may be enforced.—*Malaney v. Cameron*, 159 P. 19.

⚡86 (Or.) Under agreement to care for one for life in consideration of his promise to devise land, his death within four or five months thereafter *held* not to make the consideration so inadequate as to make specific performance of the agreement unjust or unreasonable.—*Woods v. Dunn*, 159 P. 1158.

IV. PROCEEDINGS AND RELIEF.

⚡114(1) (Cal.App.) In suit for specific performance of contract to lease land, complaint showing that defendant had contracted to sell to another, who was in possession adverse to plaintiff, is not demurrable as indefinite, though it does not set out the contract of sale.—*Colm v. Francis*, 159 P. 237.

Complaint for specific performance of contract to lease land, which alleges that the obligor has made a contract for sale to another and put him in possession is not demurrable as showing no interest in the obligor, since it shows her to be still the legal owner.—*Id.*

⚡114(2) (Cal.App.) By Civ. Code, § 3391, adequacy of consideration for a contract specific performance of which is sought must be pleaded and proved.—*Colm v. Francis*, 159 P. 237.

Complaint for specific performance of contract for lease alleging that plaintiff as consideration therefor was to develop the petroleum deposits, do all work and pay defendant one-eighth the proceeds, shows sufficient consideration under Civ. Code, § 3391.—*Id.*

⚡121(7) (Or.) In suit to enforce specific performance of an agreement by defendant's relative to devise to plaintiff certain realty in consideration of the promise of herself and husband to care for him and furnish a home during the remainder of his life, evidence *held* to show the making of such agreement.—*Woods v. Dunn*, 159 P. 1158.

⚡121(11) (Or.) In suit to enforce specific performance of an agreement whereby defendant's relative covenanted to devise to plaintiff certain land in consideration of her promise to care for him and furnish him a home during his life, evidence *held* to show that plaintiff had fully performed such agreement.—*Woods v. Dunn*, 159 P. 1158.

SPECULATIVE DAMAGES.

See Damages, ⚡40.

SPEED.

See Evidence, ⚡492; Railroads, ⚡316, 346, 350.

STATE CONSERVATION COMMISSION.

See States, ⚡67.

STATEMENT.

See Appeal and Error, ⚡560; Justices of the Peace, ⚡164.

STATES.

See Counties, ⚡24; Statutes, ⚡220.

I. POLITICAL STATUS AND RELATIONS.

⚡9 (Ok.) Under Enabling Act, § 19, and Const. art. 25, § 23, the county courts of the state are the successors of the probate courts of the territory of Oklahoma.—*Munson v. First Nat. Bank of Okmulgee*, 159 P. 486.

A creditor may proceed by garnishment in county courts under Rev. Laws 1910, § 4822, made applicable by St. 1893, § 1563, which was put in force in state by Const. art. 25, § 2.—*Id.*

⚡9 (Ok.) Defense of usury may be pleaded by virtue of Schedule to the Constitution to an action on contract executed under the laws of the Indian Territory, though the action was not instituted until after the territory, as part of the state of Oklahoma, had been admitted into the Union.—*Scott v. Potts*, 159 P. 932.

II. GOVERNMENT AND OFFICERS.

⚡27 (Wash.) Although Const. art. 2, § 3, requires state senators to be elected from districts apportioned according to population, the fact that the latest census shows gross inequalities in the districts is no ground for setting aside the legislative apportionment, which, when enacted, was based upon proper districts.—*State v. Howell*, 159 P. 777.

Const. art. 2, § 3, requiring state senators to be elected from districts apportioned according to population, does not require that the apportionment be made with mathematical exactness, but the Legislature exercises a discretion in the apportionment.—*Id.*

The Apportionment Act of 1901, fixing the districts from which state senators shall be chosen, is not unconstitutional on the ground of inequality of representation, under Const. art. 2, § 3.—*Id.*

⚡67 (Cal.App.) Under Pol. Code, § 472, an attorney at law might be employed by the state conservation commission created by St. 1911, p. 822, to compile laws of the state and the federal government relating to conservation, without the consent of the Attorney General.—*U'Ren v. State Board of Control*, 159 P. 615.

V. CLAIMS AGAINST STATE.

⚡173 (Cal.App.) State board of control, created by St. 1911, p. 590, embracing Pol. Code, §§ 654-691, in respect to a claim for salary of one employed by state conservation commission, created by St. 1911, p. 822, had only the power of an auditing body passing upon the sufficiency of the form of the claims.—*U'Ren v. State Board of Control*, 159 P. 615.

⚡173 (Cal.App.) Under Pol. Code, § 4290, providing for compensation of sheriff, and section 663, providing for examination of his accounts by board of control, the board, on finding that he has rendered the services set forth in his claim, and that the amount claimed for expenses was necessarily incurred, has no discretion other than to allow the claim, in spite of section 682 as to powers of such board.—*Hammel v. Neylan*, 159 P. 618.

⚡175 (Cal.App.) State board of control, after having approved the form of presenting a claim, if intending to require a different form, should have permitted the remedy of any defects in form, and upon application for a writ of mandate could not urge for the first time formal defects in presentation of claim.—*U'Ren v. State Board of Control*, 159 P. 615.

⚡185 (Cal.App.) In regularly approving and allowing claims presented by a sheriff for services during certain years, the board of control to a limited extent acts judicially, and its de-

cision is final and conclusive as against collateral attack.—*Hammel v. Neylan*, 159 P. 618.

VI. ACTIONS.

—191(1) (Cal.App.) Mandamus to compel state board of control to perform duty expressly enjoined upon it by law as to allowance of salary of an employé of state conservation commission might be maintained without consent of state.—*U'Ren v. State Board of Control*, 159 P. 615.

—199 (Cal.App.) The board of control cannot sue to recover money obtained from the state by fraud, and therefore, in action to compel it to allow sheriff's claim for services for later years, it cannot set up as a counterclaim that the compensation in the earlier years was obtained through fraud.—*Hammel v. Neylan*, 159 P. 618.

STATUTE OF FRAUDS.

See *Frauds*, *Statute of*.

STATUTE OF LIMITATIONS.

See *Limitation of Actions*.

STATUTES.

See *Constitutional Law*.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

—21 (Kan.) Laws 1909, c. 201, relating to construction and improvement of county roads, is not unconstitutional for failure to observe constitutional requirements in passage of act.—*Stevenson v. Board of Com'rs of Shawnee County*, 159 P. 5.

—35½ (Colo.) Under Laws 1913, p. 311, § 3, providing that all initiative and referendum petitions shall be deemed sufficient unless a protest in writing under oath shall be filed, a written protest to a petition to refer, the verifying certificate of the officer reading, "Subscribed to before me," etc., held insufficient.—*Ramer v. Wright*, 159 P. 1145.

Requirements of Laws 1913, p. 310, relative to initiative and referendum petitions and protests thereto, are jurisdictional, and the secretary of state is without power to act on a protest in the absence of a substantial compliance with the statute.—*Id.*

—35½ (Wash.) Under Const. art. 2, § 1, providing for direct legislation, no constitutional right is given to propose a preamble or declaration of purpose to a proposed law.—*State v. Superior Court in and for Thurston County*, 159 P. 92.

A preamble in a proposed act, initiated under Const. art. 2, § 1, amendatory to Fisheries Code, § 1, reciting the purposes of the act and containing argumentative statements of reason for its adoption, held improper under Laws 1913, p. 413, providing for publication of such argument at expense of proponent, and the publication of such preamble at expense of state will be enjoined.—*Id.*

—35½ (Wash.) A portion of the preamble of a proposed act, initiated under Const. art. 2, § 1, amending the Workmen's Compensation Act, so as to include surgical and hospital treatment of injured employes at the expense of the industries to be paid for out of the accident fund, held to be legislation, not mere preamble.—*State v. Superior Court in and for Thurston County*, 159 P. 101.

—47 (Wash.) Rem. & Bal. Code, § 8397½, subd. 4, stating unprofessional conduct as embracing all advertising of any medicine or means to regulate or establish menses, is not unconstitutional as vague and uncertain.—*State Board of Medical Examiners v. Macy*, 159 P. 801.

—64(1) (Nev.) The unconstitutionality of one section of law does not destroy the validity of other provisions which can stand independent of such section.—*Turner v. Fogg*, 159 P. 56.

—64(4) (Wash.) Laws 1915, p. 316, as to justices of the peace, is not void because section 2 attempts to delegate to county commissioners the power to increase salaries of justices of the peace, but the attempted delegation, if void, does not affect the remainder of the statute.—*State v. Hamilton*, 159 P. 379.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

—73(2) (Wash.) Laws 1915, p. 316, as to justices of the peace, does not violate Const. art. 11, §§ 4, 5, as to uniformity, and article 6, § 8, as to terms of county officers.—*State v. Hamilton*, 159 P. 379.

—77(1) (Utah) That Laws 1915, c. 115, only amends the proviso of Comp. Laws 1907, § 1936, by increasing the tax rate of cities of a certain class, and Laws 1915, c. 111, amends such proviso, and also amends other sections of the school law, did not make chapter 115 a special law.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

—92 (Utah) Cities and any other subjects may be classified without contravening Const. art. 6, § 26, subd. 18, providing that in all cases where a general law can be applicable, no special law shall be enacted, but such classification must be reasonable and natural, and not artificial or arbitrary.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

—93(6) (Utah) Laws 1915, c. 111, amending the proviso of Comp. Laws 1907, § 1936, by classifying cities and reducing the tax rate for school purposes, held invalid, because the classification was unreasonable and artificial, and unrelated to the subject of the legislation.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

III. SUBJECTS AND TITLES OF ACTS.

—117(8) (Wash.) Laws 1907, p. 603, entitled "An act relating to registration and confirmation of titles to land," and requiring mechanics' lien claims against registered land to be filed with the registrar of titles instead of the county auditor, is not invalid because its title insufficiently states its purpose.—*McMullen & Co. v. Croft*, 159 P. 375.

—125(5) (Nev.) Act March 29, 1915 (St. 1915, c. 283), as to nomination of candidates and primary elections, held not to contravene Const. art. 4, § 17, as to subjects and titles.—*Turner v. Fogg*, 159 P. 56.

—125(5) (Wash.) Laws 1913, p. 103, entitled "An act relating to justices of the peace and constables in cities having a population of 50,000 or more inhabitants and providing for their election and appointment and fixing their salaries," is not invalid for want of sufficient title.—*State v. Hamilton*, 159 P. 379.

—125(6) (Wash.) Laws 1915, p. 316, entitled "An act relating to justices of the peace and constables and the compensation of justices of the peace in cities of 225,000 population, and amending section 6533-1 of Rem. & Bal. Annot. Codes and Stats. of Washington," is not invalid for want of sufficient title.—*State v. Hamilton*, 159 P. 379.

IV. AMENDMENT, REVISION, AND CODIFICATION.

—130 (Or.) The Constitution does not deny to the Legislature the right to amend a statute enacted by the people in the exercise of the initiative.—*Patton v. Withycombe*, 159 P. 78.

—138(2) (Wash.) Laws 1915, p. 316, as to justices of the peace, amending Laws 1913, p. 103, on the same subject, is not invalid as attempting to amend a statute by mere reference to its title, the act having sufficiently set forth

the statute amended at length.—*State v. Hamilton*, 159 P. 379.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

⚡150 [New, vol. 2 Key-No. Series]

(Or.) The Constitution does not deny to the Legislature the right to repeal a statute enacted by the people in the exercise of the initiative.—*Patton v. Withycombe*, 159 P. 78.

Even though an independent act complete within itself works a repeal by implication, it is not pregnable for failure to observe Const. art. 4, § 22, declaring that the act amended shall be set forth at full length.—*Id.*

⚡168 (Utah) Invalidity of Laws 1915, c. 111, re-enacting and amending proviso of Comp. Laws 1907, § 1936, and repealing conflicting parts of Laws 1915, c. 115, which re-enacted section 1936 and amended the proviso thereof to fix the rate of taxes for school purposes, left the rate fixed by chapter 115 in full force and effect.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

⚡170 (Utah) Such parts of Laws 1915, c. 115, re-enacting Comp. Laws 1907, § 1936, and amending its proviso as were not in conflict with Laws 1915, c. 111, re-enacting and amending such proviso were re-enactments having force and effect from their original enactment.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⚡181(1) (Ok.) In construction of statutes, intent of Legislature must govern.—*Board of Com'rs of Creek County v. Alexander*, 159 P. 311.

When language of statute is dubious, court will consider reason and intent of law to discover its scope and true meaning.—*Id.*

⚡192 (Nev.) Technical words and phrases having peculiar and appropriate meaning in law are to be understood according to their technical import; but to such rule there is an exception where words are used to express convertible terms in a statute.—*In re Lewis' Estate*, 159 P. 961.

⚡194 (Or.) The general intent will be controlled by the particular intent subsequently expressed.—*Mackenzie v. Douglas County*, 159 P. 625.

⚡200 (Or.) Although punctuation may be resorted to as an aid in construction when it tends to throw light on the meaning, yet it may be disregarded when it would tend to convey a meaning not in consonance with the rest of the act.—*Mackenzie v. Douglas County*, 159 P. 625.

Laws 1913, p. 546, § 12, as to audit of books of any "city, county school district," will be construed as if a comma were present between "county" and "school district," so as to apply to counties, as required by the later provisions of the act.—*Id.*

⚡206 (Ok.) To ascertain the intent of a statute, all legislative provisions on the subject should be construed together and given effect as a whole.—*Board of Com'rs of Creek County v. Alexander*, 159 P. 311.

⚡207 (Wash.) When the language of a statute is ambiguous or contradictory, the court, failing to dissolve the ambiguity, may give effect to the expression last in time.—*State v. Hamilton*, 159 P. 379.

⚡210 (Wash.) A law is a rule of action, but an argument by way of preamble is not.—*State v. Superior Court in and for Thurston County*, 159 P. 92.

A preamble is not an essential part of a statute,

has no legislative force, and is of importance only as a guide to an understanding of the statute with reference to the legislative intent in case of doubt or ambiguity.—*Id.*

⚡212 (Nev.) Where a statute uses a word which is well known and has a definite sense at common law, without specific definition, it will be presumed to be used in its common-law sense, unless it clearly appears that it was not so intended.—*In re Lewis' Estate*, 159 P. 961.

⚡214 (Wash.) When the language of a statute is ambiguous or contradictory, the court may resort to extrinsic aids to ascertain the intent, or, failing to dissolve the ambiguity, give effect to the expression last in time.—*State v. Hamilton*, 159 P. 379.

⚡215 (Idaho) Statutory enactments should be construed in the light of conditions existing at their adoption.—*State v. Fite*, 159 P. 1183.

⚡217 (Utah) It is the duty of the courts in construing statutes, and especially in cases of conflict, to consider all matters that may affect their validity or meaning, including the history of legislation, and the reasons for and against their passage.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

⚡217 (Wash.) Laws 1913, p. 103, § 1, relating to justices of the peace and constables, is not void for ambiguity in declaring that elections for such offices shall be held quadrennially, and that the term shall be two years, since the legislative journals disclose that the word "quadrennial" was substituted for "biennially" in the Senate, and that the House of Representatives concurred in the change, showing an intention that the term should be four years.—*State v. Hamilton*, 159 P. 379.

⚡219 (Ok.) A ruling of the Commissioner of the General Land Office that the date of application for enrollment of a citizen of the Five Civilized Tribes should be held to be the anniversary of the birth is not a construction of Act Cong. May 27, 1908, § 3, relating to conclusiveness of enrollment as to age of Indian.—*Heffner v. Harmon*, 159 P. 650.

⚡220 (Ok.) Joint resolution by both branches of Legislature, though not signed by Governor, and hence, under Const. art. 6, § 11, not having force of law, declaring purpose of former act, may be considered as aid in construing a former act.—*Board of Com'rs of Creek County v. Alexander*, 159 P. 311.

⚡224 (Utah) Where a conflict exists between two enactments, whether enacted at the same session or at different sessions, the court must, if possible, give force and effect to all the provisions contained in both acts, notwithstanding the apparent conflict.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

⚡225 (Ok.) Subsequent legislative enactments may be considered as aid in interpretation of prior legislation on same subject.—*Board of Com'rs of Creek County v. Alexander*, 159 P. 311.

When strict interpretation of particular statute would defeat intent as shown by other legislation enacted according to general purpose in accomplishing particular result, such construction should not be adopted.—*Id.*

⚡226 (Cal.) Where foreign statute which has been construed by courts of foreign country is adopted, construction by foreign courts is also adopted.—*Ocean Accident & Guarantee Co. v. Industrial Accident Commission of California*, 159 P. 1041.

⚡228 (Or.) While a proviso is commonly found at the end of the act or section, and is usually introduced by the word "provided," that word is not necessary, the matter, and not the form, of the succeeding words controlling; a proviso necessarily containing a condition or limitation up-

on the preceding matter.—*Mackenzie v. Douglas County*, 159 P. 625.

§ 230 (Wash.) Laws 1915, p. 316, providing for election of certain justices to be held in November, 1914, is not void for ambiguity in providing for an election at a past date, since the act amends Laws 1913, p. 103, § 1, and its provisions as to dates of election having been continued are not to be considered as having been repealed and re-enacted, but as hav-

ing been continuously in force.—*State v. Hamilton*, 159 P. 379.

(C) Time of Taking Effect.

§ 260 (Utah) Where a statute is made effective only from a future date, but in terms repeals a former law on the subject, the repealing clause becomes effective only when the statute goes into effect.—*Board of Education of Ogden City v. Hunter*, 159 P. 1019.

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II. REGULATION AND OPERATION.

¶86(1) (Cal.) A street railway is charged with notice of defective condition of temporary crosswalk over its tracks, which condition it has itself created.—Burr v. United Railroads of San Francisco, 159 P. 584.

¶114(6) (Cal.) Evidence held to show that automobile in which plaintiff was injured was stalled on crossing through its negligent construction of defendant street railroad in full view of motorman on approaching car.—Burr v. United Railroads of San Francisco, 159 P. 584.

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SUBROGATION.

¶1 (Wash.) Subrogation is not founded on contract, and may be enforced in absence of contract, but, where liability of a party is fixed by contract or statute, courts will not resort to equity to either enlarge or defeat it.—*Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 159 P. 788.

¶7(1) (Wash.) Where road building contracts permit the county to retain 20 per cent. of the price to satisfy liens, the surety on contractors' bond is subrogated to the rights of creditors in such fund as collateral security when it pays their claims.—*Maryland Casualty Co. v. Washington Nat. Bank*, 159 P. 689.

¶7(2) (Wash.) Where county retained state warrants for state aid road construction, surety on contractors' bonds, having paid claims of creditors, had equity in them as against bank, which loaned money to the contractors, taking assignment of all sums due them, but failed to trace the money to payments on the work.—*Maryland Casualty Co. v. Washington Nat. Bank*, 159 P. 689.

SUBSCRIPTIONS.

See Corporations, ¶80-82.

SUFFRAGE.

See Elections.

SUICIDE.

See Evidence, ¶59.

SUMMARY PROCEEDINGS.

See Criminal Law, ¶252-257; Taxation, ¶573, 588.

SUMMONS.

See Process.

SUNDAY.

See Time, ¶10.

¶26(1) (Okla.) One is not barred from recovery for injuries received while working in violation of the Sunday law.—*Lisle v. Anderson*, 159 P. 278.

SUPPORT.

See Guardian and Ward, ¶30.

SURETYSHIP.

See Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, ¶119.

SURGICAL OPERATIONS.

See Damages, ¶62.

SURPLUSAGE.

See Pleading, ¶364.

SURRENDER.

See Landlord and Tenant, ¶109, 194.

SURVEYS.

See Boundaries; Evidence, ¶460.

SURVIVAL.

See Abatement and Revival, ¶53.

TAXATION.

See Adverse Possession, ¶79, 94; Constitutional Law, ¶285; Counties, ¶191-196; Ejectment, ¶142; Eminent Domain, ¶124; Estoppel, ¶70; Highways, ¶122; Municipal Corporations, ¶958-986; Schools and School Districts, ¶101; Statutes, ¶77, 93, 168.

III. LIABILITY OF PERSONS AND PROPERTY.**(D) Exemptions.**

¶210 (Okla.) Grantees of Creek homestead allotment, conveyed under authority of Act of Congress May 27, 1908, cannot claim the exemption from taxation given by Act of Congress of June 30, 1902.—*Board of Com'rs of Muskogee County v. Fink*, 159 P. 470.

Upon alienation of the allotments authorized by Act of Congress of May 27, 1908 (35 Stats. 312), § 4, such lands became subject to taxation.—*Id.*

A Creek homestead upon alienation by allottee, as authorized by the Act of Congress May 27, 1908 (35 Stat. 312), ceased to be exempt from taxation.—*Id.*

V. LEVY AND ASSESSMENT.**(C) Mode of Assessment in General.**

¶363 (Wash.) The owner of property must take notice of the fact that taxes will be assessed against his property and must be paid, and, if not, the property will be sold to satisfy the tax.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

The owner of property is bound to take notice of every step from the initial listing and levy of taxes, until the power of the sovereignty then in motion is exhausted; personal notice to the owner not being required unless demanded by statute.—*Id.*

(G) Review, Correction, or Setting Aside of Assessment.

¶452 (Okla.) Rev. Laws 1910, § 4881, authorizing the enjoining of illegal levy and collection of taxes, has been modified by Laws 1915, c. 107, § 7, which provides an effectual remedy in such case.—*Black v. Geissler*, 159 P. 1124.

¶453 (Okla.) The remedy provided by Laws 1915, c. 107, § 7, against illegal tax executions being plain, speedy, and adequate, it is exclusive.—*Black v. Geissler*, 159 P. 1124.

¶461 (Wash.) The owner of property may question the validity of a tax either before or after the tax is levied or is made a charge upon the property.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

An owner may not question the procedure assessing a tax if the record is fair upon its face and shows a compliance with the statute.—*Id.*

VI. LIEN AND PRIORITY.

¶508 (Wash.) Under Rem. & Bal. Code, §§ 9230, 9235, 9245, delinquent personal tax held not a lien upon realty owned by tax debtor prior to county treasurer's selection of it to be charged with the tax.—*Scandinavian-American Bank v. King County*, 159 P. 786.

¶509 (Wash.) The state has undoubted power to create a priority of lien in aid of its taxing power; but such priority will not be indulged unless sustained by some positive statute, and will not be sustained by resort to construction.—*Scandinavian-American Bank v. King County*, 159 P. 786.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

¶531(2) (Wash.) Under Rem. & Bal. Code, § 9258, providing that any person interested in land sold for delinquent taxes may pay taxes

and costs before the tax deed is issued, and have a lien, a mortgagee of such property may pay a delinquent tax and assert it as a lien.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(B) Summary Remedies and Actions.

⚡573 (N.M.) Compiled Laws 1897, § 4157 (Code 1915, § 5509), authorizing action by attorney general, or by district or state attorney in name of state to collect taxes, was not repealed by Laws 1913, c. 84.—*Glasgow v. Peyton*, 159 P. 670.

⚡588 (Wash.) Under Rem. & Bal. Code, § 9254, a proceeding to collect a tax being a proceeding in rem, objections going to jurisdiction over the person will find no favor unless based upon some recognized principle of equity.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

X. REDEMPTION FROM TAX SALE.

⚡696 (Cal.App.) Under Pol. Code, § 3817, as amended by St. 1895, p. 333, and St. 1909, p. 42, section 3785, as amended by St. 1895, p. 328, and section 3788, as amended by St. 1895, p. 329, and by St. 1909, p. 122, and repealed by St. 1915, p. 605, §§ 1-3, *held*, that assignee of purchaser of school lands sold for delinquent taxes had no vested rights violated by repealing statute.—*Curtin v. Kingsbury*, 159 P. 830.

⚡697(5) (Wash.) Under Rem. & Bal. Code, § 9259, providing for the redemption of property upon which a certificate of delinquency has been issued, a mortgagee might redeem property upon which a certificate of delinquency has been issued in the aid of his mortgage at any time before the deed was issued.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

⚡708(1) (Wash.) Tax proceedings do not necessarily depend upon the practice acts.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

⚡708(3) (Wash.) On foreclosure of a certificate of delinquency, a subsequent owner who was the then record owner was not a necessary party, and a foreclosure proceeding against the person on whom the tax was assessed alone would not be open to question.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

⚡708(6) (Wash.) Under Rem. & Bal. Code, § 9257, making a proceeding to foreclose for delinquent taxes a proceeding in rem, failure to serve an unnecessary party defendant could not be asserted in a collateral action to foreclose a mortgage on the property.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

⚡734(1) (Wash.) A title issued under a void tax foreclosure being a good title if not attacked within three years, such title is equivalent to a decree quieting the title in the purchaser as a grant from the sovereign state.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

(B) Tax Deeds.

⚡788(3) (Wash.) Under Rem. & Bal. Code, § 9267, providing that tax deeds shall be prima facie evidence, the burden is on the one asserting the invalidity of a tax title to overcome the deed by competent and controlling evidence, except in case of fraud or fault of public officers.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

(C) Actions to Confirm or Try Title.

⚡796(1) (Wash.) One whose duty it was to meet a tax must find his rights as well as his remedies in the statute.—*Sparks v. Standard Lumber Co.*, 159 P. 812.

⚡809(2) (N.M.) Where state proceeds in attachment and sells property for taxes, com-

plaint by attachment defendant to quiet title, attacking the right to proceed under Code 1915, § 5509, but not showing that judgment in attachment was void, is demurrable.—*Glasgow v. Peyton*, 159 P. 670.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

⚡879(1) (Cal.) Where bank deposits were made by husband and wife as joint tenants, the wife, surviving, did not take any interest therein as heir, but took by virtue of her estate originating at the creation of the tenancy; the inheritance tax law then in force not imposing taxes on right accruing to a surviving joint tenant.—*McDougald v. Boyd*, 159 P. 168.

⚡893 (Cal.) Tax proceedings, being in invitum, must comply strictly with all the requirements of the statute imposing them, and, in order to collect the tax, the government or agency seeking to recover must show the fulfillment of all the conditions upon which the obligation to pay depends.—*McDougald v. Boyd*, 159 P. 168.

Officer seeking to recover a tax under Inheritance Tax Law, § 1, subd. 3, *held* to have the burden of showing that a transfer made in contemplation of death was without valuable consideration.—*Id.*

Findings not declaring the want of a valuable adequate consideration would not support a judgment declaring a tax due under Inheritance Tax Law, § 1, subd. 3, imposing a tax on transfer in contemplation of death made without consideration.—*Id.*

In proceeding to collect inheritance tax under St. 1911, p. 713, § 1, subd. 3, defendant, wishing to raise the point that the petition failed to allege a want of consideration for her husband's transfer to her in contemplation of death, was not required to demur to the petition.—*Id.*

In proceeding to collect inheritance tax under St. 1911, p. 713, § 1, subd. 3, where the burden of proving transfer without consideration was on plaintiff, defendant was not bound to offer evidence, and, after judgment, might insist that the facts necessary to establish her liability had not been alleged or proven.—*Id.*

XIV. DISPOSITION OF TAXES COLLECTED, AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.

⚡909 (Okla.) Under Laws 1915, c. 107, art. 2, subd. "a," § 4, one-half of tax collected under such act should be distributed to county treasurer from whence collected, to be apportioned among school districts.—*Board of Com'rs of Creek County v. Alexander*, 159 P. 311.

TAX TITLES.

See Municipal Corporations, ⚡982; Taxation, ⚡734-809.

TEACHERS.

See Schools and School Districts, ⚡141.

TECHNICAL ERRORS.

See Appeal and Error, ⚡1170.

TELEGRAPHS AND TELEPHONES.

See Electricity, ⚡14, 19.

II. REGULATION AND OPERATION.

⚡28 (Or.) Bank, which installed a private intercommunicating telephone system with which H. telephone company connected, could not, in suit against the P. telephone company, have injunctive relief to compel latter to connect its system to the bank's, effecting a connection of the two telephone systems, competitors, the H. company not being a party, until Public Service Commission fully considered all questions

involved.—First Nat. Bank of Albany v. Pacific Telephone & Telegraph Co., 159 P. 561.

⌚32 (Utah) Where defendant installed private and pay phones in plaintiff's place of business under an agreement to share with him the pay phone receipts, a rule, restricting the private phone's use to plaintiff, is reasonable, at least against its promiscuous use by others.—Johnson v. Mountain States Telephone & Telegraph Co., 159 P. 526.

TELEPHONES.

See Electricity; Telegraphs and Telephones.

TENANCY IN COMMON.

See Divorce, ⌚822; Shipping, ⌚20.

TENDER.

See Payment, ⌚22; Vendor and Purchaser, ⌚170.

⌚12(2) (Okla.) Tender of payment, to constitute defense to action on money demand, must be unconditional and of such amount as to cover demand.—Bly v. Poole, 159 P. 511.

TERM.

See Justices of the Peace, ⌚8.

TERRITORIES.

See States, ⌚9.

TESTAMENTARY CAPACITY.

See Wills, ⌚50, 53.

THEFT.

See Larceny.

THREATS.

⌚6 (Cal.App.) There is a fatal variance where an information under Pen. Code, § 528, charges sending of a threatening letter in words and figures following, which are in English, and the proof is of a letter in a foreign language.—People v. Rizotto, 159 P. 190.

TIMBER.

See Injunction, ⌚52; Logs and Logging.

TIME.

See Appeal and Error, ⌚337-356, 425, 624, 771, 778; Bills and Notes, ⌚129; Constitutional Law, ⌚43; Criminal Law, ⌚279, 1106; Eminent Domain, ⌚124; Exemptions, ⌚119; Insurance, ⌚540; Limitation of Actions, ⌚46-127; Mechanics' Liens, ⌚132; New Trial, ⌚155; Pleading, ⌚172; Principal and Surety, ⌚104, 128; Sales, ⌚81, 126; Statutes, ⌚260; Taxation, ⌚508.

⌚10(9) (Or.) Where the last day for perfecting appeal fell on Sunday, notice was properly filed the next day, under L. O. L. § 531, as to computation of time.—Hewey v. Andrews, 159 P. 1149.

TITLE.

See Adverse Possession, ⌚79; Banks and Banking, ⌚129; Execution, ⌚275; Garnishment, ⌚106; Judgment, ⌚743; Quiet-ting Title; Shipping.

TOOLS.

See Master and Servant, ⌚101-103.

TORTS.

See Death; Electricity; Fraud; Hospitals, ⌚8; Husband and Wife, ⌚333; Libel and Slander; Malicious Prosecution; Master and Servant, ⌚85-417; Municipal Corporations, ⌚706-821; Negligence; Nuisance; Physicians and Surgeons, ⌚14-18; Railroads, ⌚265-391; Street Railroads, ⌚114; Trover and Conversion; Warehousemen, ⌚24.

TOWNS.

See Counties; Municipal Corporations.

TRADE-MARKS AND TRADE-NAMES.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

⌚3(4) (Cal.App.) The name "Faultless," applied to a brand of bread, is descriptive only of the kind or quality, so that under Civ. Code, § 991, the owner could not exclusively appropriate it, such section excepting names relating only to quality or description.—Temple v. Gordon, 159 P. 983.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(C) Actions.

⌚95(1) (Cal.App.) Evidence held insufficient to show abuse of discretion in refusing preliminary injunction against use of trade-name similar to that registered by plaintiff.—Temple v. Gordon, 159 P. 983.

TRADE UNIONS.

See Injunction, ⌚228.

TRANSFER OF CAUSES.

See Removal of Causes.

TRANSFERS.

See Corporations, ⌚123.

TRANSPORTATION.

See Intoxicating Liquors, ⌚138.

TREBLE DAMAGES.

See Forcible Entry and Detainer, ⌚30.

TREES.

See Injunction, ⌚52; Logs and Logging.

TRESPASS.

See Animals, ⌚91, 100; Injunction, ⌚52; Limitation of Actions, ⌚82.

TRESPASS TO TRY TITLE.

See Ejectment.

TRIAL.

See Continuance; Costs; Criminal Law, ⌚635-877; Jury; New Trial; Reference.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

⌚6(3) (Cal.) Where defendant, consenting to a continuance to a certain day, clearly states that plaintiff must then be ready for trial, there is no necessity of giving formal notice under Code Civ. Proc. § 594.—Canty v. Pierce & Anderson, 159 P. 582.

IV. RECEPTION OF EVIDENCE.

(C) Objections, Motions to Strike Out, and Exceptions.

⇒84(1) (Wash.) An objection that evidence of plaintiff's industrious habits was immaterial and irrelevant does not raise the point that the complaint does not allege such habits.—*Forsyth v. Wallace*, 159 P. 696.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

⇒114 (Wash.) That plaintiff's counsel when about to address the jury told plaintiff to take a certain chair may not be complained of as misconduct; it being immaterial where plaintiff sat.—*Backman v. Holman*, 159 P. 125.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⇒139(1) (Cal.App.) The court is authorized to take a case from the jury by directing a verdict for defendant where upon the whole evidence, were a verdict returned for plaintiff, the court would have felt impelled to set it aside as unsupported by the evidence.—*Gaskill v. Pacific Electric Ry. Co.*, 159 P. 200.

⇒139(1) (Okla.) Evidence reasonably supporting sufficient allegations of a petition is not demurrable.—*Lisle v. Anderson*, 159 P. 278.

⇒139(1) (Okla.) When any competent evidence has been presented reasonably tending to prove issues, it is proper to overrule demurrer to evidence or refuse peremptory instruction.—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 344.

⇒139(1) (Okla.) When the evidence offered by plaintiff is sufficient to make a prima facie case, it is reversible error to sustain a demurrer.—*Sartain v. Walker*, 159 P. 1096.

A peremptory instruction can be given only where reasonable minds would draw the same conclusion.—*Id.*

⇒139(1) (Okla.) Where defendant's evidence tends to establish a defense in whole or in part, to note sued on, it is error to sustain a demurrer thereto.—*Zehr v. Champlin*, 159 P. 1185.

⇒143 (Okla.) Where there is a conflict in the evidence, it is not error to refuse to direct a verdict.—*Phoenix Ins. Co. of Hartford v. Newell*, 159 P. 1127.

⇒143 (Wash.) Questions of fact as to which the evidence was sharply in conflict should have been submitted to the jury.—*Munson v. Baldwin*, 159 P. 1070.

(B) Demurrer to Evidence.

⇒156(3) (Okla.) Demurrer to evidence admits all facts which the evidence tends to establish and all reasonable inferences favorable to demurree.—*Midland Valley R. Co. v. Ogden*, 159 P. 256.

⇒156(3) (Okla.) Unless the evidence and all inferences justifiably drawn therefrom are insufficient to support verdict, a demurrer to the evidence should be overruled.—*Ft. Smith & W. R. Co. v. Knott*, 159 P. 847.

⇒156(3) (Okla.) A demurrer to the evidence admits all the facts which the evidence tends to prove and all inferences which can be drawn therefrom.—*Sartain v. Walker*, 159 P. 1096.

Before a demurrer to evidence can be sustained, the court must be able to say that, admitting every fact favorable to plaintiff and every inference therefrom, still plaintiff has failed to make out a prima facie case.—*Id.*

(C) Dismissal or Nonsuit.

⇒163 (Cal.App.) Motion for nonsuit, if in general terms, failing to specify any particular defect in evidence, should be disregarded.—*In re Soale*, 159 P. 1065.

⇒165 (Cal.) In deciding motion for nonsuit, every favorable inference fairly deducible from

the evidence produced must be considered in plaintiff's favor; and any substantial evidence tending to prove plaintiff's case entitles him to go to the jury.—*Lassen v. Southern Pac. Co.*, 159 P. 143.

⇒165 (Wash.) On motion for involuntary nonsuit, the plaintiff is entitled to the benefit of every favorable inference to be drawn from his evidence.—*Brown v. Hayes*, 159 P. 89.

⇒165 (Wash.) On motion for a nonsuit the plaintiff is entitled to the benefit of every inference favorable to his cause of action which can reasonably be drawn from the evidence.—*Hull v. Davenport*, 159 P. 1072.

(D) Direction of Verdict.

⇒168 (Okla.) Where the facts are undisputed or of such conclusive character that the court in its discretion would be compelled to set aside verdict returned in opposition thereto, verdict may be directed.—*Sartain v. Walker*, 159 P. 1096.

⇒178 (Okla.) In ruling on motion for directed verdict, all evidence unfavorable to the party against whom the verdict is sought, as well as incompetent evidence, must be disregarded.—*Sartain v. Walker*, 159 P. 1096.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⇒191(1) (Wash.) Requested instructions, based on improper assumptions of fact, are properly refused.—*Phoenix Assur. Co. v. Columbia & P. S. R. Co.*, 159 P. 369.

⇒192 (N.M.) Where the evidence introduced in support of facts is of a conclusive character and not controverted, the court in instructing the jury may assume such facts to be true.—*Milliken v. Martinez*, 159 P. 952.

⇒194(19) (Cal.App.) An instruction held not to state unqualifiedly it was the master's duty to warn a servant, but to leave the finding of facts to the jury.—*Fonts v. Southern Pac. Co.*, 159 P. 215.

A requested instruction entering on the domain of fact, by unqualifiedly stating that, on the case as made, plaintiff was not defendant's employé, held to invade the province of the jury.—*Id.*

⇒199 (Or.) In architect's action for price of house plans ordered for owner by a contractor, portion of instruction held not improper, as permitting the jury to decide what an agent may do by virtue of his authority.—*Wicks v. Sanborn*, 159 P. 71.

(C) Form, Requisites, and Sufficiency.

⇒236(2) (Cal.App.) Requested instruction as to distrusting testimony of witness false in one part of it, though conforming to Code Civ. Proc. § 2061, subd. 3, held to omit essential elements of willfulness and materiality.—*Poor v. W. P. Fuller & Co.*, 159 P. 233.

(D) Applicability to Pleadings and Evidence.

⇒251(1) (Okla.) It is not error to refuse to instruct upon an issue not within the pleadings.—*Sand Springs Ry. Co. v. Baldrige*, 159 P. 437.

⇒251(3) (Okla.) In action for conversion, instruction authorizing recovery for breach of warranty was erroneous.—*Pierce v. Barka*, 159 P. 323.

⇒251(9) (Wash.) Where complaint did not allege future pain, nor was there any express proof thereof, but evidence showed continuous suffering since accident, and probability that injury would not entirely heal, instruction authorizing jury to include damages for future pain was proper.—*Bankson v. Laffam*, 159 P. 369.

⇒252(11) (Okla.) It is not error, in action for death of servant, to refuse requested instruction

on question of assumption of risk which deals wholly with ordinary risks and embodies no definition thereof, or any qualification appropriate to particular facts which involved extraordinary hazards.—*Ft. Smith & W. R. Co. v. Knott*, 159 P. 847.

↪252(11) (Or.) In employe's action for personal injury, instruction that if there was a safe way for work and he voluntarily chose an unsafe way, his negligence would defeat recovery was properly refused, where there was no evidence that there were two ways to do the work.—*Gunnell v. Van Emon Elevator Co.*, 159 P. 971.

↪252(18) (Or.) In action by architect for price of house plans, instruction held properly modified in view of evidence.—*Wicks v. Sanborn*, 159 P. 71.

(E) Requests or Prayers.

↪260(1) (Cal.App.) Requested instructions being but a restatement in different language of principles, accurately, and clearly covered by other portions of the charge, are properly refused.—*Fonts v. Southern Pac. Co.*, 159 P. 215.

↪260(1) (Mont.) Where offered instructions, so far as embodying correct statements of applicable law, are substantially covered by instructions submitted, their refusal is not error.—*Stokes v. Long*, 159 P. 28.

↪260(1) (Okla.) Refusal of instructions, though correctly stating the law, is not error, if the law is clearly and substantially given in the court's charge.—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 344.

↪260(1) (Or.) Error cannot be predicated upon refusal of an instruction substantially covered by others given.—*Brewster v. Crook County*, 159 P. 1031.

↪260(1) (Wash.) Where requested instructions are mere amplifications of the law given in other portions of the charge, their refusal is not error.—*Phoenix Assur. Co. v. Columbia & P. S. R. Co.*, 159 P. 369.

(G) Construction and Operation.

↪295(1) (Okla.) The entire law of a case need not be stated in single instruction, but if all instructions, considered as a series, present the law accurately, it is sufficient.—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 344.

↪295(6) (Okla.) In a personal injury action by a railroad employe, instructions as a whole held proper.—*Chicago, R. I. & P. Ry. Co. v. Penix*, 159 P. 1141.

↪296(2) (Okla.) In action by interstate shipper for loss of goods, refusal of instruction held not erroneous, in view of instructions given.—*St. Louis & S. F. R. Co. v. Akard*, 159 P. 344.

↪296(3) (Mont.) A new trial will not be ordered in a personal injury action for an erroneous statement of defendant street car company's duties to passengers, where another instruction correctly stated it.—*Batch v. Helena Light & Ry. Co.*, 159 P. 411.

↪296 (4, 5) (Okla.) That in servant's action where contributory negligence was relied on, an instruction allowing jury to find for plaintiff did not require them to find him free from contributory negligence will not warrant reversal, where next instruction, beginning, "But, on the other hand," correctly stated rule as to contributory negligence.—*Sulzberger & Sons Co. of Oklahoma v. Strickland*, 159 P. 833.

↪296(9) (Okla.) In servant's personal injury action, an instruction that the servant was entitled to such sum as would compensate him for any loss sustained from his injuries, together with a previous instruction denying recovery unless he had been injured, held not erroneous in assuming the fact of injury.—*Chicago, R. I. & P. Ry. Co. v. Penix*, 159 P. 1141.

IX. VERDICT.

(A) General Verdict.

↪325(3) (Cal.App.) The effect of a judgment entered on a directed verdict for defendant is that of a nonsuit, and it is therefore immaterial that upon polling the jury some of them answered that a directed verdict was not their verdict.—*Gaskill v. Pacific Electric Ry. Co.*, 159 P. 200.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

↪370(2) (Okla.) In purely equitable cases, the court may, of its own motion or on request, call in jury to advise him on any issue or issues he desires.—*City of Chickasha v. O'Brien*, 159 P. 282.

↪374(2) (Okla.) When jury trial is not matter of right, answers of jury to special questions are merely advisory, and court may decide for itself all questions, notwithstanding such answers.—*City of Chickasha v. O'Brien*, 159 P. 282.

(B) Findings of Fact and Conclusions of Law.

↪391 (Cal.App.) In action to cancel a policy of life insurance, where the evidence on the issue of plaintiff's knowledge as to insured's health when the policy was delivered, etc., was conflicting, plaintiff was entitled to a finding thereon.—*Security Life Ins. Co. of America v. Booms*, 159 P. 1000.

↪393(1) (Cal.) On trial without jury where findings are not waived, no expression of judge, whether casual or in opinion, restricts power under Code Civ. Proc. §§ 632, 633, to file decision, though record is prepared under the new and alternative method.—*Scholle v. Finnell*, 159 P. 1179.

↪404(1) (Wash.) Generally, when the language of findings is equivocal, that meaning will be given to them which supports the judgment rather than one which would defeat it.—*Dobren-tai v. Piehl*, 159 P. 371.

↪405(1) (Cal.App.) Code Civ. Proc. § 634, providing that proposed findings shall be served on the adverse party five days before the court signs them, being for his benefit solely, may, under Civ. Code, § 3513, be waived by him.—*California Central Creameries Co. v. Crescent City Light, Water & Power Co.*, 159 P. 209.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

↪419 (Mont.) Where defendant introduces evidence after his motion for nonsuit is denied, on appeal the court considers only the question whether the evidence as a whole made a case for the jury.—*Stokes v. Long*, 159 P. 28.

TRIAL DE NOVO.

See Justices of the Peace, ↪174.

TROVER AND CONVERSION.

See Trial, ↪251.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

↪2 (Okla.) A person cannot be guilty of conversion of realty.—*Etchen v. Ferguson*, 159 P. 306.

II. ACTIONS.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

↪34(3) (Okla.) Where bill of particulars seeks recovery for conversion, admission of evidence of breach of warranty by defendants is error.—*Pierce v. Barks*, 159 P. 323.

TRUST DEEDS.

See Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

See Monopolies.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

⌚327 (Cal.App.) Since from the very nature of a trust there is implied a duty to account, if the court intends to declare that there is no such duty, the decree should specifically so find.—*Schneider v. Moncur*, 159 P. 459.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(B) Right to Follow Trust Property or Proceeds Thereof.

⌚357(1) (Cal.) Contract to purchase realty on which payments have been made, being transferable, may, under Civ. Code, § 2947, be mortgaged, and the mortgagee acquires a real interest in the property, and may therefore be an innocent purchaser, so that under section 2248 no trust is created in him, though the property was transferred in violation of a trust.—*Tripler v. MacDonald Lumber Co.*, 159 P. 591.

In absence of proof of notice to mortgagee of trust as against mortgagors, court must give effect to mortgage when it antedates, of record, title acquired by deed to another, since under Civ. Code, § 856, incumbrancer's rights could not be prejudiced without notice.—*Id.*

ULTRA VIRES.

See Banks and Banking, ⌚261.

UNDERTAKINGS.

See Bonds.

⌚2 (Cal.App.) Where a statute permits the correction of an original undertaking or the substitution of a new one, it has the effect of validating the proceeding from its inception.—*Bone v. Trafton*, 159 P. 819.

UNDUE INFLUENCE.

See Gifts, ⌚49.

UNITED STATES.

See Indians; Public Lands; Removal of Causes.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer; Landlord and Tenant, ⌚288.

UNLIQUIDATED DEMANDS.

See Set-off and Counterclaim, ⌚35.

USAGES.

See Customs and Usages.

USURY.

See States, ⌚9.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

⌚99 (Okl.) A plea of usury to a contract executed under the laws of the Indian Territory, offered in ejectment, does not impose on the party making the plea any duty to return the

original loan; no affirmative equitable relief being requested.—*Scott v. Potts*, 159 P. 982.

⌚102(1) (Okl.) Where, under Rev. Laws 1910, § 1005, one who has paid usurious interest makes a written demand, the one receiving the usury is bound to return the amount received, though the demand was for a larger sum than that received; the notice not being defective because of the excessive demand.—*Ardmore State Bank v. Lee*, 159 P. 903.

⌚109 (Okl.) Under Rev. Laws 1910, § 1005, providing that an action to recover usurious interest must be brought within two years after maturity of the usurious contract, a note, reserving usurious interest, constitutes the contract, and suit must be brought within two years after its maturity.—*Ardmore State Bank v. Lee*, 159 P. 903.

Where a note bearing usurious interest matures, but the holder for a valuable consideration extends the time of payment, the limitation prescribed by Rev. Laws 1910, § 1005, on actions to recover usury, does not begin to run until the expiration of the extension.—*Id.*

VACANCY.

See Officers, ⌚55.

VACATION.

See Appeal and Error, ⌚857, 982; Arbitration and Award, ⌚78, 84; Execution, ⌚249-275; Executors and Administrators, ⌚509; Judgment, ⌚143-163, 363, 384.

VALUE.

See Evidence, ⌚488, 489.

VARIANCE.

See Indictment and Information, ⌚171.

VENDOR AND PURCHASER.

See Dower; Exchange of Property; Guardian and Ward, ⌚107, 108; Judgment, ⌚682; Logs and Logging, ⌚3; Mines and Minerals, ⌚54; Municipal Corporations, ⌚980; Principal and Agent, ⌚103; Sales; Specific Performance.

I. REQUISITES AND VALIDITY OF CONTRACT.

⌚13 (Wash.) To sustain a contract conveying lands in consideration of support during grantor's life, it is not necessary that there be a present passing of a valuable consideration.—*Roudebush v. Gannon*, 159 P. 680.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

⌚58 (Cal.) The vendor's agreement to render the purchaser an accounting "upon the final consummation of the purchase," according to the contract, does not make such accounting a necessary part of the vendor's offer of performance.—*Schwerin Estate Realty Co. v. Slye*, 159 P. 420.

⌚85(1) (Cal.) Under a sale of an undetermined acreage at a certain price per acre, the purchaser is bound to pay only for the land actually included and conveyed.—*Cords v. Goodwin*, 159 P. 138.

⌚79 (Cal.) A railroad's statement that intoxicating liquors would never be sold or given away in a town in which it was seeking to sell lots did not constitute a binding contract with, or warranty to, a buyer of lots, that the future should be according to the prophesy, or a basis for an action.—*Ayers v. Southern Pac. R. Co.*, 159 P. 144.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

⚡87 (Cal.App.) Where a vendor, after the purchaser's breach of his contract agreed to a mutual abandonment and rescission, and promised to repay the purchaser the amount paid under the contract as soon as the land was sold, the purchaser was entitled to a repayment of his money.—Hay v. Casey, 159 P. 726.

IV. PERFORMANCE OF CONTRACT.

(B) Conveyance.

⚡157 (Cal.) Where one makes an agreement of sale binding him to deliver possession to the purchaser, the purchaser is entitled to possession before being called upon to pay the price, and cannot be obliged to accept a mere paper title and rely on his success in an action for possession against adverse holder.—Cords v. Goodwin, 159 P. 138.

(D) Payment of Purchase Money.

⚡170 (Cal.) Under a contract terminating the vendor's obligations unless the price was promptly paid, the purchasers must tender payment before the vendor is required to put them in possession, notwithstanding tenants at will occupy part of the land.—Schwerin Estate Realty Co. v. Slye, 159 P. 420.

⚡176 (Cal.) Although certain land is within the description in a purchase-money mortgage, the mortgagor is entitled to an abatement for any portion of the land of which he cannot gain possession.—Cords v. Goodwin, 159 P. 138.

V. RIGHTS AND LIABILITIES OF PARTIES.

(B) As to Third Persons in General.

⚡217 (Ok.) Where defendant contracted to deed land on condition that building be erected, and the other party absconded without paying his contractors, settlement by defendant with one contractor does not render him liable to another.—Etchen v. Ferguson, 159 P. 306.

(C) Bona Fide Purchasers.

⚡231(3) (Or.) Purchasers of land take title with constructive notice of the grant of an easement theretofore executed and recorded.—Patterson v. Chambers' Power Co., 159 P. 568; City of Eugene v. Same, Id. 576.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

⚡250 (Ok.) One having parol agreement with owner for conveyance of land has no such title as will, on his entering into written contract for sale of the land, support reservation of vendor's lien.—Everest v. Gault Lumber Co., 159 P. 910.

⚡252 (Utah) A vendor who retains title has a purchase-money lien upon the land.—Wherritt v. Dennis, 159 P. 534.

⚡299(2) (Cal.) Where the entire course of business between parties to a contract of sale has amounted to a waiver by the vendors of the clause making time of payment of installments of the essence thereof, they may not declare a forfeiture without proper notice and demand.—Myers v. Williams, 159 P. 982.

⚡299(3) (Cal.) Allegations of vendor's complaint held to sufficiently allege notice of intention to forfeit for failure to pay installments due.—Myers v. Williams, 159 P. 982.

Before the purchaser can rely on alleged waiver of forfeiture for failure to pay installments when due, he must plead it, unless it appears from the vendor's complaint.—Id.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

⚡335 (Cal.) Under a contract terminating the vendor's obligations unless the price was promptly paid, the purchasers cannot recover part payments where they defaulted as to the balance.—Schwerin Estate Realty Co. v. Slye, 159 P. 420.

⚡336 (Cal.) The purchasers' failure to specify the defects in an accounting rendered by the vendor on offer of performance waived any infirmities in the offer under Civ. Code, § 1501.—Schwerin Estate Realty Co. v. Slye, 159 P. 420.

⚡341(2) (Cal.App.) Complaint of purchasers to recover of the vendor payment made on executory contract, alleging he without cause repudiated it, declared it canceled, and denied to them any right or interest thereunder, states a cause of action on the ground of rescission.—McNeil v. Kreda, 159 P. 818.

The complaint of purchaser to recover of the vendor payment made on the executory contract, because of his rescission, alleging they had not received anything from him, need not allege placing or offer to place him in statu quo before election to accept his rescission.—Id.

⚡341(3) (Cal.App.) In purchaser's action, brought after his breach of his contract, to recover amount paid thereunder, evidence held to sustain finding that vendor had promised to repay all money paid by the purchaser under contract as soon as premises were sold by him, and had not declared a forfeiture of any of purchaser's contracts.—Hay v. Casey, 159 P. 726.

(B) Actions for Breach of Contract.

⚡351(1) (Or.) Injury to one given an option on land subject to lease given by owner, from the lessee not breaking sod, held not direct and necessary result of owner's failure to furnish lessee a man to assist in farming, as required by lease, but remote and uncertain.—Fargo v. Wade, 159 P. 624.

VENDORS' LIENS.

See Vendor and Purchaser, ⚡250-299.

VENUE.

See Justices of the Peace, ⚡72.

VERDICT.

See Appeal and Error, ⚡1001-1015; Criminal Law, ⚡877; Homicide, ⚡342; New Trial, ⚡70, 72; Trial, ⚡325, 374.

VERIFICATION.

See Pleading, ⚡422.

VESTED RIGHTS.

See Constitutional Law, ⚡93.

WAGES.

See Exemptions, ⚡48.

WAIVER.

See Appeal and Error, ⚡158, 162, 429, 1078; Appearance; Attorney and Client, ⚡186; Exemptions, ⚡93; Insurance, ⚡560, 789; Jury, ⚡28; Landlord and Tenant, ⚡94, 288; New Trial, ⚡5; Pleading, ⚡406-422; Pledges, ⚡25; Principal and Surety, ⚡129; Receivers, ⚡174; Sales, ⚡50; Trial, ⚡405; Vendor and Purchaser, ⚡336.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

⚡24(1) (Ok.) A cotton compress company is a bailee for hire, and under Rev. Laws 1910, § 1109, must exercise at least ordinary care to preserve property intrusted to it.—*Inland Compress Co. v. Simmons*, 159 P. 262.

⚡24(7) (Ok.) Contract by compress company relieving it from liability for loss by fire, flood, or other agencies, unless caused by willful act or gross negligence, is against public policy and void.—*Inland Compress Co. v. Simmons*, 159 P. 262.

WARNING.

See Master and Servant, ⚡150, 155, 278.

WARRANT.

See Arrest; Municipal Corporations, ⚡371.

WARRANTY.

See Sales, ⚡426.

WASTE.

See Husband and Wife, ⚡287; Landlord and Tenant, ⚡56.

WATERMASTER.

See Waters and Water Courses, ⚡217.

WATERS AND WATER COURSES.

See Descent and Distribution, ⚡8; Eminent Domain, ⚡28; Estoppel, ⚡71; Municipal Corporations, ⚡271, 371.

I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

⚡20 (Mont.) Subsequent appropriation of water is no notice of adverse claim.—*Moore v. Sherman*, 159 P. 966.

II. NATURAL WATER COURSES.

(D) Diversion.

⚡86 (Kan.) One who has obtained water power rights in a stream has no ownership in the water, and on its diversion may recover for injury sustained, but not the value of water.—*Wallace v. City of Winfield*, 159 P. 11.

V. SURFACE WATERS.

⚡119(2) (Kan.) Laws 1911, c. 175, § 2, permitting an owner of land to drain it by constructing drains leading to a water course, uses the term "water course" in its ordinary meaning, as one having a distinct channel and excludes mere depressions.—*Wood v. Brown*, 159 P. 396.

⚡119(5) (Ok.) Where surface water has been accustomed to gather and flow along well-defined channel, it may not be obstructed to the injury of dominant estate.—*McLeod v. Spencer*, 159 P. 326.

VI. APPROPRIATION AND PRESCRIPTION.

⚡138 (Cal.) Mere taking of the natural flow into a slough will not vest in a claimant of river waters the right to artificially cause a greater flow into that slough.—*Woods Central Irrigating Ditch Co. v. Porter Slough Ditch Co.*, 159 P. 427.

⚡151 (Mont.) An abandonment is a question of intention, so that where one did not intend to abandon an irrigation ditch or a water right, even though there was a nonuser for a longer period than the statute of limitations, there was no abandonment.—*Moore v. Sherman*, 159 P. 966.

One entitled to certain water rights might be estopped by conduct from saying that she did not intend to abandon the rights, or that she had a present claim to such rights, which es-

toppel might arise from action or nonaction, from silence or speech.—*Id.*

To create obligation upon defendant to speak or assert claim, it was incumbent to show that defendant knew of another's contemplated or actual expenditure of time and money in making appropriation of water rights, relying for any benefit on the assumption that defendant's rights had been abandoned, or would not be asserted to his prejudice.—*Id.*

VII. CONVEYANCES AND CONTRACTS.

⚡154(1) (Or.) There are many water rights and rights of way for ditches which do not come strictly within the definition of a pure easement and yet are called easements.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, *Id.* 576.

Rights of way for pipe or raceway are in a sense easements, although there is no dominant tenement.—*Id.*

⚡156(1) (Or.) Grant of a present right of way for water raceway, with right to enlarge it to supply mills on a tract of land, held a valid and definite grant.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, *Id.* 576.

⚡156(2) (Or.) The grant of a present right of way for water raceway with right to enlarge it to supply mills on a tract of land calls for no action by the grantee until the exigency contemplated arises.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, *Id.* 576.

⚡156(5) (Or.) Where an easement for raceway is conveyed as appurtenant to a tract, a deed of part of the tract by the grantee passes such proportion of the easement as the tract sold bears to the entire tract, unless the easement is reserved in the deed.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, *Id.* 576.

⚡156(8) (Or.) If from the terms of a grant of a raceway right of way there is manifested a clear intention that the grantee shall enlarge the space originally occupied by him in accord with the demands of the future, such enlargement will be upheld.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, *Id.* 576.

Under an indefinite grant to an easement or right of way for raceway, with nothing to indicate that it may be changed or enlarged, the first location and user fixes the limit of the grant.—*Id.*

The grant of a raceway with right to dig it as wide and deep as may be necessary to supply future defined needs does not include or confer the right to maintain the ditch at its then depth by dumping upon adjoining property filth and silt which fortuitously accumulates on its bottom.—*Id.*

The owner of a raceway right of way for power purposes had no right to use the ditch for the purpose of floating logs, timber, or cordwood, without protecting its sides from the consequent erosion.—*Id.*

Courts will not interfere with a change of use of a raceway for power purposes to use for floating logs and timber, unless it imposes an additional burden upon the servient tenement.—*Id.*

⚡156(9) (Or.) Adverse possession of grantor or his successors does not run against the right to enlarge a raceway, as required by future necessities, at least until the right to enlarge has accrued.—*Patterson v. Chambers' Power Co.*, 159 P. 568; *City of Eugene v. Same*, *Id.* 576.

Where an easement for raceway is conveyed as appurtenant to a tract, a deed of part of the tract by the grantee passes such proportion of the easement as the tract sold bears to the entire tract, unless the easement is reserved in the deed, and the easement is not extinguished.—*Id.*

Even if appurtenant to an entire tract a water right in the nature of an easement may be

reserved in a grant of any parcel of such tract, without extinguishing the easement.—Id.

The grantees of land subject to a recorded easement for raceway with right of enlargement for future needs of a certain tract cannot claim the easement is extinguished because the grantee of the raceway easement has sold part of the tract and reserved the water power or easement, as long as the water taken is necessarily used on that tract.—Id.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

☞177(1) (Ok.) Regardless of ability to respond in damage, owner of servient estate may be enjoined from maintaining obstruction in water course, causing ordinary flood waters to injure dominant estate.—McLeod v. Spencer, 159 P. 326.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

☞182 (Mont.) Const. art. 13, § 6, empowering Legislature to authorize extended indebtedness of municipalities for water supply, providing that the city shall own and control the works, does not exempt the city from control and regulation under Laws 1913, c. 52, creating and defining the powers of the Public Service Commission.—Public Service Commission of Montana v. City of Helena, 159 P. 24.

Laws 1913, c. 52, creating and defining the powers of the Public Service Commission over municipal water supplies, does not infringe Const. art. 12, § 4, prohibiting the Legislature from levying taxes for municipal purposes.—Id.

☞188(2) (Cal.) A water company in charge of a public trust to furnish water to consumers cannot burden it or the property devoted to the trust so as to destroy or impair the public interest therein, and contracts attempting to do so are subject to revision and reform by competent public authority.—Southern Pac. Co. v. Spring Valley Water Co., 159 P. 865.

☞191 (Cal.) In view of Civ. Code, § 1636, instrument whereby railroad granted water company right of way for its main along the railroad line *held* to require the water company to furnish water from its main to the railroad free of charge.—Southern Pac. Co. v. Spring Valley Water Co., 159 P. 865.

Under instrument involved *held* that water company acquired right of way for its conduit upon railroad's right of way, subject to the burden of furnishing water from such line for railroad purposes so long as the conduit was used.—Id.

Principle that contract to buy and sell personal property, silent as to its duration, may be terminated by either party after a reasonable time and upon reasonable notice, *held* not to apply to contract creating an easement in realty of railroad in consideration of furnishing water.—Id.

☞197 (Cal.) Under Const. art. 12, § 23, and Public Utilities Act, *held* that railroad company might resort to ordinary action in courts for enforcement of rights under its contract with water company relating to the furnishing of water, and was not limited to an application to the Railroad Commission.—Southern Pac. Co. v. Spring Valley Water Co., 159 P. 865.

(B) Irrigation and Other Agricultural Purposes.

☞216 (Cal.) Law authorizing collection of assessments by reclamation districts by judgment and execution against person owning land assessed would be unconstitutional.—Atchison, T. & S. F. Ry. Co. v. Reclamation Dist. No. 404, 159 P. 430.

☞217 (Or.) Complaint in action against county, alleging that plaintiff was the duly elected, qualified, and acting water master, and rendered services under direction of the superintendent of a water division of the state, is sufficient, under L. O. L. § 6621, to show that the work was done on direction of the superintendent.—Brewster v. Crook County, 159 P. 1031.

Complaint on claim against county for services as water master showing that the master was busy at one point, and it was immediately necessary to supervise headgates at a distant point, and that he also broke his arm and was forced to have an assistant, sufficiently shows emergencies entitling him to claim for services of assistants then appointed.—Id.

L. O. L. § 6619, providing that on approval by the division superintendent the county court shall allow and pay the water master's claim for services, makes it mandatory for the county court to pay a claim so approved.—Id.

When water master works under direction of division superintendent, he need not attach a copy of the order to his bill against the county, under L. O. L. § 6621, whose requirement that the order be attached applies only when work is done on request of water users.—Id.

☞222 (Cal.) Reclamation assessments have not the character of a tax so as to be collectible by execution or levy upon the general property of the owner of the land against which the assessment is made.—Atchison, T. & S. F. Ry. Co. v. Reclamation Dist. No. 404, 159 P. 430.

A reclamation district is an agency of the state, or local public corporation, for purposes of local improvement, similar in that respect to an irrigation district.—Id.

Law authorizing assessments by reclamation districts does not provide the district may collect by ordinary judgment and execution against person owning land assessed, Pol. Code, § 3466, prescribing only method of collection.—Id.

Under Pol. Code, § 3466, not expressly authorizing sale of part of right of way of railroad to satisfy reclamation assessment, courts cannot allow remedy of action at law for recovery of personal judgment for amount of assessment merely because part of easement or franchise of a road, used for its right of way, cannot be sold under such a special assessment.—Id.

☞226 (Cal.) An irrigation district may include within its boundaries a previously existing municipality and assess for district purposes land therein, notwithstanding Const. art. 11, § 19, as amended in 1911, gives municipalities authority to operate waterworks.—La Mesa Homes Co. v. La Mesa, Lemon Grove & Spring Valley Irr. Dist., 159 P. 593.

☞227 (Cal.App.) Acts Ex. Sess. 1911, p. 135, providing for recall of officers of irrigation districts, is constitutional and a valid exercise of legislative power.—Wigley v. South Joaquin Irr. Dist., 159 P. 985.

☞230(6) (Colo.) Under act relating to irrigation districts (Laws 1905, pp. 258-262, §§ 15, 17, 19-22), *held* that, where fund assessed to pay interest on irrigation bonds was insufficient to pay accruing interest on first and second series, it would be presumed that the shortage was intended to be apportioned to holders of first and second issues of bonds.—Thomas v. Patterson, 159 P. 34.

Holder of coupons from bonds of irrigation district, notwithstanding Irrigation District Law 1905, § 22, *held* to have no right to have funds in hands of treasurer applied to payment thereof in preference to others of same issue because he might first present them for payment, but fund would be payable in its ratio to amount of coupons to which it was applicable.—Id.

☞231 (Cal.) Irrigation Act, § 48, providing that a deed of property sold for assessments duly

acknowledged or proved is, except as against actual fraud, conclusive evidence of the regularity of all the proceedings from assessment by the assessor, inclusive, up to the execution of the deed, etc., does not extend to defects in the deed itself.—*Bruschi v. Cooper*, 159 P. 734.

☞231 (Cal.App.) Under Irrigation Act, § 45, providing that the collector must make out a certificate in duplicate dated on the day of sale, a certificate, incorrectly dated, but stating the correct date of the sale in the body of the instrument, and that the property might be redeemed within 12 months, was a sufficient compliance.—*Bruschi v. Cooper*, 159 P. 728.

Under Irrigation Act, §§ 35, 45, 48, and 50, touching sales for taxes, a certificate of sale and deed, reciting the name of the owner as "D. Bruscia," were void, where the assessment was to "D. Bruschie," since the listing of land for assessment necessarily means that the name of the owner, if known, must be correctly stated.—*Id.*

☞234 (Mont.) If stockholder in irrigation company objects to alleged fraudulent transfer of its property, he must proceed under Rev. Codes, §§ 3899, 3900; and, if he fails so to do, the acts are valid as against him, under sections 6440, 6451, declaring the two and five year periods of limitation.—*Canyon Creek Irr. Dist. v. Martin*, 159 P. 418.

☞238 (Mont.) Where an irrigation company has commercially valued capital stock and its articles declare its purpose to supply water to the public, it is a corporation for profit and not a mutual company so as to give its stockholders the right to easement in the water right which could not be divested by sale by the corporation.—*Canyon Creek Irr. Dist. v. Martin*, 159 P. 418.

☞238 (N.M.) Where two or more community ditch companies take water from common ditch or head, and lower ditch company has under contract or with consent of upper enlarged the head, it becomes a tenant in common in such structure, and is entitled with upper ditch company to joint management.—*Halford Ditch Co. v. Independent Ditch Co.*, 159 P. 860.

☞247(1) (Cal.) The rights of landowners to the use of irrigation water are real property, and conflicting claims may be made the subject of an action to quiet title under Code Civ. Proc. § 738.—*Stone v. Imperial Water Co.*, No. 1, 159 P. 164.

☞247(1) (Cal.) In suit to quiet title to water, defendant's answer held to justify findings as to proper division of river waters between two natural channels.—*Woods Central Irrigating Ditch Co. v. Porter Slough Ditch Co.*, 159 P. 427.

☞247(1) (Mont.) Where it is not shown that diversion of water was such as to challenge notice of irrigation district, it cannot be charged with laches in failing to bring action to enforce its rights.—*Canyon Creek Irr. Dist. v. Martin*, 159 P. 418.

☞257(1) (Wash.) A valid contract with a water power company for water rates was subject to change by Public Service Commission order under Laws 1911, p. 538.—*Raymond Lumber Co. v. Raymond Light & Water Co.*, 159 P. 133.

Laws 1911, p. 561, § 34, did not ipso facto terminate when it took effect a discriminatory contract between a waterworks company and a sawmill, but conferred power upon the commission to direct the termination of such contract.—*Id.*

Under Laws 1911, p. 538, a complaint to the Public Service Commission by a city as to charges of water company held sufficiently broad to support an order to the water company to discontinue an unduly favorable contract with a sawmill.—*Id.*

WAYS.

See Easements; Highways.

WIDOWS.

See Dower.

WILLFUL AND WANTON INJURIES.

See Railroads, ☞391.

WILLFUL MISCONDUCT.

See Master and Servant, ☞380.

WILLS.

See Descent and Distribution; Executors and Administrators; Frauds, Statute of, ☞75; Specific Performance, ☞86, 121; Taxation, ☞879, 893.

II. TESTAMENTARY CAPACITY.

☞50 (Cal.) A testator has the requisite mental capacity if he is able to understand the nature of his property, his relation to the natural objects of his bounty, and is free from any delusion which would affect the disposition of his property.—*In re Ross' Estate*, 159 P. 603.

☞53(8) (Cal.) In a suit contesting a will for mental incapacity, exclusion of testimony regarding a real estate transaction by testator is proper where it was not shown, nor offered to be shown, that the testator's conduct was abnormal.—*In re Ross' Estate*, 159 P. 603.

III. CONTRACTS TO DEVISE OR BEQUEATH.

☞58(1) (Or.) It is competent for one to make a binding agreement to devise real property by his last will.—*Woods v. Dunn*, 159 P. 1158.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

☞72 (Cal.) A writing signed by deceased held to show no intent to make a disposition of her property after her death.—*In re Anderson's Estate*, 159 P. 426.

(B) Form and Contents of Instruments.

☞94 (Or.) L. O. L. §§ 804, 805, 7319, relating to evidence of acquisition of an interest in real property, and to the requisites of a will, held satisfied by a duly executed writing or will devising certain real property.—*Woods v. Dunn*, 159 P. 1158.

(D) Holographic Wills.

☞130 (Cal.) Unsigned writing by testator upon separate sheets of paper containing directions to his executor, not written animo testandi, is not admissible to probate as part of an holographic will already admitted, although found after testator's death held together with will by single metal clip in sealed envelope, indorsed with testator's handwriting as his last will and testament.—*In re Keith's Estate*, 159 P. 705.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(I) Hearing or Trial.

☞324(1) (Cal.) The evidence presented by will contestants should be viewed most favorably to them, and all contradictory testimony disregarded before directing a nonsuit.—*In re Ross' Estate*, 159 P. 603.

☞324(2) (Cal.) Testator's testamentary capacity held a jury question where he died 9 days after making the will, was 86 years old, had suffered two paralytic strokes, and was unable to remember or carry on a connected conversation.—*In re Ross' Estate*, 159 P. 603.

VI. CONSTRUCTION.**(A) General Rules.**

⚡457 (Nev.) The word "bequeath" is generally used to express a gift of personalty made in a last will; and the word "devise" is a term generally used to express a gift of realty made by will.—*In re Lewis' Estate*, 159 P. 961.

(E) Nature of Estates and Interests Created.

⚡601(4) (Cal.) Provision in will that widow and heir taking absolutely by descent at testator's death, subject only to administration, should not sell or dispose of it *held* an ineffectual restriction.—*Drexler v. Washington Development Co.*, 159 P. 166.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.**(C) Advancements, Ademption, Satisfaction, and Lapse.**

⚡775 (Nev.) Under Rev. Laws, § 6219, and in view of sections 6205, 6220, bequest of residue of real and personal property to relative and her daughter, upon death of the relative before testatrix *held* to result in intestacy as to one-half the residue of the personal estate.—*In re Lewis' Estate*, 159 P. 961.

WITHDRAWAL.

See Appeal and Error, ⚡657; Bankruptcy, ⚡338; Criminal Law, ⚡301; Elections, ⚡126.

WITNESSES.

See Appeal and Error, ⚡994; Criminal Law, ⚡823, 942, 1153, 1170½; Depositions; Evidence; Trial, ⚡236.

II. COMPETENCY.**(A) Capacity and Qualifications in General.**

⚡56(2) (Okl.) An agency resting in parol may be established either by the testimony of the principal or the agent; this rule prevailing where one spouse is the agent of the other.—*State Nat. Bank v. Scales*, 159 P. 925.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

⚡167 (Cal.) In action against administrator for refusal to deliver trees under contract, buyer's conversations with seller *held* inadmissible under express provision of Code Civ. Proc. § 1880, subd. 3.—*Pearson v. Parsons*, 159 P. 1171.

(D) Confidential Relations and Privileged Communications.

⚡211(2) (Cal.) In a suit to set aside a will because of testator's mental incapacity, the opinion of testator's physician, based upon facts known to him, is incompetent under Code Civ. Proc. § 1881, providing that a physician cannot, without the patient's consent, be examined as to information acquired in treating the patient.—*In re Ross' Estate*, 159 P. 603.

III. EXAMINATION.**(A) Taking Testimony in General.**

⚡240(2) (Ariz.) Permitting leading questions is ordinarily in the sound discretion of the trial court.—*Talley v. State*, 159 P. 59.

⚡246(1) (Okl.Cr.App.) The trial judge may ask a pertinent question, but it is improper for him to indicate his opinion as to the merits or the credibility of witnesses.—*Smith v. State*, 159 P. 941.

⚡259 (Cal.App.) The reporter may use his notes in testifying to refresh his memory, as provided in Code Civ. Proc. § 2047, and, on objection that they had not been filed, it is no error to direct him to file them, and then overrule the objection.—*People v. Ferrara*, 159 P. 621.

(B) Cross-Examination and Re-Examination.

⚡270(2) (N.M.) Exclusion of cross-examination whether the kind of hat which witness had testified was worn by accused was worn by others at the time was not error.—*State v. Orfanakis*, 159 P. 674.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.**(A) In General.**

⚡316 (Wash.) Where a party's memory is conclusively shown to have been at fault as to part of a transaction, it raised a strong probability that he was mistaken as to other items, and a finding, though contrary to his statements, will not be set aside.—*Forrer v. John Davis & Co.*, 159 P. 666.

⚡330(1) (Cal.) Where physician testified that unless nervous collapse occurred, there was no necessity for making hot or cold applications to patient, it was competent to cross-examine him as to custom of having the bed warmed by hot water bottles; plaintiff having alleged that she was burned by such applications while unconscious, preceding operation.—*Meyer v. McNutt Hospital*, 159 P. 436.

Where nurse testified that she put no hot applications in patient's bed, it was competent to cross-examine her on custom of hospital as to warming beds after operations, for purpose of testing truth of her statement that no artificial heat was applied to patient, who was burned during operation.—*Id.*

⚡330(1) (Cal.App.) Cross-examination of defendant tending to impeach his testimony showing physical deficiency of sexual ability to commit rape *held* proper.—*People v. Deatrick*, 159 P. 175.

(B) Character and Conduct of Witness.

⚡337(5) (Okl.Cr.App.) While a witness may be asked whether he has been convicted of crime to affect his credibility, where accused took the stand, an examination as to whether he had previously been "arrested" on similar charges is error.—*Corliss v. State*, 159 P. 1015.

(E) Contradiction and Corroboration of Witness.

⚡405(2) (Cal.App.) Testimony, in prosecution for incest with one daughter, of another daughter that accused had sexual relations with her was not rendered admissible where defendant had testified as to trouble with his daughters, to show animus, by his statement on cross-examination under objection that the only trouble was over their staying out late at night, where such other daughter was not then a witness.—*People v. Letolle*, 159 P. 1057.

⚡406 (Cal.App.) Advertisement by defendant of fireproof storage, though unknown to plaintiffs, *held* admissible to contradict defendant's agent denying that the contract was for fireproof storage, and stating nothing was said about fireproof storage.—*Lynch v. Bekins Van & Storage Co.*, 159 P. 822.

⚡414(1) (Wash.) In an action for the rent of furniture plaintiff's letter to a defendant, a self-serving declaration, was not admissible to corroborate plaintiff's testimony that he had a previous conversation with defendant in regard to their matters of difference.—*Munson v. Baldwin*, 159 P. 1070.

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